The University as an Employer: A Study of the Application of Title VII to the Modern American Institution of Higher Education

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Dedicated to my loved ones
who helped make this dissertation happen:
Mom, Dad, Enyo, Altagracia, Dafney, and
all of my family and friends who supported
me throughout this process.
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TABLE OF CONTENTS

ABSTRACT ............................................................................................................................................... vii

1. INTRODUCTION ................................................................................................................................. 1

   Purpose .................................................................................................................................................. 4
   Significance .......................................................................................................................................... 4
   Operational Definitions ....................................................................................................................... 6
   Limitations .......................................................................................................................................... 8
   Summary ............................................................................................................................................ 9

2. LITERATURE REVIEW: TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 ................................. 11

   The Road to the Civil Rights Act of 1964: The Evolution of Anti-Discrimination in
   Employment Policy ............................................................................................................................... 11
     Civil Rights in the mid-1800s through Reconstruction .................................................................. 12
     Civil Rights in the early to mid-1900s .......................................................................................... 15
     Fair Employment Practice Statutes: 1930s-1963 ......................................................................... 17
   The Civil Rights Act of 1964 ............................................................................................................. 22
     Passing the Act ................................................................................................................................. 23
     Legislative History of Title VII ....................................................................................................... 25
     Selected Provisions of Title VII ...................................................................................................... 28
   Title VII: What Happened After the Passing of the Civil Rights Act of 1964? ......................... 32
     What Came After: 1965-1981 ......................................................................................................... 33
     What Came After: 1982-1990 ......................................................................................................... 59
     What Came After: 1991-2002 ......................................................................................................... 67
     What Came After: 2003 - present ................................................................................................. 77
   Conclusion .......................................................................................................................................... 80
   Putting It All Together: Framing the Research Question ................................................................. 81

3. LITERATURE REVIEW: HIGHER EDUCATION IN AMERICA ..................................................... 84

   The Evolving Role of Higher Education in America ........................................................................ 85
     The Beginnings of American Higher Education .............................................................................. 85
     Higher Education from 1776 through 1860 ............................................................................... 89
     Higher Education from 1860 through 1920 ............................................................................... 94
     Higher Education from 1920 to the present ............................................................................... 104
   The University as an Employer .......................................................................................................... 129
   Putting It All Together: Framing the Research Question ................................................................. 144

4. METHODOLOGY & PROCEDURES ................................................................................................. 146

   Legal Analysis .................................................................................................................................... 146
   Legal Reasoning ................................................................................................................................ 150
   Legal Research ................................................................................................................................... 152
   Methodology ....................................................................................................................................... 154

5. TITLE VII IN HIGHER EDUCATION ............................................................................................. 159

   The Appellate Courts and the Standard of Review ......................................................................... 160
   Title VII Cases with Faculty Plaintiffs .............................................................................................. 164
     Denial of Tenure Based on Race .................................................................................................... 164
     Denial of Tenure Based on Gender .............................................................................................. 182
     Failure to Promote and/or Termination (Non-Renewal) Based on Gender ................................ 193
     Termination Based on Race and/or Gender .................................................................................. 199
     Failure to Hire Based on Race and/or Gender ............................................................................. 201
     “Other” Decisions Based on Race and/or Gender ......................................................................... 204
ABSTRACT

Title VII is a federal anti-discrimination in employment statute that was passed as a part of the Civil Rights Act of 1964. The passage of Title VII of the 1964 Act was the result of years of political wrangling to enact federal legislation to eliminate discrimination in employment. Leaders of the Civil Rights Movement fought for the Act’s passage in order to improve the economic well-being of African Americans in the United States who were still fighting the effects of overt discrimination. Title VII made it unlawful for employers to discriminate against American citizens based on race, color, religion, sex or national origin.

At the time of the Act’s passage, state and local government employees as well as employees of educational institutions were not protected by the Act. It would not be until eight years later that the 1964 Act was amended by the Equal Employment Opportunity Act of 1972 that these individuals would come under the purview of the statute.

As time went on, Title VII would undergo more changes as the judiciary worked to interpret the law and Congress sought to specifically delineate its intent in passing the statute. Meanwhile, institutions of higher education across the country would begin their own metamorphosis from the isolated ivory tower of old to a new modern multi-billion dollar business that employs thousands of employees. This study seeks to understand the university as an employer; specifically, this study wants to understand how Title VII works at institutions of higher education in light of higher-education-specific concepts such as: tenure, academic deference, as well as the corporatization of higher education.

Using legal historical methods, the researcher analyzed federal circuit court cases in order to determine whether any special rules, concerns, or considerations arise in the application of Title VII to higher education institutions and whether any changes should be made in how these cases are litigated. In particular, the researcher studied: failure to promote, denial of tenure, termination, and failure to hire employment decisions in light of the employment environment as well as academic-specific concepts such as academic deference as a special concern of academic freedom and tenure. Further, the phenomenon of the corporatization of higher education is an additional factor under consideration in this study. Ultimately, this study seeks to understand how Title VII, initially inapplicable to educational institutions, responds to this particular environment.
CHAPTER ONE

INTRODUCTION

In 1964, Congress passed landmark legislation in the form of the Civil Rights Act ("the Act"), a comprehensive law that denounced and outlawed the pervasive discrimination infecting American society. The Act prohibited discrimination in voting, places of public accommodation, federally-assisted programs, and a number of areas wherein equal opportunity was unavailable to certain American citizens. The Act can arguably be considered the most substantial response to the increased dissatisfaction within the African-American community with the manner in which they were being treated. Christopher Lucas explains:

Deprived of the right to vote by poll taxes and trumped-up literacy tests, consigned to segregated housing, and isolated in schools that all too frequently prepared only for menial employment, blacks were now resolved to gain for themselves the basic civil rights to which they were entitled under the Constitution and which had been so long denied them.¹

Amongst the protections provided by the Act, there is a proscription against discrimination in employment; Title VII seeks to ensure equal employment opportunity to all individuals without regard to race, color, religion, sex, or national origin. This portion of the Act was aimed specifically at the economic causes of black oppression.²

Eight years later, the 92nd Congress succeeded in amending Title VII of the Civil Rights Act, expanding the scope of Title VII to provide protections to those employees who work in educational institutions. The original act specifically exempted from its jurisdiction “educational institution[s] with respect to the employment of individuals to perform work connected with the educational activities of such institution.”³ This amendment was a significant achievement in the quest for equal rights in employment that had begun decades prior.

Title VII was not the first instance where the government sought to provide equal opportunity in employment. Anti-discrimination in employment policies can be traced back to the New Deal with the Unemployment Relief Act of 1933.⁴ However, by the time Title VII was passed, the evidence was clear that previous efforts had proved ineffective, illustrated by statistics that cited the unemployment rate for African Americans at twice as that of white Americans and the median family income of non-white families as little more than one-half

¹ CHRISTOPHER J. LUCAS, AMERICAN HIGHER EDUCATION 276 (2d ed. 2006).
⁴ The Unemployment Relief Act of 1933 provided: “That in employing citizens for the purpose of this Act no discrimination shall be made on account of race, color, or creed.” Legislative History of Titles VII and XI of Civil Rights Act of 1964, 1 (Clifford L. Alexander, Jr., ed.).
the national average.\textsuperscript{5} Moving forward, it would become imperative that Title VII’s proscription against discrimination in employment would help to advance the social and economic positions of African Americans.

Concurrent with the efforts to pass civil rights legislation in employment were efforts to increase opportunity in education. Legally, substantial headway had been made in this area with the \textit{Brown v. Board of Education}\textsuperscript{6} decision which desegregated public schools and overruled the “separate but equal” doctrine that was promulgated by the Supreme Court in \textit{Plessy v. Ferguson}\textsuperscript{7} in 1896. However, despite the significance of \textit{Brown}, the residual effects of segregation and continued resistance from southern states made the achievement of equal opportunity in education an uphill battle.

Legal achievements in both fields, employment and education, would become increasingly important since the two areas were interrelated, each necessary to the other in obtaining equal opportunity for African Americans. For example, Title VII specifically proscribes the use of “any professionally developed ability test that [is]…designed, intended, or used to discriminate because of race, color…”\textsuperscript{8} Such tests, those testing aptitude and educational achievements, had commonly been used by employers to set rigorous standards for job openings and promotions and often worked to marginalize African Americans who had previously been denied equal opportunities to quality education.

Some gains had been made, however. As a result of the \textit{Brown} decision, which has been held to apply to higher education, more and more black students were enrolling in college. By 1967-1968, the number of black students in northern colleges more than doubled since the \textit{Brown} decision, and in the south, the number of black students applying to college rose from 3,000 in 1960 to 24,000 in 1965, soon after the Civil Rights Act was passed.\textsuperscript{9}

However, by 1972, the \textit{employment} inequalities that existed in the field of academia had been well documented. And rather than racial inequalities serving as the basis for the above-referenced amendment, it was employment discrimination based on sex that seemed to influence Congress’ decision making. Several representatives of women’s organizations testified before Congress protesting the exclusion of the education field from Title VII protections. Wilma Scott Heide of the Pennsylvania Human Relations Commission, stated: “[t]he exemption of educational institutions from employment coverage is unthinkable, if we value at all the critical role of education in social change to promote human equality.”\textsuperscript{10}

\textsuperscript{5} \textit{Id.} at 1113.
\textsuperscript{6} 347 U.S. 483 (1954).
\textsuperscript{7} 163 U.S. 537 (1896).
\textsuperscript{9} \textsc{Christopher J. Lucas, supra} note 1 at 262.
Meissner of the National Women’s Political Caucus further testified, “In the academic world, where we expect less bias and more reasoned leadership in the area of human rights, discrimination against women continues unabated.”11

Both women’s statements reflect their, and likely Congress’, understanding of the standing of academia in American society, the high standards it is perceived to exemplify and uphold, and the significant influence it wields with regard to social change. This view seems to conform to the purist model of the American university, as described by Benjamin Barber, that “calls always for refurbishing the ivory tower and reinforcing its monastic isolation from the world.”12

Arguably, what has emerged and remained pervasive are universities that conform to the vocational model “embracing servitude to the market’s whims and fashions.”13 Barber explains: “Service to the market, training for its professions, research in the name of its products are the hallmarks of the new full-service university, which wants nothing so much as to be counted as peer among the nation’s great corporations, an equal opportunism producer of prosperity and material happiness.”14 Barber’s idea gained traction as time passed and the idea of the traditional university’s metamorphosis into a more business-like entity became recognized and better understood. As Henry Steck explains,

[N]ot to overlook the lure of the dollar, with higher education approaching something like $250 billion a year, the university [has] become too important to leave to academicians of the old school...Higher education is changing profoundly, retreating from ideals of liberal arts and the leading-edge research it always has cherished. Instead, it is behaving more like the $250 billion dollar business it has become.15

As the number of colleges and universities increase, their influence continues to grow and, by the end of 2011, there were 4,599 degree-granting institutions in the United States.16 4,599 of these “full-service” university-businesses, as Barber described them, each microcosms of society employing thousands of students and professionals. The proliferation of these institutions of higher education is indicative of the importance these institutions hold in American society.

Given the importance the U.S. places on obtaining post-secondary education and the equally important proscription against discrimination, particularly in institutions of higher

13 Id.
14 Id.
education, it is worth examining how universities function as employers. Having established the pervasiveness of this new business-like university, it bears questioning how Title VII applies to an entity that simultaneously espouses the characteristics of the traditionally-isolated ivory tower, and all of the ideals it encompasses, and a public employer subject to the jurisdiction of federal statutes. In light of academic-specific concepts such as academic deference and tenure, it is hypothesized that the application of Title VII to institutions of higher education will yield special rules and considerations among American jurisprudence. This study seeks to determine what those rules are and whether or not they retain their relevance in view of the changing colleges and universities.

**Purpose**

The purpose of this study is to analyze case law in order to determine whether any specific themes emerge when Title VII is applied to higher education employment discrimination decisions. In light of the growth of American universities, their metamorphosis into more business-like entities, and their simultaneous retention of traditional academic values and practices, this study examines whether any special rules apply, or should apply, to the application of Title VII in the field of higher education. This study will answer the following research questions:

1. How has the law of employment discrimination been applied within the environs of institutions of higher education with respect to claims of discrimination based on race, color, and gender? and
2. What changes should be made, if any, to how the law of employment discrimination is applied in the field of higher education considering the emergence of the modern corporatized university and the special concerns associated therewith?

This study will outline the evolution of Title VII through a review of court decisions and legislative enactment. Further, this research will provide a brief history of the metamorphosis of the American university into the billion-dollar business it is today, providing a foundation for an examination of court decisions that have applied Title VII to higher education institutions. This research seeks to delineate any emerging themes that are particular to the application of Title VII to higher education employment discrimination decisions considering the special rules that apply to institutions of higher education.

**Significance**

The central concept of this study is discrimination in the workplace as defined by Title VII of the Civil Rights Act of 1964. Specifically, this study seeks to analyze discrimination in the workplace where that workplace is an institution of higher education. Although the concept of equal opportunity in employment did not originate with the passage of Title VII, the federal statute has become the basis for many employment discrimination claims. Title
Title VII jurisprudence consists of cases tried on several theories including: disparate treatment, disparate impact, mixed-motive cases, retaliation cases, quid pro quo, and hostile work environment. Each theory may be used to prove discrimination within the workplace.

Title VII of the Civil Rights Act has spawned a wealth of litigation since its passage and thus has been extensively analyzed. For example, the extant literature contains studies reviewing the statute's legislative history, the case law having to do with disparate treatment cases as well as the case law on disparate impact cases. Further, studies have been conducted analyzing each of the statute's protected classes: race, color, religion, sex, or national origin in relation to particular constructs.

In higher education, scholars have also analyzed the effects of tenure and academic deference to the application of Title VII to colleges and universities. However, the literature appears to be silent with regard to a holistic analysis of the modern university as an employer and how its characteristics may or should have an influence on the manner in which Title VII is applied to this particular entity. Where the several studies in the literature concentrate on particular aspects such as academic deference or tenure, none provide a broad look at the university as an employer or provide an examination of how these academic-specific concepts effect the application of Title VII to colleges and universities.

Therefore, this study not only expands upon the extant related literature, it contributes to the understanding of Title VII in the field of higher education and may inform the field of practice. This study also synthesizes the applicable rules and considerations of applying Title VII to higher education institutions which may be helpful in developing practices that protect the university from costly litigation. Further, considering the changes the modern university has undergone within the past several decades, this study may also inform thinking about policy development and implementation with regard to employment in higher education institutions.

Applying legal-historical methods, the researcher will examine and analyze the extant literature, case law, as well as the legislative history of the statute in order to delineate the evolution of Title VII and its application to institutions of higher education. To do this, the researcher will employ a three-part process: first, the researcher will analyze and discuss the

legislative history and subsequent case law of Title VII in general in order to provide a foundation for the basis of employment discrimination law as it currently stands. Next, a review of the history of higher education provides further foundation for the application of the federal statute within this special environment. Finally, the researcher will collect and analyze the case law wherein Title VII was applied to higher education institutions such that the emerging special rules and considerations in applying the statute in this particular environment may be analyzed and discussed.

Analyzing the case law in this manner will allow the researcher to: 1) provide a detailed synthesis of employment discrimination law as it applies to higher education; 2) highlight the different rules that emerge in consideration of the educational environment; and 3) provide analysis that may work to inform attorneys in practice as well as administrators in the implementation of policies that may affect employees on campus.

**Operational Definitions**

Unless otherwise indicated, definitions of legal terms were obtained from Black’s Law Dictionary.\(^\text{19}\)

1. **Academic Deference Doctrine** – The practice wherein courts decline to intrude or substitute their judgment for that of a college/university with respect to the qualifications of faculty members for promotion and tenure. Courts have noted that the determination of such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.\(^\text{20}\)

2. **Burden-shifting analysis** – also known as the “tripartite test,” is applicable in disparate treatment cases where the plaintiff attempts to prove by circumstantial evidence that he has been discriminated against. It involves the shifting of the burden of proof from one party to another beginning with the plaintiff’s burden to make a prima facie case for discrimination.

3. **But-for Causation** – a hypothetical construct; In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that the factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way.\(^\text{21}\)

4. **Circumstantial evidence** – Testimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are

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\(^\text{20}\) *Kunda v. Muhlenberg College*, 21 F. 2d 532 (3d Cir. 1980) (articulating the academic deference doctrine).  
drawn, showing indirectly the facts sought to be proved. The proof of certain facts and circumstances in a given case, from which jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind.

5. **Clear and Convincing proof** - The proof which results in reasonable certainty of the truth of the ultimate fact in controversy. Proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. Clear and convincing proof will be shown where the truth of the facts asserted is highly probable.

6. **Declaratory Judgment (Relief)** - Statutory remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights. A binding adjudication of the rights and status of litigants even though no consequential relief is awarded.

7. **De novo Trial** - Trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered.

8. **Direct Evidence** - Evidence in form of testimony from a witness who actually saw, heard or touched the subject of questioning. Evidence, which if believed, proves existence of fact in issue without inference or presumption.

9. **Disparate Impact** - A theory under which a plaintiff may sue for discrimination that alleges that a particular practice or policy within the workplace, although facially neutral, has a discriminatory impact on the plaintiff.

10. **Disparate Treatment** - A theory under which a plaintiff may sue for discrimination alleging by direct or circumstantial evidence that they have experienced differential treatment on the basis of their membership in a protected class and that the discrimination was intentional.

11. **Injunction (Injunctive relief)** - A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury. A prohibitive, equitable remedy issued or granted by a court at the suit of a party complainant, directed to a party defendant in the action, or to a party made a defendant for that purpose, forbidding the latter from doing some act which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action at law.

12. **Institution of Higher Education** - an establishment that offers education beyond the secondary level: a college or university.

13. **Preponderance of evidence** - As a standard of proof in civil cases, is evidence which is of greater weight or more convincing than the evidence which is offered in
opposition to it; that is, evidence which as a whole shows that the fact sought to be
proved is more probable than not.

14. Prima Facie – Such as will prevail until contradicted and overcome by other evidence.
A case which has proceeded upon sufficient proof to that state where it will support
finding if evidence to the contrary is disregarded. It is the evidence necessary to
require the defendant to proceed with his case.

15. Protected Class – Under Title VII of the Civil Rights Act of 1964, one of the groups the
law sought to protect, including groups based on race, sex, national origin, and
religion.

disposition of controversy without trial when there is no dispute as to either material
fact or inferences to be drawn from undisputed facts, or if only a question of law is
involved.

17. Tenure – A form of continuing contract designed to create a contractually enforceable
institutional commitment to appointment for an indefinite term that can be
terminated only for good cause in accordance with procedures specified as part of a
contract of employment.

Limitations

1. The collection of legal jurisprudence applying Title VII to higher education institutions
is limited to those cases that were reported in official federal and state reporters and
republished by Westlaw, an online legal database.

2. Title VII of the Civil Rights Act of 1964, in its original form, excluded from its
jurisdiction institutions of higher education. This exemption was repealed by the 1972
amendments. As such, this research will examine all institution types (public and
private) that fall under the purview of Title VII in light of its increased scope.

3. Title VII of the Civil Rights Act of 1964 protects individuals from discrimination based
on race, color, religion, sex, or national origin. The statute has been amended to
include pregnant women as a protected class. For the purposes of this research, the
examination of employment discrimination cases will be limited to race, color, and sex.
In discussing protections based on an individual’s sex, only cases that allege
discrimination based on gender will be analyzed. Cases alleging discrimination based
on pregnancy, religion, and national origin are excluded from this study.

4. Cases based on other discrimination statutes such as the Equal Pay Act (EPA), the
Pregnancy Discrimination Act, or the Age Discrimination in Employment Act of 1967
(ADEA), as well as those alleging other forms of employment discrimination including
disability and veteran’s status are also excluded from this study.
This study focuses on anti-discrimination through the lens of Title VII of the Civil Rights Act of 1964. Any applicable implications of other anti-discrimination statutes or policies (e.g. affirmative action or 14th Amendment Equal Protection Clause) are beyond the scope of this study.

Any discussion of the National Labor Relations Act (NLRA) or the National Labor Relations Board (NLRB) will be solely discussed as a larger part of the historical aspects of the Civil Rights Act of 1964. Further discussion of the NLRA or the NLRB or labor unions is beyond the scope of this study.

Title VII applies to unions as well as employment agencies; however, the discussion of discrimination by employers in this study is limited to private and non-government employers. Thus, a discussion of unions and employment agencies is beyond the scope of this study.

The discussion of employment discrimination claims as applied to higher education professionals will be limited to disparate treatment claims, disparate impact claims and mixed-motive claims. Sexual harassment claims to include hostile work environment and quid pro quo theories of discrimination as well as retaliation claims and all other theories of employment discrimination claims are beyond the scope of this study.

This study does not include a discussion of the Office for Civil Rights (OCR). The OCR enforces federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. Cited statutes include Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. The organization's website is silent as to its participation, if any, in Title VII claims that take place on university campuses. Thus, for the purposes of this study, the regulatory environment of focus will be that of the Equal Employment Opportunity Commission (EEOC).

Summary

In recent decades, universities have become multi-billion dollar businesses with characteristics resembling corporations rather than the ivory tower of old. As they become larger and larger, the number of employees required to provide the multitude of services required to maintain the university similarly increases. Despite this metamorphosis, university campuses have retained certain traditional aspects and practices that make them unique entities. Therefore, this investigation into the application of Title VII to higher education institutions is not only relevant, but also necessary to understand how this federal statute works in this unique environment. Investigating this phenomenon required an examination of case law applicable to Title VII cases with higher education institutions as the defendant. Applying legal-historical methods, the researcher will explore and synthesize the
case law with regard to Title VII and discuss the special rules and considerations that emerge when applied to universities.

Chapter two will review the extant literature regarding the evolution of Title VII of the Civil Rights Act of 1964 providing a foundation for understanding the subsequent chapters which discuss the application of Title VII to higher education. It begins with an analysis of the legislative history of the Civil Rights Act of 1964 and Title VII and is interspersed with major cases that formed Title VII jurisprudence between subsequent amendments to the Act as well as changes to the regulatory environment, specifically the evolution of the Equal Employment Opportunity Commission (EEOC). The review includes an examination of Title VII cases that form the law as it currently stands. Chapter three begins with a brief analysis of the evolution of the American university and its metamorphosis into multi-billion dollar business and discusses the hypothesized effects of this change on colleges and universities. The chapter concludes with a discussion of postsecondary-specific concepts such as academic deference and tenure that may affect judicial decisions in employment discrimination cases. Chapter four discusses the methodology used for this study. Chapter five analyzes and summarizes Title VII case law that has been applied to institutions of higher education. Chapter six concludes this study by providing analysis and recommendations based on the emerging themes highlighted in the previous chapter.
CHAPTER TWO

LITERATURE REVIEW: TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The enactment of Title VII of the Civil Rights Act of 1964 (hereinafter, “the Act”) was
the culmination of decades’ worth of attempts to pass federal anti-discrimination in
employment legislation. Evidence of anti-discrimination in employment policies, particularly
in the federal government, can be traced back to the 1930s and 1940s. While many
subsequent attempts in this area were blocked by Congress, several states during that time
had achieved success in passing anti-discrimination in employment legislation.

What follows is a chronological review of the literature beginning with the evolution of
anti-discrimination in employment policy through to the enactment of the Act. Following a
brief discussion of pertinent language from Title VII of the Act, this review proceeds by
providing a decade-by-decade review and analysis of United States Supreme Court cases that
form the basis of employment discrimination law, subsequent amendments to the Act and
their effect on the area, as well as a review of the evolution of the Equal Employment
Opportunity Commission. This review provides contextualization of the applicable
considerations in passing anti-discrimination in employment legislation and provides a
foundation for the subsequent portions of this study which examine how this statute
functions within the environs of higher education institutions.

The Road to the Civil Rights Act of 1964: The Evolution of
Anti-Discrimination in Employment Policy

The Civil Rights Act of 1964 is generally credited as a significant piece of federal
legislation that provided protection from discrimination to those American citizens who had
previously been unable to enjoy the rights guaranteed by the United States Constitution. The
Act was, in part, the result of strategic efforts of the Civil Rights Movement to improve
African-American economic progress. 22 One scholar posits 23 that the judiciary deserves at
least some of the credit by showing their willingness to enforce the U.S. Constitution’s
proscription against discrimination in Brown v. Board of Education. 24 In truth, the eventual
enactment was the result of both of these events and more. However, the focus on these
events may tend to recognize the successes while concurrently failing to recall the status of
minorities that made the Act necessary and the countless failures that went before. 25 The
following provides a brief review of significant events that led to the passing of the Act.

23 GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 1 (3d ed. 2010).
25 See Jacquelyn Dowd Hall, The Long Civil Rights Movement and the Political Uses of the Past, 91 J. AM. HIST. 1233, 1234
Civil Rights in the mid-1800s through Reconstruction

On September 22, 1862, President Abraham Lincoln's Emancipation Proclamation was issued. The country was still in the midst of the Civil War. However, this step was taken by Lincoln at least partly as a result of pressure he received from fellow Republicans to make the end of slavery the main issue of the conflict. In order to assure the end of slavery, Republicans further proposed the thirteenth amendment to the U.S. Constitution on January 31, 1865, just prior to the end of the war. The amendment soon passed and reads in pertinent part: “Neither slavery nor involuntary servitude...shall exist within the United States.” While this legislation was monumental, it would soon become apparent that it wasn't enough to eradicate slavery. The fact that slaves were declared freedmen by federal statute did not mean that state laws, nor the minds and mores of many white American citizens for that matter, were set to accept this new reality.

It was fundamental to the concept of slavery that a slave was his master's chattel, his property. Therefore, not being a “person” in the eyes of the law, a slave could not own anything (other chattel or real property); he could not marry, nor could he enter into contracts. These concepts had been promulgated almost a decade prior by the Supreme Court of the United States in the now-infamous Dred Scott decision which held that even freed slaves were not citizens as contemplated by the U.S. Constitution. The Court found, “[t]he only two clauses in the Constitution which point to this race, treat them as persons whom it was morally lawful to deal in as articles of property and to hold as slaves.” Thus, these inherent disadvantages of slavery necessitated further legislation in order to give truth to the proscription in the Thirteenth Amendment. The Civil Rights Act of 1866 (hereinafter, “the 1866 Act”), the first civil rights bill in U.S. history, was passed to address these inherent disadvantages. The 1866 Act provides in relevant part:

[C]itizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude...shall have the same right, in every State and Territory of the United States to make and enforce contracts; to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of the laws and proceedings for the security of person and property, as is enjoyed by white citizens...

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27 Id.
28 Id.
29 U.S. CONST. amend. XIII, §1.
30 Kohl, supra note 26, at 275.
31 Scott v. Sanford, 60 U.S. 393 (1856).
32 Id.
The text of the 1866 Act makes clear that it was not enough to declare that slaves were now free men; more was needed to clarify what rights these newly freed American citizens were endowed with. Indeed, testimony before the Joint Committee indicated that prior to passing the 1866 Act, Congress was battling against practices in southern states that included “using physical compulsion to force freedmen to sign employment contracts at low rates” and discouraging freedmen from having schools since this would put “them in a position of independence, and ... elevate the race.” Thus, it was necessary that the 39th Congress take affirmative steps to establish former slaves as American citizens who could enjoy all of the rights and privileges “enjoyed by white citizens.” The 1866 Act served as a crucial first step in the long road toward achieving this goal.

However significant the 1866 Act proved to be in establishing African Americans as citizens of this country, lawmakers and these new citizens alike would learn over and over again that the vestiges of slavery had taken root, and that fighting against the attitudes and mores that had allowed slavery to continue would be a difficult if not impossible task. Over the next several years Congress would enact several laws to this end: the Slave Kidnapping Act of 1865, the Peonage Abolition Act of 1867, the Civil Rights Act of 1870, the Anti-Lynching Act of 1871, and the Civil Rights Act of 1875. The titles of the several acts give some indication of the issues with which these new American citizens had to contend. And

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35 Kohl, supra note 26, at 281.
36 Id. at 283.
37 Civil Rights Act of 1866, supra note 34.
38 See Franklin, supra note 33 at 1137 (explaining that the constitutionality of the Civil Rights Act of 1866 was upheld by the Supreme Court in 1872 when it declared that the 1866 Act was intended to protect blacks from the “prejudices that existed against the colored race, which naturally affected the administration of justice in the State courts, and operated harshly when one of that race was a party accused...The [1866] Act extend to both races the same rights, and the same means of vindicating them.” Blyew v. United States, 80 U.S. 581 (1871).
39 See Slave Kidnapping Act of 1866, ch. 86, 14 Stat. 50 (current version 18 U.S.C. §443 (2006)) which states: “if any person shall kidnap or carry away any other person, whether negro, mulatto, or otherwise, with the intent that such other person shall be sold or carried into involuntary servitude, or held as a slave...he or she shall be punished on conviction thereof, by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment not exceeding five years...
40 See Peonage Abolition Act of 1867, ch. 187, 14 Stat. 546 (current version 18 U.S.C. §1581 and 42 U.S.C. §1994 (2006)) which states: “The holding of any person to service or labor under the system known as peonage is hereby declared to be unlawful, and the same is hereby abolished and forever prohibited in the Territory of New Mexico, or of any other Territory or State of the United States...” Peonage was defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness.” Clyatt v. United States, 197 U.S. 207, 215 (1905).
41 See Civil Rights Act of 1870, 86 Stat. 103 (current version 42 U.S.C. §1981 (2012)) which reads in pertinent part: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.”
42 See Anti-Lynching Act of 1871, 17 Stat. 13 (current version 42 U.S.C. §1985 (2012)) which states in pertinent part: “if two or more persons within any State...shall conspire together...or go in disguise upon the public highway upon the premises of another for the purpose, either directly or indirectly, of depriving any person or class of persons of the equal protection of the laws...” This act is also known as the Ku Klux Klan Act of 1871.
while the constitutionality of the 1866 Act has been upheld by the Supreme Court of the United States, the Court invalidated the Civil Rights Act of 1875 in the *Civil Rights Cases*.\footnote{See 109 U.S. 3 (1883). The *Civil Rights Cases* were a series of cases that implicated the Civil Rights Act of 1875’s proscription against the denial of access to public accommodations and transportation.}

The ultimately-overturned act was another attempt to delineate the rights of freed slaves. Its stated purpose was to “protect all citizens in their civil and legal rights.”\footnote{Id. at 4.} The 1875 act read in pertinent part:

> all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.\footnote{Civil Rights Act of 1875, ch. 114, 18 Stat. 335, invalidated by *The Civil Rights Cases*, 109 U.S. 3 (1883).}

Passage of the 1875 Act has been considered no more than a symbolic achievement by the Republicans and abolitionists who worked to get the legislation passed.\footnote{James M. McPherson, *Abolitionists and the Civil Rights Act of 1875*, 52 J. Am. Hist. 493-510, 493 (1965).} Indeed, efforts to outlaw segregation from public schools were removed from the 1875 Act prior to its passage and its proscriptions against discrimination in public places were rarely enforced.\footnote{Id.}

Only eight years later, the law was overturned by the Supreme Court of the United States in the *Civil Rights Cases*. In its decision, the Court noted that parties argued that authority for the 1875 Act passed by Congress was ostensibly found in the Fourteenth Amendment. However, the acts complained of involved denial of access by private citizens. Since there was no state action, as required to implicate the Fourteenth Amendment to the U.S. Constitution, the Court invalidated the 1875 Act. The Court found: “[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment.”\footnote{Id.} The Court further explained that Congress was not empowered to adopt legislation that is beyond the purview of the Fourteenth Amendment; rather, Congress, the Court held, was limited to adopting “appropriate legislation for correcting the effects of …prohibited State law and State acts, and thus to render them effectually null, void, and innocuous.”\footnote{Civil Rights Cases, supra note 44 at 11.} The denial of access to public accommodations, the Court deemed, was a private right that was beyond the reach of Congress.

