University of Pennsylvania v. EEOC: The Denial of an Academic Freedom Privilege

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I. INTRODUCTION

In 1972, Congress amended Title VII of the Civil Rights Act of 1964[1] so that it prohibited discrimination by universities and colleges.[2] In so doing, Congress recognized that discrimination within the university[3] setting had become a societal problem with no adequate remedy.[4] Previously, the only remedy available to the victim of university discrimination was an action under sections 1981, 1983, or 1985 of Title 42 of the United States Code.[5] However, such actions inadequately dealt with private universities.[6] The amending of Title VII was an attempt to stem discriminatory practices which had flourished within private universities.[7] The natural consequence of the amendment was an increase in discrimination claims by disgruntled faculty members who had been refused employment or tenure.[8]

The cases involving denial of tenure launched a legal debate over

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1. 42 U.S.C. §§ 2000e-2000e-17 (1982). Section 2000e-2 provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Id. at § 2000e-2(a).

2. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

3. The term "university," as used in this Note, will include colleges and other academic institutions.

4. *See* H.R. REP. NO. 238, 92d Cong., 2d Sess. 4, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2139 ("Despite the commitment of Congress to the goal of equal employment opportunity . . . the machinery created by the Civil Rights Act of 1964 is not adequate.").

5. Recent Development, *A Qualified Academic Freedom Privilege in Employment Litigation: Protecting Higher Education or Shielding Discrimination?*, 40 VAND. L. REV. 1397, 1398 n.4 (1987).

6. *Id.* Section 1983 of the United States Code requires that the alleged civil rights violation occur "under color of [state law]." 42 U.S.C. § 1983 (1982).

7. H.R. REP. NO. 238, 92d Cong., 2d Sess. 18, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2155.

8. In fact, as of January 10, 1990, several cases were pending wherein it was alleged that a law school faculty member had been denied tenure. L.A. Daily J., Jan. 10, 1990, at 9, col. 1.

the discovery of confidential material involving the tenure process.[9] The obvious intent of Congress to eradicate discriminatory practices in academia necessarily clashed with university autonomy. A faculty member who has been denied tenure on discriminatory grounds has a right to discover the relevant material on which to base a claim.[10] On the other hand, a university has a right to choose who may teach without unnecessary state involvement.[11] Moreover, the state has an interest in protecting each of these rights. Title VII recognizes state interests in preventing discrimination in the university and promoting academic freedom[12] so as to encourage the university to be a "marketplace of ideas."[13] The courts' attempts to balance these interests led to a split in the circuits regarding the validity of an academic freedom privilege.[14] The Supreme Court settled the split, by unanimous decision, in *University of Pennsylvania v. Equal Employment Opportunity Commission*.[15]

This Note will discuss the Court's decision and its impact. Section II will provide the historical background of the tenure process and its role on university campuses.[16] This section will also consider the importance of peer review in the tenure process and necessity of confidentiality in insuring effective peer review. Furthermore, section II will provide a background of the legal issues involved in *University of Pennsylvania*, including the proposed academic freedom privilege and the constitutional and common law justifications thereof.[17] Lastly, this section will discuss prior decisions of various courts, which have been divided on whether to recognize confidential tenure reviews as privileged.

Next, section III will examine the factual setting and procedural

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9. Tenure is the means by which university faculty members are promoted. The Association of American University Professors [hereinafter AAUP] explains the purpose of tenure as: "a means to certain ends; specifically: (1) Freedom of teaching and research and of extramural activities and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability." AMERICAN ASS'N OF UNIV. PROFESSORS, ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS at 34-35 (1969) [hereinafter HANDBOOK].

10. The right to discover relevant information is codified by the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . .").

11. *See* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) ("The essentiality of freedom in The Community of American universities is almost self-evident." (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957))).

12. For historical analysis of academic freedom, see O'Neil, *Academic Freedom and the Constitution*, 11 J.C.U.L. 275 (1984).

13. *Keyishian*, 385 U.S. at 603.

14. *See infra* notes 149-73 and accompanying text.

15. 110 S. Ct. 577 (1990).

16. *See infra* notes 21-55 and accompanying text.

17. *See infra* notes 56-148 and accompanying text.

history which gave rise to *University of Pennsylvania*.[18] Section IV will then analyze the Court's unanimous decision, delivered by Justice Blackmun, which denies any privilege with regard to university peer review.[19]

Section V will evaluate the practical impact of *University of Pennsylvania* on the tenure process and future discrimination claims.[20] It will also discuss alternatives which Congress or the courts may employ to protect confidential peer review, including evidentiary privileges. Finally, this Note will conclude that the Supreme Court has dealt a severe blow to arbitrary discrimination in tenure practices so long as candor remains a part of the peer review process.

II. BACKGROUND OF THE LEGAL ISSUE

A. Peer Review Within the Tenure Process

Most universities utilize a peer review system whereby faculty members receive tenure.[21] The process varies among universities, but generally involves what is known as an "up or out" system.[22] Under this system, a faculty member serves a number of years as a junior faculty member until his application for tenure is reviewed.[23] At that point, the applicant is either granted tenure or is out of a job.[24]

The tenure process generally includes review of applicants by their peers.[25] Peer review allows scholars in the candidate's field to assist in determining whether the candidate is qualified to continue teach-

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18. *See infra* notes 174-210 and accompanying text.

19. *See infra* notes 211-59 and accompanying text.

20. *See infra* notes 260-96 and accompanying text.

21. AAUP encourages the following academic tenure guidelines:

> After the expiration of a probationary period, teachers . . . should have permanent or continuous tenure, and their service should be terminated only for adequate cause . . . . [T]he probationary period should not exceed seven years . . . . Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.

HANDBOOK, *supra* note 9, at 36-37.

22. Comment, *An Academic Freedom Privilege in the Peer Review Context: In re Dinnan and Gray v. Board of Higher Education*, 36 RUTGERS L. REV. 286, 296 (1983).

23. *Id.*

24. *Id.* For an in-depth discussion of the process by which tenure is granted, see Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach To Faculty Title Litigation*, 60 B.U.L. REV. 473, 475-82 (1980).

25. Lee, *Balancing Confidentiality and Disclosure in Faculty Peer Review: Impact of Title VII Litigation*, 9 J.C.U.L. 279, 279 n.2 (1983).

ing at the particular university.[26] The peer review system operates on the premise that senior faculty members within the candidate's department possess a better understanding of the particular field of study and the necessary qualifications and can therefore better evaluate an applicant's level of expertise than a president or board member.[27] It has been argued that peer review is the most effective and fairest means of promoting qualified teachers.[28]

The peer review process, however, can be manipulated to such an extent that the entire tenure process may be abused. Often, those who evaluate tenure candidates are influenced by "nonmeritorious considerations."[29] Because senior faculty members are susceptible to individual prejudice, bias and other unwanted criteria often infiltrate the tenure process.[30] University and departmental politics may also taint peer recommendations.[31] It has been alleged that the subjectivity of peer review has created a "good old boy" system at universities which often exclude women and minorities.[32]

B. The Role of Confidentiality

The confidentiality of evaluations made by senior faculty members serves to foster the potential for abuse in a tenure system which relies upon peer review for promotion of junior faculty members.[33] Universities argue, however, that confidentiality is a necessary component of the peer review process.[34] Additionally, confidentiality is perhaps more important in the university context than in other occu-

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26. Comment, *supra* note 22, at 296.

27. *Id.* Normally, senior faculty members will review the candidate and make a recommendation to the president of the university as to professional competence and whether or not a tenured position should be extended. The president then forwards this recommendation to the board of trustees. However, in most instances, this process is merely ritual in that "the president and the board members simply endorse the recommendation of the faculty committees." *Id.*

28. Comment, *Out of Balance: The Disruptive Consequences of EEOC v. Franklin & Marshall College*, 50 U. PITT. L. REV. 323, 339 n.73 (1988). *See also* EEOC v. Franklin and Marshall College, 775 F.2d 110, 114 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986); Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1346 (W.D. Pa. 1977) ("[I]t is apparent that a well informed decision can only be made by the colleagues with whom the faculty member has worked.").

29. Comment, *Academic Freedom v. Title VII: Will Equal Employment Opportunity be Denied on Campus?*, 42 OHIO ST. L.J. 989, 1003 (1981).

30. Comment, *supra* note 22, at 298.

31. *Id.*

32. Comment, *supra* note 29, at 1003 n.25 ("Women and minorities tend to be excluded from the academic profession . . . because they are outside of the prestige system entirely." (quoting Solomon & Heeter, *Affirmative Action in Higher Education: Towards a Rationale for Preference*, 52 NOTRE DAME L. REV. 41, 72 (1976))).

33. *See infra* notes 50-51 and accompanying text.

34. *See* EEOC v. Franklin and Marshall College, 775 F.2d 110, 114 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986); EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 336-37 (7th Cir. 1983); and Amicus Curiae Brief for Petitioner at 2, EEOC v. University of Pa. 850 F.2d 969 (3d Cir. 1988) (No. 87-1547).

pations because the tremendous interest in providing students with the most qualified teachers can best be furthered by a "rigorous and critical" review of the candidate's performance.[35] It is said, therefore, that "confidentiality is a prerequisite" for peer review to attain the necessary level of effectiveness.[36] The retraction of confidentiality could have disastrous effects on the peer review process.[37] The potential "chilling effect" on faculty candor would be the most damaging result of the denial of confidentiality.[38] Evaluators might become less honest, critical, and forthright[39] if their statements were to become a matter of public record, or if they feared being called to testify at trial.[40] This "chilling effect" could weaken the review process in several ways. For instance, since those who ultimately decide whether a faculty member receives tenure rely almost exclusively on peer review, it is conceivable that unqualified faculty members could receive tenure if the evaluators are not completely frank.[41] Furthermore, once it becomes obvious that peer review is no longer candid, decision-makers will not rely on written peer evaluations.[42] They might then rely on undocumented statements which would further reduce fairness and accuracy.[43]

Forced disclosure of peer review files might cause other difficulties within the tenure process. First of all, it may become increasingly difficult to locate faculty members who are willing to review tenure candidates, knowing that the evaluation is not held in strict confidence.[44] Second, disclosure could create tension among colleagues at

35. *See* Smith, *Protacting the Confidentiality of Faculty Peer Review Records: Department of Labor v. The University of California*, 8 J.C.U.L. 20, 22 (1981).

36. *See* McKillop v. Regents of Univ. of Cal., 386 F. Supp. 1270, 1276 (N.D. Cal. 1975).

37. Comment, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 CALIF. L. REV. 1538, 1551 (1981) ("Compelling a university to disclose its secret tenure ballots and confidential faculty evaluations imposes significant burdens on institutional academic freedom.").

38. *Id.* (this "chilling effect" may serve to diminish the thoroughness of evaluations, resulting in an erosion of the integrity and candor of the peer review system).

39. *Id. See also* Keyes v. Lenoir Rhyne College, 552 F.2d 579, 581 (4th Cir. 1977), *cert. denied*, 434 U.S. 904 (1977); *McKillop*, 386 F. Supp. at 1276.

40. Lee, *supra* note 25, at 282.

41. *See* Kroll, *Title IX Sex Discrimination Regulations: Private Colleges and Academic Freedom*, 13 URB. L. ANN. 107, 115 (1977). *See also* Smith, *supra* note 35, at 22-23.

42. Comment, *supra* note 37, at 1551-52.

43. *Id.* at 1552. *See also*, Recent Development, *supra* note 5, at 1409-10 n.73.

44. A letter from an outside evaluator to the University of California, Berkeley, suggests the reluctance to evaluate a candidate in the absence of confidence:

I want to make it perfectly clear that this is a confidential assessment and is

a university.[45] Finally, the democratic ideal of a secret ballot within the tenure process would be completely meaningless if the reviewers' identities and votes were available to the disgruntled candidate.[46] Thus, the absence of confidentiality could conceivably undermine the peer review process, eroding its integrity and value.[47]

On the other hand, opponents of a privilege protecting peer review evaluations argue that while confidentially may promote candor in these evaluations, it may also serve to conceal the true motivation behind a negative recommendation.[48] Complete confidentiality allows a reviewer to opine solely on the basis of his own "bias, bigotry, and discriminatory attitudes."[49] The potential dangers of a confidential peer review system are exacerbated by individual subjectivity.[50]

Moreover, as one commentator argues, disclosure of peer review material, under certain circumstances, might not have such a drastic impact on the peer review system.[51] For example, most applicants who are denied tenure will not file a discrimination suit.[52] Nonetheless, the possibility of disclosure of peer review evaluations might encourage reviewers to be more objective in their evaluations and to provide proper, nonprejudicial bases for their recommendations.[53] Additionally, universities might restructure the peer review process so that committee records are more complete and evaluations more

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> not to be regarded otherwise. If it should turn out that your attempt to maintain confidentiality breaks down, then you must delete this letter from your file and make no further use of it. If you then wish support from me in the form of a letter that can be shown to the candidate, then you should write me again asking for me to put on paper a suitably bland version of my opinion of the case. I take it, however, that what you are asking for at the moment is a really thorough and frank assessment which it would, in my view be quite inappropriate to give to the candidate, and I want you plainly to understand that you are in no circumstances to do that.

Smith, *supra* note 35, at 22 n.9.

45. *See* Comment, *supra* note 37, at 1552.

46. *Cf.* Comment, *Balancing Academic Freedom and Civil Rights: Toward an Appropriate Privilege for the Votes of Academic Peer Review Committees*, 68 IOWA L. REV. 585, 593-94 (1983) (however, the secret ballot privilege does not apply to the peer review process in that the privilege only applies to political election); Blaubergs v. Board of Regents of the Univ. Sys. of Ga. (*In re* Dinnan), 661 F.2d 426 (5th Cir. Unit B Nov. 1981), *cert. denied*, 457 U.S. 1106 (1982) (upholding contempt citation of a professor who refused to disclose vote).

47. *See* Comment, *supra* note 37, at 1551-52.

48. *See* Note, *Autonomy and Accountability: The University of California and the State Constitution*, 38 HASTINGS L.J. 927, 940 (1987).

49. *Id.* (additionally, confidentiality may shield the use of impermissible or arbitrary criteria in the evaluation process).

50. *See* Lee, *supra* note 25, at 303 ("The system relies upon trust, moral persuasion, and subjective analysis - which makes the system potentially abusive . . . .").

51. *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1627 (1985) [hereinafter *Developments*].

52. *Id.* As an illustration, many unsuccessful tenure candidates are white men, so a claim of discrimination is probably untenable.

53. *Id.*

thorough.[54] Thus, instead of deteriorating the peer review process, the threat of disclosure might paradoxically lead to a process by which tenure is decided on legitimate, academic grounds.[55]

C. Title VII of the Civil Rights Act of 1964

1. The Equal Employment Opportunity Commission

Title VII, as amended, prohibits an employer from "fail[ing] or refus[ing] to hire or . . . discharg[ing] any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[56] The Equal Employment Opportunity Act of 1972[57] amended Title VII to prohibit discrimination against "certain employees (primarily teachers) of educational institutions."[58] Thus, Title VII proscribes discrimination in the hiring practices of universities with regard to their faculty.

Title VII also created and empowered the Equal Employment Opportunity Commission (the Commission).[59] The statute requires a victim of discrimination to file a written, sworn charge alleging an "unlawful employment practice."[60] The Commission then investigates to determine the legitimacy of the charge. After the investigation, if the Commission has "reasonable cause" to believe that the allegations are true,[61] it should attempt to convince the employer to "eliminate any such alleged unlawful employment practice."[62] If the employer is unwilling to conciliate, the Commission may institute a civil action thirty days after the charge is filed with the Commission.[63]

The statute authorizes the Commission to obtain any evidence

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54. *Id.*
55. *Id.*
56. 42 U.S.C. § 2000e-2 (1982).
57. Pub. L. No. 92-261, 86 Stat. 103 (1972).
58. H.R. REP. NO. 238, 92d Cong., 2d Sess. at 26, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2161.
59. *See* 42 U.S.C. §§ 2000e-4, 2000e-5 (1982).
60. *Id.* at § 2000e-5(b). The charge may be filed by the victim, by someone else on behalf of the victim, or by a member of the Commission. *Id.*
61. *Id.* The Commission has 120 days to determine the validity of the charge. *Id.*
62. *Id.*
63. *Id.* at § 2000e-5(f)(1). If the Commission does not bring an action within 180 days, the claimant may bring a private action, but the Commission may still bring an action even if the 180 days have expired where the case is of "general public importance." *Id.* *See also* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977) (a complainant may, after expiration of the 180-day limitation period from the date when his charge was filed, bring a private action to enforce his claim).

which "relates to unlawful employment practices . . . and is relevant to the charge under investigation."[64] The Commission may issue administrative subpoenas to obtain relevant evidence,[65] and the United States Supreme Court has interpreted the term "relevant" broadly in discussing the Commission's authority to issue subpoenas.[66] The Commission need not determine the strength of the claimant's case, and need only show that the claim is valid and the evidence sought by the subpoena is relevant to the claim of discrimination.[67] The Commission has broad discretionary authority to determine what evidence may be sought by subpoena.

To assure that information sensitive to the employer is not revealed to the public, Title VII forbids the disclosure of any information obtained by the Commission.[68] An employee of the Commission who makes public the information obtained by subpoena has committed a misdemeanor and is subject to a $1000 fine or one year in prison.[69] This threat of criminal penalties safeguards confidential material from undue disclosure.

2. Burden of Proof

Title VII litigation generally occurs in three stages of proof,[70] and this three-step framework has been adapted to university employment situations.[71] The plaintiff must first prove a prima facie case. In *McDonnell Douglas Corp. v. Green*,[72] the Supreme Court established four requirements to prove a prima facie case of discrimination. As applied to the university setting,[73] the test requires a plaintiff to prove: (1) that he or she is a member of a protected class; (2) that the plaintiff was qualified for the position sought; (3) that the

64. 42 U.S.C. § 2000e-8(a) (1982).

65. Section 1000e-9 incorporates the investigatory powers of section 161 of Title 29, which pertains to the right of the Natural Labor Relations Board to obtain and subpoena evidence. 42 U.S.C. 2000e-9.

66. *See, e.g.*, EEOC v. Shell Oil Co., 466 U.S. 54, 68, 72 n.26 (1984) ("the Commission may insist that the employer disgorge any evidence relevant to the allegations of discrimination contained in the charge, regardless of the strength of the evidentiary foundation for those allegations").

67. *Id.* at 72 n.26.

68. 42 U.S.C. §§ 2000e-8(e) & 2000e-5(b).

69. *Id.* at § 2000e-8(e). If the information was obtained during the informal discussions between the Commission and the employer, the individual who discloses the information is subject to *both* one year in prison *and* a $1000 fine. *Id.* at § 2000e-5(b).

70. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973).

71. *See* Smith v. University of N.C., 632 F.2d 316, 332-33 (4th Cir. 1980) ("Many courts in setting forth the elements of proof and allocating the burdens of proof in ADEA [Age Discrimination in Employment Act] cases have borrowed the principles enunciated in the Title VII case of *McDonnell Douglas Corp v. Green*."). For a complete discussion of the burden of proof in Title VII cases, see Lee, *supra* note 25, at 287-96.

72. 411 U.S. 792 (1973).

73. *Smith*, 632 F.2d at 332-33.

plaintiff did not receive the position despite being qualified; and (4) that the position was vacant and that the university continued to interview similarly qualified applicants.

Once the plaintiff has proven a prima facie case, the university defendant has the opportunity to rebut the plaintiff's case by offering a legitimate and nondiscriminatory explanation for its employment decision.[74] The rebuttal requires only a production of evidence to meet the burden,[75] and therefore, the university need not persuade the trier of fact, but must merely produce a nondiscriminatory justification.[76]

The burden then shifts back to the plaintiff "to prove by a preponderance of the evidence that the legitimate reasons offered by the [university] were not its true reasons, but instead a pretext for discrimination."[77] It is particularly difficult to discredit a university's justifications because courts generally give deference to the academic decisions of universities.[78] However, in cases where plaintiffs have been successful on their claims of pretext, the reasons articulated for denial of tenure were inconsistent with the university's conduct,[79] thereby validating a claim of pretext.