The invalidation of the Civil Rights Act of 1875 helped turn the tide against African Americans once again; for, if the mid-1800s was characterized by legislation seeking to end...
the plight of African Americans, the *Civil Rights Cases* ushered in a period of law-making that worked to further marginalize African American citizens. 51

**Civil Rights in the early to mid-1900s**

According to one scholar, the Supreme Court’s decision in the *Civil Rights Cases* 52 can be interpreted as a mirror to the decisions of lower federal courts that adhered to the idea of segregation. 53 He opines that the several decisions in the civil rights cases brought before the lower courts since the end of the Civil War reflected the idea that segregation was “constitutional and consistent with the laws of the land.” 54 Others posit that after the Civil War, blacks and whites co-existed somewhat amicably throughout the Reconstruction and Redemption periods from 1865-1890 55 until one crucial Supreme Court decision in 1896 turned the tide. 56

That Supreme Court decision, *Plessy v. Ferguson*, 57 has been credited as a major factor in the “cumulative weakening of resistance to racism.” 58 *Plessy v. Ferguson*, which announced the “separate but equal” doctrine, has been seen as a justification for laws that had begun to crop up in the southern states that “sought to separate the races in public places [including:] public schools, parks, accommodations and transportation.” 59 Regardless of the exact cause, by the end of the 19th century Jim Crow segregation was firmly in establishment and would last roughly, until the 1950s. 60 Jim Crow laws worked in two ways. They “disenfranchised by invidiously administered literacy tests, white primaries, and poll taxes, and victimized by a criminal process from whose juries and other positions of power [blacks] were routinely excluded.” 61

For example, in the area of education, one Supreme Court case decided in 1899, supported a Georgia law that required plaintiffs, black tax payers, to pay county taxes that funded a county school where they were denied access on account of their race. The Court stated,

52 Civil Rights Cases, supra note 44.
54 Id. at 20.
55 “The Jim Crow period did not begin with the end of Reconstruction. There was a period of some twenty years of relations between Reconstruction and Jim Crow. The Jim Crow laws are commonly associated with extreme, legally mandated segregation of the races. But disenfranchisement of the black population preceded this radical segregation; indeed, disenfranchisement was necessary to accomplish segregation. Political motivations thus provided the original impetus for disenfranchisement; economic exploitation, through law and custom, came later.” Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. Chi. L. Rev. 1161 (1984).
56 Id. at 18.
57 Plessy, supra note 7.
58 Stephen J. Riegel, supra note 53 at 19.
59 Ronald L. F. Davis, supra note 51 at 1. These laws also worked to prevent black men from exercising their right to vote.
There is no complaint in the petition that there is any discrimination made in regard to the free common schools of the county. So far as the record discloses, both races have the same facilities and privileges of attending them. The only complaint is that these plaintiffs, being taxpayers, are debarred the privilege of sending their children to a high school...and that a portion of the school fund, raised by taxations, is appropriated to sustain white high schools to which negroes [Sic] are not admitted. We think we have shown that it is in the discretion of the board to establish high schools. It being their discretion, they could, without a violation of the law or of any constitution, devote a portion of the taxes collected for school purposes to the support of this high school for white girls and to assist a county denominational high school for boys. In our opinion, it is impracticable to distribute taxes equally. The appropriation of a portion of the taxes for a white girls’ law school is not more discrimination against these colored plaintiffs than it is against many white people in the county.62

Such circuitous reasoning would have been common place around this time, where laws were used to discriminate against African Americans. Further, this period was also characterized by extreme violence against African Americans; indeed, between “1889 and 1930, over 3,700 men and women were reported lynched in the United States – most of them southern Blacks.”63 Jim Crow segregation would last until the middle of the twentieth century; “a legal and political system that had [lasting social and] economic consequences.”64

These economic consequences, one author indicates, was greatly affected by three particular events: the depression, the advent of the New Deal, as well as the Second World War.65 The confluence of these events affected African Americans in specific ways as it was becoming clearer and clearer that the insecurity of the economic status of African Americans influenced a host of social issues including crime and delinquency, housing, recreation, and social development.66 After the Great Depression and with the approach of World War II, one author notes,

Economic insecurity, while feared and disliked, was sufferable in a depression which dragged down the entire population, but became psychologically and economically intolerable in a period distinguished by mass job openings and appeals to democratic ideals on the one hand and rising living costs and continuation of the old pattern of segregation, discrimination and inequalities for the Negro [Sic] on the other.

62 Cumming v. Board of Ed. of Richmond County, 175 U.S. 528, 542-543 (1899).
63 Ronald L.F. Davis, supra note 51 at 1.
64 Jennifer Roback, supra note 55 at 1161.
The New Deal period of the 1930s, on the other hand, brought about a particular new consciousness wherein uncontrolled excess engendered by free initiative and independent enterprise was shunned due to its negative effects on American economic and social life, and where humanitarian sentiment grew as people became more concerned about the neglected portion of the population. This resulted in the promulgation of government programs that sought to aid those at the lower economic levels. This new deal alleviated tensions between the poorer white class who often competed with blacks for employment opportunities, and also had the effect of providing programs that particularly benefited the black population in some cases. Thus, as African Americans became more aware of the effect of their negative economic status on all areas of their lives, a movement began seeking to end one of the greater obstacles to their economic well-being: employment discrimination.

**Fair Employment Practice Statutes: 1930s - 1963**

The New Deal, promulgated by President Franklin D. Roosevelt, contained several federal statutes designed to address the employment discrimination problem that adversely affected the African American community. For example, the National Industry Recovery Act of 1938 was passed containing proscriptions against discrimination based on race, color, or religion. The 1938 Act was helpful in the sense that it brought about a minimum wage increase for those who worked in the railway industry, an industry that employed over 100,000 African Americans. But the federal laws on employment discrimination were mainly viewed as expressions of policy since there was no mechanism to determine whether discrimination had taken place, or to enforce it if it had.

In a time where Jim Crow segregation still reigned, African Americans were disproportionately employed in unskilled jobs. One scholar explains the results of a New York legislature-commissioned study on the urban Negro population:

> The financial and mercantile enterprises employing white-collar workers would not hire Negroes for its trades and related industries. With the exception of the garment and fur trades and related industries, there were no openings for Negro labor in the vast array of factories...The department stores used them only as elevator operators, cleaners, and cafeteria and kitchen workers. In Rochester, out of 35,120 employees in private firms, only 70 were Negroes. The largest firm, manufacturing photographic equipment and supplies and employing 16,351 persons, had 1 Negro porter and 19 construction workers engaged by a subsidiary corporation. The largest insurance company in the state, with more Negro policyholders than all Negro policyholders than all Negro policyholders of the state, had a single Negro male employee, a stenographer.

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67 Charles S. Johnson, *supra* note 65 at 856
68 *Id.*
69 *Id.*
71 Charles S. Johnson, *supra* note 65 at 856-57.
insurance companies combined, had no Negro [Sic] in its employed force of over 20,000 in New York State alone.73

The results of the study reflected the experiences of African Americans throughout the country. However, African Americans became increasingly dissatisfied with the ineffective attempts to eradicate employment discrimination. Thus began the Fair Employment Practice Commission movement whose mission was “to gain the support of the states and the national government in the elimination of racial discrimination in employment.”74

The 1940s would see increased protests against employment discrimination as African Americans were unable to take advantage of the available jobs brought about by the war effort. However, these protests took place concurrently with several attempts by the government to ameliorate the problem. The federal government had made a push in the beginning of the 1940s to end industrial employment discrimination. A new Labor Division head was chosen for the National Defense Advisory Commission with the task of bringing African Americans into the defense program.75 Further, the Commission instructed defense contractors that discrimination should not take place and the Labor Division obtained agreements from the AFL and CIO to remove barriers maintained by labor.76

The National Defense Training Act was ostensibly one of the more powerful efforts in this area. Once the Office of Production Management (OPM) was established, the Assistant Director penned a letter to those holding defense contracts asking for full use of competent African American workers.77 Further, the Negro [Sic] Employment & Training Branch of the OPM was established to increase the number of African American workers in the war effort.78 However, by March 1941, of 175,000 trainees only 4,600 were African American; and for the six months from June 1941 to January 1942 less than 300 of the 10,000 trainees placed in New York defense jobs were African American.79 Thus it was apparent that, despite these several efforts by the federal government, discrimination in employment was fully entrenched and would take further efforts to eliminate.

One author explains,

It was at this point that the movement for a well-defined governmental policy against racial, religious, and nationality barriers in industry got underway. The key role of government in the war economy had brought home to opponents of discrimination the fact that the swiftest, surest road to minority employment lay in action by the national government. The old argument that employment is a private affair between the

73 Charles S. Johnson, supra note 65 at 860.
74 Louis C. Kesselman, supra note 66 at 33.
75 Id. at 36.
76 Id.
77 Id.
78 Id.
79 Id. at 36-37.
employer and the worker could not be maintained in a period of national emergency when the continued existence of the country depended upon maximum utilization of the labor force.\(^{80}\)

Thus, on June 25, 1941, President Roosevelt issued Executive Order 8802 wherein he re-affirmed the policy\(^{81}\) of the United States against employment discrimination in defense industries and created the Committee on Fair Employment Practice (FEPC).\(^{82}\) The impetus for the order was a threat by then-President of the Brotherhood of Sleeping Car Porters, A. Phillip Randolph, to march on Washington if changes were not made.\(^{83}\)

One year after Executive Order 8802 was issued, Vito Marcantonio introduced a bill in the House proposing a permanent committee, similar to the National Labor Relations Board (NLRB) that could issue orders enforceable in courts.\(^{84}\) It was entitled, “A Bill to Prohibit Discrimination by Any Agency Supported in Whole or in Part with Funds Appropriated by the Congress of the United States, and to Prohibit Discrimination against Persons Employed or Seeking Employment on Government Contracts because of Race, Color or Creed.”\(^{85}\) However, as one scholar notes in his study of the FEPC, the bill was referred to a hostile Committee of the Judiciary.\(^{86}\) He explains that referring the bill in this manner was just one of the parliamentary machinations employed by certain congressmen in order to stall such bills; compelling a hostile committee to report out a bill would have been difficult to say the least.\(^{87}\) Not surprisingly, it died in committee.\(^{88}\)

Despite the necessity for the executive order, it had little effect on the overall fight against employment discrimination. The Committee on Fair Employment Practice was a five-man, non-salaried committee who was authorized to do little in the way of enforcing the government’s stated policy.\(^{89}\) Rather, the committee was to take “appropriate steps” to address valid grievances and to make recommendations to the President as well as other federal agencies about whatever it deemed necessary to carry out the executive order.\(^{90}\) Further, the committee, staffed by eight,\(^{91}\) lacked authority in non-war industry, and had no power to subpoena witnesses, or to enforce its findings.\(^{92}\) There seems to be little evidence

\(^{80}\) Id. at 37.
\(^{81}\) Executive Order 8802 indicated that it was the policy of the United States, “[t]o encourage full participation in the national defense program by all citizens of the United States, regardless of race, creed, color, or national origin, in the firm belief that the democratic way of life within the nation can be defended successfully only with the help of all groups within its borders.” Legislative History of Titles VII and XI of Civil Rights Act of 1964, supra note 4 at 2.
\(^{83}\) Id. at 409.
\(^{84}\) Id.
\(^{85}\) Francis J. Vaas, Title VII Legislative History, 7 B.C. L. Rev. 431-458, 431 (1966).
\(^{86}\) Will Maslow supra note 82 at 409.
\(^{87}\) Id.
\(^{88}\) Id.
\(^{89}\) Id.
\(^{90}\) See Legislative History of Titles VII and XI of Civil Rights Act of 1964, supra note 4 at 2.
\(^{91}\) Id.
\(^{92}\) Louis C. Kesselman, supra note 66 at 39.
that the Committee was in any way successful in achieving its goal.93 and in early 1943, operations were suspended.94

After the failure of the first FEPC, President Roosevelt was soon under pressure again from the African American community and, as a result, issued Executive Order 9346 establishing a new FEPC.95 This order was broader in that it extended to all employment by government contractors, recruitment and training for war production, as well as employment by the federal government.96 However, despite increased budget and staff size,97 the power and authority of the agency remained the same.98 Finally, by 1945, Southern congressmen were successful in reducing the appropriation for the agency to a mere $250,000 which led to the closure of several regional operations.99

The lack of success at the federal level precipitated the forward movement of the campaign for permanent FEPCs at the state level. Indeed, on December 30, 1943 a national conference was held wherein the National Council for a Permanent Fair Employment Practice Commission was established.100 Its major accomplishment came in 1945 wherein at least 50 bills proposing authority to FEPCs or establishing state FEPCs were introduced in 21 state legislatures.101 Of those bills, one bill that was proposed before a state legislature was successful. In 1945, New York became the first state to enact a law providing administrative regulation for racial discrimination.102 This success led to other state-level success, and over the next 18 years more than twenty states enacted FEP statutes.103

Many state FEPC laws authorized the committees to: receive and investigate discrimination complaints, use conciliation and/or persuasion to eliminate unlawful discrimination, and issue cease-and-desist orders to non-compliant firms.104 However, other state FEPCs simply provided that employment discrimination was a misdemeanor, making the action a criminal offense.105 The last type of state FEPCs were mainly voluntary organizations and provided no enforcement authority.106 While the level of enforcement power of each FEPC

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93 Charles S. Johnson, supra note 65 at 861.
94 Legislative History of Titles VII and XI of Civil Rights Act of 1964, supra note 4 at 2.
95 Id.
96 Id.
97 Id.
98 Louis C. Kesselman, supra note 66 at 40 (explaining that the southern congressmen were successful in preventing the expansion of the jurisdiction of the second FEPC).
99 Id. at 40. Authority for the second FEPC ended in June 1946.
100 Louis C. Kesselman, supra note 66 at 41. The movement was led by A. Phillip Randolph and Dr. Allan Knight Chalmers and its main goal was to advance state laws and raise money to support the fight at the national level.
101 Id. at 42.
103 See William J. Collins, supra note 22 at 245. These states included: New Jersey (1945); Massachusetts (1946); Connecticut (1947); New Mexico, Oregon, Rhode Island, Washington (1949); Alaska while still a territory (1953); Michigan, Minnesota, Pennsylvania (1955); Wisconsin, Colorado (1957); California, Ohio (1959); Illinois, Kansas, Missouri (1961); and Hawaii, Indiana (1963).
104 Id. at 246.
105 Legislative History of Titles VII and XI of Civil Rights Act of 1964, supra note 4 at 6. This included Delaware, Idaho, Iowa, and Vermont.
106 Id. These included Nevada, Oklahoma and West Virginia.
differed by state, many of these early FEPCs commonly proscribed employment discrimination based on race, national origin, and religion, and applied to hiring, firing, and terms of employment by both public and private employers as well as labor unions. Further, most FEPC laws shared four characteristics, one scholar explains,

FEPC laws typically foreclosed private enforcement efforts and...granted complainants few procedural rights once a complaint was filed...Second, FEPC laws authorized the commission to award only injunctive relief, typically in the form of a cease-and-desist order, requiring the respondent to cease the discriminatory conduct and take any affirmative action including hiring, rehiring or promotion...Third, FEPC laws were highly individualized, authorizing the commission to enter a remedial order only in response to a formal complaint and only as to a particular claimant...Finally, FEPC laws emphasized a noncoercive [Sic] approach to dispute resolution, typically mandating that the agency engage in informal “conciliation” of disputes prior to deploying harder-edged legal powers.

There were several advantages to state FEPCs; most important was that they filled the gap as there was no federal legislation effectively working to eradicate employment discrimination. Further, practically speaking, the conciliation process adopted by the state FEPCs was viewed as a faster and less expensive option to costly court litigation. Also, FEPCs were in a position to publically embarrass non-compliant employers. Finally, FEPCs were able to “undertake educational campaigns to encourage workplace integration by: engaging the public, challenging racial stereotypes, and invoking the rhetoric of fairness and democracy.”

However, state FEPCs could only go so far. One author notes that civil rights groups criticized state FEPCs’ inability to effectively deter discriminatory practices. Speaking on the limited reach of states’ efforts to combat employment discrimination, a scholar explains,

[The problem of discrimination is an indivisible aspect of the total national economy and culture...Unquestionably the minorities have made substantial gains during the postwar decade, most of them attributable directly or indirectly to the passage of state and local civil rights laws and ordinances. But the gap between first- and second-class citizenship remains wide, especially...in access to supervisory and managerial employment and promotion; there prejudice is compounded by the cumulative effects of economic and educational underprivilege [Sic] which will take more than one generation to overcome.]

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108 Id. at 1081-82. Many of these enforcement themes will be seen again in a forthcoming discussion on the enforcement powers of the Equal Employment Opportunity Commission.
109 Id. at 1085.
110 William J. Collins supra note 22 at 247.
111 Id.
112 Id. at 245.
These feelings of dissatisfaction would provide the impetus for continued efforts in passing federal anti-discrimination legislation.

Thus, the beginning half of the twentieth century was characterized by Jim Crow segregation and a realization on the part of African American civil rights leaders that discrimination in employment was a major barrier to their economic security. The battle targeting employment discrimination is distinguished from attempts to gain equal opportunity either by court litigation implicating the Civil Rights Acts of 1866 and 1875 or by attempts to educate the masses on the effects of discrimination. This portion in time would also see several attempts to pass effective federal legislation that would help eradicate employment discrimination.

A major accomplishment in the battle during this period however would be found in the establishment of several state FEPCs, the last of which were created in 1963. This provided the means for many African Americans to find work and keep their jobs in the face of discriminatory employment decisions. However successful these state FEPCs were in the cause, there was still a perceived need for effective federal legislation banning employment discrimination. The proliferation of state FEPCs would be one of the final steps in the anti-discrimination in employment effort prior to the passage of the Civil Rights Act of 1964.

**The Civil Rights Act of 1964**

By the middle of the twentieth century, the Civil Rights Movement was in high gear. Decades of life for African Americans under Jim Crow culminated in a series of events that would galvanize civil rights leaders into further action in an attempt to gain equal rights.

[T]he Montgomery bus boycott of 1955-56 through the momentous civil rights demonstrations at Birmingham and Selma in 1963 and 1965...Emmett Till's lynching and the acquittal of his killers in Mississippi in 1955; race riots over the desegregation of schools in Little Rock in 1957-1958 and New Orleans in 1960-1961; the brutalization of Freedom Riders in Alabama in 1961; the use of police dogs and high pressure water hoses against civil rights demonstrators in Birmingham in May 1963; and so on.\(^{114}\)

As discussed previously, leaders in the movement had focused on inequities in the work environment as a means of shoring up the economic security of African Americans. The movement had been moderately successful, passing anti-discrimination in employment laws in approximately 20 states. However, effective federal legislation banning employment discrimination had yet to be passed.\(^{115}\) In 1964, after much congressional wrangling, groundbreaking federal legislation requiring equal opportunity was finally passed.

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\(^{115}\) Civil Rights Acts were passed in 1957 and 1960, respectively. The Civil Rights Act of 1957 authorized the appointment of a Federal Commission on Civil Rights whose function was to investigate violations of voting rights, equal protection of the laws. *Substantive Civil Rights Under Federal Legislation*, 3 RACE REL. L. REP. 133-161, 133 (1958). The Civil Rights Act of 1957 is codified as §1971 of Title 42 of the United States Code. Deuel Ross, *Pouring Old Poison*
Passing the Act

By the time the Civil Rights Act of 1964 was signed into law, several attempts had been made by the federal government to eradicate discrimination in employment. During Presidents Harry S. Truman and Dwight D. Eisenhower’s respective administrations, each had issued executive orders creating committees working against employment discrimination in the area of government contracts. Each called on governmental agencies to include non-discrimination clauses in their contracts. However, each effort could be criticized in that they lacked enforceability.

Later, President John F. Kennedy similarly issued anti-discrimination in government contracts Executive Order 10925 creating the President’s Committee on Equal Employment Opportunity. President Kennedy’s plan differed in that it “had teeth.” President Kennedy’s Committee was authorized to:

- Publish the names of noncomplying contractors and unions;
- Recommend suits by the Justice Department to compel compliance;
- Recommend criminal actions by...against contractors who furnish false information;
- Terminate the contract of a noncomplying employer; and
- Forbid the contracting agencies to enter into new contractors who have discriminated unless they can demonstrate that they have changed their policies.

President Kennedy later broadened the reach of the first executive order by extending the anti-discrimination policy to “all construction contracts paid for in whole or in party by funds obtained from the federal government or borrowed on the credit of the government pursuant to a grant, contract, loan, insurance or guarantee [as well as to] contracts undertaken pursuant to any federal program.”

Heightened pressure from the African-American community in the form of litigation, demonstrations, and the violence that sometimes resulted from those demonstrations, galvanized President Kennedy’s continued efforts in the anti-discrimination in employment effort. On February 28, 1963, President Kennedy delivered a special message to the 88th Congress reiterating “the democratic principle that no man should be denied employment
commensurate with his abilities because of his race or creed or ancestry.”  \(^\text{124}\) However, President Kennedy did not request any legislation in the area of private employment until his second special message was issued on June 19, 1963 in response to “a rising tide of discontent that threatened the public safety [as well as the] events in Birmingham and elsewhere.”  \(^\text{125}\) On that day, President Kennedy sent to Congress a draft proposal of what was then titled, the Civil Rights Act of 1963.  \(^\text{126}\) In his second special message, President Kennedy stressed that “the relief of Negro [Sic] unemployment required progress in three major areas, namely, creating more jobs through greater economic growth, raising the level of skills through more education and training, and eliminating racial discrimination in employment.”  \(^\text{127}\)

Meanwhile, in Congress, several Senators and Representatives had proposed civil rights bills that had previously been unsuccessful making it out of their respective houses.  \(^\text{128}\) Further, in 1960, both Democrats and Republicans alike had made civil rights issues a part of their platforms \(^\text{129}\) and it would soon become time to make good on those political promises. Perhaps it was the violence accompanying civil rights demonstrations or the mandates from President Kennedy’s two special messages on anti-discrimination in employment that motivated the eventual passing of federal legislation on civil rights. Most likely, it was the confluence of all of these events that caused serious debate to begin over what would eventually become known as the Civil Rights Act of 1964.

It was on July 2, 1964, that President Lyndon B. Johnson would sign the Civil Rights Act of 1964 into law.  \(^\text{130}\) The landmark legislation consisted of 11 titles that “touched almost every facet of American society.”  \(^\text{131}\) The stated purpose of the Act was to:

- enforce the constitutional right to vote, to confer jurisdiction up on the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity and for other purposes.  \(^\text{132}\)

The law generally proscribed discrimination on the basis of race, color, religion, and national origin.  \(^\text{133}\) Title I outlawed discriminatory denial of voting rights; Title II proscribed discrimination in places of public accommodation; Title III called for the desegregation of

\(^{124}\) Id.

\(^{125}\) Id.


\(^{127}\) Francis J. Vass, \textit{supra} note 85 at 432.


\(^{129}\) Francis J. Vass, \textit{supra} note 85 at 432.


\(^{131}\) Id.

\(^{132}\) Id. at 328.

public facilities; Title IV mandated the desegregation of public education; Title V created the Commission on Civil Rights; Title VI prohibited discrimination in federally assisted programs; Title VII prohibited discrimination in employment; Title VIII required the collection of voting and registration statistics; Title IX announced the mechanism for intervention and procedure after removal in civil rights cases; Title X established the Community Relations Service; and Title XI contained miscellaneous provisions designed to maximize the Act’s effectiveness.\textsuperscript{134}

Title VII, proscribing discrimination in employment, was the most extensive section of the Act. This may be because, as one scholar opines, “discrimination in employment is the most widespread and undoubtedly the most harmful to its victims and to the nation as a whole. Denial to Negroes [Sic] and to members of other minority groups of the right to be gainfully employed shuts off to them nearly all prospects of economic advancement.”\textsuperscript{135} The details of how this section proceeded through the 88\textsuperscript{th} Congress are discussed below.

**Legislative History of Title VII**

As previously mentioned, several civil rights bills, some containing anti-discrimination in employment legislation, had been presented before both the House and the Senate with little success.\textsuperscript{136} The bills on employment, those that focused on private employment as well as those that focused on equal opportunity to both public and private employment, found the most conflict in how these proposed laws should be enforced.\textsuperscript{137} Lawmakers could not agree upon whether employment discrimination should be policed by a strong agency with the power to hold hearings and issue orders enforceable in court, or whether conciliation and persuasion should be the scope of the power retained by the agency.\textsuperscript{138}

However, on January 9, 1963, H.R. 405 entitled, “A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age,” was introduced in the House and referred to the House Committee on Education and Labor.\textsuperscript{139} A little over five months later, one day after President Kennedy’s second special message was delivered, H.R. 7152 was introduced in Congress and was referred to the subcommittee of the House Committee on the Judiciary.\textsuperscript{140} These two proposals would be the precursors to what is now known as Title VII of the Civil Rights Act of 1964.

The initial version of H.R. 7152 contained two specific provisions dealing with discrimination in employment: Title V which proposed increasing the powers of the

\textsuperscript{134} Id.
\textsuperscript{135} Richard K. Berg, supra note 126 at 62.
\textsuperscript{136} Of the 172 bills considered by House Committee on the Judiciary, Subcommittee No. 5, six of them included provisions banning discrimination in the workplace. H.R. 24, 2027, 6028, 6300, 6333 and 6757. Francis J. Vaas, supra note 85 at 434.
\textsuperscript{137} See Francis J. Vaas, supra note 85 at 433.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 434.
Commission on Civil Rights\textsuperscript{141} so that it would assist both public and private agencies and individuals in fighting employment discrimination, and Title VII which statutorily authorized the President to establish the Commission on Equal Employment Opportunity which had been created by Executive Order 10925 two years prior.\textsuperscript{142}

Title VII of H.R. 7125 was deleted and replaced with H.R. 405 which prohibited employment discrimination based on race, religion, color, national origin, or ancestry and covered all employers who employed more than 25 employees, labor organizations with 25 or more members, as well as employment agencies.\textsuperscript{143} It also created the Equal Employment Opportunity Commission (EEOC) whose duty it was to: investigate complaints and bring formal charges, hear and determine cases brought before them, and issue cease- and-desist orders where appropriate.\textsuperscript{144} However, the bill would again be amended because of disagreements as to the enforcement powers as stated in H.R. 405. Some felt that the EEOC should be a prosecuting agency that would seek relief through civil suit in federal court rather than an agency empowered with quasi-judicial authority with the power to determine cases and issue orders.\textsuperscript{145} Further disagreements revolved around whether to add age as a protected class within the provisions of the law.\textsuperscript{146}

Eventually, hearings on H.R. 7125 before the House Rules Committee would take place in January of 1964.\textsuperscript{147} During that month testimony from 40 members of Congress was heard and the bill was reported without amendment.\textsuperscript{148} Hearings ended on January 30, 1964 and the Committee of the Whole House on the State of the Union began its debates the following day.\textsuperscript{149} General debates on the bill lasted 10 hours and were over on February 1, 1964.\textsuperscript{150} Over 40 amendments to the bill were considered on February 8 and February 10, 1964 of which 16 were adopted and only two survived the rewriting of the bill in the Senate.\textsuperscript{151}

One of the amendments that survived the re-write was proposed by Mr. Smith, Chairman of the House Committee on Rules, who suggested adding sex as a protected class to the bill. The suggestion seemed to be offered in “a spirit of satire and ironic cajolery” as a result of a letter received from one of Mr. Smith’s female constituents.\textsuperscript{152} It has also been said

\textsuperscript{141} Id. The Commission on Civil Rights was established in the Civil Rights Act of 1957.
\textsuperscript{142} Id.
\textsuperscript{143} Richard K. Berg, supra note 126 at 64-65.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 65.
\textsuperscript{146} Francis J. Vaas, supra note 85 at 436.
\textsuperscript{147} Id. at 437-38.
\textsuperscript{148} Id. at 438.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 441. The letter read in pertinent part: “The census of 1960 shows that we had 88,331,000 males living in this country, and 90,992,000 females, which leaves the country with an “imbalance” of 2,661,000 females. Just why the Creator would set up such an imbalance of spinsters, shutting of the “right” of every female to have a husband of her own, is, of course, known only to nature. But I am sure you will agree that this is a grave injustice to womankind and something the Congress and President Johnson should take immediate steps to correct, especially in this election year.
that Smith proposed the addition in an attempt to defeat the entire legislation. Several proponents of H.R. 7152 spoke against this amendment, but it eventually passed with a vote of 168 to 133 in favor of the amendment after brief debate. H.R. 7152 passed the House on February 10, 1964.