D. The Proposed Academic Freedom Privilege

The question of whether tenure review files should remain confidential is in fact a by-product of the larger question of whether university tenure review deserves an evidentiary privilege. Federal Rule of Evidence 501 lays the groundwork for privileges recognized in fed-

74. *McDonnell Douglas*, 411 U.S. at 802. *See also Smith*, 632 F.2d at 332-33.

75. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 29 (1978).

76. *Texas Dept. of Community Affairs*, 450 U.S. at 254-55 ("The defendant need not persuade the court that it was actually motivated by the proffered reasons.").

77. *Id.* at 253; *McDonnell Douglas*, 411 U.S. at 804; *Smith*, 632 F.2d at 333.

78. *See infra* notes 116-25 and accompanying text.

79. *See, e.g.*, Sweeney v. Board of Trustees, 604 F.2d 106, 110-11 (1st Cir. 1979) (in denying a female professor a promotion, the university claimed plaintiff had "personalized professorial matters," was difficult to work with, and did not contribute to campus committees; however, the university had awarded her tenure two years prior, and after filing of the discrimination suit, promoted her the following year), *cert. denied*, 444 U.S. 1045 (1980); Kunda v. Muhlenberg College, 621 F.2d 532, 538-39 (3d Cir. 1980) (university contended that the reason why female instructor was denied tenure was failure to complete master's degree, but three male faculty members were promoted despite the lack of such completion); Mecklenberg, 13 Empl. Prac. Dec. (CCH) ¶ 11,438 (D. Mont. Feb. 17, 1976) (department chairperson criticized plaintiff's research and teaching, but had previously recommended her for promotion and given her a merit pay increase).

eral courts.[80] Rule 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.[81]

Thus, four distinct sources may establish a privilege according to Rule 501: the Constitution, acts of Congress, decisions of the Supreme Court, and common law principles.[82] Commentators conclude, as supported by legislative history, that Rule 501 was designed to encourage flexibility and to allow courts to create new privileges as deemed necessary.[83] A court might thus declare that the role of confidentiality in the tenure review process is worthy of an evidentiary privilege based on either constitutional or common law grounds.[84]

1. Academic Freedom: The Constitutional Basis

a. A "Special Concern" of the Constitution

Academic freedom[85] is the ideal that academicians must be allowed to research and propose novel concepts without interference.[86] More

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80. FED. R. EVID. 501.

81. *Id.*

82. For a discussion of the "analytical framework" of Rule 501, see Comment, *supra* note 37, at 1540-42. *See also* Recent Development, *supra* note 5, at 1399-1400.

83. Comment, *supra* note 37 at 1541-42; Recent Development, *supra* note 5, at 1399-1400. Representative Hungate, an author of the Federal Rules of Evidence, noted that Rule 501 was "intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis." 120 CONG. REC. 40, 891 (1973) (remarks by Rep. Hungate).

84. For a discussion of the common law and constitutional basis of an academic privilege, see *infra* notes 85-148 and accompanying text. While Rule 26(c) of the Federal Rules of Civil Procedure may afford protection to confidential peer reviews by way of a protective order, it is discretionary in application and does not amount to an evidentiary privilege. *See* FED. R. CIV. P. 26(c). *See also* Comment, *supra* note 37, at 1543-44; Recent Development, *supra* note 5, at 1404-06.

85. Academic freedom has its roots in the German concept of *Lehfreiheit* which means the freedom to teach. Comment, *supra* note 29, at 993. In America, the first glimpse of academic freedom was in a 1894 declaration by the Board of Regents of the University of Wisconsin, which has been "hailed as the Magna Carta of academic freedom in America." Lee, *supra* note 25, at 288-89 (the regents refused to criticize or dismiss a professor for "possibly visionary opinions").

86. For a discussion of the doctrine of academic freedom, see Comment, *Kahn v. Superior Court of the County of Santa Clara: The Right to Privacy and the Academic Freedom Privilege with Respect to Confidential Peer Review Materials*, 15 J.C.U.L. 73, 74 (1988). One definition of academic freedom states:

> Academic freedom is the freedom of the teacher or "research worker" in higher institutions of learning 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 or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics.

eloquently, "it is the absolute freedom of thought, of inquiry, of discussion, and of teaching, of the academic profession."[87] Academic freedom encourages search for the truth which may be reached only by the "continual and fearless sifting and winnowing" of scholars.[88] All of society is the benefactor of such a search.[89]

The Supreme Court first recognized academic freedom in *Sweezy v. New Hampshire*,[90] acknowledging the societal interest in protecting the free flow of ideas at universities.[91] The Court in *Sweezy* overturned a contempt citation against a professor who refused to disclose his political beliefs or the contents of his lectures during a state investigation.[92] The plurality opinion noted that imposing a "strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."[93]

Perhaps the most quoted opinion on academic freedom is the concurring opinion of Justice Frankfurter.[94] He proclaimed that university studies should remain "as unfettered as possible,"[95] and that the government should intrude only when its reasons are "exigent and obviously compelling."[96]

Following *Sweezy*, the next major development with regard to academic freedom occurred in *Keyishian v. Board of Regents*.[97] In *Keyishian*, the Supreme Court stressed the importance of allowing the university to be a "marketplace of ideas," because the future depends

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Comment, *supra* note 29, at 994 (citing Lovejoy, *Academic Freedom*, 1 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 384, 384 (1930)).

87. Comment, *supra* note 22, at 291.

88. *Id.* at 289 (quoting R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 426 (1955)).

89. *Id.*

90. 354 U.S. 234 (1957). Individual Justices had endorsed academic freedom prior to *Sweezy* in Wieman v. Updegraff, 344 U.S. 183, 196-98 (1952) (Frankfurter, J., concurring) ("teachers must be examples of open-mindedness and free inquiry") and Adler v. Bd. of Educ., 342 U.S. 485, 510-11 (1952) (Douglas, J., dissenting) (in the absence of academic freedom "[i]nstruction tends to become sterile, pursuit of knowledge is discouraged; [and] discussion often leaves off where it should begin.").

91. *Sweezy*, 354 U.S. at 250. Chief Justice Warren is quoted as saying in the majority opinion, "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." *Id.*

92. *Id.* at 235.

93. *Id.* at 250.

94. For an in depth discussion of Justice Frankfurter's concurring opinion, See *infra* notes 107-10 and accompanying text.

95. *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring).

96. *Id.*

97. 385 U.S. 589 (1967).

on "leaders trained through wide exposure to that robust exchange of ideas which discovers truth."[98] The Court concluded that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[99] With this decision, the Court established constitutional protection for academic freedom.[100]

b. Institutional Versus Individual Academic Freedom

Historically, academic freedom was recognized as that which protected individual teachers and professors from interference from the government or university administration.[101] Increasingly, universities began asserting an institutional academic freedom which would allow them to make academic decisions free from government intrusion.[102] It was argued that without autonomy, an institution would be unable to maintain individual academic freedom.[103] If the government were allowed to regulate university policy, the academic freedom of individuals within the university might be worthless.[104] The main contribution universities make to society is the development of free-thinking individuals, matured in an unrestricted, intellectual environment. Such a contribution will only survive in an atmosphere which is free from intrusion.[105]

The concept of institutional academic freedom as protected by the first amendment was endorsed, albeit in a limited manner, by the Supreme Court.[106] Justice Frankfurter's concurring opinion in *Sweezy* provided first glimpse of a constitutional basis for institu-

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98. *Id.* at 603.

99. *Id.*

100. Comment, *supra* note 37, at 1545-46 (more recently, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), reaffirmed that academic freedom is to be afforded institutional protection). One commentator has noted that although a "special concern of the First Amendment," academic freedom has "[never] risen to the level of a constitutional right." *See* Comment, *supra* note 29, at 994.

101. Comment, *supra* note 86, at 74. *See also* Comment, *supra* note 46, at 590-91.

102. Comment, *supra* note 86, at 75 (the theory of institutional academic freedom is derived from the traditional doctrine of academic freedom merged with the concept of institutional autonomy). *See also* Comment, *supra* note 46, at 591.

103. *See* Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 829 (1983).

104. Comment, *supra* note 46, at 591 ("If the university is subject to direct governmental regulation of thoughts and ideas, an individual's privilege would be of questionable value.").

105. Comment, *supra* note 37, at 1550. ("The university's contribution to social progress is the ultimate justification for [institutional] academic freedom."). *Id.*

106. *Id.* at 1547. The Supreme Court has never explicitly upheld nor neglected constitutional protection for institutional academic freedom. However, an endorsement is perceived in that it has been the Court's practice to respect institutional academic freedom and university autonomy. *Id.*

tional academic freedom.[107] Justice Frankfurter noticed the need to avert "governmental intervention in the intellectual life of a university."[108] Moreover, he recognized "four essential freedoms" for a university.[109] The university has the freedom to determine "on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[110]

The Supreme Court further approved the concept of institutional academic freedom in *Regents of the University of California v. Bakke*.[111] In upholding a university's right to consider race as a criteria in its admissions policy,[112] the Court cited Justice Frankfurter's "four essential freedoms."[113] Justice Powell, writing for the majority, endorsed an institution's constitutional right of academic freedom, including the "selection of its student body."[114]

Despite this support, the majority of the Supreme Court has neither denied nor confirmed the existence of an institutional academic freedom.[115] However, courts have historically demonstrated a certain amount of deference toward university decisions, thus promoting university autonomy.[116] Intrusions into academic policies by the judiciary were considered inappropriate.[117] Much deference was given to evaluations by faculty members in early Title VII cases.[118] Judicial abstention was most apparent in the sex discrimination cases,[119] as evidenced by the fact that all of the first approximately thirty Title VII cases involving sex discrimination were decided in favor of the university defendants.[120]

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107. *See* Sweezy v. New Hampshire, 354 U.S. 234, 262-63 (1957) (Frankfurter, J., concurring).

108. *Id.* at 262 (Frankfurter, J., concurring).

109. *Id.* at 263 (Frankfurter, J., concurring) (quoting Reports of the University Grants Committee in Great Britain, Open Universities in South Africa 10-12).

110. *Id.*

111. 438 U.S. 265 (1978).

112. *Id.* at 272.

113. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

114. *See id.*

115. Comment, *supra* note 37, at 1548.

116. Note, *supra* note 48, at 948.

117. Lee, *supra* note 25, at 284.

118. *Id.* The courts avoided questioning employment decisions as well as administrative decisions. *Id.*

119. Note, *supra* note 48, at 942 n.93. *See also* Gray, *Academic Freedom and Nondiscrimination: Enemies or Allies?*, 66 TEX. L. REV. 1591, 1596 (1988) ("Commentators often attribute this deference to the complexity and specialized nature of sex discrimination cases and courts' lack of familiarity with academic procedures.").

120. Note, *supra* note 48, at 942 n.93 (citing H. EDWARDS & V. NORDIN HIGHER EDUCATION AND THE LAW 14 (1979)). Only four plaintiffs prevailed in the approximately

The peak of this "academic abstention"[121] came in *Faro v. New York University*.[122] *Faro* was a sex discrimination case in which the Second Circuit Court of Appeals stated: "[o]f all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."[123] This statement conflicts with the intent of Congress in amending Title VII to prohibit discrimination in educational institutions.[124] However, a justification for this deferential treatment is that the opinions of professors are beyond the expertise of the court.[125]

Courts soon began to notice that plaintiffs carried a heavier burden of proof with regards to Title VII cases in the university setting than in other employment situations.[126] Courts altered their approach so that decisions based on academic grounds continued to receive deference, but the legislative intent would also be considered.[127] One court asserted:

> The fact that the discrimination in this case took place in an academic rather than commercial setting does not permit the court to abdicate its responsibility to insure the award of a meaningful remedy. Congress did not intend that those institutions which employ persons who work primarily with their mental faculties should enjoy a different status under Title VII than those which employ persons who work primarily with their hands.[128]

Even Justice Frankfurter's concurring opinion in *Sweezy*, which discussed the origin of institutional academic freedom, limited the scope of a university's academic freedom to "academic grounds."[129] Therefore, while the Supreme Court has endorsed the ideal of institutional

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fifty academic discrimination cases litigated between 1970 and 1982. Lee, *supra* note 25, at 281 n.18.

121. Note, *supra* note 48, at 942.

122. 502 F.2d 1229 (2d Cir. 1974).

123. *Id.* at 1231-32.

124. *See supra* notes 57-59 and accompanying text.

125. Lee, *supra* note 25, at 285 (other courts have used the "*Faro*" deference statement to justify their reluctance to evaluate the legality of personnel decisions). *See also* Clark v. Whiting, 607 F.2d 634, 640 (4th Cir. 1979) ("Courts are not qualified to review and substitute their judgment for these subjective, discretionary judgments of professional experts on faculty promotions or to engage independently in an intelligent informal comparison of the scholarly consultations or teaching talents of one faculty member granted a promotion.").

126. For a discussion of the cases which began to note the differential in proof between university and other employment settings, see Note, *supra* note 48, at 943-44. *See also* Powell v. Syracuse Univ., 580 F.2d 1150, 1153 (2d Cir. 1978) ("anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias"), *cert. denied*, 439 U.S. 984 (1978).

127. *See, e.g.*, Kunda v. Muhlenberg College, 621 F.2d 532, 548-51 (3d Cir. 1980) (recognizing that the courts "should not substitute this judgment for that of the college with respect to the qualifications of faculty" yet refusing to "shirk the responsibility placed on [the courts] by Congress").

128. *Id.* at 550.

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

freedom, the federal courts have been reluctant to extend such a freedom beyond deference for university decisions based on academic grounds.

2. The Common Law Basis

a. The Common Law Analysis

The recognition of a privilege demonstrates that certain societal interests are more valuable than discovery of the truth.[130] Professor Wigmore suggested four factors for determining the existence of a privilege:

> (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 communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.[131]

One commentator asserts that courts typically undertake a similar analysis which involves only three factors.[132] In the case of the proposed academic freedom privilege, the courts would typically balance the need to fully disclose relevant information with the social importance of the university's academic freedom and peer confidentiality.[133] Assuming the balance tips in favor of a privilege, courts must further find that the privilege is *necessary* to protect the societal interest at stake.[134]

Another commentator suggests that Wigmore's analysis for establishing a common law privilege, or any variation thereof, is not applicable to the university peer review process, because the focus should

130. Comment, *supra* note 46, at 586 (*construed in* Blaubergs v. Board of Regents of the Univ. Sys. of Ga. (*In re* Dinnan), 661 F.2d 426, 429 (5th Cir. Unit B Nov. 1981), *cert. denied*, 457 U.S. 1106 (1982)). A privilege is recognized if it would "promote[] sufficiently important interests to outweigh the need for probative evidence in the administration of . . . justice." Trammel v. United States, 445 U.S. 40, 51 (1980).

131. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (1961).

132. Comment, *supra* note 37, at 1556. The three factors to be weighed are (1) the need to fully disclose all relevant information; (2) the social importance attached to the interest which would otherwise be revealed in the absence of privilege; and (3) the necessity of protecting the asserted interest through recognition of an evidentiary privilege. *Id.* For a thorough discussion of the application of these elements in establishing a common law privilege, see *id.* at 1556-61.

133. *See id.* at 1556-61.

134. *Id.* at 1560 ("a privilege is unnecessary if the interest at stake would be protected even without assurances of confidentiality").

not be on the relationship between the parties.[135] He believes, therefore, that a "qualified topic privilege," which may apply even in the absence of a special relationship, would be more appropriate.[136]

b. The Supreme Court's Creation of Privilege

In general, even with the flexibility allowed by Rule 501,[137] the Supreme Court has been reluctant to recognize new privileges.[138] The Court has recognized privileges based on well-established constitutional, historical, and statutory grounds,[139] such as those which protect grand jury proceedings,[140] petit jury deliberations,[141] and intra-governmental documents.[142] The Court even acknowledged the importance of confidentiality when it recognized an executive privilege, albeit a qualified one, which protects the confidentiality of presidential communications.[143] This executive privilege was based on the constitutional doctrine of separation of powers.[144]

The Court has also denied a proposed privilege allegedly based on the Constitution. In *Branzburg v. Hayes*,[145] a reporter contended that revealing the source of his information, after a guarantee of confidentiality, would inhibit the freedom of the press as protected by the first amendment.[146] The Court, however, refused to recognize a

135. Comment, *supra* note 46, at 592-93, 599 (arguing that Wigmore's test is not applicable because there is no special relationship between the parties in a peer review setting that needs protection).

136. *Id.* at 599-600. A "topic privilege" is preferable because a personal relationship for application of the privilege is unnecessary, the balancing of interests required under the Wigmore analysis is avoided, and the plaintiff must only prove a "likelihood of discrimination" for the materials to be discoverable. *Id.* at 589-600. The privilege would be similar to other privileges, such as those protecting state secrets or other confidential government documents. *Developments, supra* note 51, at 1592 n.1.

137. *See supra* notes 80-84 and accompanying text.

138. Lee, *supra* note 25, at 307. Chief Justice Burger's statement in United States v. Nixon, 418 U.S. 683 (1974), exemplifies this reluctance: "Whatever their origins, . . . [privileges] are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id.* at 710.

139. University of Pa. v. EEOC, 110 S. Ct. 577, 585 (1990).

140. *See* Douglas Oil Co. v. Petrol Stops N.W., 441 U.S. 211, 218 n.9 (1979) (recognizing that grand jury proceedings have depended on secrecy since the seventeenth century).

141. *See* Clark v. United States, 289 U.S. 1, 12-13 (1933) ("[T]he arguments and votes of jurors . . . are secrets protected from disclosure unless the privilege is waived.").

142. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) (based upon an exception to the Freedom of Information Act).

143. United States v. Nixon, 418 U.S. 683, 705 (1974) (presidential privilege is "fundamental to the operation of Government").

144. *Id.* at 705-06.

145. 408 U.S. 665 (1972). *Branzburg v. Hayes* is a consideration of two cases, both concerning newsmen and the right of newsmen to keep their sources of information confidential in response to a grand jury subpoena to testify.

146. In *Branzburg*, the reporter of a newspaper story which described the production of hashish from marijuana, was subpoenaed to testify before a grand jury. In writ-

privilege, noting that any negative effect on the freedom of the press or on the availability of information resulting from forced disclosure was "unclear."[147] The Court thus demonstrated its reluctance to create a privilege unless the damage to a constitutionally based right is clear and unattenuated.[148]

E. The Split in the Circuits: Determining the Legitimacy of an Academic Freedom Privilege

When confronted with discovery requests for peer review materials by a disgruntled faculty member who alleges discrimination, the respective circuit courts have adopted three basic approaches to a proposed academic freedom privilege: (1) balancing of interests;[149] (2) recognition of a qualified academic freedom privilege;[150] and (3) denial of any privilege whatsoever.[151]

The Second Circuit refused to observe an evidentiary privilege and instead adopted a balancing approach in *Gray v. Board of Higher Education, City of New York*.[152] In *Gray*, a black professor brought a discrimination suit against a New York community college after he was refused promotion and reappointment with tenure.[153] The court

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ing the story, Branzburg had promised the "hashish makers" that he would change their names in the article. At the grand jury proceeding, Branzburg refused to answer questions concerning the identities of his informants. *Id.* at 667-68. The Court also decided the case of a television newsman, Pappas, who had gained entry into a "Black Panther" headquarters by agreeing not to reveal what happened while he was there. *See id.* at 672-73.

147. *Id.* at 693-94 ("evidence fails to demonstrate that there would be a significant construction of the flow of news to the public").

148. *Id.* at 697-700. The Court professed, "We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination." *Id.* at 703.