By comparison, H.R. 7152’s movement through the Senate was a long and drawn out affair and was characterized by parliamentary maneuvers designed to thwart and/or stall the bill. Initially, it was a struggle for civil rights proponents to even get the bill considered before the Senate. The bill was received from the House and read once on February 17th and a second time on February 26, 1964. Instead of being referred to committee, the bill went directly to the floor of the Senate.

Next, getting the bill placed on the Senate calendar proved to be a difficult endeavor. Senator Mansfield, the majority leader, would request that H.R. 7152 be considered by the Senate three times; one such request was debated for 14 days. Finally, on March 26, 1964 a vote was taken in favor of considering the merits of the bill. General debates on the bill finally began four days later.

Once the general debate began, it would take over 80 days and undergo 87 amendments to the measure before the bill was adopted by the Senate. An important aspect of passing this measure was bipartisanship. Thus, Senators Dirksen, Mansfield, Humphrey and Kuchel worked on amendments outside of the general debates in order to move the bill along. The several senators would debate on the main areas where the House bill differed from what was called the, “leadership compromise.” One author explains that the plans differed in three respects: “(1) the right of the Equal Employment Opportunity Commission to enforce the title by bringing civil actions to obtain compliance; (2) the relationship of the title to state fair employment laws and procedures; [and] (3) the power of the Commission to conduct investigations and to require the keeping of records.” Amendments to H.R. 7152 would address these issues.

Would you have any suggestions as to what course our Government might pursue to protect our spinster friends in their “right” to a nice husband and family?” Francis J. Vaas, supra note 85 at 441-42.

154 Francis J. Vaas, supra note 85 at 442.
155 Richard K. Berg, supra note 126 at 66.
156 Francis J. Vaas, supra note 85 at 443.
157 Legislative History of Titles VII and XI of Civil Rights Act of 1964, supra note 4 at 10.
158 Id. at 444.
159 Id. at 445.
160 Legislative History of Titles VII and XI of Civil Rights Act of 1964, supra note 4 at 10-11.
161 Senator Dirksen (R., Ill); Senator Mansfield (D., Mont.); Humphrey (D., Minn.) and Senator Kuchel (R., Calif.) Legislative History of Titles VII and XI of Civil Rights Act of 1964, supra note 4 at 10.
162 Francis J. Vaas, supra note 85 at 444.
163 Id.
164 Id. at 445.
Again, a major sticking point seemed to be what enforcement powers the EEOC would have. In the end, the senators decided to deprive the EEOC of the right to sue and substituted it with an individual right to sue; however, the amendment also authorized the Attorney General to bring suit in pattern or practice discrimination suits.\footnote{Id.} In resolving the conflict between state FEPCs and their relationship to Title VII, it was decided that discrimination complaints should be reviewed under state procedures where they existed, but after 60 days, an individual may take advantage of the federal procedure regardless of where the state proceeding was in the process.\footnote{Id. at 67-68.} Finally, the record-keeping portion of the Act seemed to alarm the business community who was unsure how burdensome the requirement would be. The amendment to this provision offered a compromise by exempting several business and labor organizations from the record-keeping requirement.\footnote{Id. at 68.}

The amendments were voted on, on June 17, 1964 and adopted by the Senate by a vote of 76 to 18.\footnote{Legislative History of Titles VII and XI of Civil Rights Act of 1964, supra note 4 at 11.} It was then returned to the House where the House was asked to vote on the Act as amended by the Senate. On July 2, 1964, the House voted in favor of the amendments by a vote of 289 to 126 and President Johnson signed the measure into law on the same day.\footnote{Id.} The passage of the Civil Rights Act of 1964 would act as a legacy to President John F. Kennedy who had initially sent the bill to Congress the year before but would be assassinated prior to its passage.\footnote{Henry L. Chambers, Jr., supra note 130 at 327.}

**Selected Provisions of Title VII**

This study is concerned with how the provisions of Title VII of the Civil Rights Act of 1964 work in concert with certain aspects of higher education institutions. This section proceeds by providing an abridged look at pertinent sections of Title VII as it was enacted in 1964. It provides a review of the provisions delineating the law of employment discrimination. The absence of a particular provision does not speak to its worth, but rather indicates that that particular section has been deemed beyond the scope of this study.

**Section 701** defines key terms. In this section, the term “employer” is defined to mean “a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year...”\footnote{Civil Rights Act of 1964, 42 U.S.C. § 2000e-(b) (2012).} For the purposes of the Act, the term “employer” does not include the
United States, corporations wholly owned by the U.S. government, or a State or political subdivision of that State.\textsuperscript{173}

The clause indicating that an employer is one who employs 25 or more employees would not take effect until years after the law’s enactment. First, Title VII did not become effective until July 2, 1965.\textsuperscript{174} Second, Congress took a staggered approach wherein initially, this clause provided that an employer was one who employs 100 or more employees, while the next year, an employer was defined as one who employs 75 or more employees until the law would provide maximum coverage five years after the law became effective.\textsuperscript{175}

This section further defines an “employee” as an individual employed by an employer.\textsuperscript{176} Finally, Section 701 also reiterates the policy of the United States to “insure equal opportunities for Federal employees without discrimination because of race, color, religion, sex, or national origin...”\textsuperscript{177} In doing so, it sets forth the suspect classes of individuals who are protected by the title.

Section 702 exempted certain categories of employers from the purview of Title VII. This section stated: “This title shall not apply to...an educational institution with respect to the employment of individuals to perform work connected with educational activities of such institution.”\textsuperscript{178} Curiously, the congressional debates reveal that there was very little discussion with regard to this exemption. Indeed, the only discussion expressed a concern that the educational exemption appeared to be too broad.\textsuperscript{179} However, the Act passed with the educational exemption intact and with no further discussion on the matter.

Section 703 defined what actions constitute unlawful employment practices. Subsection (a)(1) makes it unlawful for employers to refuse to hire or to discharge an individual or to otherwise discriminate against an individual because of that person’s race, color, religion, sex or national origin.\textsuperscript{180} Subsection (a)(2) further makes it unlawful for employers to limit, segregate, or classify employees in a way that deprives, or tends to deprive, them of employment opportunities because of their race, color, religion, sex or national origin.\textsuperscript{181}

Subsection (e) specifies that it is not unlawful for an employer to hire and employ employees on the basis of their religion, sex, or national origin where religion, sex, or national origin is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal

\textsuperscript{173} Id.
\textsuperscript{174} Richard K. Berg, supra note 126 at 70.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} 88 CONG. REC. S8452-56 (1964).
operation of that business or enterprise. Of this subsection, which sets forth the BFOQ exception, one scholar opines that until sex was made a protected class, the exception was of little importance because even lawmakers strained to find examples where it would apply.

Subsection (e)(2) further clarifies that it is not unlawful for a school, college, or university, or other educational institution to hire and employ employees of a particular religion if such school, college, or university is wholly or in substantial part owned, supported, controlled, or managed by a particular religion or religious corporation, association or society, or if the curriculum of the school, college or university is directed toward the propagation of a particular religion. It was this exemption that was the subject of the objection to section 703’s exclusion of educational institutions from the purview of this title. Again, despite the overlap in protection, the exemption for educational institutions prevailed.

A portion of subsection (h) clarifies that preferential treatment based on factors other than race, color, religion, sex or national origin, such as merit or seniority, are not unlawful employment practices where merit and seniority systems are not used to intentionally discriminate. Another portion of subsection (h) states that it is not unlawful for employers to give and act upon the results of any professionally developed ability test provided that the test, its administration, or action upon the results is not designed, intended or used to discriminate against an individual because of their race, color, religion, sex, or national origin. This clarification was added, one author notes, because of concerns in the Senate with a recent state FEP decision that held that “a written test administered to job applicants was discriminatory because it did not ‘reflect and equate inequalities and environmental factors among the disadvantaged and culturally deprived groups.’” Lawmakers wished to protect the right of employers to use ability tests to ensure that applicants of any race met applicable job qualifications.

Subsection (j) indicates that nothing in the Act should be construed to require employers to grant preferential treatment to an individual or group because of the race, color, religion, sex, or national origin of that individual or group on account of any existing imbalance with respect to the total number or percentage of persons employed by an employer in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community or state. This subsection was added in

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182 Id.
183 Richard K. Berg, supra note 126 at 72.
185 Richard K. Berg, supra note 126 at 73-74.
187 Richard K. Berg, supra note 126 at 74.
188 Id.  This was an Illinois FEP decision, Myart v. Motorola, Inc., 110 Cong. Rec. 7026 (1964).
189 Id.
response to concerns that Title VII would require employers to maintain a racial balance among employees leading to quota hiring.\footnote{Legislative History of Titles VII and XI of Civil Rights Act of 1964, supra note 4 at 1008.}

Section 704 makes it an unlawful practice for employers to discriminate against employees or applicants in retaliation for their compliance with the title, or because of their opposition to any practice made unlawful by the title, or because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.\footnote{Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2012).}

Section 705 establishes the Equal Employment Opportunity Commission (EEOC). Pursuant to subsection (a) the EEOC would be comprised of five members, no more of three of whom should be in the same political party. Those members will be appointed by the President with the advice and consent of Senate. The President would also appoint a Committee Chairman as well as a Vice Chairman.\footnote{Civil Rights Act of 1964, 42 U.S.C. § 2000e-4 (2012).} This subsection also sets forth the term limits for the members wherein one member is appointed for a year, another for two years, a third for three years and so on and so forth.\footnote{Id.}

Subsection (f) specifies that the principal office of the EEOC shall be in or near the District of Columbia (D.C.) but grants permission for the establishment of regional or State offices, as necessary.\footnote{Civil Rights Act of 1964, 42 U.S.C. § 2000e-4(h) (2012).}

Subsection (g) sets forth certain powers of the EEOC including the power to assist in conciliation where employers refuse to comply with the provisions of the title; to make technical studies as appropriate and make them available to the public; and to refer matters to the Attorney General with recommendations for intervention in a civil action where applicable, and to consult, advise, and assist the Attorney General in those matters.\footnote{Civil Rights Act of 1964, 42 U.S.C. § 2000e-4(g) (2012).}

Section 706 is concerned with the enforcement methods of this title. Subsection (a) indicates that where a charge, in writing and under oath, has been filed either by an aggrieved person or by the Commission, that an employer has engaged in an unlawful employment practice, the Commission must furnish a copy of the charge to the employer and proceed with an investigation. It is cautioned that this charge must remain confidential. If, after investigation, the Commission has reason to believe the charge is true, it may use informal methods such as conference, conciliation, and persuasion to eliminate the unlawful employment practice.\footnote{Francis J. Vaas, supra note 85 at 452.}

Subsection (b) provides the procedure and time deadlines for bringing a claim.\footnote{Id.}
Finally, subsection (g) discusses available remedies upon a finding of intentional discrimination which include enjoining the prohibited actions as well as ordering reinstatement or hiring of employees with or without back pay.198

Section 707 authorized the Attorney General to file civil suits in the appropriate federal court when he had reasonable cause to believe that an employer was intentionally engaged in a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII.199

As discussed in the legislative history, major debate was held with regard to the enforcement powers of the EEOC in the passage of the Act. Sections 705 and 706 were the subject of extensive amendments to the House version of the bill. The amendment to Section 705 stripped the EEOC of the power of bringing civil suit in its own name but required referral to the Attorney General; this compromise ostensibly strengthened the enforcement powers of the EEOC.200 Section 706’s amendments were viewed as the most “basic and far-reaching of all the Senate amendments”201 and further stripped the EEOC of any enforcement powers. As previously stated, the Commission could not institute claims, nor could it file charges on behalf of aggrieved parties. Only an aggrieved party could file suit unless a pattern and practice of unlawful discrimination was found; in that case, pursuant to section 707, the Attorney General could bring suit.202 The EEOC’s enforcement powers were relegated to persuasion, conference, and conciliation.

The above review of Title VII of the Civil Rights Act of 1964 discusses pertinent portions of the title that may be implicated and discussed in subsequent portions of this study.203 Any provisions and/or discussion of labor organizations or employment agencies were omitted since they have limited relevance to the forthcoming points of discussion.

Title VII: What Happened After the Passing of the Civil Rights Act of 1964?

The Civil Rights Act of 1964 became effective on July 2, 1965 after months of political wrangling to enact federal civil rights legislation. And while the Act has been called groundbreaking, this did not mean that the Act turned out to be a panacea for the rights of minorities. Rather, it supplied federal legislation where there had previously been a void in effective protections from employment discrimination. Only time, and the application of the landmark legislation, would tell just how effective this law would be.

198 Id.
200 Francis J. Vaas, supra note 85 at 452.
201 Id.
202 Id.
203 Further analysis of the above-referenced sections will take place in the subsequent portions of this study. The purpose of this section was simply to delineate relevant portions of the statute for the purposes of this study.
As indicated in the outset of the review, this portion of the literature review provides a
decade-by-decade analysis of the judicial, regulatory, and legislative fields as they pertain to
Title VII of the Civil Rights Act of 1964. With regard to the judicial arena, this review is
limited to those landmark Supreme Court decisions that interpret Title VII and form the basis
of employment discrimination law. Discussion of the regulatory environment entails a
discussion of the Equal Employment Opportunity Commission (EEOC), and the major changes
in its methods of enforcing of Title VII. Finally, where applicable, legislative changes to the Act
will be reviewed and analyzed. Thus, this review provides a holistic view of employment
discrimination law subject to the limitations delineated in the outset of this study.

What Came After: 1965-1981

“Begin as you mean to go on…”204 Had the 88th Congress been mindful of this dictate,
perhaps what came to pass after the legislation was enacted would have happened differently.
Instead, the extensive compromises that took place in order to get the law passed seemed to
lend a negative spectre over the passing of the legislation as the gap widened between what
Congress initially intended and what came to be. This was most evident with the
establishment of the EEOC.

The Equal Employment Opportunity Commission (EEOC)

Section 705 of the Act provides for the establishment of the EEOC.205 Initially, the
EEOC was to be a powerful enforcement administrative agency patterned after the National
Labor Relations Board (NLRB).206 In enforcing Title VII, it was thought that the agency could
fight unlawful employment practices by addressing individual charges of discrimination.207
But an all-powerful EEOC leading the charge against employment discrimination never
materialized. Rather, in compromising with opponents of the bill, and ending the longest
filibuster in the history of Congress, lawmakers essentially stripped the EEOC of any
enforcement power.208 One commentator explains, “[t]hey accepted this compromise under
the faulty premise that employers should not be forced into compliance by a powerful
government agency and accepted the belief that it would be better to have the statute passed
with a weak agency than not pass at all.”209

Thus, the EEOC began on shaky legs, empowered with the authority to investigate
charges of discrimination and provide remedies using persuasion and conciliation.210 The
agency was not able to sue employers who were in violation of Title VII;211 that power was

204 CHARLES H. SPURGEON, ALL OF GRACE 32 (2007).
206 Michael Z. Green, Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by
208 Michael Z. Green, supra note 206 at 321-322.
209 Id. at 322.
211 Id. at 673.
vested in the Attorney General, and then, only in pattern and practice suits. Nor did they have the power to issue cease-and-desist orders like the NLRB. Individual claimants were able to pursue litigation, but only after obtaining a right-to-sue letter from the EEOC. Finally, the EEOC was empowered to issue guidelines interpreting Title VII, but was not authorized to promulgate rules with the force of law.

This lack of authority essentially turned the agency into a claims processor, in-taking and processing charges rather than fully investigating them. This role manifested Congress’ intent for the EEOC in that it was their belief that the best way to fight unlawful employment practices was to focus on individual incidents of discrimination. One author explains that “Congress intended the EEOC’s main role to be dispute resolution between individuals and their employers, and it modelled the EEOC on earlier Fair Employment Agencies (FEAs).” This view of combatting employment discrimination by focusing on individual claims would prove erroneous and ultimately challenging for the EEOC. These difficulties manifested themselves in two ways.

First, already proceeding from a weakened position of authority, the EEOC also suffered from a lack of effective leadership. When the EEOC was created, it was to consist of five members, one of which was the Chairman of the Commission designated by the President with the advice and approval of the Senate. The members were to serve staggered terms up to five years. However, within the first five years of its existence, the EEOC was helmed by four different chairmen, none of whom served out their five-year terms. Further, there was high turnover within the commission with eleven different commissioners serving within that time span. By 1967, just two years after the EEOC had opened its doors, an internal report indicated that the agency suffered from “lack of clear guidance, uniformity in its operation, and good management.”

Second, this lack of organization in its leadership bled onto a staff that proved ill-equipped to handle the EEOC’s charge. The first five-member staff began just one month prior to the EEOC’s opening. Almost two months later, the office was staffed with only 48

213 Id. at 56.
214 Id. at 61.
216 See Nancy M. Modesitt, Reinventing the EEOC, 63 SMU L. Rev. 1237-1277, 1240-41 (2010).
217 Maurice E.R. Munroe, supra note 207 at 250.
218 Id. at 250-251
220 Legislative History of Titles VII and XI of Civil Rights Act of 1964, supra note 4 at 1009.
221 Id.
222 Nicholas Pedriana & Robin Stryker, supra note 219 at 713.
223 Id.
224 Anne Noel Occhialino & Daniel Vail, supra note 210 at 674.
employees, only seven of which were full time investigators.\textsuperscript{225} This lack of appropriate staffing revealed itself in the face of the almost 9,000 claims it received in its first year.\textsuperscript{226} Congress had grossly underestimated the number of claims that the agency would receive by almost 7,000 claims.\textsuperscript{227} Of the overwhelming backlog, EEOC Chairman Stephan Shulman averred, “We’re out to kill an elephant with a fly gun.”\textsuperscript{228} And by 1969, the number of claims doubled.\textsuperscript{229} Thus, the problem of addressing employment discrimination by focusing on individual claims reveals itself. By then, it took an average sixteen months or more to process a single charge of employment discrimination creating an ever-increasing backlog of cases.\textsuperscript{230}

Thus, heading into the early 1970s, the agency that had emerged as the result of a compromise was feeling the brunt of the complaints that justified its existence. Congress was confronted with the reality that a weak agency was not necessarily better than none at all, and soon it would act in an attempt to rectify its mistake.

\textit{The Equal Employment Opportunity Act of 1972}

In 1971, Congress would hold public hearings on amendments to Title VII as more of the 1964 Act’s shortcomings became evident.\textsuperscript{231} Chief among the complaints about Title VII were the deficiencies of the EEOC. Despite the lack of adequate funding,\textsuperscript{232} the high turnover of the EEOC staff, and the ever-growing backlog, most considered the largest problem to be its lack of enforcement powers. Congress would address the critiques about the EEOC in this new legislation. It would also respond to a growing tide of complaints regarding the exemption of certain classes of employees from Title VII protections: state and local government employees as well as employees of educational institutions.\textsuperscript{233} Thus, the Equal Employment Opportunity Act of 1972 (hereinafter, “the 1972 Act”) is responsible for making changes to the enforcement powers of the EEOC as well as bringing under the Act’s purview a class of employees previously unprotected by Title VII.\textsuperscript{234} Both changes will be discussed below.

\textbf{Changes to the EEOC’s enforcement powers}

Although Congress had previously compromised by establishing the EEOC with little to no enforcement powers, it was by no means the last attempt to provide the agency with the...
authority necessary to carry out its charge. A commentator explained: “the Senate, during the 91st Congress, had passed an enforcement bill which died in the House; the House, during the 89th Congress, had passed an enforcement bill which died in the Senate.”

During congressional hearings on the matter, at issue, was the type of enforcement power the EEOC would wield. On one side were the administration witnesses and business groups who favored court enforcement and on the other side were civil rights leaders who favored cease-and-desist enforcement powers for the EEOC. What was clear by this point, at least to Congress, was that conciliation and voluntary compliance were not enough. It was noted that, “although the EEOC has made an heroic attempt to reduce the incidence of employment discrimination in the nation...employment discrimination is even more pervasive and tenacious than Congress had assumed.”

It was during the 92nd Congress that legislators were finally able to make substantive changes to the Act that would provide increased power to the EEOC. Specifically, the 1972 amendment gave the EEOC authority to enforce its administrative findings by private suit although cease-and-desist enforcement power was again denied. Thus, employers could no longer enter conciliation with the mindset that their participation was voluntary. Rather, the 1972 Act empowered the EEOC to file suit when it was unable to conciliate.

Expansion of Title VII coverage to educational institutions

The other major change brought about by the 1972 Act was the expansion of Title VII coverage to state and local government employees as well as employees of educational institutions. The 1964 Act’s §701 exclusion of state and local government employees from Title VII protections meant that employees at public and state schools were excluded from protection. Further, §702 of the 1964 Act explicitly excluded employees of educational institutions who did work connected with the educational activities of that institution. As indicated previously, this education exemption passed with little or no debate. However, legislative history of the 1972 Act indicates that lawmakers and interested parties alike, namely women, would not let new civil rights legislation pass without rectifying this mistake.

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235 Id. at 840.
236 Id. at 841.
237 Michael Z. Green, supra note 206 at 324.
238 Id. at 323-24.
239 Id. at 324.
240 Maurice E.R. Munroe, supra note 207 at 257.
241 The expansion of coverage to state and local employees had further repercussions. Indeed, the expansion added over 10 million employees under the purview of the EEOC and would strain its limited resources. While discrimination was alive and well in state and local governments, the Fourteenth Amendment to the U.S. Constitution as well as sections 1981 and 1983 served as protections against the same prior to the enactment of Title VII. It has been noted that “the intention of Congress in expanding Title VII to include state and local governments was to provide an effective remedy through federal action to governmental employees in this area and not to remove any right which may have existed under established law.” George P. Sape & Thomas J. Hart, supra note 232 at 848-49. This section however, will discuss the expansion of coverage as it affected the field of education in order to highlight its effects to this area for the overall purposes of this study.
As mentioned previously, Title VII’s proscription against discrimination based on sex was added as a tactic by Southern congressmen to thwart the passage of the Act. A gross miscalculation on House Rules Committee Chair Howard Smith’s part, the inclusion was a significant achievement in that it provided protections for 100 million people, rather than the 20 million it would have covered had the 1964 Act only applied to race. However, the exemptions in §§ 701 and 702, as discussed above, set up a dichotomy in that they denied protection in a field that was significantly populated by women. One commentator reported that in 1968, 67.6% of the elementary and secondary school teachers were women. The dearth of women in higher ranking post-secondary positions was evidence of the discrimination that ran rampant in the field. Thus, it is no surprise that the congressional hearings for the 91st and 92nd were replete with letters and statements to congress supporting the various bills repealing the exemption. A brief description of the several statements is provided below.

During the first session of the 91st Congress, the subject of the aforementioned exemptions was up for debate in both the House and the Senate. A congressional hearing statement in support of H.R. 6228 provided by the Greater Pittsburgh Area Chapter of the National Organization for Women (NOW) averred,

A blanket exemption to all [educational] institutions...merely invites discrimination. Educational institutions should be at the forefront of social change. The principle of nondiscrimination should be taught by precept and by example: an individual should be considered on individual capacities and not on the basis of characteristics generally attributed to a group. Unfortunately, educational institutions often ignore this principle.

However, no action was taken on this bill.

During the second session of the 91st Congress, Senate bill 2453 was proposed. During debates on the bill which proposed amendments to §702 of Title VII, the Senate refused to

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244 Id.
246 Id. at 9 (explaining "[t]he higher the rank, the fewer the women. For example, the last time a woman was hired as a professor in the Department of Psychology at the University of California in Berkeley was in 1924. Yet women received 23% of the doctorates in psychology at this university. At Columbia University, there is no woman on the faculty of the department of Psychology although 36% of the doctorates in that field were awarded to women. At the University of Chicago, the percentage of women faculty members is less now than what it was in 1899.") Id.
247 Bills to Further Promote Equal Employment Opportunities for American Workers: Hearing on H.R. 6228 and H.R. 13517 Before the General Subcomm. on Lab. of the H. Committee on Educ. and Lab., 91st Cong. 1-2 (1970) (Statement of the Greater Pittsburgh Area Chapter of the National Organization for Women). This refusal to extend coverage was despite appeals by Wilma Scott Heide citing the critical role of educational institutions to social change as quoted in the outset of this study.
248 George P. Sape & Thomas J. Hart, supra note 234 at 836.
249 S. Rep. No. 91-1137, at 8 (1970) (showing that Mr. Williams of New Jersey from the Committee on Labor and Public Welfare explained the reasons for the exemption. He stated, "It is the conclusion of the committee that the Act’s extension to employees of state and local governments should include teachers and administrative staff employed in
amend Title VII to provide coverage for employees of state and local governments as well as educational institutions. In the House, an attempt to pass H.R. 17555, substantially similar to S. 2453, proposing to repeal the exemption also failed. In that bill, Mr. Perkins of the Committee on Education and Labor stated that the exemption excluding “essentially teachers...contributes to discrimination because of race, color, religion, national origin, and sex. There is nothing in the legislative background of Title VII nor does any national policy suggest itself to support [this] exemption.” However, the 91st Congress ended without adopting any amendments that would bring educational institutions under the purview of Title VII.

Debates on this matter would continue into the 92nd Congress where both the House and the Senate reported their findings with regard to discriminatory practices in the field of education and the necessity of extending Title VII coverage to this area. In the House, in the Report to accompany H.R. 1746, Mr. Hawkins of the Committee on Education and Labor reiterated an absence of justification for the exemption in the legislative history of Title VII and further cited national policy against such an exemption. He stated,

[...]discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. In the field of higher education, the fact that black scholars have been generally relegated to all-black institutions, or have been restricted to lesser academic positions when they have been permitted entry into white institutions is common knowledge. Similarly, in the area of sex discrimination, women have long been invited to participate as students in the academic process, but without the prospect of gaining employment as serious scholars. When they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than their male counterparts...The committee feels that discrimination in educational institutions is especially critical. The committee cannot (Sic) imagine a more sensitive area than educational institutions where the Nation’s youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination.

In the hearing records on this bill, interested parties provided statements on the specific effects of the exemption on women. In support of H.R. 1746, President of the public schools. Employees of private schools should have the same protection as those in public education and further exemption is simply not warranted. It appears a self-evident proposition to the committee that employment discrimination is improper anywhere, it is improper in educational institutions...”) Id. at 8.

250 George P. Sape & Thomas J. Hart, supra note 234 at 835.
251 Id. at 836.
253 George P. Sape & Thomas J. Hart, supra note 234 at 836.
254 Id. H.R. 1746 provided the basis for House action with regard to the eventual amendment to Title VII.
National Education Association (NEA), Mrs. Helen P. Bain, spoke on the effects sex discrimination was having on the field of education. She reported,

[alt the higher education level, discrimination is even more acute [than at the elementary, and secondary levels]. Women college faculty members receive about $1,000 less average annual salary than their male counterparts. We know of no state university or college with a woman president. There are one or more municipal or private colleges with women presidents, usually members, of a religious order, but here, too, the men far outnumber the women...We do believe...that those in the field of education who feel they are discriminated against because of sex should receive the same opportunity to challenge the alleged discrimination as those who are employed in business and industry.]

The hearing records on this bill also included a study submitted by Florence Howe, Chairwoman on the Commission on the Status of Women of Modern Language Association (MLA). The study sought to illustrate the extent of the discrimination that women in education suffer by providing statistics using a sample of 595 departments from junior and senior colleges as well as universities. Ms. Howe cited disparities that existed in the faculty composition: of the 595 departments included in the study, 37% of the total faculty was women; women held only 1/3 of the full-time faculty positions and 54% of the part-time faculty positions. With regard to tenure patterns, Ms. Howe reported that within the sample, women constituted 40% of tenured faculty in departments with B.A. programs, but only 14% of the tenured faculty in departments offering the Ph.D. Further, within the sample of departments, women faculty comprised 45% of the faculty that taught first and second year courses but only 14% of the faculty that taught graduate courses. In departments offering the Ph.D., women made up only 14% of the faculty teaching undergraduate and graduate courses only and just 8% of the faculty teaching only graduate courses. Finally, with regard to salary, Ms. Howe indicated that women assistant and associate professors made approximately $1,000 less than men at similar ranks and up to $3,000 less than male full professors with similar ranks. Further, “the difference between the median salaries of women full professors in A.A. or B.A. and those in Ph.D. granting departments is between $4,000 and $7,000, and women are about four times as likely to be full professors in departments which grant A.A. or B.A. degrees than in departments with Ph.D. programs.”

Ms. Howe’s study provided a holistic view of the dismal state of affairs as it regards women faculty in higher education. In addition to the above statistics, Ms. Howe provided anecdotal evidence of the situation with which women faculty had to contend.