149. *See* Gray v. Board of Higher Educ., 692 F.2d 901, 907-08 (2d Cir. 1982) (balancing educator's need for discovery of tenure votes against college's interest in confidentiality). *See also* Zaustinsky v. University of Cal., 96 F.R.D. 622, 626 (N.D. Cal. 1983), *aff'd without opinion*, 782 F.2d 1055 (9th Cir. 1985); McKillop v. Regents of Univ. of Cal., 386 F. Supp. 1270, 1278 (N.D. Cal. 1975).

150. *See* EEOC v. University of Notre Dame Du Lac, 715 F.2d 331, 337 (7th Cir. 1983) (qualified academic freedom privilege recognized as preventing disclosure of the identities of persons participating in the peer review process). *See also* Jackson v. Harvard Univ., 111 F.R.D. 472, 474 (D. Mass. 1986).

151. Blaubergs v. Board of Regents of the Univ. Sys. of Ga. (*In re* Dinnan), 661 F.2d 426, 427 (5th Cir. Unit B Nov. 1981) (held professor on tenure committee had no privilege to refuse to withhold information concerning his vote), *cert. denied*, 457 U.S. 1106 (1982). *See also* EEOC v. Franklin and Marshall College, 775 F.2d 110, 114 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986); Rollins v. Farris, 108 F.R.D. 714, 719 (E.D. Ark. 1985).

152. 692 F.2d 901 (2d Cir. 1982).

153. Dr. Gray brought this action under 42 U.S.C. §§ 1981, 1983, and 1985.

balanced the college's interest of confidentiality against Dr. Gray's interest and determined that the files should be disclosed.[154] In so doing, the Second Circuit relied on a brief submitted by the American Association of University Professors (AAUP) which emphasized that a university must at least offer an explanation for the denial of tenure.[155] The court also stated that a qualified privilege may be appropriate when a university provides a meaningful statement of the reasons for denial.[156]

In *Equal Employment Opportunity Commission v. University of Notre Dame Du Lac*,[157] the Seventh Circuit recognized a qualified academic freedom privilege. The court noted the importance of academic freedom[158] and confidentiality,[159] but also recognized that establishing an absolute privilege would be unwise.[160] It asserted that under a qualified privilege, the plaintiff must show a "particularized need" for materials before they can be disclosed.[161] The court believed that this qualified privilege would "preserve the integrity of the peer review" process while adequately protecting the plaintiff by allowing discovery when necessary.[162] Thus, the Seventh Circuit concluded that a sufficient balance between academic freedom and the search for truth was achieved with a qualified privilege.

The Fifth and Third Circuits have refused to allow any protection for faculty peer review material.[163] The Fifth Circuit, in *In re Dinnan*,[164] faced a case in which a faculty evaluator, Professor James

154. *Gray*, 692 F.2d at 907-08. The Second Circuit held:

> Rather than adopting a rule of absolute disclosure, in reckless disregard of the need of confidentiality, or adopting a rule of complete privilege that would frustrate reasonable challenges to the fairness of hiring decisions, our decision today holds that absent a statement of reasons, the balance tips toward discovery and away from recognition of a privilege.

Id. at 908.

155. *Id.* at 907. The AAUP brief explained that "[i]f an unsuccessful candidate for reappointment or tenure receives a meaningful written statement of reasons from the peer review committee and is afforded proper intramural grievance procedures, disclosure of individual votes should be protected by a qualified privilege." *Id.* (quoting AAUP Brief at 23).

156. *Id.* at 908.

157. 715 F.2d 331 (7th Cir. 1983).

158. *Notre Dame*, 715 F.2d at 335-36.

159. *Id.* at 336-37.

160. *Id.* at 337.

161. *Id.* at 338. The Seventh Circuit asserted that a relevance standard did not provide university peer reviews adequate protection from discovery and that a more appropriate standard would allow discovery if the party can show a " 'compelling necessity' for the *specific* information requested." *Id.* (emphasis in original) (citing Douglas Oil Co. v. Petrol Stops N.W., 441 U.S. 211, 222-23 (1979)).

162. *Id.* at 339. Interestingly, Notre Dame had offered to produce the documents with identifying features of those faculty members participating in peer evaluations redacted, but the district court refused the offer, claiming that the EEOC's need for discovery was "substantial." *Id.* at 334.

163. *See infra* notes 166-72 and accompanying text.

164. 661 F.2d 426 (5th Cir. Unit B Nov. 1981), *cert. denied*, 457 U.S. 1106 (1982).

Dinnan, refused to disclose his vote on the tenure application of a particular faculty member. He was consequently held in contempt.[165] The court dismissed his claims that his tenure vote was protected by both academic freedom[166] and a common law secret ballot privilege.[167] In fact, the court stated that his arguments were not "even slightly persuasive."[168]

The Third Circuit, in *Equal Employment Opportunity Commission v. Franklin and Marshall College*,[169] declared that the standard required for issuance of Commission subpoenas, simple relevance,[170] was met. The court also took note of the legislative history of Title VII, noting that the goal of eradicating discrimination in universities outweighed any harm that would be caused to academic freedom.[171] The court also noted that any harm to confidentiality would not undermine the integrity of the peer review process.[172]

Thus, the Circuits were divided along very distinct lines when the Supreme Court agreed to hear *University of Pennsylvania v. Equal Employment Opportunity Commission*.[173]

III. STATEMENT OF THE CASE

A. Factual History

The University of Pennsylvania (the University) is a private university located in Philadelphia, Pennsylvania. Founded in 1740,[174] it now has approximately 18,000 full-time students enrolled in twelve

165. Professor Dinnan served a three month jail sentence and paid $3000 in fines. *Id.* at 427.

166. *Id.* at 431. The Fifth Circuit stated that "[t]o rule otherwise would mean that the concept of academic freedom would give any institution of higher learning a *carte blanche* to practice discrimination of all types." *Id.* (emphasis in original).

167. *Id.* at 431-32. The court noted that a secret ballot privilege was limited to political ballots. *Id.* at 432.

168. *Id.* at 430. Insisting that evaluators be accountable for their actions, the court stated, "We find nothing heroic or noble about the appellant's position; we see only an attempt to avoid responsibility for his actions." *Id.* at 432.

169. 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986).

170. *Franklin and Marshall College*, 775 F.2d at 116-17.

171. *Id.* at 114-15.

172. *Id.* at 115. Although recognizing the importance of confidentiality, and the potential burden upon the tenure process, the court implied that the tenure process would survive if "the honesty and integrity of the tenured reviewers in evaluation decisions [can] overcome feelings of discomfort and embarrassment." *Id.*

173. 110 S. Ct. 577 (1990).

174. The University of Pennsylvania was founded by Benjamin Franklin and became the first university in the United States in 1779. Petitioner's Brief at 2, University of Pa. v. EEOC, 110 S. Ct. 577 (1990) (No. 88-493).

schools.[175] One of these schools is the Wharton School of Business.[176] The tenure process at the University includes evaluations from colleagues within the applicant's department, as well as from scholars outside the University, which the "Advisory Committee on Faculty Personnel" considers when determining the future status of a tenure candidate.[177] The University claimed that it was not unusual for the personnel committee to deny tenure to a candidate who received favorable recommendations from departmental colleagues.[178]

Rosalie Tung, a Chinese-American woman, was hired as an associate professor in the management department of the Wharton School of Business in 1981.[179] During the 1984-85 academic year, Professor Tung was a candidate for tenure.[180] Her colleagues within the management department recommended that she receive tenure, but the personnel committee refused to grant it to her.[181] Professor Tung was given no explanation for the denial, but she allegedly discovered that the personnel committee had attempted to justify its decision by declaring that the school was "not interested in China-related research."[182] Professor Tung believed that this explanation was merely a pretext for discrimination and that she was at least as qualified as five male faculty members who had been granted tenure.[183] She filed a charge with the Commission, basing her claim on racial and gender discrimination.[184]

The Commission began an investigation into Professor Tung's allegations by requesting certain documents relevant to her denial of tenure.[185] The University agreed to produce a "wide range of

175. *University of Pa.*, 110 S. Ct. at 580.

176. *Id.*

177. Petitioner's Brief at 3, University of Pa. v. EEOC, 110 S. Ct. 577 (1990) (No. 88-493).

178. *Id.* According to the University, two male candidates were also denied tenure after they had been recommended by the management department. *Id.* at 4 n.1.

179. *Id.* at 3.

180. *Id.*

181. *Id.* Professor Tung was reevaluated after she submitted more material, but the Committee again refused to recommend her for tenure. *Id.* at 4.

182. *University of Pa.*, 110 S. Ct. at 580.

183. *Id.* Professor Tung also contended that the chairman of the management department had sexually harassed her, and that she was denied tenure because she insisted that their "relationship remain professional." *Id.*

184. EEOC v. University of Pa., 850 F.2d 969, 972 (3d Cir. 1988), *aff'd*, 110 S. Ct. 577 (1990).

185. *Id.* The Commission issued a subpoena which sought:

1. Copies of Tung's tenure file;
2. Copies of the tenure files for the five other candidates considered with Tung for tenure;
3. The identity, tenure status, and qualifications of those individuals who comprised the tenure committees for the University's management department from June, 1984 to the present; and
4. The identity of all members of the University's personnel committee.

documents" regarding Professor Tung's candidacy for tenure, including most of her tenure review file.[186] The University, however, refused to provide the materials containing confidential peer reviews.[187] The University wanted the Commission to minimize the intrusion into the peer review process.[188] At the least, the University requested that the Commission amend its subpoena to exclude peer review material.[189] The Commission, relying on Third Circuit precedent,[190] rejected the University's explanation and threatened to bring an action to enforce its subpoena.[191]

B. Procedural Facts

Once the Commission refused to amend its subpoena, the University had twenty days within which to comply with the request for production before the Commission would initiate enforcement pro-

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Id.