256 Id. at 466.
257 Id. at 486.
258 Id. at 487.
259 Id. at 488.
260 Id. at 488-89.
261 Id. at 489.
We face a legacy of plain, old-fashioned male-supremacist attitudes: departments which advertise for “a married man in his mid-thirties”; chairmen who say “we already have too many women in this department”; graduate-school professors who agree to limit female enrollment...It is not unusual...for universities to discuss “nepotism” in the faculty handbook under the heading “wives.” And we have in our files case studies of reputable female scholars and teachers forced to commute from Philadelphia to Buffalo...in order to find positions denied them, in part, by “anti-nepotism” practices.\footnote{Id. at 490.}

When Senate bill 2515 was introduced by Senator Harrison Williams, protests about the exemption were as vociferous as they were in the House. In his report, Senator Williams indicated that removing the exemption would bring under the statute’s protection, 120,000 educational institutions with approximately 2.8 million teachers and professional staff members and another 1.5 million non-professional staff members.\footnote{S. Rep. No. 92-415, at 11 (1971).} While citing similar statistics to those of Ms. Howe, Mr. Williams further reported that “in elementary and secondary school systems Negroes (Sic) accounted for approximately 10% of the total number of positions, in the higher-paying and more prestigious position in institutions of higher learning, blacks constituted only 2.2% of all positions, most of these being found in all-black or predominantly black institutions.”\footnote{Id. at 12.}

The above-cited statistics and congressional hearing reports indicate how important the expansion of Title VII was to the field of education. Not only was race and sex discrimination rampant in the industry, as shown by the above-referenced statistics, the federal protections available prior to Title VII simply did not do enough to adequately protect minorities. Prior to the passage of the 1964 Act, those in the education citing discrimination had some recourse under §§1981 and 1983 of the Civil Rights Act of 1866 as well as the Equal Pay Act. One author explains that the protections provided under these statutes however, did not always go as far as Title VII’s protections, particularly for those in academia.\footnote{George P. Sape & Thomas J. Hart, supra note 234 at 257.} This commentator cites a §1983 case involving the failure to promote an African American professor. In rejecting the professor’s claim, the court opined:

The judiciary is not the appropriate forum for decisions involving academic rank. A professor's value depends upon his creativity, his rapport with students and colleagues, his teaching ability, and numerous other intangible qualities which cannot be measured by objective standards...Since the courts are not qualified to make such evaluations, judicial review is only proper if the plaintiff can clearly demonstrate legal discrimination.\footnote{Id. at 490.}

\footnotetext[262]{Id. at 490.}
\footnotetext[263]{S. Rep. No. 92-415, at 11 (1971).}
\footnotetext[264]{Id. at 12.}
\footnotetext[265]{George P. Sape & Thomas J. Hart, supra note 234 at 257.}
\footnotetext[266]{Id. at 490.}
Thus, it is evident the high burden of proof academicians had in making claims under §§1981 and 1983. It has been noted that Title VII provides more “liberal” standards on academician-claimants alleging discrimination.267 This point is certainly arguable. However, what the above makes clear was the necessity for bringing academic institutions under the purview and protection of Title VII.

With the House vote on March 8, 1972, the battle to amend the Civil Rights Act of 1964 was concluded.268 On March 24, 1972, President Nixon signed the Equal Employment Act of 1972 into law.269 The 1972 Act succeeded in: increasing the enforcement power of the EEOC by allowing the agency to litigate cases when it determined that discrimination existed; reducing the number of employees needed from 25 to 15 to fall under the purview of Title VII; and extending coverage to state and local government employees as well as educational institutions. The EEOC was now armed with new enforcement powers but simultaneously accepted increased responsibilities.

**The EEOC Attempts to Flex Its New Muscle**

As reported previously, the expansion of coverage brought about by the 1972 Act, brought 10 million state and local government employees, and 4.3 million employees from 120,000 educational institutions under the purview of Title VII.270 Thus, despite the hard-earned victory for increased enforcement power, the EEOC now had a new problem on its hands.

Partly in response to the expansion of coverage, in 1972, the EEOC received 32,840 charges.271 By the next year, this number had increased to 48,849 charges.272 Around this time, the EEOC attempted to flex its new litigation muscles by developing in-house litigation capacity.273 In order to tackle this new problem, the agency created five regional litigation centers that were charged with evaluating cases and forwarding litigation recommendations to their headquarters for final determination.274 However, the process was slow and inaccurate since out of the 1,319 cases that were referred for to headquarters in 1972, only 124 were approved to move forward with litigation.275

267 Id. The burden of proving discrimination claims in academic settings as compared to general business settings is the main focus of this study. While this author posits that §§1981 and 1983 require a higher burden of proof than Title VII, this does not mean that the burden of proof under Title VII strictures is easy for academicians. This subject will be discussed further in subsequent chapters of this study.

268 Id. at 845.

269 Maurice Munroe, supra note 207 at 256-57.


271 Anne Noel Occhialino & Daniel Vail, supra note 210 at 677.

272 Id.

273 Id. at 678.

274 Id.

275 Id.
During this period in time, the agency chose to approach the case load by investigating charges through “aggrieved persons” charges. This method, executed by the newly-created National Program Division (NPD), involved the EEOC launching an investigation to determine whether the employer was guilty of an unlawful employment practice. This inefficient and unreliable approach would help create a backlog of cases that would continue to plague the agency for years to come. By the middle 1975, it would take on average 32 months to process a single charge.

By 1976, the agency was overwhelmed by the number of charges and a report noted that most charges filed with the EEOC were not fully investigated; less than 40% of charges resulted in a determination regarding whether discrimination had occurred and half of the charges were closed administratively. This was due in part to the fact that the EEOC had begun expanding “aggrieved person” charges which “entail[ed] procuring and analyzing extensive employment and economic data [to determine whether and why African Americans are underrepresented in a firm. These] investigations seeking unlawful practices [were] more time consuming and resource-intensive than those seeking merely to resolve aggrieved person charges.”

By 1977, there was a backlog of 94,700 unresolved charges. This year also marked the beginning of Eleanor Holmes Norton’s tenure as Chairman of the EEOC. Norton responded to this backlog by implementing a reorganization plan called the Rapid Charge-Processing (RCP) system to speed the resolution of new charges. This plan differed from the previous approach in that trained investigators were now conducting the intake interviews rather than clerical staff, thus improving efficiency. Further, Norton implemented fact-finding conferences that allowed investigators to determine whether the charge was properly placed with the EEOC or whether it should be re-routed to an appropriate agency or organization rather than launching exhaustive investigations for each charge. This RCP system along with the fact-finding conferences proved a successful method for approaching

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276 Maurice Munroe, supra note 207 at 257.
277 Id.
278 As reported by Munroe, “attempts at attacking practices of discrimination through “aggrieved person” charges were unsuccessful because this basis for targeting employers was unreliable.” Maurice Munroe, supra note 207 at 258.
279 Anne Noel Occhialino & Daniel Vail, supra note 210 at 677-78.
280 Nancy M. Modesitt, supra note 1241.
281 Maurice Munroe, supra note 207 at 259-60.
282 Id. Munroe also reports that by 1977, the EEOC had 130,000 pending charges. The author does not discern a difference between “unresolved” or “pending” charges. Therefore, the reason is unknown for this inaccuracy.
284 Anne Noel Occhialino & Daniel Vail, supra note 210 at 681.
285 Id.
286 Id.; Michael Z. Green supra note 206 at 329.
EEOC charges; the number of pending claims dropped from 95,000 to less than 50,000 between 1978 and 1981, the end of Norton’s tenure as chairman.\(^\text{287}\)

Thus, by the end of the 1970s and early 1980s, the EEOC would move forward with their new enforcement powers to try and accomplish their charge to eradicate employment discrimination. But if the decade after the passing of the Civil Rights Act of 1964 proved tumultuous for the EEOC and the legislature, the judiciary too was busy interpreting the groundbreaking 1964 Act and the changes from its subsequent amendment.

\textit{The Role of the Judiciary}

The Supreme Court would play a major role in the fight against employment discrimination, interpreting Title VII as a matter of first impression. During this period, five major cases would be decided: interpreting Title VII’s proscription against discrimination based on sex, defining the theories of disparate treatment and disparate impact implicated in §703(a) of the 1964 Act; setting forth the law with regard to the use of statistical evidence in disparate impact claims as well as the determining the legality of voluntary affirmative action plans. Specifically, this section will discuss the following decisions, in turn: \textit{Phillips v. Martin Marietta Corp.},\(^\text{288}\) \textit{Griggs et al. v. Duke Power Co.},\(^\text{289}\) \textit{McDonnell Douglas Corp. v. Green},\(^\text{290}\) \textit{Hazelwood School District et al. v. United States},\(^\text{291}\) and \textit{United Steelworkers, etc. v. Weber}.\(^\text{292}\)

\textit{Discrimination based on Sex under Title VII}

\textit{Phillips v. Martin Marietta Corp.} is the first case in which the Supreme Court interpreted Title VII of the Civil Rights Act of 1964. Technically, the case is still good law; however, it is not cited often amongst major employment discrimination cases since the decision of the Court ironically does what Title VII proscribes – subject women to stereotypes based on sex. The decision is a reflection of the mores of the time and thus has little applicability today.

In \textit{Phillips}, plaintiff Ida Phillips alleged that she had been denied employment by Martin Marietta Corp. because of her sex. The trial court had granted summary judgment in favor of the company after making the following findings: 1. the company informed the plaintiff that it was not accepting applications from women with pre-school aged children; 2. the company, at the time of the litigation, employed men with pre-school aged children; and 3. at the time of plaintiff’s application, 70-75% of the applicants for the position she sought were women and 75-80% of those hired for the position were women.\(^\text{293}\) The court therefore found

\begin{footnotes}
\item[287] Anne Noel Occhialino & Daniel Vail, \textit{supra} note 210 at 681.
\item[288] 400 U.S. 542 (1971).
\item[289] 401 U.S. 424 (1971).
\item[290] 411 U.S. 792 (1973).
\item[293] \textit{Phillips v. Martin Marietta Corp.}, supra note 288 at 543.
\end{footnotes}
no bias against women by the company. The Court of Appeals for the Fifth Circuit affirmed this decision and the Court granted certiorari.

The Court explained that §703(a) of Title VII requires that persons with like qualifications be granted equal employment opportunities irrespective of their sex. The Court noted that the court below improperly read §703(a) as permitting differing policies for men and women – each having pre-school aged children. However, the Court found that “[t]he existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction” and may qualify as a bona fide occupational qualification under §703(e) of Title VII. Thus, the court found that summary judgment was improper and remanded the case for further consideration of that issue.

Clearly, this type of reasoning engaged in by the Court would be the basis for its own claim today. However, this case was cited here simply for its historical significance as the first case considered by the Supreme Court interpreting Title VII.

**Disparate Impact Defined**

*Griggs v. Duke Power Co.*, the second Title VII case decided by the Supreme Court, had more long-lasting effects on employment discrimination law. This was the first case wherein the theory of disparate impact was recognized by the Court. Generally, this theory arises in systemic or class discrimination cases where the plaintiff challenges employment practices that appear neutral on their face but, in effect, operate to the detriment of a group protected by the 1964 Act.

In *Griggs*, a group of African American employees sued as a class, Duke Power Company, alleging that certain employment practices had a discriminatory effect on African Americans. Duke Power Company had an operating plant, the Dan River Steam Station, which employed 95 workers, 14 of whom were African American and 13 of whom were plaintiffs in this case. The operating plant was organized into five departments; African Americans were mostly assigned to the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four departments. All of the other departments were

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294 Id. at 544.
295 The concept of disparate impact is one of two types of discrimination that is unlawful under Title VII. It focuses not on the employer’s intent, but rather on the consequences of an employer’s behavior. The source for this concept is found in §703(a)(2) of Title VII. It was also later codified in §703(k)(1)(A) of Title VII which states, “disparate impact is established...only if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race...and the respondent fails to demonstrate that the...practice is job related for the position in question and consistent with business necessity.” Maurice E.R. Munroe, *supra* note 207 at 224.
298 *Griggs*, *supra* note 289 at 426.
299 The five departments were: Labor, Coal Handling, Operations, Maintenance and Laboratory and Test. *Id.*
300 *Id.*
staffed by white workers only. 301 Thus, the District Court found that the company had engaged in discriminatory hiring and promotion practices prior to the passing of the 1964 Act. 302

A year after the 1964 Act was passed, the company abandoned their policy of restricting African American workers to the Labor Department. 303 However, at the time of the litigation, Duke Power Company had in place two policies: one, instituted after the 1964 Act was passed, required those working in the Labor department - African Americans - to complete high school before they could transfer to any of the other four departments. White employees who were hired prior to the implementation of this requirement continued to perform satisfactorily in those departments. 304 The second policy required those employees, hired after July 2, 1965, to qualify for placement into any department but the Labor department by scoring satisfactorily on two professionally prepared aptitude tests: the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test. 305 While the passing scores required approximated the national median for high school graduates, neither of the tests were “directed or intended to measure the ability to learn to perform a particular job or category of jobs.” 306

Although the District Court found that Duke Power Company had engaged in overt discriminatory practices, it found that they had done so prior to the effective date of the Civil Rights Act of 1964. Finding that the 1964 Act was intended to act prospectively rather than retroactively, the District Court found that “the impact of prior inequities was beyond the reach of corrective action authorized by the Act.” 307

The Court of Appeals similarly found that there was no violation of the 1964 Act since there was no showing of a discriminatory purpose in the adoption of the policies. 308 They held that such policies were permitted by the Act since “there was no showing of a racial purpose or invidious intent in the adoption of the high school diploma requirement or general intelligence test and that these standards had been applied fairly to whites and Negroes [Sic] alike.” 309 Thus, the Court of Appeals rejected the idea that a policy that disproportionately affected Negroes [Sic] could be unlawful under Title VII unless shown to be job related. 310

The Supreme Court granted certiorari and framed the issue as follows:

[whether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing

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301 Id.
302 Id.
303 Id. at 427.
304 Id.
305 Id. at 427-28.
306 Id. at 428.
307 Id.
308 Id.
309 Id. at 429.
310 Id.
of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formally had been filled only by white employees as part of a longstanding practice of giving preference to whites.\footnote{Griggs, supra note 289 at 425-26.}

In ruling in favor of the plaintiffs, the Court rejected the idea that lack of invidious discriminatory intent rendered a policy permissible under Title VII. Rather, the Court explained that, pursuant to the 1964 Act, “practices, procedures, or tests neutral on their face in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory practices.”\footnote{Id. at 430.} The Court further explained that “[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes [Sic] cannot be shown to be related to job performance, the practice is prohibited.”\footnote{Id. at 431.}

In so stating, the Court explains the concept of disparate impact. Although the Court found that intent was a relevant factor, it was not always the determining factor with regard to whether a violation of the Act had occurred. Indeed, the Court explained that “Congress directed the thrust of the Act to the \textit{consequences} of employment practices, not merely the motivation.”\footnote{Id. at 432.} The facts of this case demonstrated the inadequacy of broad and general testing devices, the Court explained, since neither the high school requirement nor the intelligence tests were shown to have any bearing on the successful performance of the job.\footnote{Id. at 431-433.} Such tests, the Court explained, must be used to “measure the person for the job and not the person in the abstract.”\footnote{Id. at 436.}

The \textit{Griggs} case then, stands for the proposition that plaintiffs can prevail in a Title VII case if they prove that an employment practice – here, educational requirements and standardized tests - has a discriminatory impact on protected minorities.\footnote{George Rutherford, supra note 23 at 71.} If the plaintiff carries their burden of proof, the burden shifts to the defendant to prove that the particular
employment practice is justified by business necessity or is related to job performance as required by §703(h) of Title VII.318

During this period, the Court would be called upon again to interpret the concept of disparate impact. In *Albermarle Paper Co. v. Moody*,319 the Court was confronted with the issue of what proof must “an employer show to establish that pre-employment tests racially discriminatory in effect, though not in intent, are sufficiently ‘job related’ to survive a challenge under Title VII?”320 In *Albermarle*, plaintiffs, a class of former and present African American employees who worked at a paper mill, protested the company’s requirement that applicants for employment in skilled lines of progression must have a high school diploma and pass both the Revised Beta Examination, which purported to measure non-verbal intelligence, and the Wonderlic Personnel Test, which purportedly measured verbal skills.321

Restating the rule from *Griggs*, the Court clarified that the burden to prove business necessity only arises after the plaintiffs have met their burden of making out a prima facie case of discrimination showing that the complained of employment practice disproportionately affects the protected minority.322 Once the employer has shown that the employment practice is job related, the burden shifts back to the plaintiff to show that “other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest…Such a showing would be evidence that the employer was using its tests merely as a ‘pretext’ for discrimination.”323

Although the employer in this instance engaged an expert to determine the “job relatedness” of the challenged tests, the Court of Appeals found that “neither test was directed or intended to measure the ability to perform a particular job or category of jobs…Both were adopted…without meaningful study of their relationship to job-performance ability.”324 The Court then explained that the question of job relatedness must be viewed in the context of the plant’s operation and history of the testing program.325

Setting forth the standard of proof for job relatedness of aptitude tests, the Court said, “discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be ‘predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.’”326

318 *Id.*
320 *Id.* at 408.
321 *Id.* at 410-11.
322 *Id.* at 425.
323 *Id.*
324 *Id.* at 426.
325 *Id.* at 427.
326 *Id.* at 431.
Thus, *Albermarle* adds another inquiry to the disparate impact analysis. Once a defendant has offered proof that the complained of policy is a business necessity or job related, plaintiffs have the opportunity to show that alternative, less discriminatory means are available and preferable. Such a showing will lend credence to a finding that the defendant’s evidence of business necessity is a pretext for discrimination.

*Griggs* and *Albermarle* are by no means the last word on disparate impact as a theory of recovery under Title VII. The issue presents itself before the Supreme Court again and again in later periods seeking to clarify the parameters of the theory. Although some of these later cases are beyond the scope of this study, those discussed here provide the foundation for disparate impact theory. And soon, the Court would be called upon again to interpret Title VII’s proscription against unlawful employment practices, this time in the form of intentional discrimination.

**Disparate Treatment Defined**

Intentional discriminatory employment practices are proscribed by §703(a)(1) of Title VII. That section, proscribing disparate treatment, states,

> [I]t shall be an unlawful employment practice for an employer 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.

This theory, as distinguished from disparate impact, is concerned with the state of mind of the person who is discriminating, i.e., their intent. “The plaintiff [in disparate treatment cases] is required to prove that the defendant had a discriminatory intent or motive...”

The first Supreme Court case to interpret the aforementioned section and to delineate the applicable burdens of proof in a disparate treatment case is *McDonnell Douglas Corp. v. Green*. Prior to this case, there was confusion as to the order of allocation of proof in private, non-class action suits challenging employment discrimination. *McDonnell* sought to clarify the issue.

In *McDonnell*, the respondent was a black civil rights activist previously employed with McDonnell Douglas Corp. (“McDonnell”) Green had worked for the company for approximately eight years when he was laid off as part of a general reduction in McDonnell’s work force. In protest of the decision, Green planned a stall-in wherein he and other members of the

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329 Maurice E.R. Munroe, *supra* note 207 at 222.
330 Id.
331 *McDonnell, supra* note 290.
333 *McDonnell, supra* note 290 at 794.
Congress on Racial Equality illegally parked their cars on main roads leading to the plant in order to block ingress and egress during the morning shift change.\textsuperscript{334} Almost a year after Green was laid off, a “lock-in” took place at McDonnell wherein locks were placed on the front door of a building to prevent occupants from leaving. It is unclear to what extent Green, who knew about the plan beforehand, participated in the lock-in.\textsuperscript{335}

Approximately three weeks after the lock-in, McDonnell, advertised for qualified mechanics and Green applied for re-employment. McDonnell rejected Green’s application based on his participation in the previous year’s stall-in as well as the lock-in.\textsuperscript{336} In response, Green filed suit against the company alleging that they refused to hire him because of his race and his involvement with the Civil Rights Movement in violation of §§703(a)(1) and 704(a)\textsuperscript{337} of Title VII of the Civil Rights Act of 1964.\textsuperscript{338}

Green filed his claim before the EEOC as required by statute. The EEOC made no finding on Green’s §703(a)(1) claim but found that McDonnell was in violation of §704(a). After conciliation failed, the EEOC issued Green a right-to-sue letter to pursue the matter in federal court.\textsuperscript{339}

The District Court disagreed with the EEOC finding that §704(a) did not protect the activity Green had engaged in during the stall-in and the lock-in. Further, that court dismissed Green’s §703(a)(1) claim because the EEOC had failed to make a determination of reasonable cause to believe a violation of that section had been committed.\textsuperscript{340} The Court of Appeals agreed with the lower court’s §704(a) determination. However, they reversed the District Court’s decision with regard to Green’s §703(a)(1) claim holding that an EEOC determination of reasonable cause was not a jurisdictional pre-requisite to raising that claim in federal court.\textsuperscript{341} In remanding the case to the lower court for consideration of Green’s §703(a)(1) claim, the Court of Appeals attempted to delineate the applicable standards for consideration of his claim. In order to clarify those standards, the Supreme Court granted certiorari.\textsuperscript{342}

The Court agreed with the Court of Appeals with regard to their decision on Green’s §703(a)(1) claim holding “court actions under Title VII are de novo proceedings and...a

\textsuperscript{334} Id. “Five teams, each consisting of four cars would ‘tie up’ five main access roads into McDonnell at the time of the morning rush hour. The drivers of the cars were instructed to line up next to each other completely blocking the intersections or roads. The drivers were also instructed to stop their cars, turn off the engines, pull the emergency brake...and remain in their cars until police arrived.” Id.
\textsuperscript{335} Id. at 795.
\textsuperscript{336} Id. at 796.
\textsuperscript{337} §704(a) of Title VII reads in pertinent part, “It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title.” Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012).
\textsuperscript{338} McDonnell, supra note 290 at 796.
\textsuperscript{339} Id. at. 797.
\textsuperscript{340} Id.
\textsuperscript{341} Id.
\textsuperscript{342} Id.
Commission ‘no reasonable cause’ finding does not bar a lawsuit in that case.”\textsuperscript{343} In resolving Green’s §703(a)(1) claim, the Court noted that Green alleged that he was denied employment “because of his involvement in civil rights activities” and “because of his race and color.”\textsuperscript{344} The Court sought to explain “the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case.”\textsuperscript{345}

The plaintiff in a Title VII case alleging employment discrimination carries the initial burden to make a prima facie case of racial discrimination. The Court explained that this entailed,

showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.\textsuperscript{346}

The Court found that Green had succeeded in making out a prima facie case and next explained that having done so, the burden of proof then shifts to the employer. The employer at this stage must, “articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”\textsuperscript{347} The Court accepted McDonnell’s proffered reason for rejecting Green’s application: Green’s involvement in unlawful activity against the company. Thus, the Court explained, McDonnell having met their burden, the burden shifts back to the plaintiff who is afforded the opportunity to prove that the employer’s stated reason is pretext.\textsuperscript{348} In this case, the Court explained, “[e]specially relevant to such a showing [of pretext] would be evidence that white employees involved in acts against petitioner of comparable seriousness to the “stall-in” were nevertheless retained or rehired.”\textsuperscript{349} The Court remanded the case back to the District Court in order to allow Green the opportunity to proceed with his §703(a)(1) claim using the correct burden-shifting analysis.\textsuperscript{350}

Thus, \textit{McDonnell Douglas} is credited as setting forth the applicable analysis in making an intentional employment discrimination claim through circumstantial evidence. The Court therein clarifies that once a plaintiff alleging employment discrimination has carried his

\textsuperscript{343} Id. at 799.
\textsuperscript{344} Id. at 801.
\textsuperscript{345} Id.
\textsuperscript{346} Id. at 802. One commentator notes that with the promulgation of this prima facie case, the Court made it possible to prove discrimination with circumstantial evidence. David Benjamin Oppenheimer, \textit{The Story of Green v. McDonnell Douglas}, \textit{in Employment Discrimination Stories} 48 (Joel WM. Friedman ed., 2006).
\textsuperscript{347} Id. It was the Court of Appeals’ misinterpretation of the applicable burdens at this stage which caused the Court to grant certiorari in order to clarify the issue. The Court of Appeals intimates that McDonnell’s stated reason for refusing to hire Green was a subjective rather than objective criterion which carries little weight in rebutting charges of discrimination. However, the Court held that, “[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.” \textit{McDonnell, supra} note 290 at 803.
\textsuperscript{348} Id. at 804.
\textsuperscript{349} Id.
\textsuperscript{350} Id. at 807.
burden of setting forth a prima facie case for racial discrimination, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment action. Once the employer carries its burden, the burden shifts back to the plaintiff allowing them the opportunity to prove that the employer’s cited reason is pretext.

Similar to Griggs, McDonnell Douglas is not the final word on intentional discrimination claims. A host of cases have been tried before the Court analyzing the several aspects of this burden-shifting analysis. However, McDonnell established itself as a major employment discrimination case that arguably still has relevance today. In any event, McDonnell would remain the law of the land with regard to intentional discrimination claims during this period. Having settled the law on intentional discrimination claims as well as class or systemic discrimination claims alleging discriminatory impact, the Court would be called upon again throughout this period to interpret several nuances of these theories.

The Use of Statistical Evidence in Pattern or Practice Cases

Several years after McDonnell Douglas was decided, the Court would be faced with the issue of the use of statistical analysis as evidence of discrimination. Building upon the idea of a prima facie case of discrimination, and what evidence constitutes the same, the Court would hear two cases analyzing this issue: Hazelwood School District v. United States and International Brotherhood of Teamsters v. United States. In these cases, the Court establishes the applicable burden of proof to be carried by the plaintiff in a pattern or practice suit as well as the relevant issues courts should keep in mind when parties seek to use statistics as evidence of discrimination.

Briefly, in Teamsters, the Court had before them a case in which it was alleged that the company had engaged in a pattern and practice of employment discrimination against African Americans and Spanish-surnamed Americans. T.I.M.E. – C.C., Inc., the company, was accused of employing discriminatory hiring, assignment, and promotion policies at its Nashville terminal. Both the District Court and the Court of Appeals agreed that the company was guilty of discrimination as accused but disagreed as to the appropriate remedy. The Court granted certiorari to resolve the remedial dispute.

Before the Court, the company contended that their actions were not in violation of Title VII and that the evidence introduced at trial alleging the same was insufficient to prove a

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352 The relevance of McDonnell Douglas is under debate amongst the legal community, particularly in light of the fact that many argue that the Court’s decision in Desert Palace, Inc. v. Costa, overruled McDonnell Douglas.
353 Hazelwood, supra note 291.
355 Teamsters, supra note 354 at 328.
356 Id. at 329. It was alleged that African Americans and Spanish-surnamed persons who had been hired were given lower paying, less desirable jobs as servicemen or local city drivers, and were thereafter discriminated against with respect to promotions and transfers. Id.
357 Id. at 31-334.
violation. In evaluating the decision of the trial court, the Court explained that plaintiffs bore the initial burden of making a prima facie case of discrimination pursuant to its holding in *McDonnell Douglas*. The government’s burden, the Court explained, was to “establish by a preponderance of the evidence that racial discrimination was the company’s standard operating procedure, the regular rather than the unusual practice.”

In order to carry its burden, the government offered statistical evidence of the dearth of Spanish-surnamed persons and African Americans employed by T.I.M.E.-D.C. and bolstered these statistics with testimony from over 40 individuals recounting specific instances of discrimination. In response, the company averred that the statistical evidence could not in and of itself prove pattern and practice discrimination. The Court disagreed. They explained:

> Our cases make it unmistakably clear that “[s]tatistical analyses have served and will continue to serve an important role” in cases in which the existence of discrimination is a disputed issue...We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases...Statistics are equally competent in proving employment discrimination. We caution only that statistics are not irrefutable, they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short their usefulness depends on all of the surrounding facts and circumstances.

Thus, the Court in *Teamsters* affirmed the validity of statistical proof as sufficient evidence to make a prima facie case of discrimination. However, the Court would be called upon within the same month to address another nuance in the use of statistical evidence. In *Hazelwood*, the issue before the court was whether the Court of Appeals’ reliance on statistical proof, in finding a pattern and practice of discrimination, was lacking in probative force.

In that case, the United States had filed suit in federal court alleging that the Hazelwood, Mo. school district, located in St. Louis County, had engaged in a pattern or practice of teacher employment discrimination in violation of Title VII. The Attorney

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358 Id. at 334.
359 Id. at 336.
360 Id. at 37-339. Shortly after the government filed its complaint, the company had 6,472 employees, 5% of which were African American and 4% of which were Spanish-surnamed persons. Of the 1,828 line drivers, there were only .4% (8) African Americans and .3% (5) Spanish-surnamed persons; all of the African American line drivers had been hired after litigation commenced. A large number of African Americans who did work for the company had lower paying city operations and serviceman jobs: 83% African American and 78% Spanish-surnamed persons. Only 39% of non-minorities held jobs in these categories. Id. at 338.
362 Id. at 339.
363 Id. at 342-43.
364 Id. at 342.
365 Hazelwood, supra note 291 at 307.
366 Id. at 301.
General requested an injunction requiring the school district to cease its discriminatory practices among other prayers for relief.\textsuperscript{367}

Once again, statistics formed the basis of the government’s claim. Hazelwood was comprised of 13 school districts, and by the 1697-1968 school year, 17,550 students were enrolled in the district, only 59 of whom were African American.\textsuperscript{368} By the 1972-1973 school year, that number had increased to 25,166 students of which 576 (2\%) were African American.\textsuperscript{369} When serious recruitment for new teachers began in the 1960s, it was found that Hazelwood failed to recruit from the two predominantly black four-year colleges in Missouri.\textsuperscript{370} The 1970 census revealed that St. Louis employed 19,000 teachers, 15.4\% of whom were African American.\textsuperscript{371} However, this percentage included the St. Louis City School District who employed a policy of attempting to maintain a 50\% African American teaching staff; leaving the St. Louis City School District out of the calculation, only 5.7\% of the teachers in the county were African American during the 1970 school year.\textsuperscript{372} Thus, the government claimed that Hazelwood had a history of: racially discriminatory practices, statistical disparities in hiring, standardless and largely subjective hiring procedures, and 55 specific instances of alleged discrimination.\textsuperscript{373}

While the District Court ruled that the government failed to establish a pattern and practice of discrimination case, the Court of Appeals reversed the decision relying on the statistics provided.\textsuperscript{374} In granting certiorari, the Supreme Court reiterated its \textit{Teamsters} ruling that “where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.”\textsuperscript{375}

However, the Court took issue with the manner in which the Court of Appeals analyzed the statistics before them. While the Court agreed that a proper comparison was between the composition of Hazelwood’s teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market, the Court pointed out that the Court of Appeals failed to take into consideration that the government’s statistics could be rebutted by statistics dealing with the district’s hiring pattern after 1972, when public employers came under the purview of Title VII.\textsuperscript{376}
The Court ruled that the Court of Appeals should have remanded the case to the District Court for further proceedings that took into consideration:

whether the racially based hiring policies of the St. Louis City School District were in effect as far back as 1970, the year in which the census figures were taken; to what extent those policies have changed the racial composition of that district’s teaching staff from what it would otherwise have been; to what extent St. Louis’ recruitment policies have diverted to the city, teachers who might otherwise have applied to Hazelwood; to what extent Negro (sic) teachers employed by the city would prefer employment in other districts such as Hazelwood; and what experience in other school districts in St. Louis County indicates about the validity of excluding the City School District from the relevant labor market.377

Thus, while the Court in Hazelwood upheld the use of statistics as a basis for a prima facie case of pattern or practice discrimination, the Court clarified that such a case may be rebutted. In other words, statistics alone do not in themselves prove the existence of discrimination; it is only evidence of the same. Careful review of the statistics and the relevant labor market was needed in this case; thus the Court remanded for proceedings consistent with its findings.378

The two above-cited cases establish the utility of statistics in pattern and practice claims of discrimination and the parameters in which they may be used. As the Court attempts to make clear in Hazelwood, the use of statistics should be subject to a careful review of relevant factors in order that the statistics provide an accurate picture of the situation. An issue in the review of the statistics in that case was whether the Court of Appeals had taken into consideration the company’s post-1972 hiring practices. In the next section, the Court once again reviews post-1972 employment factors to determine their validity under Title VII.

Voluntary Affirmative Action Plans

At the end of this period, the Court was called upon in United Steelworkers of America, AFL-CIO-CLC v. Weber379 to determine whether Title VII of the Civil Rights Act of 1964 permitted unions and employers in the private sector to use a collectively-bargained-for affirmative action plan in an attempt to eliminate “manifest racial imbalances in traditionally segregated job categories.”380

377 Id. at 312.
378 See Stewart J. Schwab & Steven L. Willborn, The Story of Hazelwood: Employment Discrimination by the Numbers, in EMPLOYMENT DISCRIMINATION STORIES 48 (Joel WM. Friedman ed., 2006). Justice Brennan thought the statistical analysis in the lower courts was sufficiently muddled that a remand was appropriate to “allow the parties to address these figures and calculations with greater care and precision.” Id. at 50.
379 Weber, supra note 292.
380 Id. at 197.
Prior to 1974, Kaiser Aluminum & Chemical Corp. (“Kaiser”) hired as craft workers for their Gramercy plant those who had prior craft experience; because African Americans had traditionally been excluded from craft unions, few were able to qualify for those positions.\textsuperscript{381} Thus, only 5 out of 273 (1.83\%) workers at the Gramercy plant were African American even though the work force in the Gramercy area was 39\% black.\textsuperscript{382}

In 1974 Kaiser and United Steelworkers of America (USWA) entered into a collective bargaining agreement wherein:

> [b]lack craft-hiring goals were set for each Kaiser plant equal to the percentage of blacks in the respective local labor forces...on-the-job training programs were established to teach unskilled production workers – both black and white – the skills necessary to become craftworkers. (Sic) The plan reserved for black employees 50\% of the openings in these newly created training programs.\textsuperscript{383}

Trainees for the program were selected based on seniority, with the proviso that 50\% of the new trainees were to be black, in fulfillment of the collective bargaining agreement terms. The first year the plan was implemented, 13 new trainees were selected, 7 were black and the rest white. This suit arose because the most senior black trainee had less seniority than several white trainees who had been rejected from the program.\textsuperscript{384} Weber, the plaintiff below, alleged in his complaint that the terms of the collective bargaining agreement resulted in junior black trainees receiving preference over senior white trainees; this constituted, Weber averred, a violation of §§703(a) and 703(d)\textsuperscript{385} of Title VII.\textsuperscript{386}

In deciding this case, the Court made clear that first, Title VII works to protect both black and white citizens.\textsuperscript{387} However, the Court also indicated that since the collective bargaining was entered into voluntarily, they “were not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act.”\textsuperscript{388} This matter of first impression, the Court determined, would require an examination of the legislative history; in order to resolve this claim, the Court had to determine Congress’ intent with regard to voluntary affirmative action plans.

The first line in the Court’s rationale was to recognize that the legislative intent of Title VII was clear that “an interpretation of the [Act] that forbade all race-conscious
affirmative action would "bring about an end completely at variance with the purpose of the statute." It was clear from the Court's review of the legislative intent, that Congress was concerned with the economic plight of African Americans, and that securing jobs was a clear goal of the Civil Rights Act of 1964. The importance of securing jobs for African Americans was explained by Senator Humphrey and quoted by the Court:

What good does it do a Negro (Sic) to be able to eat in a fine restaurant if he cannot afford to pay the bill? What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a Negro (Sic) child be motivated to take full advantage of integrated educational facilities if he has no hope of getting a job where he can use that education? Without a job, one cannot afford public convenience and accommodations. Income from employment may be necessary to further a man's education, or that of his children. If his children have no hope of getting a good job, what will motivate them to take advantage of educational opportunities?

Thus, the Court found that Congress did not intend to proscribe the use of voluntary affirmative action efforts that sought to alleviate the problem as expressed by Senator Humphrey. The Court further noted that their conclusion was reinforced by the language of the legislative history of §703(j) of title VII. That provision reads, in pertinent part:

> [n]othing contained in this title shall be interpreted to require any employer...to grant preferential treatment to any individual because of his race...on account of an imbalance which may exist with respect to the total number of any race...employed by the employer, in comparison with the total number or percentage of persons of such race...in the available work force.

In analyzing this provision, the Court noted that Congress indicates that although employers are not compelled to grant preferential treatment based on racial imbalance, it did not expressly forbid employers from entering into voluntary affirmative action programs. One commentator explains that this interpretation meant that Congress did consider quotas, but chose only to bar those ordered by the government, in order to preserve employer autonomy.

Finally, the Court looked to the characteristics of the affirmative action plan employed by Weber and noted that:

1. it did not require the discharge of white workers and their replacement with new black hirees; (Sic)  
2. the plan did not create an absolute bar to the advancement of white employees as half of those trained in the program would be white; and  
3. the plan was

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389 *Id.* at 202.  
390 *Id.* at 203.  
392 See Weber, supra note 292 at 205-06.  
temporary in that preferential selection of craft trainees would end as soon as the percentage of black skilled craftworkers (Sic) in Gramercy approximated the percentage of blacks in the local labor force.\textsuperscript{394}

As such, the Court found that voluntary affirmative action plans were permissible under title VII.

The above review of Supreme Court cases heard during this period makes clear that the Court was busy interpreting the exact meaning of the 1964 statute as well as the repercussions from the 1972 amendments. During this period, a few opinions by the Court revealed that they had had a little help interpreting Title VII.

\textit{The Judiciary & the EEOC}

During this period, the cooperation between the EEOC, which was created to enforce Title VII of the Civil Rights Act of 1964, and the courts who are charged with the interpretation of statutes, was evident. Some of the early cases of the 1970s explicitly acknowledge the importance of deference to agency guidance.\textsuperscript{395} While an extensive discussion on agency deference is beyond the scope of this study, a brief description of the theories proceeds below in order to provide a foundation for later trends observed with regard to the Court and its adherence to and rejection of agency guidelines. This is relevant because the EEOC routinely publishes regulations as well as policy guidance that are recommended for use in interpreting and enforcing Title VII.\textsuperscript{396}

There are two models of deference to agency guidance: earned and compelled deference.\textsuperscript{397} By the time the 1964 Act passed, only one of the models had been promulgated by the Court.\textsuperscript{398} However, regardless of which model could apply, the general rule is that where the statutory language is unambiguous, it supersedes both models.\textsuperscript{399} “A court must first consider whether Congress has spoken clearly to the disputed issue. If so, then neither deference model applies, and the inquiry ends.”\textsuperscript{400}

Another general rule applies when determining the weight of deference to apply to a particular agency’s published rules and guidelines. One scholar explains,

\begin{quote}
[\textit{[l]}\textit{legislative regulations are grounded in a congressional grant of authority, and enacted pursuant to the Administrative Procedure Act (APA) while interpretive rules are exempt from these requirements. The purpose of this exemption is to “allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings.” When courts face difficulty distinguishing between the two, they}
\end{quote}

\begin{thebibliography}{400}
\bibitem{394} Weber, \textit{supra} note 292 at 208.
\bibitem{395} Albermarle, \textit{supra} note 319; Griggs, \textit{supra} note 289; Phillips, \textit{supra} note 288.
\bibitem{396} Occhialino and Vail, \textit{supra} note 210 at 702.
\bibitem{397} Wern, \textit{supra} note 215 at 1536.
\bibitem{398} The concept of earned deference was promulgated by the Court in \textit{Skidmore v. Swift & Co.,} 323 U.S. 134 (1944).
\bibitem{399} Wern, \textit{supra} note 215 at 1536.
\bibitem{400} \textit{Id.}
\end{thebibliography}
generally focus upon the rule’s impact on interested parties rather than its form or origin.\textsuperscript{401}

The first model of deference, earned deference, applies to those agency rules that have not undergone the administrative procedures as required by the APA in order to become legally binding rules. A commentator explains that courts are not compelled to follow these types of guidelines.\textsuperscript{402} Rather, the Court will conduct an evaluation of the rule or guideline in order to determine the appropriate weight of deference. This type of earned deference was promulgated by the \textit{Skidmore} Court which held that “such rulings were at most entitled to persuasive weight, with persuasiveness depending upon the ‘thoroughness evident in [their] consideration, the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all other factors which give [them] power to persuade…”\textsuperscript{403}

The second model of deference, compelled deference, applies to rules that have gone through all the APA requirements. “A court is compelled to follow this type of guidance unless it directly conflicts with the statute that originally empowered the agency,”\textsuperscript{404} one author explains. This concept was promulgated by the \textit{Chevron}\textsuperscript{405} Court in a two-step analysis that would aid courts in determining when and how to defer to agency regulations. The first step requires that a court determine if the language of the statute is clear; if so, a court is obliged to follow that language.\textsuperscript{406} Under the second step, if the language is ambiguous, the issue before the court is whether the agency’s answer is based on a permissible construction of that statute.\textsuperscript{407} In order to make this determination, the Court explained,

[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.\textsuperscript{408}

In interpreting the two-part test as set forth in \textit{Chevron}, one scholar notes that \textit{Chevron} (compelled) deference does not apply to non-binding or “interpretive rules” similar to the guidelines promulgated by the EEOC. Therefore, if \textit{Chevron} is read to apply only to binding regulations, its impact on judicial deference is very narrow.\textsuperscript{409}

The \textit{Griggs} Court, the \textit{Phillips} Court, as well as the \textit{Albermarle} Court all indicated that EEOC regulations are entitled to “great deference”\textsuperscript{410} even though EEOC guidelines have not

\textsuperscript{401} Id. at 1543.
\textsuperscript{402} Id. at 1536.
\textsuperscript{403} Rebecca Hanner White, \textit{supra} note 212 at 71.
\textsuperscript{404} Wern, \textit{supra} note 215 at 1536.
\textsuperscript{406} Wern, \textit{supra} note 215 at 1542.
\textsuperscript{407} Id.
\textsuperscript{408} \textit{Chevron}, \textit{supra} note 405 at 843-44.
\textsuperscript{409} Wern, \textit{supra} note 215 at 1542.
\textsuperscript{410} See \textit{Albermarle}, \textit{supra} note 319 at 430-31, \textit{Griggs}, \textit{supra} note 289 at 433-34, and \textit{Phillips}, \textit{supra} note 288 at 545-46.
undergone the rigors of APA procedures that give them the force of binding rules. But by 1976, the Court had started to shy away from according the guidelines of the EEOC with that level of deference. Indeed, in one case, *General Electric Co. v. Gilbert*, the Court disparaged the force of the guidelines. In that case, they explained that “since the agency had not been given the authority to issue substantive legislative rules, its guidelines were merely interpretive rules entitled to “less weight” from the reviewing court.” The theme of rejecting EEOC guidelines that characterized the latter part of the decade would recur as time went on, and the cooperation enjoyed between the courts and the EEOC would continue to dwindle.

The above provides a review of the interplay of judicial interpretation, the regulatory environment and legislative enactment that took place between 1964 and 1981. This period saw the 1972 amendments to the Civil Rights Act of 1964 and the resulting changes to the statute. Further, both the courts and the EEOC were kept busy throughout this period interpreting and enforcing the law. The forthcoming section advances the story with regard to Title VII and the major events influencing the law in the 1980s.

**What Came After: 1982-1990**

It is now approximately 17 years after the Civil Rights Act of 1964 was passed and about a decade since the 1964 Act was amended to provide the EEOC with more powers and bringing previously unprotected employees under the purview of the statute. While no further substantive legislative changes take place during this period, this time period is characterized by a few notable changes within the EEOC and its methods of enforcing the 1964 Act. Further, the end of this period sees the Supreme Court flail in its efforts to further interpret Title VII.

**The EEOC, A Time of Change and Reassessment**

At the beginning of this decade, the EEOC is boasting the success of Norton's RCP system and her fact-finding conferences in effectively tackling the backlog of cases. However, the agency was simultaneously reeling from the expansion of its authority as a result of President Carter's Reorganization Plan No. 1 of 1978 and Executive Order 12067. With this order, The Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, as well as §§501 and 505 of the Rehabilitation Act of 1973 were brought under the purview of the EEOC. Further, Congress had amended Title VII in 1978 passing the Pregnancy Discrimination Act of 1978 and placed the duty for enforcing the same on the EEOC. The expansion of enforcement duties helped create another backlog; the agency was inundated

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41 *429 U.S. 125 (1976).*
42 *Rebecca Hanner White, supra* note 212 at 71.
44 *Occhialino and Vail, supra* note 210 at 682.
with 683,000 charges that decade based on the various statutes under its purview.\footnote{Occhialino and Vail, supra note 210 at 683.} Several factors contributed to this situation.

First, although President Carter and Congress expanded the scope of the EEOC’s duties, they failed to increase funding for the EEOC.\footnote{Id.} This resulted in a significant reduction in staff by the end the 1980s; from a staff of 3,752 positions in 1979, the EEOC had only 2,941 positions by 1987.\footnote{Id.}

Second, this period would see a change in the leadership of the agency. In 1982 Clarence Thomas began his tenure as the Chair of the EEOC.\footnote{Michael Z. Green, supra note 206 at 329.} The confluence of this event and criticisms of the RCP system would change the focus of the enforcement methods at the agency. A General Accounting Office (GAO) report indicated that the RCP program “fostered a system where culpability did not matter...cases with merit were being settled too quickly and too cheaply, and cases without merit were being settled for too much money.”\footnote{Id.} Perhaps as a result of these criticisms, Thomas changed the focus of the EEOC’s enforcement methods in 1983 to concentrate on more complete investigations.\footnote{See Maurice E.R. Munroe, supra note 207 at 266.} While Thomas did not fully abandon the RCP system, he favored a case-by-case analysis of the appropriate method for filing charges rather than assuming cases would be handled by the RCP system.\footnote{Id.} Thus, the goal was full investigation of all charges, rather than prioritizing which charges should be given the most attention.\footnote{Id.}

Around 1984 and 1985, the EEOC’s philosophy of investigating all charges resulted in a new policy wherein they “pursued through litigation each case in which merit has been found and conciliation has failed”\footnote{Id.} with a goal of “prompt, comprehensive and complete relief for all individuals directly affected by violations of the statute.”\footnote{Maurice E.R. Munroe, supra note 205 at 268.} This resulted in the agency increasing the number of lawsuits it filed.\footnote{Id.} However, this also contributed to the increase in the backlog. Between 1980 and 1982, the average backlog per year was 30,433.\footnote{Id.} However, once the new policy was implemented, the backlog steadily increased from 39,893 in 1984 to 61,686 in 1987.\footnote{Id.} Further as a result of this program change, the time to process each claim increased from approximately 3-6 months in 1980 to 6.4 months in 1985 and finally up to 9.3 months in 1987.\footnote{Id.}

\footnote{Occhialino and Vail, supra note 210 at 683.}
\footnote{Id.}
\footnote{Id.}
\footnote{Michael Z. Green, supra note 206 at 329.}
\footnote{Id.}
\footnote{See Maurice E.R. Munroe, supra note 207 at 266.}
\footnote{Id.}
\footnote{See Nancy M. Modesitt, supra note 216 at 1242.}
\footnote{Maurice E.R. Munroe, supra note 207 at 267.}
\footnote{Id.}
\footnote{See Occhialino and Vail, supra note 210 at 684; Maurice E.R. Munroe, supra note 205 at 268.}
\footnote{See Maurice E.R. Munroe, supra note 207 at 268.}
\footnote{Id.}
\footnote{Id.}
As a result, one author notes, during this time, the EEOC initiated fewer investigations under its systemic program than it had in the previous decade, and its record of pursuing pattern and practice class suits also deteriorated.\(^{430}\) Thus, by the conclusion of this time period, the EEOC was fully engaged in determining how best to handle its ever-increasing number of charges.\(^{431}\) While the end of the decade brought about challenges for the EEOC in determining how to tackle its growing case load and to gain recognition by the Court, the Supreme Court was similarly burdened and busy interpreting title VII, with equally unsatisfactory results.

**The Supreme Court is Overruled**

The 1980s was significant for litigation of Title VII claims; indeed, the Supreme Court heard some 124 cases that dealt with Title VII in some form or fashion.\(^{432}\) Several important cases were heard by the Court during this period. For example, the Court began the decade by hearing *Texas Department of Community Affairs v. Burdine*\(^{433}\) wherein it clarified the applicable burden of production as stated in *McDonnell Douglas*.\(^{434}\) The Court made clear that the burden on the employer to articulate a legitimate non-discriminatory reason for an employment decision is a burden of production; the employer is not obliged to "persuade the court that it was actually motivated by the proffered reasons."\(^{435}\) The Court explained that the burden of persuasion rests at all times with the plaintiff.\(^{436}\) One year later, the Court would once again be called upon to clarify the appropriate analysis for Title VII discrimination claims in *United States Postal Service Board of Governors v. Aikens*.\(^{437}\)

Reading the cases in *pari materia*, we learned from *McDonnell Douglas*, the "basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment."\(^{438}\) *McDonnell* set forth the means in which a Title VII plaintiff establishes a prima facie case, which creates a rebuttable presumption that the employer unlawfully discriminated against him.\(^{439}\) In *Burdine*, the Court clarifies that once the prima facie case is established, the burden that shifts to the defendant is one of production; all the employer need do is clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection thereby rebutting the presumption raised by the prima

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\(^{430}\) Id. at 269.

\(^{431}\) See Occhialino and Vail, *supra* note 210 at 685. At the end of the decade, in 1989, the EEOC received 59,411 charges. While this is a significant decrease from the previous year's 72,002 charges, the EEOC was clearly overburdened in handling the number of charges. Maurice E.R. Munroe, *supra* note 207 at 270.

\(^{432}\) This figure was reached by conducting a search on Westlaw legal database and entering a search for Title VII cases. The search returned a list of 305 cases, 124 of which were heard between 1980 and 1990.


\(^{434}\) *McDonnell*, *supra* note 290.

\(^{435}\) *Burdine*, *supra* note 433 at 254.

\(^{436}\) Id. at 255.


\(^{438}\) *Burdine*, *supra* note 433 at 252.

\(^{439}\) Id. at 254.
The plaintiff, at all times, retains the burden of persuasion on the ultimate question of whether the employer intentionally discriminated against him; he may prove this directly by persuading the court that the discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.

United States Postal Service provides further clarity initially by stating that the ultimate factual inquiry in a Title VII case is “whether the defendant intentionally discriminated against the plaintiff.” The power to make this determination lies in the hands of the District Court, the Court explains. In United States Postal Service, the Court was concerned that after a full bench trial, the parties were still disputing whether a prima facie case had been established by the plaintiff. The Court instead made clear that once the defendant proffered the explanation for the employment decision, it is irrelevant whether a prima facie case is established; at this point, the court has before it the evidence required to determine the ultimate question. The Court explains,

when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff’s proof by offering evidence of the plaintiff’s rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption ‘drops from the case,’ and the factual inquiry proceeds to a new level of specificity.

Concerned that litigants were unnecessarily focused on the mechanics of the burden-shifting analysis set forth in McDonnell, the court indicated that parties should not make the ultimate question more difficult by “applying legal rules that were devised to govern the ‘allocation of burdens and order of presentation of proof.’”

In the middle of the decade, the Court heard the case of Meritor Savings Bank, FSB v. Vinson, which declared that hostile work environment sexual harassment cases are actionable under Title VII. One year later, the Court in Bazemore v. Friday, once again dealt with the issue of statistics in Title VII cases. The Court held in that case that, employees’ use of multiple regression analyses which failed to use all variables affected the probativeness (Sic) of the analyses but not their admissibility. And finally, two years after that decision, the

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440 Id. at 255.
441 Id. at 256.
442 United Postal Service, supra note 437 at 715.
443 Id.
444 Id.
445 Id. at 714-15.
446 477 U.S. 57 (1986).
Court heard *Watson v. Fort Worth Bank and Trust*,\(^{449}\) which considered whether disparate impact analysis may be applied to hiring or promotion systems that involve the use of “discretionary” or “subjective” criteria. The Court answered this question in the affirmative.\(^{450}\) This has particular resonance for the education cases discussed later in this study wherein educators habitually rely on subjective criteria in employment decision making.

The aforementioned cases heard by the Supreme Court in this period are significant for their interpretation of Title VII’s strictures. However, arguably the most important cases of this period were all heard in 1989 and are significant in that the collective holdings in these cases were impetus for legislative action in the next time period. While these five cases continue the work of interpreting Title VII, their significance lies in their collective capacity as cases that represent a shift from congressional intent.\(^{451}\) Thus, the description of these cases will proceed in a similar fashion to the aforementioned cases in this section, with a brief outline of the issue and holding of each case.\(^{452}\)

The first of these five cases, *Price Waterhouse v. Hopkins*, was overruled because of portions of the concurring opinion of Justice O’Connor relating to direct and circumstantial evidence. However, the judgment of the court as announced by Justice Brennan sets forth the law with regard to discrimination based on sex stereotyping and is discussed here for that point of law. In *Hopkins*, plaintiff, Ann Hopkins, sued her employers, Price Waterhouse, for discrimination based on her sex when her candidacy for partnership was held over for consideration for the following year. On the year she was proposed for partnership, 87 other individuals were proposed; Hopkins was the only female. Although Hopkins made significant contributions to the firm, including helping to secure a $25 million contract with the Department of State, and her professional skills were lauded, her evaluations were filled with complaints that Hopkins was sometimes “overly aggressive, unduly harsh, difficult to work with and impatient with staff.”\(^{453}\)

Relevant to her discrimination claim, were comments in her evaluations made by other partners that: described her as “macho,” suggested that she “overcompensated for being a woman,” objected to her using foul language because “it’s a lady using foul language,” and indicated that in order to improve her chances to make partner she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled,

\(^{449}\) Watson, supra note 327.
\(^{450}\) See Id.
\(^{451}\) David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, 849 LAB. LAW 849-922, 849 (1992). The details of the legislative action taken as a result of these case holdings will be discussed in the following section.
\(^{452}\) However, the details of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) will be discussed more fully as this case represents significant case law interpreting discrimination based on sex stereotypes and has applicability to the subsequent chapters of this study as a foundation for education cases based on a similar theory.
\(^{453}\) Price Waterhouse, supra note 21 at 235.
and wear jewelry.”\textsuperscript{454} In this case, the Court found that Title VII protects individuals from sex stereotyping. The Court explained:

As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court’s conclusion that a number of the partners’ comments showed sex stereotyping at work. As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”… An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.”\textsuperscript{455}

Although this case will be discussed more fully in subsequent portions of this review for other points of law implicated in this opinion, it is discussed here for its significance in promulgating the law as it regards to sex stereotyping. It provides foundation for subsequent discussion of education cases that utilize this theory under Title VII.

The other four cases decided by the Court and subsequently superseded by statute were decided in June of 1989. \textit{Wards Cove Packing Company, Inc. v. Antonio et al.},\textsuperscript{456} addresses the issue of relevant labor markets as discussed in \textit{Hazelwood}.\textsuperscript{457} In \textit{Wards Cove}, respondents, in the lower court, attempted to make a disparate impact claim regarding the employment practices of two salmon canneries operating in Alaska.\textsuperscript{458} Respondents alleged that the companies’ employment practices kept white workers in skilled non-cannery jobs while non-skilled cannery positions were primarily held by non-white, Filipinos and Alaska Natives.\textsuperscript{459} Respondents supplied statistics in line with this alleged disparity. However, the Court indicated that in disparate impact cases, the first issue is causation; it is not enough to show statistical evidence of disparities; rather, plaintiffs must show that a particular employment practice is responsible for the disparity.\textsuperscript{460} The Court then noted, “if, on remand, respondents...establish a prima facie case of disparate impact with respect to any of petitioner’s employment practices, the case will shift to any business justification petitioners offer for their use of these practices...”\textsuperscript{461} If the petitioner carries this burden, the respondents have the opportunity to persuade the factfinder that another employment

\begin{thebibliography}{9}
\bibitem{454} Id.
\bibitem{455} Id. at 251.
\bibitem{456} Wards Cove, supra note 327.
\bibitem{457} Hazelwood, supra note 291.
\bibitem{458} Wards Cove, supra note 327.
\bibitem{459} Id. at 647.
\bibitem{460} Id. at 656-57.
\bibitem{461} Id. at 658.
\end{thebibliography}
practice may be employed without a similarly undesirable racial effect. Thus, the Court here attempts to show that Title VII disparate impact claims target specific employment practices that cause a disparate impact, not simply statistics evincing disparities that may have resulted for any number of reasons. In so holding, the Court clarifies the applicable burdens of proof for both plaintiffs and defendants in these types of disparate impact cases.

The next case, Lorance v. AT&T Technologies, Inc., et al., challenged a collective bargaining agreement that changed the manner in which seniority was calculated to the detriment of several female workers. The respondents in this case filed a motion for summary judgment before the trial court alleging that petitioners had failed to timely file their complaint with the EEOC; respondents contended that the claims were time barred because “the relevant discriminatory act that triggers the period of limitations occurs at the time an employee becomes subject to a facially neutral but discriminatory system that the employee knows, or reasonably should know, is discriminatory.” The Supreme Court agreed. They held that,

when a seniority system is nondiscriminatory in form and application, it is the allegedly discriminatory adoption which triggers the limitations period...allowing a facially neutral system to be challenged, and entitlements under it to be altered, many years after its adoption would disrupt those valid reliance interests that §703(h) was meant to protect...[Here,] a female tester could defeat the settled (and worked-for) expectations of her co-workers whenever she is demoted or not promoted under the new system, be that in 1983, 1993, 2003 or beyond.

In so holding, the Court explained that a contrary holding would have disruptive implications. In Martin v. Wilks, petitioners, a group of white firefighters, alleged that the City of Birmingham discriminated against them by denying them promotions in favor of less qualified black firefighters. The promotion of black firefighters was a goal provided for in a consent decree entered into between “black individuals and the City.” Petitioners argued that the consent decree worked to discriminate against white firefighters while respondents claimed that the promotions were made in fulfilment of the consent decree. However, both the Court of Appeals and the Supreme Court found that although there is a strong general policy in favor of voluntary affirmative action programs, “this interest ‘must yield to the policy against requiring third parties to submit to bargains in which their interests were either ignored or sacrificed.’” The Court found that since petitioners were not parties to the

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462 Id. at 660.
464 Id. at 903.
465 Id. at 911-12.
467 Id. at 759.
468 Id. at 761.
consent decree, nor were they made a party by service of process, it would be unjust to bind
them to the strictures of the consent decree. They held that “[a] judgment or decree among
parties to a lawsuit resolves issues as among them, but it does not conclude the rights of
strangers to those proceedings...a party seeking a judgment binding on another cannot
obligate that person to intervene, he must be joined.” 469

Finally, in *Patterson v. McLean*, 470 the court granted certiorari to determine whether
petitioner’s claim of racial harassment was actionable under §1981 which provides, in
pertinent part, “all persons within the jurisdiction of the United States shall have the same
right in every State...to make and enforce contracts...” The petitioner in this matter claimed
that her employer, a credit union, harassed her, failed to promote her and then discharged her
because of her race in violation of §1981. Petitioner endorsed a reading of the statute that
found that the credit union’s racial harassment interfered with her right to make and enforce
contracts under §1981. The Court disagreed, finding that the complained of conduct, if true,
occurred after the contract relation had been established. 471 They held that §1981 “cannot be
construed as a general proscription of racial discrimination in all aspects of contract relations,
for it expressly prohibits discrimination only in the making and enforcement of
contracts...the right to make contracts does not extend, as a matter of either logic or
 semantics, to conduct by the employer after the contract relation had been established.” 472

The Court further noted that reading the statute in the manner petitioner proposed
would work to undermine the procedures for conciliation and resolution of Title VII claims. It
stated:

> [w]here conduct is covered by both §1981 and Title VII, the
detailed procedures of Title VII are rendered a dead letter, as the
plaintiff is free to pursue a claim by bringing suit under §1981
without resort to those statutory prerequisites...where the
statutes do overlap we are not at liberty to ‘infer any positive
preference for one over the other.’ 473

Thus, in this case, the Court indicates that racial harassment that takes place after the
formation of a contract is not actionable under §1981 as requested by the petitioner.