186. Petitioner's Brief at 4-5, University of Pa. v. EEOC, 110 S. Ct. 577 (1990) (No. 88-493). The University voluntarily produced the following:

> [1] the Personnel Committee's statement of reasons for the denial of tenure; [2] two detailed position statements describing the University's tenure review process and its treatment of Tung's candidacy for tenure; [3] Tung's complete personnel file; [4] a chart showing the results of tenure decisions for candidates at the Wharton School which include the sex, national origin, rank and department of each candidate; [5] a summary of applications and appointments to Management Department positions by race, sex and national origin; [6] relevant sections from the University's faculty handbook covering faculty structure, tenure review process and the grievance process; [7] a description of the University's policies on faculty salary merit increases; [8] charts showing salaries and salary increases for associate professors at Wharton, by national origin; and [9] information on vacancies, advertisements and recruitment for positions at Wharton.

Id.

187. *Id.* at 5. The University wanted to avoid producing evaluations from Wharton faculty as well as outside faculty. *Id.*

188. *University of Pa.*, 110 S. Ct. at 580-81.

189. *Id.* at 580. Specifically, the University asked the Commission to exclude:

> (1) confidential letters written by Tung's evaluators; (2) the Department Chairman's letter of evaluation; (3) documents reflecting the internal deliberations of faculty committees considering applications for tenure, including the Department Evaluation Report summarizing the deliberations relating to Tung's application for tenure; and (4) comparable portions of the tenure-review files of the five males.

Id.

190. For the leading case on point in the Third Circuit, see EEOC v. Franklin & Marshall College, 775 F.2d 110 (3d Cir. 1985) (no qualified academic privilege protecting tenure review information from discovery), *cert denied*, 476 U.S. 1163 (1986). For a discussion of *Franklin and Marshall College*, see *supra* notes 171-73 and accompanying text.

191. *University of Pa.*, 110 S. Ct. at 973.

ceedings.[192] During that grace period, on May 1, 1987, the University, attempting to avoid adverse precedent in the Third Circuit,[193] brought suit seeking declaratory and injunctive relief in the United States District Court for the District of Columbia.[194] The University sought to have the Commission's subpoena quashed on the grounds that it was unconstitutional.[195] The Commission filed a motion to dismiss the action based on lack of subject matter jurisdiction, improper venue, and failure to state a claim.[196] While this motion was pending, and six weeks after the University's action was filed, the Commission filed its own action to enforce the subpoena in the United States District Court for the Eastern District of Pennsylvania.[197]

The District Court in Pennsylvania retained jurisdiction, refused to dismiss the action even though a parallel action had previously been filed in the District of Columbia, and ordered the University to comply with the subpoena and produce the peer review materials.[198] The Third Circuit affirmed,[199] acknowledging a general rule of comity which allows a court, in an action which was "first-filed," to retain jurisdiction while any subsequent action involving the same parties and issues may be enjoined.[200] However, the Third Circuit opined, the "first-filed" rule is flexible, so that a subsequent court can retain jurisdiction in spite of it when a case exhibits "rare or extraordinary circumstances, inequitable conduct, bad faith, or forum shopping."[201] The appellate court ruled that the district court did not abuse its discretion in declining to invoke the "first-filed" rule because the university's selection of jurisdiction gave the appearance of forum shopping.[202]

The court of appeals then addressed the issue of confidential peer

192. EEOC v. University of Pa., 850 F.2d 969, 972-73 (3d Cir. 1988), *aff'd*, 110 S. Ct. 577 (1990).

193. *See supra* notes 169-72 and accompanying text.

194. *University of Pa.*, 850 F.2d at 973. The University filed the action three days before the grace period expired. *Id.*

195. *Id.* The University claimed that the Commission's nationwide policy to require peer review disclosures violated the first and fifth amendments to the U.S. Constitution, as well as the Administrative Procedure Act. *See* U.S. CONST. I, V, and the Administrative Procedure Act, 5 U.S.C. § 553 (1982). *Id.*

196. Petitioner's Brief at 7, University of Pa. v. EEOC, 110 S. Ct. 577 (1990) (No. 88-493).

197. *See University of Pa.*, 850 F.2d at 973.

198. *See id.* at 973-74.

199. *Id.* at 972.

200. *Id.* at 971.

201. *Id.* at 972.

202. *Id.* Contrarily, the University had argued that it filed the action in the District of Columbia rather than Philadelphia because "more was at stake than the single question of the Commission's possible enforcement of the its [sic] subpoena against the University." *Id.* at 973 (quoting Petitioner's Brief at 6, University of Pa. v. EEOC, 110 S. Ct. 577 (1990) (No. 88-493)).

review. The court relied exclusively on its prior decision in *Equal Employment Opportunity Commission v. Franklin and Marshall College*,[203] and rejected the University's argument that the Commission's subpoena was unconstitutional.[204] The court remanded the case to the district court to determine whether names and other material which would indicate the identity of the evaluators should be redacted.[205]

On September 18, 1988, the University petitioned the United States Supreme Court for a writ of certiorari on two issues.[206] It challenged (1) the Commission's right to subpoena confidential peer review materials, and (2) the district court's disregard for the "first-filed" rule.[207] On December 12, 1988, to the surprise of many, the Supreme Court granted certiorari to consider only the "first-filed" issue.[208] However, after briefs were submitted, and eleven days before oral arguments, the Court amended the grant of certiorari so that only the academic freedom privilege issue would be heard.[209] It is unclear what caused the change,[210] but the Court rescheduled oral arguments and accepted more briefs so as to finally settle the split in the circuit courts concerning a proposed privilege for peer review materials within the university setting.

IV. ANALYSIS OF THE OPINION

The United States Supreme Court unanimously affirmed the Third Circuit's decision in *University of Pennsylvania v. Equal Employment Opportunity Commission*,[211] and finally laid to rest the possi-

203. 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986).

204. *University of Pa.*, 850 F.2d at 980.

205. *Id.* at 982.

206. For a brief discussion of the granting of certiorari in this case, see Stewart, *A Switch in Time*, A.B.A. J., Mar. 1990, at 42.

207. *See* Petition for Writ of Certiorari at i, EEOC v. University of Pa., 850 F.2d 969 (3d Cir. 1988) (No. 88-493), *cert. granted*, 109 S. Ct. 554 (1988).

208. Stewart, *supra* note 206, at 42. *See also* University of Pa. v. EEOC, 109 S. Ct. 554 (1988) (cert. granted).

209. University of Pa. v. EEOC, 109 S. Ct. 1660 (1989) (modifying grant of cert.).

210. One commentator pointed out several possibilities for the Court's "mixup":

> Possibly the justices reversed the numbers of the questions in conference, or perhaps they recorded their decision incorrectly, or perhaps it was transcribed incorrectly in the clerk's office. It is even possible—though a bit far-fetched—that the justices intended to hear the [first-filed issue] but changed their minds after they received the briefs on it.

Stewart, *supra* note 206, at 43.

211. 110 S. Ct. 577, 587 (1990) (the Court held that the first amendment does not harbor a right to academic freedom so as to protect confidential peer review materials from discovery in Title VII discrimination cases).

bility of a judicially sanctioned academic freedom privilege. Justice Blackmun's opinion addressed and discarded the University's proposed privilege as a means by which universities could escape the reaches of Title VII.[212] In so doing, the Court disapproved those circuits which recognized either a qualified privilege[213] or a balancing approach,[214] and affirmed the relevance standard for investigations by the Equal Employment Opportunity Commission of university discriminatory hiring practices.[215]

In rejecting the University's claim that peer review materials of a candidate for tenure deserve an evidentiary privilege based on common law principles, Justice Blackmun's opinion emphasized the reluctance of the Court to establish new privileges.[216] Even though Rule 501 of the Federal Rules of Evidence indicates a "congressional desire" for flexibility in the law of privileges,[217] the Court has been unwilling to create a privilege unless the interest it protects outweighs the need for evidence.[218] The Court's balance in this instance leaned heavily toward the discovery of probative evidence.[219]

The first factor weighed by the Court was the legislative history of Title VII and its amendment.[220] The fact that educational institutions were expressly added to Title VII in 1972 indicates that Congress considered discrimination within universities to be a "compelling problem."[221] The Court noted that Congress, in coming to this conclusion, even pondered the possible harm to university autonomy that Title VII might inflict.[222] In fact, the Court acknowledged, the 1972 amendment subjected tenure decisions to the same scrutiny imposed upon decisions of employers in other fields.[223] Therefore, the Commission's statutorily mandated authority to investigate a charge of discrimination and obtain any evidence that is "relevant to the charge under investigation"[224] should pertain equally to faculty tenure decisions.[225]

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212. *Id.* at 584.

213. *See supra* notes 150, 159-63 and accompanying text.

214. *See supra* notes 150, 153-56 and accompanying text.

215. *University of Pa.*, 110 S. Ct. at 584-85.

216. *Id.* at 582.

217. *See supra* notes 83-84 and accompanying text.

218. *University of Pa.*, 110 S. Ct. at 582.

219. *Id.* The Court asserted that the actual balancing of the interests "is particularly a legislative function." *Id.* Thus, the Court was persuaded by congressional intent.

220. *See id.* at 582-84.

221. *Id.* at 582.

222. *Id.* It was noted that the extension of Title VII to educational institutions might "weaken institutions of higher education by interfering with decisions to hire and promote faculty members." *Id.*

223. *Id.* at 583.

224. *Id.* (quoting 42 U.S.C. § 20003-e(a) (1982)).