As indicated previously, the several aforementioned holdings would galvanize
Congress to act in the beginning of the next period. The next section explores the actions
taken by Congress in response to the Court’s holdings.

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469 Id. at 762-63.
471 Id. at 177.
472 Id. at 176-77.
473 Id. at 181.
What Came After: 1991-2002

The legislative history of the Civil Rights Act of 1991 (hereinafter “the 1991 Act”) explicitly names as one of its purposes the intent to negate five decisions of the Supreme Court as named and discussed above.\textsuperscript{474} Further, the 1991 Act sought to expand remedies available in sex discrimination and harassment claims.\textsuperscript{475} With regard to the EEOC, the agency saw a further expansion of its charge and changes in its leadership that resulted in another change in the agency’s enforcement methods. Finally, the judiciary remained active during this period as well promulgating rules with regard to tangible employment actions and same-sex harassment. Each of these developments will be discussed in turn.

The Civil Rights Act of 1991

The passage of the Civil Rights Act of 1991 was a second attempt by Congress to amend the 1964 Act during this period; Congress had attempted to pass the Civil Rights Act of 1990 but President Bush vetoed the bill because of his view that the bill would “have the effect of forcing businesses to adopt quotas in hiring and promotion.”\textsuperscript{476} Later, during the 102\textsuperscript{nd} Congress, Senator Danforth introduced Senate bill 1745 to the Senate on September 24, 1991.\textsuperscript{477} The President indicated to Senator Danforth that he would sign the bill as long as it did not contain “quota” provisions\textsuperscript{478} and thus S. 1745 was amended to become Public Law 102-166 on October 29 and 30, 1991.\textsuperscript{479} The bill passed in the Senate on October 30, 1991 and in the House on November 7, 1991.\textsuperscript{480} Six days later, President Bush signed S. 1745 into public law.\textsuperscript{481} In passing the 1991 Act, Congress had several goals, one of which was to negate several recent Supreme Court decisions.\textsuperscript{482} Further, the 1991 Act creates the right to a jury trial under Title VII of the 1964 Act and allows for the recovery of compensatory and punitive damages for intentional discrimination claims under Title VII.\textsuperscript{483} These and several other changes brought about by the statute will be discussed below.

The 1991 Act Supersedes Patterson

As discussed in the previous section, the Court in \textit{Patterson v. McLean Credit Union}, held that racial harassment that took place during plaintiffs employment was not actionable under §1981, since the racial harassment alleged in that case did not happen at the time of

\begin{footnotesize}
\begin{enumerate}
\item David A. Cathcart & Mark Snyderman, \textit{supra} note 451 at 849.
\item Id.
\item \textit{Id. at vi.}
\item \textit{Id.}
\item \textit{Id. at xi.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
the making of the contract. Under *Patterson*, employment actions such as refusals to hire and to promote in some cases fell under §1981’s purview while post-formation conduct such as racially motivated firings, demotions, disciplinary practices and etc. are not actionable under the statute. Under §1981, however, jury trials and the recovery of compensatory and punitive damages were available; the same were not available remedies under Title VII.

As such, Congress added subsection (b) to §1981 prohibiting discrimination at the time of contract formation as well as during the course of employment. The new section makes it unlawful to “discriminate on the basis of race in ‘the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'” Thus, the last clause of the new subsection would allow a *Patterson*-like plaintiff to prevail in a case alleging racial harassment that took place after the formation of the contract since it would interfere with the enjoyment of the benefits, privileges, terms and conditions of the contractual relationship.

**Compensatory & Punitive Damages & Jury Trials**

§102 of the 1991 Act amends §1981 of the Civil Rights Act of 1866 to allow for compensatory and punitive damages in cases where intentional discrimination is alleged under Title VII. In Title VII cases, compensatory damages may be available under several theories. These damages are unavailable under Title VII if the plaintiff can recover under §1981 so as to remove the possibility of double recovery. These damages are capped at $300,000 for employers with more than 500 employees. The 1991 Act further makes jury trials available when these damages are sought. Punitive damages, like compensatory damages, are only available in Title VII intentional discrimination cases where the defendant is guilty of discriminating “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

**The 1991 Act Supersedes *Wards Cove***

The provisions of the 1991 Act addressing disparate impact and business necessity were the most controversial of the 1991 amendments. Recall that in the *Wards Cove* decision, the Court, in explaining the applicable burdens of proof, indicated that once a respondent has articulated a business necessity for the challenged practice, the petitioner then bears the burden of persuasion to convince the court that alternate, less discriminatory

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484 See *Patterson*, *supra* note 470.
485 Livingston, *supra* note 482 at 57.
486 *Id.*
487 *Id.* at 58.
488 Compensatory damages are available for: pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses. *Id.* at 59.
489 David A. Cathcart & Mark Snyderman, *supra* note 451 at 856.
490 The capped amount differs depending on the size of the employer.
491 David A. Cathcart & Mark Snyderman, *supra* note 451 at 855.
492 Livingston, *supra* note 482 at 70.
means of achieving the respondent’s goal are available.\textsuperscript{494} Pursuant to the 1991 amendments, the burdens of production and persuasion remain with the defendant at all times.\textsuperscript{495} Thus, according to the 1991 Act, a disparate impact claim is made out when:

a complaining party demonstrates that a respondent used a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.\textsuperscript{496}

The 1991 amendment encompasses a particularity requirement with regard to the challenged employment practice. It has been noted that said employment practice must cause the disparate impact.\textsuperscript{497} Further, the 1991 Act requires that if several employment practices are challenged, each practice must be shown to cause a disparate impact unless the petitioner can show “that the elements of the decision-making process ‘are not capable of separation for analysis...’”\textsuperscript{498} Finally, the 1991 Act makes clear that the business necessity defense is unavailable in intentional discrimination claims.\textsuperscript{499}

Codifying the concept of “business necessity” is what proved to be the sticking point in passing the 1991 amendments. Congress expressed an intent to codify the terms “business necessity” and “job related”\textsuperscript{500} as they were explained in \textit{Griggs v. Duke Power Co.}\textsuperscript{501} Thus, definition of the term, as announced in \textit{Wards Cove}, which stated that “business necessity is established if the challenged practice serves in a significant way, the legitimate employment goals of the employer” is no longer applicable.\textsuperscript{502} However, Congress could not agree on just what “business necessity” should mean;\textsuperscript{503} therefore, defining the concepts of business and job relatedness are left to the courts with the guidance that they should conform to the pre-\textit{Wards Cove} definitions of the terms.\textsuperscript{504}

\textit{Price Waterhouse v. Hopkins} Superseded

The decision in \textit{Price Waterhouse v. Hopkins} is credited with promulgating the mixed-motive theory of discrimination.\textsuperscript{505} The facts in that case show that while the partnership committee took into account impermissible factors based around sex stereotypes, the facts also showed that there were several complaints about the plaintiff’s demeanor with regard to her co-workers; it was alleged that she was brusque with co-workers and had been counseled,
before her bid for partnership to improve her relations with staff members. Thus, an employment decision based on all of those factors would constitute a decision based on mixed motives: some permissible and some impermissible under Title VII.

In that case, the Court held that “once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.” Thus, the Court gave the defendant an out (i.e., removed liability) if he could prove that the same decision would have been made regardless of any improper intent.

The amendment does not give the defendant an out. Rather, the 1991 amendment indicates that a violation of Title VII occurs any time an employment decision is motivated by an impermissible factor. Once it is proven that an employment decision was made and that an impermissible classification was even part of that decision, liability attaches and a court can award the plaintiff attorney's fees and costs. If the defendant can prove, however, that he would have made the same decision, damages are limited to those attorney's fees and costs. The failure to meet that burden exposes the defendant to compensatory and punitive damages as well as equitable relief in the form of reinstatement, hiring, promotion and backpay.

**Martin v. Wilks Superseded**

Recall the opinion in *Martin v. Wilks* explained that an individual had to be joined as a party in order for the terms of a consent decree to apply to him. Therein, the Court deemed that the petitioner could not be bound to the terms of the consent decree where he had not been made a party to the action. Contrarily, the 1991 amendments indicates that an employment practice implementing the terms of a consent decree or judgment may not be challenged by a person who had notice or opportunity to present objections to the judgment or order, or by a person whose interests were adequately represented by another person. It is explained that a person's interests are adequately represented by another person if the representative raised the same legal grounds or had a similar factual background to the person seeking to challenge the order.

**Lorance v. AT&T Time Limitations Expanded**

The Court in *Lorance v. AT&T Technologies, Inc.*, ruled that the plaintiff in that case had not filed her claim in a timely manner. The Court ruled that the appropriate time for

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506 Id. at 244-45.
507 Livingston, supra note 482 at 79.
508 David A. Cathcart & Mark Snyderman, supra note 451 at 874.
509 Id.
510 See Martin v. Wilks, supra note 466.
511 See Id.
512 Livingston, supra note 482 at 81.
513 Id.
514 See Lorance v. AT&T Technologies, Inc., supra note 463.
bringing a claim challenging a seniority system is when an employee becomes subject to that new system and knows or should know that the system is discriminatory.\textsuperscript{515} The amendment expands the time during which a facially-neutral seniority system may be challenged.\textsuperscript{516} It allows a plaintiff to challenge a facially-neutral seniority system at any one of three points in time: at the adoption of the provision; at the time the individual becomes subject to the provision; or when at the time when an injury caused by application to the individual occurs.\textsuperscript{517}

The above provides a summary of many of the substantive changes that occurred as a result of the 1991 amendments to Title VII.\textsuperscript{518} Further, cases that were superseded by the statute were discussed in order to state the current law with regard to previously-discussed cases. While the Civil Rights Act of 1991, in part, represents another change to the application of Title VII, the EEOC during this period similarly underwent a few changes that would affect the agency’s operations and the enforcement of the Act.

\textit{The EEOC in the 1990s}

In 1990, Evan J. Kemp replaced Clarence Thomas as Chair of the EEOC.\textsuperscript{519} That same year, Congress passed the Americans with Disabilities Act (ADA) and placed the responsibility for its enforcement with the EEOC.\textsuperscript{520} For three years, Kemp would adhere to the same policies as his predecessor as the backlog steadily increased to 100,000 in 1994.\textsuperscript{521}

In 1994 President Clinton nominated Gilbert Casellas as the new Chair of the EEOC.\textsuperscript{522} That year, the EEOC would receive 91,189 charges.\textsuperscript{523} During Casellas' tenure, the EEOC would adopt several programs focused on tackling the growing backlog. The first was the Priority Charge Handling Procedures (PCHP) which was implemented in the mid-1990s.\textsuperscript{524} Under this plan, charges are categorized into A, B, or C charges wherein: A charges are those that are very likely to result in a finding of systemic discrimination, B charges are those that may involve a violation but require more investigation, and C charges show a lack of merit (or sometimes jurisdiction.)\textsuperscript{525} The results of this program were successful; implementation of

\textsuperscript{515} Id.
\textsuperscript{516} David A. Cathcart & Mark Snyderman, supra note 451 at 901.
\textsuperscript{517} Livingston, supra note 482 at 83.
\textsuperscript{518} The Civil Rights Act of 1991 encompassed several provisions that are not discussed in this section. This section however, discusses all pertinent changes to Title VII that have been previously discussed or will be implicated in later sections of this study.
\textsuperscript{519} Michael Z. Green, supra note 206 at 329.
\textsuperscript{521} Michael Z. Green, supra note 206 at 329.
\textsuperscript{523} Michael Selmi, \textit{The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law}, 57 Ohio St. L.J. 1-64, 12 (1996).
\textsuperscript{524} Anne Noel Occhialino & Daniel Vail, supra note 210 at 687.
\textsuperscript{525} Nancy M. Modesitt, supra note 216 at 1242.
this system worked to decrease the backlog between 1996 and 1998 from 98,269 charges to 52,011 charges.526

During Casellas’ tenure, the National Enforcement Plan (NEP) was also implemented and was intended to work concurrently with the PCHP.527 NEP purportedly maximized strategic enforcement to “ensure the most effective use of the Commission’s resources by assuring that available funds are devoted to efforts which have the potential to yield the greatest dividends in achieving equal employment opportunity.”528 As a result of both programs, the time to process charges significantly decreased from an average 379 days in 1996 to 310 days in 1998.529

In 1998, Ida Castro was named Chair of the EEOC and she implemented a new plan that would help continue to reduce the backlog.530 Under her administration, the agency implemented a private sector mediation program in 1999 that proved extremely popular.531 This program helped the agency resolve more than 35,000 charges through mediation.532 As one author notes, the EEOC has a “tumultuous” history with the Court.533 This history may account for the varied results the agency has in both its damage recoveries before the court as well as with the deference its guidelines are accorded. During this time, the agency had several victories in federal court which was reflected in the amount of damages recovered during this period.534 In 1996 the agency recovered $1,934,412 in damages which shot up to $14,126,937 the following year.535 And in 1998, the agency successfully brought a pattern and practice suit against Mitsubishi Motor Manufacturing which resulted in a $34 million settlement to the class of victims affected by its discriminatory practices.536

During this same period however, results were hit and miss with regard to convincing the Supreme Court to defer to agency guidelines and regulations. In one 1989 case, the Court indicated that an EEOC regulation, adopted from the Department of Labor, was entitled to Chevron deference.537 However, just two years later, in EEOC v. Arabian American Oil Co.,538 the Court “refused to defer to the EEOC’s construction of Title VII that allowed extraterritorial application of the statute.”539

526 Anne Noel Occhialino & Daniel Vail, supra note 210 at 687-88.
528 Anne Noel Occhialino & Daniel Vail, supra note 210 at 688.
529 Id.
530 Id.
531 Id.
532 Id.
533 Theodore W. Wern, supra note 215 at 1578.
534 Anne Noel Occhialino & Daniel Vail, supra note 210 at 689.
535 Id.
537 Rebecca Hanner White, supra note 212 at 74.
539 Rebecca Hanner White, supra note 212 at 74.
Thus, this period is characterized by the EEOC attempting to find new ways to deal with the nearly insurmountable task of handling the increased number of charges that it received each year based on the statutes it has been charged to enforce. Further, despite the EEOC’s increased familiarity with the law, the Court continued to defer to the agency on a sporadic basis and similarly, the agency’s successes before the court were patchy as well. However, there was hope that the EEOC could tackle these problems as the successes with the mediation program illustrates.

**The Role of the Judiciary in the 1990s**

In the 1990s the Supreme Court would continue to interpret Title VII as nuances in the 1964 statute continued to reveal themselves. During this period, the Court would decide 3 cases (2 of which are companion cases) that have general implications for the instant study. All three cases were decided in the latter portion of the decade. The latter two cases will be discussed concurrently since both conclude with an identical one page holding.\(^{540}\)

**Oncale v. Sundowner Offshore Services, Inc. et al.**

*Oncale*\(^{541}\) presented the court with the question of whether workplace harassment can violate Title VII’s proscription against discrimination because of sex where the harasser and the harassed are of the same sex. The plaintiff in this case was employed by Sundowner as a roustabout on an eight-man crew which included the defendants: John Lyons, his supervisor, as well as Danny Pippen and Brandon Johnson, his coworkers.

Plaintiff Oncale complained that on several occasions, he was forcibly subjected to oral sex and other humiliating sex-related actions by the three defendants. He also claims he was threatened with rape. When his complaints about his fellow crewmen’s behavior went unanswered, Oncale eventually quit, stating “I felt that if I didn’t leave my job, that I would be raped or forced to have sex.”\(^{542}\) Oncale filed suit claiming he was discriminated against because of his sex in violation of Title VII. Both the District Court, and the Court of Appeals, relying on precedent in their circuit, ruled that “a male, has no cause of action under Title VII for harassment by male co-workers.”\(^{543}\) The Court, granted certiorari to resolve the dispute.

In its analysis, the Court explained that Title VII’s proscription against discrimination with respect to his compensation, terms, conditions, or privileges of employment covers not only “terms and conditions” in the narrow sense but has been interpreted to “strike at the entire spectrum of disparate treatment of men and women in employment.”\(^{544}\) Thus, the Court stated, “[w]hen the workplace is permeated with discriminatory intimidation, ridicule,
and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment, Title VII is violated.”

The Court next elucidated that the prohibition of discrimination based on sex protects both men and women; nothing in Title VII bars a claim of discrimination where both the plaintiff and the defendant are of the same sex. Although, this particular situation may not have been contemplated by Congress when it enacted Title VII, the Court opined that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.” This situation constituted a comparable evil.

The Court further expounded on the “severe and pervasive” requirement in order to make out a hostile work environment claim of sexual harassment and distinguished it from the harmless ways men and women routinely interact with one another. Of the requirement, the Court clarified, “[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment” is beyond the purview of Title VII. Whether an environment is severely or pervasively hostile should be judged by a reasonable person’s standard and depends on a totality of surrounding circumstances.

Thus, the Court in this case reiterated the severe and pervasive requirement for making a claim of hostile work environment harassment; the Court further held that such a claim could be successful regardless of the fact that both the plaintiff and the defendant are of the same sex.

_Burlington Industries v. Ellerth_ & _Faragher v. City of Boca Raton_

Proceeding on a similar theory as the previous case, these two companion cases both present similar issues: whether an employer is vicariously liable when a supervisor creates a hostile work environment that works to alter the subordinate’s terms or conditions of employment based on sex, but takes no tangible employment action pursuant thereto.

Against this backdrop, the facts of each case can be analyzed. In _Faragher_, plaintiff was a bodyguard employed by the City of Boca Raton. Her immediate supervisors were Bill Terry, David Silverman and Robert Gordon. Plaintiff had worked as a bodyguard for five years, part-time during the summer until she resigned in 1990. Two years later, Faragher brought suit against her immediate supervisors, Bill Terry and David Silverman as well as the

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545 Id.
546 Id. at 79.
547 Id.
548 Id. at 81.
549 Id. at 81-82.
552 Vicarious liability is the imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons. – Black’s Law Dictionary (6th ed. 1991).
553 Id. at 780.
554 Id.
City claiming a violation of Title VII, §1983 and Florida law.\textsuperscript{555} Specifically, Faragher alleged that her supervisors had created a “sexually hostile atmosphere” subjecting her to “uninvited and offensive touching,” making lewd remarks, and speaking of women offensively.\textsuperscript{556}

Pertinent to this case was the work structure of the lifeguards and supervisors which was structured in a parliamentary configuration wherein lifeguards reported to lieutenants and captains, who reported to Bill Terry.\textsuperscript{557} Further, although the City had adopted a sexual harassment policy in 1986, the memorandum where it was stated was never disseminated among the employees in the section where the plaintiff worked; therefore both the plaintiff and named defendants were unaware of the policy.\textsuperscript{558}

The facts of the second case, \textit{Burlington Industries v. Ellerth}, while not completely similar, allege a similar theory of hostile work environment sexual harassment.\textsuperscript{559} Plaintiff below, worked at Burlington Industries from 1993-1994 as a salesperson, and alleges that during her time there, she was subject to sexual harassment by her supervisor, Ted Slowik.\textsuperscript{560} Plaintiff alleges that in general she was subject to “boorish and offensive remarks and gestures” Slowik directed toward her.\textsuperscript{561} However, plaintiff bases her claim on three specific incidents.

First, during a business trip, Slowik invited plaintiff to the hotel lounge where he made comments about her breasts and added that she should “loosen up” and that he could “make [her] life very hard or very easy at Burlington.”\textsuperscript{562} Plaintiff claims she felt compelled to go since Slowik was her boss.\textsuperscript{563} Second, when Plaintiff was being considered for a promotion, during the interview, Slowik expressed reservations because she was not “loose enough” and commented that “you’re gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs.”\textsuperscript{564} Finally, in May 1994, during two phone calls wherein plaintiff contacted Slowik for permission to insert a customer’s logo into a fabric sample, Slowik responded by asking her what she was wearing and whether she was wearing shorter skirts yet.\textsuperscript{565} Soon after the third incident, Plaintiff quit her job; three weeks after resigning, she sent a letter explaining she had quit because of Slowik’s behavior.\textsuperscript{566}

In addressing the above-stated issue with regard to vicarious liability, the Court looked to agency principles for guidance. According to the same, a:

\begin{itemize}
  \item \textsuperscript{555} \textit{Id}.
  \item \textsuperscript{556} \textit{Id}.
  \item \textsuperscript{557} \textit{Id} at 781.
  \item \textsuperscript{558} \textit{Id} at 782.
  \item \textsuperscript{559} \textit{See Id}. However, in this case, there was also an element of quid pro quo sexual to the hostile environment. \textit{Id} at 749.
  \item \textsuperscript{560} \textit{Id} at 747.
  \item \textsuperscript{561} \textit{Id} at 747-48.
  \item \textsuperscript{562} \textit{Id} at 748.
  \item \textsuperscript{563} \textit{Id}.
  \item \textsuperscript{564} \textit{Id}.
  \item \textsuperscript{565} \textit{Id}.
  \item \textsuperscript{566} \textit{Id}.
\end{itemize}
master is subject to liability for the torts of his servants committed while acting in the scope of their employment...[scope of employment has been held to mean] conduct of a kind [a servant] is employed to perform, occurring within the authorized time and space limits and actuated, at least in part, by a purpose to serve the master...excluding intentional use of force.\^567

The extensive analysis of agency principles discussed in both cases is beyond the scope of this study. However, in *Burlington*, the Court stated that although sexual harassment is beyond the scope of one’s employment, “agency principles impose liability on employers even where employees commit torts outside the scope of employment.”\^568 Further, in that case, while the plaintiff had concentrated her efforts on making a claim of quid pro quo harassment, the Court indicated that the label on the type of harassment was not determinative in an inquiry as to whether an employer may be vicariously liable for a supervisor’s sexual harassment of a subordinate.\^569

In both cases, the Court adopted the following holding:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile employment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence...The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment (Sic) policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense. No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.\^570

\^567 *Faragher v. City of Boca Raton*, supra note 551 at 793.

\^568 *Burlington*, supra note 550 at 757-58.

\^569 Id. at 765. The court explained that it did not matter whether a plaintiff alleges hostile work environment or quid pro quo sexual harassment in the question of whether or not an employer could be found vicariously liable in a sexual harassment case.

\^570 Id.; *Faragher*, supra note 551 at 807-08.
Thus the Court, in “a great example of lawmaking,”$^{571}$ teaches the appropriate test for a finding of vicarious liability in sexual harassment cases.

Although, pursuant to the limitations set forth at the outset of this study, sexual harassment claims will not be studied, the discussion of the cases in this section were reviewed for two reasons: (1) for their significance in the body of case law interpreting Title VII and delineating the rules that apply in sexual harassment cases; and (2) for their foundational value for subsequent discussion on discrimination cases based on sex – while the theories are somewhat different, concepts that have been discussed and defined in these opinions may arise in forthcoming sections and chapters. The few cases discussed in this section comprise an important section in the law with regard to discrimination based on sex under Title VII.

**What Came After: 2003 – present**

This period in time is relatively quiet as each branch works to further the anti-discrimination charge taken up more than 50 years ago. Indeed, the EEOC celebrated the anniversary of the Civil Rights Act of 1964 just last year. However, the following section will briefly discuss where the EEOC is headed since the beginning of the 21st century. Thereafter, since there have been no significant legislative enactments since the Civil Rights Act of 1991, this section will conclude with a discussion of one significant Supreme Court case that presents relevant issues in the interpretation of Title VII today.$^{572}$

**Developments within the EEOC**

As discussed throughout this review, the sheer volume of charges continues to be a chief concern for the agency. Indeed, when Ida L. Castro concluded her tenure, Cari Dominguez, the next Chair of the EEOC would continue to push mediation and alternate dispute resolution (ADR) as a means of controlling the backlog of cases.$^{573}$ Although the PCHP program worked to reduce the backlog to 32,000 charges in 2001, this gain was short-lived since, by the middle of Dominguez’s term, the backlog would begin to steadily increase once again.$^{574}$ Between 2004 and 2007, the time to investigate a charge increased from 171 days to 205 days.$^{575}$ One commentator noted that the reasons for the backlog were (1) an increase in B and C charges under the PCHP program and (2) a decrease in EEOC investigators.$^{576}$ However,

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$^{572}$ The researcher purposefully limited the discussion of relevant case law during this period to a review of *Vance v. Ball State*, 133 S. Ct. 2434 (2013), because of its importance in defining a relevant term in employment discrimination law as well as its relevance to this study due to its setting at a higher education institution. The researcher acknowledges that the Court’s decision in *Desert Palace, Inc. v. Costa*, *supra* note 351 has significant effects on *McDonnell Douglas v. Green*, *supra* note 290 and *Price Waterhouse*, *supra* note 21, and the discussion of mixed motives and the applicable burden of proof by direct or circumstantial evidence. However, the complexities of this discussion and the trends amongst the various circuits applying *Desert Palace* are beyond the scope of this study.

$^{573}$ Anne Noel Occhialino & Daniel Vail, *supra* note 210 at 690.

$^{574}$ Nancy M. Modesitt, *supra* note 216 at 1243.

$^{575}$ *Id.*

$^{576}$ *Id.*
during Dominguez’s tenure, she was able to implement a “Five Point Plan” which emphasized the Mediation/ADR department which had proved so successful for the EEOC in the past.577

One year after Naomi Earp, the next EEOC chair, took office, there were 127,710 private sector charges pending. In fiscal year 2008, the EEOC spent over $270 million enforcing these private sector charges. This is evidence of the EEOC devoting a large portion of its resources on its “intake role” which has effectively taken over the agency.578 By the end of her term, Congress had added yet another Act to the EEOC’s charge: the Genetic Information Nondiscrimination Act which took effect on November 21, 2009.579 This act makes it illegal to discriminate against employees or applicants because of genetic information; most employers, labor organizations and other covered entities, are restricted from requesting, requiring or purchasing such information by the act.580

The EEOC celebrated the fiftieth anniversary of the Civil Rights Act of 1964 under the tenure of Jacqueline Barrien in 2014, who ended her term the same year.581 In a statement, Barrien noted that the agency currently receives approximately 100,000 charges annually.582 One named trend that the EEOC now has to contend with, amongst all other charges of discrimination, are charges from individuals of the LGBT community who suffer workplace harassment in the work place based on stereotypes.583

The current chair for the EEOC is Jenny Yang who began her term in September 2014. During her tenure, it appears that mediation will continue to be a powerful tool for the EEOC as participants rate the program favorably with a 96.4 confidence rating.584 Due to these efforts, the agency secured $296 million in benefits for clients through mediation. Further, conciliation continues to be a viable means of settling claims with the success rate of conciliation rising from 27% in 2010 to 38% in 2014.

With a host of statutes under its purview, the EEOC has grown larger and more complex than the 88th Congress could have conceived when it created this agency on a compromise, with no enforcement powers and a shoestring budget. Considering the battle the agency was charged with fighting, the EEOC’s huge backlog only proves the necessity for the agency. Although the agency is constantly criticized for its chosen methods of enforcement and its sporadic successes and achievements, critics would do well to remember

577 Anne Noel Occhialino & Daniel Vail, supra note 210 at 690.
578 Nancy M. Modesitt, supra note 216 at 1243.
580 Id.
582 Id.
583 Id.
the necessity of that agency in the face of the large number of charges indicating that discrimination in employment is still alive and thriving today, half a century later.

_The Judiciary in the New Millennium_

It would seem that as time progresses, the judiciary’s understanding of and expertise with Title VII would increase. However, the fact that the Supreme Court is still called upon to interpret nuances of an almost 50-year-old statute speaks to the complicated issues that are implicated in workplace discrimination claims. But, for all the complicated frameworks and burdens of proof and rules promulgated by the Court in their interpretation of the Civil Rights Act of 1964, the case below asks a seemingly simple question..."what is a supervisor?"

_Vance v. Ball State_

_Vance v. Ball State_ was heard by the Supreme Court in 2013 and dealt with the question of who qualifies as a supervisor in a Title VII racial harassment claim.

In previously discussed sexual harassment claims, the Court came to a decision in the _Burlington_ and _Faragher_ companion cases that an employer can be held vicariously liable in a sexual harassment claim where the harassment is perpetrated by a supervisor and that harassment results in a tangible employment action. Where the harassment does not result in a tangible employment action, an employer may avoid liability by proving that he took reasonable steps to prevent or correct the harassing behavior and that the plaintiff failed to avail himself of the corrective mechanisms in place or to otherwise avoid harm. The Court defined “tangible employment action” as hiring, firing, promotion, compensation or work assignment. Thus, the remaining question in _Ball State_, is if an employer can be vicariously liable for a supervisor's actions, who then qualifies as a supervisor?

The plaintiff in _Ball State_, Maetta Vance, was an African American woman who had been working at the university since 1989 as a substitute server in the University Banquet and Catering division. By 2007, Vance had worked her way up to full-time catering assistant. In the course of her duties, Vance came to work with Davis, a white woman employed as a catering specialist in the same division as Vance.