225. *Id.* The Court dismissed the University's argument that § 2000e-8 gives the

The University emphasized the importance of confidentiality in the peer review process and argued that this element should serve to tip the balance in favor of a privilege.[226] However, the Court refused to weigh this factor.[227] First of all, the Court reasoned, Congress provided a "modicum of protection" for confidential evidence obtained by the Commission.[228] During the investigation phase, the Commission may not disclose any of the confidential information obtained.[229] The Court refused to expand this safeguard of confidentiality past the investigatory phase because the compelling interest in preventing discrimination in universities would be severely burdened where a university is "allowed to pick and choose" the evidence to be used against it.[230] The granting of such a privilege for peer review material would allow a university to hide crucial evidence behind a veil of confidentiality, thus hindering the Commission's investigation.[231]

Furthermore, the Court feared a "wave of similar privilege claims" from other occupations which would result from the granting of a privilege to university peer reviews.[232] The Court believed that once precedent was set, writers, publishers, musicians, and even attorneys would clamor for recognition of a similar privilege.[233] Perceiving a need to establish a "breakwater," the Court stood behind its decision that all evidence "relevant" to the claim of discrimination is discoverable in the absence of a statutory provision to the contrary.[234]

Finally, in considering a proposed common law privilege, the Court examined and distinguished prior privileges as established by prece-

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Commission authority only to "seek" and not to "acquire" relevant evidence. *Id.* at 583-84 ("[t]his interpretation simply cannot be reconciled with the plain language of the text of § 2000e-8(a), which states that the Commission '*shall . . . have* access' to 'relevant' evidence" (emphasis added)).

226. *Id.* at 584.

227. *Id.* The Court dismissed the argument for confidentiality by saying that the "costs associated with racial and sexual discrimination in institutions of higher learning" outweigh the "costs that ensue from disclosure." *Id.*

228. *Id. See* 42 U.S.C. § 2000e-8 (1982) (mandating criminal penalties for those who disclose confidential information obtained during a Commission investigation).

229. *University of Pa.*, 110 S. Ct. at 584. *See also* 42 U.S.C. § 2000e-8 (1982).

230. *University of Pa.*, 110 S. Ct. at 584 (quoting EEOC v. Franklin and Marshall College, 775 F.2d 110, 116 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986)).

231. *Id.* The Court was unwilling to "place a potent weapon in the hands of employers who have no interest in complying voluntarily with the Act, who wish instead to delay as long as possible investigations by the EEOC." *Id.* (quoting EEOC v. Shell Oil Co., 466 U.S. 54, 81 (1984)).

232. *Id.* at 585.

233. *Id.*

234. *Id.*

dent.[235] The Court distinguished the presidential communication privilege of *United States v. Nixon*[236] by stating that the executive privilege, although fashioned on the importance of confidentiality, was based on the constitutional mandate of the separation of powers doctrine.[237] Contrarily, the Court asserted that the proposed academic privilege "lacks similar constitutional foundation."[238]

However, the Court later addressed the University's argument that a privilege protecting peer reviews should be created based on the constitutional notion of academic freedom.[239] In attempting to substantiate an academic privilege as based upon constitutional grounds, the University called upon prior cases which established academic freedom as a "special concern of the First Amendment."[240] The University argued that it has a constitutionally protected right to choose who may teach,[241] and that the tenure process was the method by which this freedom was exercised, and that peer reviews were an essential part of the tenure process.[242] The University further asserted that confidentiality is essential to the peer review process.[243] Therefore, denying confidentiality would inhibit the University's academic freedom.[244]

In reaction to the University's argument, the Court refused to stretch the cases recognizing academic freedom to fit the facts of the

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235. *Id.*

236. 418 U.S. 683 (1974) (the Court held that the President has a qualified privilege to refuse to disclose confidential, high-level communications concerning the military, diplomatic relations, or security secrets).

237. *University of Pa.*, 110 S. Ct. at 585. For a case discussion of the foundation of the executive privilege as based upon the doctrine of separation of powers, see *Nixon*, 418 U.S. at 705-06.

238. *University of Pa.*, 110 S. Ct. at 585. The Court distinguished other precedent noting that the proposed academic freedom privilege did not have the same "historical or statutory basis" as other privileges recognized by the Court. *Id. See* Douglas Oil Co. v. Petrol Stops N.W., 441 U.S. 211 (1979) (grand jury proceedings); NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) (intra-agency documents); Clark v. United States, 289 U.S. 1 (1933) (deliberations of a petit jury).

239. *See University of Pa.*, 110 S. Ct. at 585-88.

240. *Id.* at 585-86 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)). *See also* Adler v. Board of Educ., 342 U.S. 485, 511 (1952) (Douglas, J., dissenting) (academic freedom is central to "the pursuit of truth which the First Amendment is designed to protect").

241. *University of Pa.*, 110 S. Ct. at 586. In reaching this conclusion, the University emphasized Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*, wherein the right to determine "who may teach" was recognized as one of the "four essential freedoms" that an academic institution enjoys under the first amendment. *Id.* at 582. *See supra* notes 109-13 and accompanying text.

242. *University of Pa.*, 110 S. Ct. at 586. ("A properly functioning tenure system requires the faculty to obtain candid and detailed written evaluations of the candidate's scholarship . . . .").

243. *Id.* ("It is confidentiality that ensures candor and enlists an institution to make its tenure decisions on the basis of valid academic criteria.").

244. *Id.*

case at hand.[245] Justice Blackmun observed that those decisions affirming academic freedom were cases in which the government was attempting to *directly* regulate the *content* of academic speech.[246] Moreover, the University did not claim that the Commission's subpoena constituted such a regulation.[247] The Commission was not providing academic criteria for hiring, but instead investigating when nonacademic criteria had been allegedly utilized.[248]

The Court continued, however, by stating that a university's academic freedom may still be protected by the first amendment even when content-based speech is not involved.[249] However, the harm to the University's academic freedom in this case was found to be "extremely attenuated"[250] and speculative.[251] In demonstrating the speculative nature of the harm to the University, the Court considered the potential impact on the peer review process that would result if confidentiality were not required. It noted that not all peer review systems rely on confidentiality.[252] Moreover, even if a qualified privilege were adopted wherein a showing of "special necessity" were needed for disclosure, many peer review materials would still

245. *Id.* at 586-87. *See generally* Keyishian v. Board of Regents, 385 U.S. 589 (1967) (Court struck down a New York Education law against "treasonable seditious" utterances in public schools); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (struck down overly-broad state subversive activities act).

246. *University of Pa.*, 110 S. Ct. at 586.

247. *Id.* at 587 (the University failed to allege that the subpoenas would in fact regulate "university discourse"). The Court noted that the University was asking for "an *expanded* right of academic freedom," because the objections were neither content based, nor involved a direct infringement on University policy to determine "who may teach." *Id.* (emphasis in original).

248. *Id.* The Court cautioned courts to avoid "second-guessing . . . legitimate academic judgments" and to "show great respect for the faculty's professional judgment." *Id.* (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)).

249. *Id.* Justice Blackmun acknowledged that content-neutral speech may also be protected. *Id.* (citing Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981)). He further noted that indirect burdens on speech may also "pose First Amendment concerns." *Id.* (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958)).

250. *Id.* The University's argument was that "disclosure of peer review materials . . . undermines the confidentiality which is central to the peer review process, and this in turn is central to the tenure process, which in turn is the means by which [the University] seeks to exercise its asserted academic-freedom right of choosing who will teach." *Id.* at 587-88. Justice Blackmun pointed out that "[t]o verbalize the claim is to recognize how distant the burden is from the asserted right." *Id.* at 588.

251. *Id.*

252. *Id.* (citing G. Bednash, The Relationship Between Access and Selectivity in Tenure Review Outcomes (1989) (unpublished Ph.D. Dissertation, University of Maryland)).

be discovered.[253] Thus, the Court dismissed the "chilling effect" that absence of the proposed privilege may cause by rationalizing that at most, such an effect would "only [be] incrementally worsened."[254] Furthermore, in the absence of privilege, some evaluators will take greater care to legitimately justify their critiques and account for that criticism.[255] Finally, the Court compared the first amendment ground for the privilege to the proposed privilege in *Branzburg v. Hayes*.[256] The claim in *Branzburg* was similar to that in the subject case in that the parties advocating a privilege contended that the destruction of confidentiality would "inhibit the free flow of information in contravention of First Amendment principles."[257] Justice Blackmun commented, by comparing to *Branzburg*, that not all "incidental burdening" of academic freedom is violative of the first amendment.[258] Likewise, when the harm to a first amendment right is uncertain and speculative, the Court has been, and still is, unwilling to grant an evidentiary privilege.[259]

V. IMPACT OF THE COURT'S DECISION

A. *Impact on Future Cases*

Since discrimination cases are quite common, the refusal of an academic freedom privilege will potentially have a substantial impact.[260] However, individuals in both academics and legal fields are unsure of the actual impact of the decision on pending and future discrimination cases.[261] Interestingly, a sudden rush to file discrimination cases is not expected, since plaintiffs must still prove discrimination, a tedious and expensive task even with the benefit of the peer review evaluations.[262] The impact of the case would be tremendous, and discrimination could be proven more easily, if evaluators candidly ex-

253. *Id.*

254. *Id.*

255. *Id.*

256. 408 U.S. 665 (1972) (no reporter's testimonial privilege under the first amendment to refuse to testify to confidential sources and information in a grand jury proceeding).

257. *University of Pa.*, 110 S. Ct. at 588.

258. *Id.* (quoting *Branzburg*, 408 U.S. at 682). Since the Court held that the Commission's subpoena did not violate the first amendment, it did not address the question of whether the state's interest in eradicating discrimination outweighed the burden on first amendment rights. *Id.* at 589.

259. *Id.* at 588 (We are unwilling "to embark the judiciary on a long and difficult journey to . . . an uncertain destination." (citing *Branzburg*, 408 U.S. at 703)).

260. Reuben, *Professors Win Case On Tenure*, L.A. Daily J., Jan. 10, 1990, at 9, col. 1.

261. *See* Mooney, *Academics Are Divided Over High-Court Ruling on Tenure Documents*, Chron. Higher Educ., Jan. 24, 1990, at A1, col. 2. For a brief discussion of tenure controversies which were pending at the time of the decision, see Reuben, *supra* note 260, at 9, col. 1.

262. Blum, *Supreme Court Rejects Privacy Claim for Tenure Files, Says University*

press their biased views even though their comments are no longer held in confidence. However, a discriminating evaluator may tone down his opinion or disguise it with a seemingly legitimate pretext,[263] in which case Title VII plaintiffs' access to peer review files will not likely effect the discrimination cases in a substantial manner.[264] Although Justice Blackmun explained that if there is a "smoking gun"[265] it will be located in the peer review files, it is possible that fewer guns will be discovered due to precautions taken by discriminating evaluators. Therefore, candor must be maintained even without complete confidentiality if victims of discrimination are to benefit from the Court's decision.

Further, the decision appears to be limited to administrative subpoenas seeking peer review material in discrimination investigations. The Court emphasized the statutory authority of the Commission and the safeguards from abuse provided by Title VII.[266] The Court did not address a plaintiff's request for peer review material in a private cause of action.[267] Nevertheless, the decision may have a "larger rippling effect."[268] Justice Blackmun's refusal to accept the arguments that the loss of confidentiality would destroy peer review, and that academic freedom mandated a privilege, will most likely prevent future courts from creating a privilege for private discrimination actions and other actions such as libel.[269] Therefore, even though the Court did not address discovery requests other than Commission subpoenas, it is likely that no privilege will exist in other circumstances either.

B. Impact on University Tenure Review

The impact of the decision on universities and their tenure proce-

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Must Disclose Information in Bias Case, Chron. Higher Educ., Jan. 17, 1990, at A1, col. 2.

263. One commentator noted that "[s]cholars who read and write faculty evaluations know that there's more than one way to say the same thing." Blum, *Writers of Evaluations Know There's More Than One Way to Describe a Colleague's Accomplishments or Lack Thereof*, Chron. Higher Educ., Feb. 14, 1990, at A19, col. 2.

264. Reuben, *supra* note 260 at 9, col. 1.

265. University of Pa. v. EEOC, 110 S. Ct. 577, 584 (1990).

266. *See id.* at 583.

267. Lee, *The Supreme Court's U. of Pennsylvania Ruling Does Not Sound the Death Knell for Peer Review*, Chron. Higher Educ., Jan. 24, 1990, at B1, col. 2.

268. Blum, *supra* note 262, at A17, col. 2 (quoting William W. Van Alstyne, general counsel for the American Association of University Professors and Professor of law at Duke University).

269. *Id.*

dures is equally, if not more, uncertain. Some commentators have predicted that purging the peer review process of confidentiality will weaken the process by which universities grant tenure.[270] The fear is that evaluators will hesitate to be candid and critical, resulting in bland and ineffective peer reviews.[271] Moreover, evaluators from outside the particular university may become unwilling to participate in the peer review process, especially where a charge of discrimination is likely to be made.[272]

Other commentators agree with Justice Blackmun and believe that the decision will have a minimal effect, if any, on the tenure process.[273] First of all, few tenure decisions are challenged on the basis of discrimination.[274] Secondly, universities generally had difficulty keeping peer reviews confidential before this decision.[275] Furthermore, evaluators may become more careful to consider meritorious criteria without forfeiting candor or criticism,[276] and universities may actually begin to treat minorities fairly when making tenure decisions.

Perhaps the most compelling evidence of a possible impact on universities comes from those universities that allowed tenure candidates access to their peer reviews before *University of Pennsylvania*.[277] Many universities that employ an "open system" are compelled to do so as state universities under state law.[278] Nevertheless, those universities claim that openness has not diminished candor; in fact, it has "boost[ed] morale."[279] However, in smaller universities, professors who are members of a small, tightly-knit community might suffer harsher effects from an open system than would professors in a larger school.[280]

Indeed, the actual impact on universities and the tenure process re-

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270. Mooney, *supra* note 261, at A1, col. 2.

271. *Id.* at A21, col. 1. One commentator suggests that evaluators be instructed how to write critiques to prevent the evaluations from being bland and eventually discarded. Blum, *supra* note 263, at A19, cols. 1 & 2.

272. Professor Van Alstyne admitted that, although his evaluations would remain candid, he might not participate in the review of women or minorities in certain situations. Mooney, *supra* note 261, at A18, col. 4.

273. For a discussion of Justice Blackmun's opinion concerning the impact of disclosure, see *supra* notes 248-250 and accompanying text.

274. *See supra* note 53 and accompanying text.

275. Mooney, *supra* note 261, at A18, col. 3 (quoting Walter Lynn, dean of the faculty at Cornell University); Comment, *supra* note 46, at 599.

276. Mooney, *supra* note 261, at A1, col. 2.

277. The Court noticed that "confidentiality is not the norm in all peer review systems." University of Pa. v. EEOC, 110 S. Ct. 577, 588 (1990) (citing G. Bednash, The Relationship Between Access and Selectivity in Tenure Review Outcomes (1989) (unpublished Ph.D. Dissertation, University of Maryland)).

278. *See* Blum, *Universities Where Tenure Candidates Can Review Their Files Say System Has Not Been Undermined*, Chron. Higher Educ., Feb. 14, 1990, at A19, col. 4.

279. *Id.*

280. *See* EEOC v. Franklin and Marshall College, 775 F.2d 110, 115 (3d Cir. 1985)

sulting from *University of Pennsylvania* is difficult to predict, but the crucial factor may be the way the universities and evaluators react to the decision.[281] An educational institution might conceivably suffer a loss of confidence in the tenure process, potentially resulting in low morale and inferior faculty, if it overreacts to the decision and abandons peer reviews.[282] Conversely, individual evaluators may eliminate any negative impact to the peer review process by making a conscious effort to support their conclusions with data to insure a tenure decision based on merit.[283]

C. *Possible Legal Reactions*

Any impact of this decision may be eliminated completely through legislation, as Justice Blackmun[284] observed, stating that "[i]f [Congress] dislikes the result, it of course may revise the statute."[285] Congress can amend Title VII to expressly prohibit the discovery of confidential peer reviews. In fact, as recognized by Rule 501 of the Federal Rules of Evidence, Congress may create a statutory privilege protecting academic peer reviews.[286] While the creation of such a privilege would eliminate the negative impact on universities, it would decimate both private and Title VII causes of action in discrimination claims and would be contrary to congressional intent.[287]

Even in the absence of a statutory privilege, district courts have the power to minimize any ill effects suffered by the university, while at the same time allowing the Commission to pursue discrimination claims.[288] The tool by which courts may accommodate these interests is Rule 26(c) of the Federal Rules of Civil Procedure. Rule 26(c) permits a court to grant a protective order denying "in whole or in part" the discovery of requested material.[289] This rule allows courts lati-

(court acknowledged that disclosure of peer reviews might especially effect small schools), *cert. denied*, 476 U.S. 1163 (1986).

281. *See* Blum, supra note 263 at A19, cols. 1 & 2 (in light of this decision, evaluators might make "disclaimers and gloss [] over critical opinions").

282. Blum, *supra* note 278, at A21, col. 1.

283. *See* Blum, *supra* note 263, at A19, col. 4.

284. University of Pa. v. EEOC, 110 S. Ct. 577, 585 (1990).

285. *Id.*

286. *See supra* notes 82-86 and accompanying text. Several state legislatures have created privileges to protect medical peer reviews. *Developments*, *supra* note 51, at 1627.

287. Comment, *supra* note 37, at 1543 ("fixing a university privilege in a federal statute would undermine the judicial flexibility sought by Congress in adopting rule 501").

288. *Id.*

289. FED. R. CIV. P. 26(c).

tude to prevent plaintiffs, or the Commission, from discovering certain portions of the peer review materials that would cause a university "annoyance, embarrassment, oppression, or undue burden or expense."[290]

Under the authority of Rule 26(c), courts may redact identifying language from peer review files, allowing the evaluators to remain anonymous.[291] Some scholars contend that a protective order is insufficient to protect a university's interest,[292] and that it is unclear whether redaction would effectively preserve confidentiality. Nevertheless, because they have been denied an evidentiary privilege, universities must consider alternatives which, although not offering complete protection, might retain sufficient confidentiality to combat the "chilling effect."[293]

Courts should also be cautious when dealing with university defendants to prevent the holding in *University of Pennsylvania* from becoming a precedent for intruding into university autonomy. Although "[t]he decision sets a tone for government intervention in university affairs,"[294] even Justice Blackmun recognized that courts should avoid "second-guessing of legitimate academic judgments."[295] It may be catastrophic to academia in America if this case were misconstrued and utilized as a stepping stone toward government intrusion into academic decision-making. However, although the case allows the Commission to fully investigate discrimination claims against a university, it also requires that tenure decisions based on *academic* grounds should receive extremely cautious judicial review.[296]

VI. CONCLUSION

The Supreme Court has settled the issue of a judicially created academic freedom privilege and, in so doing, has taken what it believes to be a step toward eradicating discrimination in the hiring practices of universities. As long as educational institutions and individual faculty evaluators respond to the decision with a commitment to rec-

290. *Id.*

291. Even though a privilege was denied, the Court did not address whether a university may redact certain information from peer review materials. University of Pa. v. EEOC, 110 S. Ct. 577, 589 n.9 (1990).

292. *See* Comment, *supra* note 37, at 1543.

293. Daniel Steiner, vice-president and general counsel at Harvard University said, "We have to look for alternatives to deal with a situation which might deter totally candid evaluations. Redaction might help considerably in preserving confidentiality and the tenure process." Blum, *supra* note 262, at A17, col. 5.

294. Mooney, *supra* note 261, at A18, col. 1. (quoting Anne H. Frank, associate secretary and counsel for the AAUP).

295. *University of Pa.*, 110 S. Ct. at 587.

296. *Id.* Courts reviewing "the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment." *Id.* (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)).

ommend faculty members for tenure based on merit, *University of Pennsylvania* could provide the groundwork on which universities can be built free from arbitrary discrimination.

However, the Court's decision might also set the tone for excessive government intrusion into university affairs. The district courts should be wary of impeding university autonomy without sacrificing the value of Title VII as a tool against discrimination. The courts should utilize protective orders to encourage candor in peer reviews by redacting certain identifying features. These protective orders would allow universities to continue to employ the peer review process and suggest to evaluators that their identities may remain confidential.

Thus, the battle over disclosure of faculty peer reviews could take a new form as universities argue that certain material should be redacted, and plaintiffs request that the documents be produced in full. Hopefully, the district courts will be able to strike a balance so that both the fight against arbitrary discrimination and an effective tenure system may coexist in the university setting.

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