While the parties disagreed as to the nature and scope of Davis’ duties, the parties did agree that Davis did not have the ability to make tangible employment decisions; in other words, she could not hire, fire, demote, promote, transfer, or discipline Vance.
Throughout 2005 and 2006 Vance would lodge several complaints with the university as well as with the EEOC alleging racial harassment and discrimination; many of these complaints were filed against Davis.\textsuperscript{594} Despite the university's attempts to ameliorate the problem, Vance filed suit in 2006 in federal court claiming that she had been subjected to a racially hostile work environment in violation of Title VII.\textsuperscript{595}

Both the District Court and the Court of Appeals determined that Ball State could not be held vicariously liable for the alleged harassment because Davis could not take any tangible employment action against Vance.\textsuperscript{596} The Supreme Court granted certiorari to resolve the conflict in the lower courts regarding the meaning of the word “supervisor” and held that:

an employer may be vicariously liable for an employee’s unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.\textsuperscript{597}

Plaintiff (and the EEOC) endorsed a more expansive definition of the term supervisor to include, “a person who can direct another person’s work.”\textsuperscript{598} However, the Court rejected this definition and failed to accord deference to the EEOC’s definition after an extensive analysis of the varying meanings of the word “supervisor” colloquially and within the law.\textsuperscript{599} The Court endorsed this definition of supervisor stating that it was in accord with the framework as set up in \textit{Burlington} and \textit{Faragher}, and that the definition of supervisor as adopted by the Court would function to facilitate litigation for, where a question arises as to the status of a particular employee, this matter would be easily settled.\textsuperscript{600} In so finding, the Court affirmed the judgment of the Court of Appeals. Thus, a supervisor, simply stated, is one who can take tangible employment action against another employee.

The judiciary in this period then would define a foundational concept that will affect the litigation of employment discrimination cases going forward. Although the Court heard several issues during this period, as indicated previously, those decisions discussed concepts beyond the scope of this study.

\textbf{Conclusion}

The above review sought to provide a holistic look at employment discrimination law flowing from the enactment of Title VII of the Civil Rights Act of 1964. This was accomplished by studying judicial interpretation, legislative enactments, and the regulatory

\textsuperscript{594} Id.
\textsuperscript{595} Id. at 2440.
\textsuperscript{596} Id.
\textsuperscript{597} Id. at 2443.
\textsuperscript{598} Id. at 2444.
\textsuperscript{599} Id. at 2445.
\textsuperscript{600} Id. at 2450.
environment, espoused by the actions of the EEOC, who has been charged with enforcing the 1964 Act. Specifically, the cases studied herein provide a basis for understanding how the Supreme Court of the United States has interpreted Title VII. In this way, rules defining disparate treatment and disparate impact theories, rules delineating the proper use of statistical evidence in disparate impact cases, and rules illustrating the proper burdens of proof on the parties in discrimination cases were revealed. This review also provided a chronological discussion of the EEOC and the challenges it faced with little staff, inadequate budget and increasing enforcement charges. Finally, this review further discussed the enactment Title VII of the Civil Rights Act of 1964 and its subsequent amendments.

**Putting It All Together: Framing the Research Question**

This portion of the literature review provided a historical view of Title VII from its enactment through several legislative amendments. The evolution of the EEOC was recounted and the subsequent case law, specific to the Supreme Court, was reviewed to provide an overview of the law with regard to workplace discrimination and Title VII's proscription thereof.

Throughout this review of the several studied judicial opinions, only one took place on a university campus. This is not to say that Title VII has not been applied to the university campus. However, several rules gleaned from the opinions of the Court implicate questions that have not been addressed with regard to the application of Title VII on university campuses.

The first research question in this study asks, *“How has the law of employment discrimination been applied within the environs of institutions of higher education with respect to claims of discrimination based on race, color, and gender?”* In chapter five of this study, the researcher will provide an extensive analysis of American jurisprudence that examines just how Title VII claims are adjudicated in institutions of higher education, particularly in consideration of the higher education concepts of academic deference and tenure.

In light of the foregoing analysis of employment discrimination law, one can immediately see the implications that Title VII could have in the special environment of American higher education institutions. For example, *McDonnell Douglas*, arguably still good law, promulgated a burden-shifting analysis between the plaintiff and the defendant in a discrimination case. Once a plaintiff has made a prima facie case of discrimination, as directed by the Court, the defendant employer must articulate a legitimate non-discriminatory reason for the employment action. What rules should apply when a faculty member alleges discrimination because he was not promoted? When the burden shifts to the defendant-university, the university’s proffered legitimate non-discriminatory reason for failure to

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601 McDonnell Douglas, supra note 290.
602 Id. at 802-03.
promote the plaintiff is offered under a burden of production and is thus not subject to
significant review by the courts. Next, once the burden shifts back to the plaintiff, who has an
opportunity to prove that the proffered reason is pretext, what type of proof could the
plaintiff gather to substantiate this claim?

Alternatively, how would this situation be analyzed under the mixed-motive
framework promulgated by \textit{Price Waterhouse v. Hopkins}\footnote{Id. at 804.}? If the university has mixed-
motives for failing to promote this faculty member and the plaintiff can prove that some
protected status was a motivating factor, liability for the institution is instantaneous. The
university then bears the burden of showing that they would have made the same decision
anyway in order to avoid exposure to compensatory and punitive damages.

This review also discussed the implications of using statistical evidence to make a
prima facie case of discrimination. Could a female plaintiff seeking a job in a STEM-field
department, where there is a dearth of females, use statistical evidence to make a prima facie
claim of discrimination against a university? Can she point to specific employment practices
that explain the dearth of women faculty in STEM fields, similar to the statistics pointed out in
the congressional hearings for the Equal Employment Opportunity Act of 1972?

The university has been afforded deference by the courts in making hiring, promotion,
firing, and other employment decisions. The courts have acknowledged that they are not in
the position to make academic decisions, or to substitute their judgment for academicians in
these types of decisions. What makes the university campus such a different employer that
they are accorded this deference? Why are judges willing to oversee employment decisions in
traditional companies, but employ a hands-off approach when it comes to universities?

Congress clearly contemplated that courts would review the circumstances surrounding
employment decisions. Title VII’s proscriptions against unlawful employment practices
evincing intentional (or even unintentional) discrimination that are made manifest during
hiring and discharge decisions support this assertion. Thus, why should courts continue to
take this hands-off approach, particularly in light of the new aspects of the modern university
wherein universities are taking on characteristics more similar to corporations rather than the
ivory tower of old? Although this study does not purport to answer all of the above-raised
questions, it seeks to highlight certain aspects of the university as an employer and the
questions that arise when legal principles, generally applied in traditional work environments,
are applied in the university context.

\footnote{Id. at 804.}
\footnote{\textit{Price Waterhouse}, supra note 21.}
\footnote{See \textit{Hazelwood}, supra note 291.}
\footnote{See Delaware State College v. Ricks, 449 U.S. 250 (1980).}
\footnote{Id.}
In the next chapter, the discussion will turn to highlighting and examining particular aspects of the American institution of higher education. Specifically, what aspects of today’s higher education institution justify the continued deference shown by U.S. courts to their decision-making? The next chapter will provide a brief look into the evolution of the American system of higher education in an effort to determine the answer to this question. Further, this chapter will provide an analysis of higher-education-specific topics, specifically, tenure, academic deference (i.e., judicial deference) as well as the concept of the corporatization of higher education. The historical examination of the American institution of higher education will lay the foundation for the subsequent discussion of tenure and academic deference, and their application to colleges and universities. In turn, the aggregate discussion within chapters three and four provide a basis of understanding for the analysis of American jurisprudence that applies Title VII of the Civil Rights Act of 1964 to claims of discrimination based on race, color, and gender that take place on college and university campuses.
CHAPTER THREE

LITERATURE REVIEW: HIGHER EDUCATION IN AMERICA

At the outset of this study, it was cited that by the end of 2011, there were 4,599 degree-granting institutions in the United States. In the fall of 2013 college enrollment was 20.8 million, and the National Center for Education Statistics (NCES) further reports that between fall 2012 and fall 2023, college enrollment may increase by as much as 15%. Further, expenditures of postsecondary institutions in the United States in that year reached $496 billion. These statistics evince two things. First, it illustrates a commitment to the pursuit of higher education in the United States; students continue to go to school in higher and higher numbers, and vast sums of money are allocated toward this end. Second, the amount of the annual expenditure by postsecondary institutions is an indicator of how large the business of higher education has become. But how did this come to pass? How did the United States become so committed to higher education that billions of dollars are spent annually in helping students achieve their educational goals? How did the institution gain such a purpose and place in society?

This chapter will provide an analysis of the history of higher education in America that may help to answer the previously posed questions. However, it should be noted that the forthcoming analysis is not an exhaustive look at the history of higher education in America. Rather, the events as delineated below will focus on the role of higher education in American society and its evolving purposes. Understanding its role in this manner will help to provide a foundation for the subsequent discussion and analysis of what some researchers term, the corporatization of American higher education. This chapter concludes with discussions on higher-education-specific concepts including academic deference and tenure. These concepts: the corporatization of higher education, academic deference, and tenure, act as independent variables, if you will, to how the law of employment discrimination is generally applied. It is a hypothesis of this study that the manner in which employment discrimination cases are adjudicated take on a different form in light of this special environment and the above-referenced variables. This chapter examines and analyzes these variables.

610 Id.
611 Id.
612 It should be noted that the term “corporatization” is a somewhat controversial term within the higher education community. The extant literature, some of which will be analyzed herein, will discuss the debate within the industry regarding the term and its supposed effects on higher education. When applicable, a definition of the term, as used in this study will be provided.
The Evolving Role of Higher Education in America

In order to determine how higher education came to claim such an important place in American society, we need only look to American history. It seems that the evolving role and purposes of higher education reflect or respond to the major changes that took place in this country from the time of the first settlers. However, as it is often said, “the more things change, the more they stay the same.” In higher education, while the system has undergone many changes, there are recurring themes of elitism (prestige), personal and social improvement, and utility that run throughout the course of its history. Further, some of the challenges that existed in the system at its inception still exist today, albeit cloaked in slightly different clothes.

The following takes an abridged look at the history of higher education by tying the major changes that took place in the system to the historical events that took place in this country. This review will provide only a brief look at the origins of the American system of higher education during that time and will focus rather on the significant changes in the system that took place in the seventeenth century moving forward.

The Beginnings of American Higher Education

On October 28, 1636, the Great and General Court of Massachusetts Bay dedicated 400£ for the establishment of a “schoale or colledge.” According to one early settler: “we had builded [sic] our houses, provided necessaries for our livelihood, reared convenient places for God’s worship, and settled the civil government: one of the next things we longed for, and looked after was to advance learning and perpetuate it to posterity.” Thus, it was in 1636 that the first institution of higher education, Harvard College, was established.

Prior to the American Revolution, nine colleges, including Harvard, would carry on the work of postsecondary education in the colonies: the College of William and Mary (1693); the Collegiate School at New Haven (later known as Yale; 1701); the College of Philadelphia (later known as University of Pennsylvania; 1701); the College of New Jersey ( later known as Princeton; 1746); Kings College (later known as Columbia University; 1754); the College of Rhode Island (later known as Brown; 1764); Queen’s College (later known as Rutgers; 1766); and Dartmouth College (1769). The proliferation of postsecondary institutions is evidence of the importance the colonists placed on education; they were the manifestation of ideals the first settlers brought with them from England.

There were a variety of ways in which the colonists addressed education, and English traditions would remain a strong influence on the settlers’ approach to education. This pre-

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613 Jean-Baptiste Alphonse Karr (1808-1890) penned the phrase, “plus ça change, plus c’est la même chose” which has commonly been translated in English as stated above.
615 CHRISTOPHER LUCAS, supra note 1 at 103-104.
616 Id. at 105.
revolutionary period, between the 1600s to the latter half of the 1700s would see the establishment of not only the nine aforementioned institutions of higher education, but also several traditions that would become recurring themes in American higher education for centuries to come.

First, the idea that formal education was many times a prerogative of the wealthy and those who could afford it, originated in America during the seventeenth century. In keeping with English tradition, many colonists, particularly in the Chesapeake and southern colonies adhered to the idea that education was a private matter. The prevailing thought was “every man according to his own ability in instructing his children.” Thus, many wealthy colonists who had the ability sent their children to England for secondary and higher education. Boys were sent back to England to attend boarding schools at the age of 10 (approximately) and from there attended the colleges of Oxford, Cambridge, or Edinburgh. By contrast, those who could not afford English boarding schools engaged in various means to provide some type of education for their children including, home schooling, church schools, free schools, old field schools, or apprenticeship, where available and depending on the region. Urban and Wagoner explain that with few exceptions, “the farther into the backcountry people lived, the less likely they were to have access to books or literate neighbors. Consequently, many lives were passed in ignorance of any learning that could not be transmitted orally or by way of demonstration.” Indeed, they further explain, higher education was realistic mostly for the sons of the economically privileged.

Second, the tradition of classical education was brought to the colonies and perpetuated in America. Some colonists employed live-in tutors transplanted from England and Scotland who were themselves students of classical education. This devotion to classical education would persist until the mid to late nineteenth century where adherence to this teaching method would become controversial.

Third, the idea that an education, particularly, higher education, becomes synonymous with being cultured and refined finds its roots during this period as well. Early elements of this theme can be found in Bernard Bailyn’s theory regarding the promulgation of education laws by the Puritans. Bailyn theorized that the younger generations of settlers were “on the verge of incipient savagery” as a result of their new environment in the wilderness. In

618 Id. at 25.
619 Id. at 31.
620 Id.
621 Id. at 5-29.
622 Id. at 26.
623 Id. at 33.
624 Id. at 25. This pedagogy was characterized by concentrations in Greek, Latin, and in some places, Hebrew languages. Id. at 50. Students were also to be versed in mathematics, geography, history, and grammar. Id.
625 URBAN & WAGONER, supra note 617 at 41.
response, the Puritans sought to “strengthen the threatened agencies of education: the family, community, and the church. Alarmed by the less respectful and less reverential attitudes of the younger generation, Puritan leaders enacted laws requiring...pubic support of schools.”

Here, the thought was that well-behaved children were molded by education; it was seen as a manner in which proper social behavior was cultivated. Urban and Wagoner further explain that passing these education laws were an attempt to “overcome...cultural degeneracy.”

This theme of culture and refinement as an outcome of education was echoed during the establishment of the first institution of higher education. Frederick Rudolph notes that the creation of Harvard College was a necessary endeavor since society requires the “adornment of cultured men.” Thus, the earliest settlers in this country saw the attainment of education as a vehicle for cultural refinement and cultivation of proper social behavior. Indeed, it was noted that “appeals to base passions, and revolutionary rumblings” would have resulted if the first college had not been founded.

Fourth, closely related to the theme that education breeds culture and refinement was the thought that an education would provide upward social mobility or increased social status. The earliest settlers in the New England area were mostly literate. Urban and Wagoner report that approximately 50%-66% of adult males who came from England in the 1600s could write their names. Specifically, in the Virginia and Pennsylvania colonies, just prior to the American Revolution, literacy levels among the colonists reached to 60%-70%. In these colonies, there was a "strong correlation between social status and literacy." Promoting increase in social status was a goal of the founders of Harvard, as well. As Geiger notes, “[i]n the hierarchical society that the Puritans brought from England, education...[was a] marker of status. A college education signified high social status, but also the expectation to play a prominent role in community affairs. The Harvard College curriculum inculcated the culture associated with this status.”

As John Thelin further explains, “[c]learly, a main purpose of the colleges was to identify and ratify a colonial elite. The college...was essential to transmitting a relatively fixed social order.” Thus, obtaining an education placed one above the masses and secured one's place amongst the elite in society. The themes of social

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626 Id.
627 Id. at 44.
628 FREDERICK RUDOLPH, THE AMERICAN COLLEGE & UNIVERSITY: A HISTORY 6 (1990). In speaking about Harvard, Roger Geiger elaborated on this idea: "[l]earning itself – the basic arts curriculum – was universally recognized as the foundation of the culture of a gentleman. The polite learning acquired from ancient literature was certainly a part of this culture. But the College also inculcated a sense of eupraxia (well-acting), the Aristotelian notion embedded in Puritan theology that the end of knowledge is praxis, or knowing how to act. GEIGER, supra note 614 at 8.
629 RUDOLPH, supra note 628 at 7.
630 URBAN & WAGONER, supra note 617 at 38 (explaining that literacy was measured by the ability of an individual to write his own name).
631 Id.
632 Id.
633 GEIGER, supra note 614 at 7.
mobility and their relation to prestige and elitism recur over and over throughout the history of American higher education.

Finally, perhaps the most practical of themes was the thought that education would train the future leaders of society. This theme has two implications: one, our leaders should be learned; and two, in supplying the public with learned leaders, education becomes a societal good or a benefit to society as a whole. Derived from two Puritan cardinal principles which promoted “a learned clergy, and a lettered people” the founders of Harvard College would find its central purpose in the “train[ing of] the schoolmasters, the divines, the rulers, the cultured ornaments of society – the men who would spell the difference between civilization and barbarism.” The founders of the College of Rhode Island affirmed this ideal declaring that “institutions for liberal education are highly beneficial to society by forming the rising generation to virtue, knowledge and useful literature and thus preserving in the community a succession of men duly qualified for discharging the offices of life with usefulness and reputation.” This sentiment combines many of the aforementioned themes: education as a societal good, education as a source for training future leaders, and education as a source of cultural refinement or virtue.

Further, flowing from the philosophy that education constitutes a societal good, eight of the nine colonial colleges, were created by government charters and supported financially by their communities; only the College of William and Mary was created by royal charter. This theme of government and community commitment to and financial support for higher education would undergo several permutations through to the present day manifesting itself in the forms of philanthropy and state and federal financial support for higher education.

The above discussion highlighted the factors that play a part in how American society in the colonial period viewed the role and purposes of higher education. Rudolph captures the essence of those themes in his interpretation of the purposes of higher education during this period. He states:

A college develops a sense of unity where, in a society created from many of the nations of Europe, there might otherwise be aimlessness and uncontrolled diversity. A college advances learning; it combats ignorance and barbarism. A college is a supporter of the state; it is an instructor in loyalty, in citizenship, in the dictates of conscience and faith. A college is useful; it helps men to learn the things they must know in order to manage the temporal affairs of the world; it trains a legion of teachers.

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635 Rudolph, supra note 628 at 6.
636 Id. This thought was carried forward when the second institution of higher education was founded, the College of William and Mary. Those who established the college would work to ensure that their students were educated in good letters and manners producing a population of students from which society could draw its public servants. Id. at 7.
637 Lucas, supra note 1 at 106.
638 Geiger, supra note 614 at 12.
639 Id.
All these things a college was. All these purposes a college served.⁶⁴⁰

Many of these themes recur in subsequent periods even as times and societal mores change and will be discussed in subsequent portions of this chapter.

Thus, the colonial period represented a time of growth in higher education. However, as indicated previously, it is not the goal of this chapter to review in great detail the events surrounding the founding of each of the colonial colleges. Rather, this chapter is to be an exploration of themes that highlight the purposes and role of higher education in American society from past to present.⁶⁴¹ As such, it will focus on how the overarching themes of culture, career, and knowledge manifest throughout the history of American higher education from the post-colonial period to the present.

**Higher Education from 1776 through 1860**

The American Revolutionary War (1775-1783), wrought havoc on institutions of higher education in more ways than one. The nine colleges that were established prior to the war suffered serious physical damage, some more than others. Nassau Hall at Princeton, for example, appeared to suffer the worst of the damage having been occupied by the British in 1776, attacked by American troops one year later, appropriated for use as a military hospital, and ultimately served as a capitol for congressmen in flight from mutinous soldiers in 1783.⁶⁴²

However devastating the physical damage was, it was the ideological change in American culture that caused the most significant effects to higher education during this period. Geiger notes that, “even as their physical fortunes were at low ebb, the aspirations of colleges soared. They perceived themselves, and were perceived by the new states, as having an indispensable role to play in forming republican citizens for the new nation.”⁶⁴³ While Geiger paints a picture of a higher educational system secure in its position as instruments of change in the new nation, Lucas advances a theory that the industry was characterized by uncertainty following the war, questioning whether higher education, previously rooted in aristocratic notions and traditions, could be adapted to the new republic developing in the states.⁶⁴⁴ As such, subsequent events during this period indicate that while higher education

⁶⁴⁰ RUDOLPH, supra note 628 at 13.
⁶⁴¹ This approach is in line with Geiger’s methodologies. He encapsulates the several themes discussed above into three main constructs: culture, careers, and knowledge and explains that they are all parts of English heritage that would help shape the colonial colleges. He further explains: “culture, careers, and knowledge represent the most basic social purposes of higher education. Each has a dynamic of its own with respect to higher education and to the larger society. Each is also contingent on time and place, so that higher education’s relation to culture, careers, and knowledge changes with historical context. Hence they present three largely independent dynamics that shape higher education. (Emphasis added). GEIGER, supra note 614 at xiii.
⁶⁴² RUDOLPH, supra note 628 at 33.
⁶⁴³ Id. at 90.
⁶⁴⁴ LUCAS, supra note 1 at 113. Illustrating this feeling of uncertainty, Noah Webster expressed, “Our constitutions of civil government are not yet firmly established; our national character is not yet formed; and it is an object of vast magnitude that systems of education should be adopted and pursued which...may implant in the minds of the
institutions may have been assured of their place in helping to mold this new democratic society, they were not sure just how this would be accomplished. Rudolph explains, “[t]he spirit of this rising democratic tide overtook the colleges, much to the despair of many for whom the old ways were the best ways.”645 Thus, with an “American faith in tomorrow,”646 and despite the uncertainty necessarily involved in understanding and accommodating this new democratic nation, this period would be characterized by a proliferation of new colleges, and challenges to the traditional curriculum that questioned the purposes of obtaining an undergraduate degree. Each of these trends will be discussed, in turn, below.

Colleges, colleges everywhere!

In 1851, Absalom Peters observed, “Our country is to be a land of colleges.”647 Peters had more than enough reason to believe this was so, considering the increase in the number of colleges that had been established since the American Revolution ended in 1783. Between 1782, just one year prior to the end of the war, and 1802, 19 colleges were chartered.648 In 1800, there were 25 total degree-granting institutions in this country.649 The numbers jumped from 28 colleges in 1815,650 to 52 in 1820651 and then to 80 by 1840.652 Thelin indicates that just two decades later, in 1860, that number had once again increased exponentially to 241 colleges, not including 40 additional institutions which had been founded and ceased operation during this period.653 Finally, just prior to the Civil War, the number had reached 250.654 But what were the reasons behind this growth in the number of institutions?

Rudolph cites several factors including: state loyalty, increasing wealth, and growing population that contributed to this growth.655 In support of a new state university, one Minnesota newspaper reported, for example, “not a single youth of either sex should be permitted to leave the territory to acquire an education for want of a suitable institution in Minnesota.”656 Lucas further notes the “western march of the frontier” as a contributing factor to the proliferation of colleges during this period.657 Indeed, due to the sheer expanse of the United States, travel to other locales in order to go to school many times proved difficult and

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645 Rudolph, supra note 628 at 34-35.
646 Id. at 48.
647 Id. at 47.
648 Id. at35 (explaining that this number represents more than twice as many colleges as had been founded during the almost 150 previous years).
649 Thelin, supra note 634 at 41. These two statistics seem a bit off. Considering there were 9 degree-granting institutions prior to the commencement of the American Revolution, an additional 19 institutions would bring the total to 28.
650 Geiger, supra note 614 at 173.
651 Thelin, supra note 634 at 41.
652 Geiger, supra note 614 at 173.
653 Thelin, supra note 634 at 41-42.
654 Lucas, supra note 1 at 117.
655 Rudolph, supra note 628 at 36.
656 Rudolph, supra note 628 at 52.
657 Lucas, supra note 1 at 117.
expensive; thus it became important for each state to have its own institution for higher education. Thelin also cites the ease with which institutions could now obtain charters, as a reason for the increased number of schools as well. He explains, “[I]n colonial America, receiving a charter had been difficult...In...the new United States – especially in the South and the West – the granting of charters came to be regarded as an aspect of political patronage and the spoils system...an easy, inexpensive way for legislators and governors to reward supporters.” Finally, denominationalism contributed significantly to this proliferation of colleges. Rudolph dubbed the religious denominations, “the busiest agents of all this college-founding.” These busy college-founding agents took advantage of governments who were liberal with their granting of charters and spent the first half of the nineteenth century establishing colleges all over the country. Geiger notes that between the end of the Revolution and 1820, a new college was opened every 18 months. This figure increased between 1820 and 1840 to a new college every 8 months, until between 1830 and 1845, three new colleges were established each year as a result of denominationalism. Just prior to the Civil War, the number of colleges had increased by ten per year. Thus, between 1820 and 1860, approximately 180 colleges were established. This period also saw the establishment of the first women’s colleges as well as the first law, military, and medical schools. Thus, schools were not just increasing quantitatively, but they were becoming more varied in their focus. When the advisability of establishing so many colleges was questioned, the prevailing thought was that “'more' was 'better' and [that] the appearance of colleges dotting the landscape...was a sure sign of American progress in the field of arts and letters.”

This period in time, just after the American Revolution, also represented a period where criticisms of higher education would challenge the traditions that formed the American higher education system. Prior to the American Revolution, the nine colleges in existence were sure of their place in society as a producer of political leaders and a learned ministry. Thus, a main criticism of the system at that time was that although college served a societal good, it was not a necessity for the colonists, most of who thought of college as something

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658 RUDOLPH, supra note 628 at 52.
659 Id.
660 Rudolph, supra note 628 at 54.
661 D. Geiger, supra note 614 at 194.
662 Id.
663 Id.
664 Id.
665 Id.
666 The Lin, supra note 634 at 55 (reporting that between 1800 and 1860, approximately 14 institutions enrolled women in college-level work).
667 Id. at 53 and 55 (indicating that there were approximately 36 distinct law schools operating between 1800 and 1860, and approximately 175 medical schools in operation during the first half of the nineteenth century).
668 Lucas, supra note 1 at 119.
669 RUDOLPH, supra note 628 at 22.
that could wait. Subsequent to the war, and perhaps in light of the proliferation of colleges, challenges questioning the utility of higher education, particularly as a result of the adherence to the classical curriculum, would shake the industry.

**Challenges to the Curriculum**

At the beginning of the nineteenth century, it seemed well-settled that a college served a public, societal good. At least, this was the rhetoric that was circulated at the time. However, the first half of the nineteenth century would represent a time of conflict as to the proper focus of pedagogical efforts. Should educators cater to utility or should the tradition of classical education continue? Colleges at this time “would be asked to pass a test of utility. They would have to answer to the question of whether they were serving the needs of a people whose interest in yesterday hardly existed, and whose interest in today was remarkably limited to its usefulness for getting to tomorrow.” During this period, colleges tried both courses to varying degrees of success; the influence of democratic ideals and the introduction of science into the mainstream were two of the bigger issues with which educators of the day had to contend.

In this age of spreading democratic ideals, higher education was expected to be accessible to more and more students rather than just the elite who could afford it. A president of the University of Michigan once stated, “[w]e have cheapened education so as to place it within the reach of everyone.” Concurrent with the expectation that schools be accessible to more students was that schools should be useful; critics of the day felt that classical education was “intellectually uninspiring” and adherence to the traditional pedagogy many times resulted in revolts and demonstrations by dissatisfied students who were frustrated with a “dull course of study irrelevant to the issues they would face as adults.” Francis Wayland of Brown too questioned adherence to these European traditions asking, “[i]n a free country like our own, unembarrassed by precedents, and yet not entangled by the vested rights of bygone ages, ought we not to originate a system of education which shall raise to high intellectual culture the whole mass of our people?”

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670 Id. (explaining how the colonists of 1776 perceived the issue of obtaining a college education).
671 For example, President McKeen of Bowdoin was addressed students in 1802 saying, “It ought always be remembered, that literary institutions are founded and endowed for the common good, and not for the private advantage of those who resort to them for education. It is not that they may be able to pass through life in an easy or reputable manner, but that their mental powers may be cultivated and improved for the benefit of society. If it be true no man should live for himself alone, we may safely assert that every man who has been aided by a public institution to acquire an education and to qualify himself for usefulness, is under peculiar obligation to exert his talents for the public good.”
672 RUDOLPH, supra note 628 at 110-111.
673 Id. at 63.
674 THELIN, supra note 634 at 64.
675 Id. at 65.
676 LUCAS, supra note 1 at 132.
While many institutions implemented new pedagogical approaches to varying degrees of success, the leadership at Yale continued offering their traditional course of study and enjoyed the highest enrollment in the nation during this time. Indeed, their disagreement with modern trends to re-model the American college was reduced to two-part report drafted by President Jeremiah Day and professor James Kingsley. The *Yale Reports*, as they came to be known, were a widely-read, “defense of traditional classical education.”

Yale’s success in keeping their focus on traditional classic study, while not an anomaly, did not respect the democratic thinking of the times. Lucas explains that at the turn of the century, American social and political thought venerated the self-made man who made his way to the top as a result of hard work. However, there was a simultaneous distrust of anything elite or aristocratic, so that once that self-made man made it to the top, he would come to represent the privilege and social inequality that went against the appeal of egalitarianism that reigned at the time. This paradox in American society became an important influence on colleges who responded to it by “dumbing-down” the curriculum. Scholars note that in response to the democratic ideals that were prevalent, many institutions “succumbed to a genteel sort of ‘collegiate anti-intellectualism’” in order to cater to a society that had become suspicious of anything smacking of elitism.

Many schools still catered to the elite during this period of extreme growth, many of which would be geographically located in the south and the west portions of the country. They were exclusive and expensive. By contrast, many of the other schools, located in varied states across the country were characterized by relatively low tuition, flexible entrance requirements and non-exclusionary in their admissions practices. Thelin explains, these institutions “helped to create an elite rather than to confirm one.” These schools produced

\[677\] Attempts to make higher education more useful were inconsistently successful at the time. For example, acknowledging the increasing influence of science, Columbia attempted to add an engineering course of study to its curriculum, but students did not seem interested. However, courses in applied sciences and engineering were quite successful at Union College in New York. As Thelin explains, “there was no guaranteed formula for a college to attract paying students.” Thelin, *supra* note 634 at 68.

\[678\] *Id.*

\[679\] Geiger, *supra* note 614 at 188.

\[680\] Lucas, *supra* note 1 at 133.

\[681\] Thelin, *supra* note 634 at 69-70 (explaining that despite the proliferation of colleges during this period and increased enrollment, the data suggests that a college education remained a rare experience during this period. It was still true that many families could not afford the tuition, nor could families afford to forfeit the labor of an elder child who left home for school. Additionally, the growing American economy presented several options for an individual to make his fortune, most of which did not require a college education to do so).

\[682\] Lucas, *supra* note 1 at 122.

\[683\] *Id.*

\[684\] *Id.* at 123.

\[685\] *Id.*

\[686\] Thelin, *supra* note 634 at 69.

\[687\] These states included: Ohio, Illinois, Pennsylvania, Tennessee, Kentucky, North and South Carolina as well as the rural areas of Connecticut, Maine, Massachusetts, Rhode Island, New Hampshire and Vermont.

\[688\] Thelin, *supra* note 634 at 69.
a new educated elite, with the professions of ministry, teaching, law, and engineering as their staples.\textsuperscript{690}

Thus, the conflict of the American Revolution would be reflected in the conflict that existed in higher education for \( \frac{3}{4} \) of a century after the war; similar to the Revolution, the conflict in higher education was about whether to continue to adhere to traditional, European modes of education, or whether to adopt pedagogical methods based on the democratic ideals that characterized the new nation. Unlike the Revolution, it appears that, if a winner is to be declared in this conflict, European ideals were the victors. As Geiger explains, although the connection between curriculum and content were questioned, they were not significantly challenged in practice. As such, the overall role and purposes of higher education during this time was to “serve as a custodian of high culture; to nurture and preserve the legacy of the past; to foster a... 'common learning,' capable of enlarging and enriching people’s lives; and to impart the knowledge, skills, and sensibilities foundational to the arts of living themselves.”\textsuperscript{691}

Thus, despite the war and changing ideologies, overall, higher education during this period would retain many of the characteristics from the previous period. Higher education was still mostly concentrated around educating young white men.\textsuperscript{692} But the profile of that white male student was broadened to include not just aristocratic sons of the wealthy, but the “common man” as well. Less wealthy, middle class individuals now had more of an opportunity to improve social status by obtaining a college degree creating an “educated elite.” Further, the role higher education plays in producing leaders in society continued during this period evinced by the proliferation of law and medical schools during this period. Finally, although traditional approaches many times prevailed during this period, the proliferation of different types of institutions that characterized this period represent a precursor to the varied and extensive higher education system in place today.

\textit{Higher Education from 1860 through 1920}

The increase in the number of colleges experienced during the previous period was characterized by a bit of uncertainty as to just exactly what role colleges would play in society overall. This uncertainty was illustrated in the conflict over which pedagogical approach was appropriate for educating this new democratic society’s young citizens. This period, by contrast would be characterized by a bit more certainty; for although there was still disagreement as to the correct pedagogical approach, it did not stop the growth of higher education institutions. Rather, the field of higher education, by the end of this period would be diversified to cater to different types of students depending on the desired approach to education. Overall, this period is characterized by the development of more clearly defined

\textsuperscript{690} Id.
\textsuperscript{691} LUCAS, supra note 1 at 135.
\textsuperscript{692} Id. at 122 (explaining that demands for the expansion and reform of higher education did not speak to the aspirations of women, blacks, indigenous peoples, or other ethnic minorities).
roles for the institutions that emerged during this time including land-grant institutions and the precursors of the university as we know it today.

During this period, the continuing theme of government financial support for institutions of higher education is evident, but to a greater extent than before as evinced by the passing of land-grant legislation. Additionally, the origins of seeking private donors as avenues for capital to fund higher education emerges in this period with the increase of philanthropy that took place in this period. Finally, the recurring theme of elitism manifests itself in different ways as the origins of ranking colleges and universities emerge during this time. This period, arguably more than the previous two periods, is responsible for the creation of institutions that are the foundation of the system of higher education currently in existence.

As mentioned previously, a particularly important development during this period was the enactment of the Morrill Land Grants of 1862 and 1890. The legislation represents an event in American higher education history that had lasting effects on the system. Indeed, the Morrill Land Grant Act is responsible for the establishment of Cornell - a land-grant institution. Cornell, and two other institutions: Harvard and Johns Hopkins, would demonstrate qualities in their collective capacity that would come to typify the American University. Indeed, “Cornell’s melding of academic and practical studies would characterize American state universities. Eliot oversaw the transformation of undergraduate and professional education at Harvard. And John Hopkins stood for research, graduate education, and the American Ph.D.”693 The details of these leaders’ contributions to the emergence of the American university, as well as the characteristics of these universities, will be discussed below.

Building the American University

The establishment of the land-grant institution represented only one example of the extreme growth and reform higher education underwent during this period. This moment in time also saw the development of universities, institutions that embodied modes of pedagogy that are the foundation of universities as we know them today.

The pioneers of the American university – namely, Andrew Dickson White, Charles W. Eliot, and Daniel Coit Gilman – sought guidance as to how to proceed at their own institutions, from their first-hand experiences with European, specifically German, universities.694 These education reformers were impressed by the pedagogical principles that characterized the German universities. Geiger explains,

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They shared a unifying ideology that idealized Wissenchaft, or systematic inquiry in theoretical bodies of knowledge.
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Accordingly, a German professor’s sole obligation was to pursue, master, and extend knowledge of his subject and then to profess it to students as he saw fit. This principle as honored as Lehrfreiheit, or freedom to teach. The corresponding principle for students was Lernfreiheit. That is, students were expected to learn their subjects as they saw fit – from the lectures of professors and unpaid private docents, from reading, or from matriculating at different universities. The dynamic element animating this structure was merit-based competition among universities for the most accomplished academic talents – scholars who advanced their fields.\textsuperscript{695}

From the above description, the roots of principles that came to characterize the American higher education system become evident, particularly with regard to academic freedom; this concept will be discussed in further detail later in this study. The above-named educational reformers would take from these German principles, and each would be instrumental for significant educational reforms at their respective institutions, reforms that continue to characterize today’s universities.

In 1868, Andrew Dickson White, would found Cornell as a result of the land-grant movement.\textsuperscript{696} White’s main contribution to the field of higher education, specifically at the undergraduate level, was his establishment of a version of the elective system, called the “group” or “major” system, wherein the university was responsible for structuring the classes within a particular field.\textsuperscript{697} This development of this system was the result of White’s belief that students should have a choice in their course of study. Thus, within a chosen field or course of study, under the “Cornell Idea,” courses were prescribed for about two years.\textsuperscript{698}

One year later, in 1869, Charles Eliot was named president of Harvard University.\textsuperscript{699} Although Eliot made major contributions in the area of graduate study in the arts and sciences, he is most remembered for his work at the undergraduate level in establishing the elective course of study.\textsuperscript{700} In so doing, he would settle the conflict between advocates of practical studies and advocates of liberal studies regarding which approach was most appropriate; Eliot would respond by saying “this University recognizes no real antagonism between literature and science...We would have them all, and at their best.”\textsuperscript{701} Thus, no longer would educators fight over which pedagogical approach was best; Eliot made room for both at Harvard.

\textsuperscript{695} Id. at 328.  
\textsuperscript{696} Id. at 316.  
\textsuperscript{697} GEIGER, supra note 614 at 317.  
\textsuperscript{698} Id.  
\textsuperscript{699} Id. at 318.  
\textsuperscript{700} RUDOLPH, supra note 628 at 291.  
\textsuperscript{701} Id. at 292.
Eliot believed that students should be able to choose their own course of study, thus his endorsement of the elective system.\textsuperscript{702} He noted,

\begin{quote}
In education, the individual traits of different minds have not been sufficiently attended to...[Y]oung men of nineteen or twenty ought to know what he likes best and is most fit for...when the revelation of his own peculiar taste and capacity comes to a young man, let him reverently give it welcome, thank God, and take courage. Thereafter, he knows his way to happy, enthusiastic work, and, God willing, to usefulness and success.\textsuperscript{703}
\end{quote}

The final educational reformer discussed in this section came the closest to achieving “true” university status at his institution. Daniel Coit Gilman was the president of Johns Hopkins when it opened in 1876.\textsuperscript{704} After failed attempts to implement his view of the American university at Yale and the University of California, Gilman would find success in building an institution dedicated to research and graduate education.\textsuperscript{705}

Thus, Gilman’s institution was characterized by a strong, renowned faculty and talented students. He recruited young, eager academics seeking the opportunity to advance their fields,\textsuperscript{706} and students who would provide the faculty with challenging and rewarding stimulation.\textsuperscript{707} In his quest to develop a university focused on scholarly research, Gilman also created graduate fellowships, funded laboratories for scientific research, built extensive libraries, and brought in guest lecturers on a regular basis to enhance the research environment.\textsuperscript{708} The institution was also influential in increasing the prestige of the American Ph.D.\textsuperscript{709} Gilman’s successes at Johns Hopkins would influence a host of institutions and is the antecedent of the research universities that exist today.\textsuperscript{710}

In the aggregate then, these pioneers established practices that still characterize higher education today: student choice in their course of study as manifested in Eliot’s elective principle, the group or major system established by White at Cornell, and the establishment of the first major research university based on the Germanic principles of \textit{Lehrfreiheit} and \textit{Lernfreiheit} by Goit at Johns Hopkins. Not only do these developments represent the origins of the basic tenets of today’s higher education system, they also represent the formal repudiation of previous pedagogies that reigned during the previous
period. No longer would one pedagogical method represent the standard for higher education; these new developments made room for the pursuit of varied modes of study.

These innovative institutions along with the creation of land-grant institutions would continue to proliferate in the latter part of the nineteenth century; modern, forward-thinking higher education institutions that many times eschewed tradition and represented the most current thinking on what a university should be. However, another influence in the proliferation of higher education institutions would cause one tradition in higher education to re-emerge, albeit in different clothes: elitism.

Liberal Arts Colleges, Philanthropy, and Elitism in Higher Education

During this period, the ideal of elitism in higher education would be expanded to include new developments; it would come to reveal itself both through liberal arts pedagogy in a nod to traditional values as well as through the influence of generous benefactors who financially assisted existing institutions or created new ones.

First, as discussed previously, elitism in higher education previously came in the form of the aristocrats and the wealthy that were many times the sole beneficiaries of a postsecondary education. The theme was also perpetuated through the notion that higher education was a vehicle for upward social mobility. By the early 1900s, traditional colleges were again displaying a preference for an elite education; they were anti-education for democratic or vocational or purposes and anti-education with an emphasis on research. Their chosen pedagogical method was aimed at “cultivating the minds of undergraduates through a well-rounded education while also producing scholarly works on literature, foreign languages, history, and philosophy.”

Woodrow Wilson, president at Princeton beginning in 1902 endorsed the concept of liberal culture that formed the bases for the educational approach he utilized during his tenure at Princeton. Geiger explains:

Liberal meant that the focus was entirely on the liberal arts, or what Wilson once called pure literature, pure philosophy, pure science, and...history and politics. Culture meant that the object was to instill “the intimate and sensitive appreciation of moral, intellectual, and aesthetic values.” But such training was “not for the majority who carry forward the common labor of the world...It is for the majority who plan, who conceive, who superintend, who mediate between group and group and must see the wide stage as a whole.”

These lofty ideals would come to characterize the liberal arts education that proliferated at colleges in the early 1900s. The emergence of universities in the previous decade influenced the emergence of liberal arts education in American colleges as it became

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711 DEREK BOK, HIGHER EDUCATION IN AMERICA 29 (Revised ed. 2013).
712 GEIGER, supra note 614 at 411.
clearer and clearer that they were unable to compete with universities in doing what they did; rather, it seemed that when all else failed, these institutions fell back on traditionally elitist ideals to form their own niche in the higher education landscape.

A. Lawrence Lowell, successor to Charles Eliot, would bring part of this philosophy to Harvard during his tenure. He felt that “the best type of liberal education in our complex modern world aims at producing men who know a little of everything and something well.” A staunch believer that higher education had leaned too far in catering to vocationalism and professionalism, he argued for a return to when the pursuit for a higher education had more purpose and dignity. He expressed, “[a]ny man who is to touch the world on many sides, or touch it strongly must have at his command as large a stock as possible of the world’s store of knowledge and experience; and...bookkeeping does not furnish this in the same measure as literature, history, and science.”

Thus, the establishment of the liberal arts college amidst the university movement represented an endorsement of the concept of elitism in higher education. Indeed, Geiger indicates that the establishment of these colleges was “an effort to recapture the elite character that a college education had formerly represented.” During this period, the theme would also reveal itself as generous benefactors, the “captains of erudition,” began populating the American landscape with modern universities and philanthropy became another vehicle for elitism.

For example, in 1876, Johns Hopkins University was established as a result of a $7 million bequest from its namesake benefactor. Nearly 20 years later, as the establishment of new institutions of higher education continued, similar investments were made by the most successful of businessmen at the time. Thelin explains that “the discretionary wealth generated by American corporations and enterprises in the late nineteenth century” were the source of funding for many emerging universities in the last decades of the 1800s.

These gifts establishing institutions of higher education would help re-define elitism and prestige in higher education during this period. This is not to say that the previous forms of elitism were eliminated; rather, the prestige of the new great universities was another manner in which elitism revealed itself. How did this phenomenon emerge? Or, as Geiger

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713 Id. at 415-416.
714 Id. at 414.
715 Lucas, supra note 1 at 220.
716 Id.
717 Geiger, supra note 614 at 421.
718 Thelin, supra note 634 at 111.
719 Id. at 112 (explaining that indexed for inflation, the gift would have been worth $112.8 million in 2000.)
720 Id.
721 Id.

Philanthropy would contribute to the creation of liberal arts colleges as well. For example, Simeon and Amanda Reed left their $3 million for the establishment of an institution for higher education. Geiger, supra note 614 at 416. Cornelius Vanderbilt provided the initial $1 million to establish Vanderbilt University in the south. Vanderbilt University, Wikipedia Free Encyclopedia, https://en.wikipedia.org/wiki/Vanderbilt_University (last visited September 27, 2015). John D. Rockefeller would make a gift for the creation for the University of Chicago in the amount $12 million.
asks, “[w]hy did two of the wealthiest men in the United States and a third multimillionaire almost simultaneously and independently decide to found universities committed to research?” He explains that the academic revolution redefined the prestige structure of higher education in this country. When the wealthiest philanthropists invested in higher education, they spared no expense to obtain “men of the very highest attainments” and to build an “institution of the highest rank and character.”

Two additional events would serve to cement the elevated status American universities were beginning to enjoy. First, in 1900 the presidents of 14 institutions met and established the Association of American Universities (AAU). “The immediate motive,” Geiger explains “was to bolster the prestige of the American PhD in the eyes of European universities and distinguish their degrees from dubious doctorates being awarded by unqualified colleges.” He continues, “The AAU was immediately recognized as an exclusive club of those institutions best embodying academic values.” Here, the theme of elitism is illustrated in the universities attempts to establish the preeminence of their institutions over the other postsecondary institutions that existed at the time. The creation of elite status for these institutions was important because of the complaints by American professors with ties to European universities; the formation of the association was meant to send a message to European scholars that these members were quality institutions.

Second, a decade later, science journalist Edwin E. Slosson published an article profiling the 14 Great American Universities. By this time, Slosson contended, a “standard American University (S.A.U.)” became discernible and embodied several characteristics that represented maturity and crystallization. In reviewing Slosson’s research, one begins to see the significance of his study of the great American university. Categorized by their, size, resources, and commitment to academic quality, Slosson created profiles of each institution describing their administration, faculty, and student cultures. In essence, Slosson’s volume profiling the 14 great universities can be viewed as the antecedent of the U.S. News & World

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722 GEIGER, supra note 614 at 339.
723 Id.
724 Id.
725 THELIN, supra note 634 at 110.
726 GEIGER, supra note 614 at 349.
727 Id.
728 THELIN, supra note 634 at 110 (listing the charter members of the AAU as: Harvard University, Johns Hopkins University, Columbia University, University of Chicago, University of California, Clark University, Cornell University, Catholic University, University of Michigan, Leland Stanford, Jr., University, University of Wisconsin, University of Pennsylvania, Princeton University, and Yale University). Id. at 147.
729 GEIGER, supra note 614 at 348.
730 THELIN, supra note 634 at 111. Thelin constructed a composite profile that sought to describe the great American university that included nine categories: large scale philanthropy; presidential presence; professors as professional experts; presence of professional schools; curriculum with an emphasis on research; professionalization of students; large, complex facilities; and embodiment of the dynamics of the academic enterprise to include the orchestration of administration, faculty, and students according to a particular script. Id. at 127-130.
731 GEIGER, supra note 614 at 348.
Report rankings which currently have significant influence on institutions of higher education. As Gaye Tuchman explains, “[a] high ranking on the U.S. News & World Report’s ‘America’s Best Colleges’ seems to be associated with such American values as elite status and selectivity.” Thus, we can see that the theme of elitism at the core of the ranking system in higher education has its roots during this period at the beginning of the twentieth century.

The above illustrates how the concept of elitism influenced the emerging great universities, but Thelin explains that between 1890 and 1910, elitism and prestige would significantly influence American colleges as well. Indeed, the “age of the university” was at the same time the golden age of collegiate life."

_The Mystique of American Colleges_

The creation of the land-grant universities, state universities, and research universities, which were essentially democratic in nature, increased access to higher education for many Americans. However, there was still a niche in the higher education system where elitism reigned, as previously discussed. Concurrent with the university movement of the 1880s and 1890s, the collegiate revolution would spread on college campuses that fostered the traditional way of doing things.

Although critics had called for reform in higher education, spawning the creation of universities with diverse course offerings, it appears that it was the traditional colleges that created intrigue amongst Americans about higher education. Thelin explains,

> The single most important change in American higher education at the end of the nineteenth century was that college-going became fashionable and prestigious. This meant that the historic institutions had some leverage in the decades when modernization and industrialization were a high priority, and it explains why the undergraduate college associated with the bachelor-of-arts degree did not wither, despite the dire predictions by the university-builders.

The American college at this time was surrounded by a sort of mystique; schools such as Yale and Princeton capitalized on their extensive history in the country. The thought was, “age, not modernity, bestowed prestige.” These institutions that had been around since the seventeenth century had that in spades. But it was not just their historical standing that

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[73] _GAYE TUCHMAN_, WANNABE U 10 (2010).
[74] _THELIN_, _supra_ note 634 at 154.
[75] _LUCAS_, _supra_ note 1 at 161-167 (explaining that in addition to the development of land-grant, state, and research universities, two minorities, women and African-Americans were also beginning to take advantage of higher education during this era. Wellesly, Smith and Vassar were established in the 1870s and women were also being admitted into colleges where they were previously denied entry. Further, more and more African-Americans were attending institutions of higher education that catered to black students; several of them were established during this period including Morehouse College, Shaw University, Clark University, and Fisk University).
[76] _GEIGER_, _supra_ note 614 at 365.
[77] _THELIN_, _supra_ note 634 at 156.
[78] _Id._
contributed to the growing interest in American colleges; several factors would play a part in their growing popularity, even in the midst of the university movement.

First, the media, in the form of national-circulation magazines, catering to a middle-class audience, played a large role in popularizing the goings-on at American colleges.\(^739\) They would serve as the messengers, appeasing the curiosity about what transpired on college campuses.\(^740\) These pictures and articles gave readers a view of student life at prestigious colleges where students’ clothing, college songs, and intercollegiate athletics would become of particular interest to the American public. In publishing the exploits of college students, the media would play an important role in establishing and spreading of the lore of collegiate life. Thelin explains,

> 'For some unexplained reason the general public seems to find the college man fascinating. It takes a deep concern in all his affairs – his athletics, his literary and social attainments, his pranks and follies. Consequently college fiction is becoming a popular kind of literature.' Often the stories were romanticized accounts of undergraduate adventures, of highly varying degrees of authenticity...The common denominator over the decades was that the American campus had broad audience appeal.\(^741\)

Second, by this time, the opportunity for increased social mobility made attending college more attractive to the previously-discussed “self-made man,” who would come to see the merit in sending his sons off to college where they would enjoy the campus experience and mix with other boys from established, educated families.\(^742\) At this juncture, simply going to college conferred elite status on an individual.\(^743\)

Third, intercollegiate sports that were popular not only amongst students and alumni, but with the American public as well.\(^744\) In particular, college football would become popular during this period with the aid of the prestige and popularity of the Big Three: Princeton, Harvard, and Yale.\(^745\) In turn, football and its increasing popularity would further increase the reputations of those institutions.\(^746\)

Associated with intercollegiate sports was the participation of alumni and the establishment of alumni associations. Geiger explains, “athletic contests created a sentimental link between graduates and alma mater, as well as an excuse to return to

\(^739\) Id. at 157 (explaining, these media outlets included, The Independent Atlantic Monthly, The Century, Scribner's, and McClure's).
\(^740\) Id.
\(^741\) Id. at 634 at 162.
\(^742\) Id. at 155.
\(^743\) Id. at 169.
\(^744\) Id. at 177 (explaining that intercollegiate athletics had been a source of intense enjoyment and rivalry among students from the start. Over time, the games also soared as a matter of public interest, in terms of paying spectators and news coverage).
\(^745\) Geiger, supra note 614 at 374.
\(^746\) Id.
Alumni and students would simultaneously enjoy elaborate celebrations such as homecoming parades that allowed alumni to indulge in a bit of nostalgia. Further, alumni became an active presence on campus encouraging and rallying for collegiate activities and atmosphere.

Finally, the trappings of the collegiate experience that formed the undergraduate culture would act as a great lure to students and the public. There was the loyalty to one’s college that was engendered by the adoption of distinguishing symbols, institutional colors, and mascots. Fraternities would proliferate during this period as well which served the purposes of: socializing its members in preparation for entry into high society as well as the business world and promoting school spirit by their participation in collegiate activities. The college culture, characterized by particular dress, speech, and code would act as draw to students.

All of these factors would contribute to the mystique of higher education and would play a part in helping to explain why the institution came to be venerated in American society. It seems almost impossible that these colleges that still stood for elitism and privilege, that were still many times prohibitively expensive for most American families, that catered almost exclusively to middle and upper-middle class white men, could catch and hold the attention of the increasingly diverse and democratic-minded American public. However, somehow, Harvard, Princeton, and Yale, the archetypes for the collegiate way, managed to send the signal to middle-class America that if one worked hard one could achieve success on one of these campuses; college was no longer the prerogative of the wealthy, it was open to all who qualified. Geiger further clarifies:

The colleges no longer appeared to be reserved for a narrow population aiming for professional careers but rather appeared open to all qualified aspirants, even if that was still a small slice of an age cohort. Colleges were portrayed as promoting the manliness and savoir faire needed for success in the business world...[C]olleges had emerged as a clear route to middle-class careers and life styles.

Thus, in thinking about the role and purpose of the American higher education system, the period between 1860 and 1920 represented a time of intense change and transformation. This period, bookended by the Civil War and World War I wrought
foundational changes in postsecondary education. Most significantly, democratic ideals would make more headway in influencing higher education and increasing access with the creation of land-grant universities, state universities, and research universities. Further, the reforms taken by the leaders at Cornell, Harvard, and Johns Hopkins with regard to university curriculum are foundational policies that still exist today. Institutions continued to embody themes of increasing social mobility, prestige, and elitism, particularly illustrated by the collegiate revolution. The collegiate movement would also be responsible for helping to take higher education public; the culture at colleges like Yale that embodied the collegiate ideal produced fascination amongst the American public that may contribute to why the system of higher education became held in such high regard in the United States. In other words, the collegiate movement may be responsible for the positive visceral response Americans have toward institutions of higher education. As a result of the foundational events that took place during this period in the history of American higher education, the system would continue to flourish through to the present day.

Higher Education from 1920 to the present

The developments of higher education that took place during the previously-discussed periods aptly illustrate the characteristics that typify the institution of higher education that we’ve become accustomed to today. More important for this study, the previously discussed periods help to provide answers to the questions asked at the outset of this chapter; specifically, the above discussion helps clarify how higher education came to hold its place in today’s society. This is not to say that nothing significant has transpired in the field of higher education since the 1920s. However, as this look into the history of higher education is focused on elucidating the role and purpose of higher education, this section will be devoted to a discussion of major trends and events that help paint a picture of the American system of higher education in existence today. Specifically, the move toward universal access to higher education as well as the trend of the American campuses as a potential site for social justice will be discussed in conclusion of this section.

The Move to Mass Higher Education and Beyond

From the 1920s moving forward, higher education would experience continued growth. As Rudolph expressed it, “growth would, indeed, feed on growth.”\textsuperscript{757} During the interwar years, college enrollment increased from 250,000 to 1.3 million.\textsuperscript{758} Several factors contributed to this occurrence: the expansion of secondary education,\textsuperscript{759} the introduction of modern technology which required an increased number of trained individuals,\textsuperscript{760} and finally, the

\textsuperscript{757} RUDOLPH, supra note 628 at 463.
\textsuperscript{758} THELIN, supra note 634 at 205.
\textsuperscript{759} Id.; GEIGER, supra note 614 at 429.
\textsuperscript{760} RUDOLPH, supra note 628 at 463.
continued faith in higher education as a benefit.\textsuperscript{761} Typical of mass higher education systems, the expansion that took place resulted in an increase of institution-type.\textsuperscript{762} During this period, several institutions catering to different audiences would crop up around the country. The number of universities expanded and were soon joined by: technical institutes, junior colleges, teachers’ colleges, business schools, women’s colleges, and state regional colleges, to name a few.\textsuperscript{763} Another contributor to the expansion of institutions of higher education was the development of a new structural innovation: the multi-campus, statewide university system.\textsuperscript{764} This was first represented by the founding of the University of California at Los Angeles (UCLA).\textsuperscript{765}

Although the Great Depression curtailed enrollment growth, efforts by the federal government, anticipating the end of the war, would contribute to an increase in enrollments by 1945.\textsuperscript{766} The Serviceman’s Readjustment Act of 1944, also known as the G.I. Bill, provided billions of dollars for returning war veterans to attend college.\textsuperscript{767} The legislation\textsuperscript{768} was responsible for the enrollment of 88,000 veterans by 1945, and over 1 million one year later.\textsuperscript{769} By 1950 this number had swelled to over 2 million students who had enrolled in college as a result of the G.I. Bill.\textsuperscript{770}

Veterans were not the only ones who took advantage of higher education during this time. In 1947, shortly after the end of World War II, student enrollment had increased to 2.3 million students across 1,800 institutions.\textsuperscript{771} This represents not only an increase in college-going students, but the proliferation of different institutions and institution types. The number of students steadily increased each decade such that by 1970, registration at colleges across the country totaled 8.5 million.\textsuperscript{772}

This period, between the mid-1940s and 1970 has been dubbed, the “golden age” of higher education, characterized by prosperity, prestige, and popularity.\textsuperscript{773} In other words, the country was moving closer and closer to providing mass access to higher education, and the now diverse field of higher education institutions became increasingly capable of providing selective programs from the undergraduate level through to professional and doctoral

\textsuperscript{761} Theelin, supra note 634 at 206.
\textsuperscript{762} Geiger, supra note 614 at 429.
\textsuperscript{763} Theelin, supra note 634 at 206.
\textsuperscript{764} Id. at 207.
\textsuperscript{765} Id.
\textsuperscript{766} Id. at 262.
\textsuperscript{767} Lucas, supra note 1 at 252.
\textsuperscript{768} Theelin, supra note 634 at 263 (explaining that the legislation guaranteed a year of education for 90 days’ service, plus one month for each month of active duty, for a maximum of 48 months. Tuition, fees, books, and supplies up to $500 a year would be paid directly to the college or university).
\textsuperscript{769} Id.
\textsuperscript{770} Id.
\textsuperscript{771} Lucas, supra note 1 at 248.
\textsuperscript{772} Id. at 248-49.
\textsuperscript{773} Theelin, supra note 634 at 260.
programs.\textsuperscript{774} This “golden” period would also be characterized by consistent state support as well as federal commitment to advanced research and access to higher education.\textsuperscript{775}

Two decades later, in 1990, enrollments increased to approximately 12.6 million students enrolled across 3,500 public and private colleges and universities.\textsuperscript{776} Growth during this period was significantly influenced by the increase in women, black, and other minority attendance at post-secondary institutions.\textsuperscript{777} The increase of part-time students also factored into the expansion of higher education between 1970 and 1990.\textsuperscript{778}

By the 2010s, Derek Bok relates that “higher education in the United States [had] grown to become a vast enterprise comprising some 4,500 different colleges and universities, more than 20 million students, 1.4 million faculty members, and aggregate annual expenditures exceeding $400 billion.”\textsuperscript{779} And by this point, the substantial growth of postsecondary education from the 1940s through to the present would illustrate that higher education has cemented its place in American society as integral to national interests.\textsuperscript{780}

The post WWII period typified by extreme growth in higher education, to the present day system of higher education with its proliferation of institution types, can be characterized as a transition from a system of mass higher education to a system of universal access as described by Trow.\textsuperscript{781} Indeed, Thelin indicates that the United States was a frontrunner in making deliberate attempts to promote mass and then universal access to postsecondary studies.\textsuperscript{782} In delineating aspects of the two different constructs, Trow explains:

\begin{quote}
In mass higher education, the institutions are still preparing elites, but a much broader range of elites that includes the leading strata of all the technical and economic organizations of the society. And the emphasis shifts from the shaping of character to the transition of skill for more specific technical elite roles. In institutions marked by universal access, there is concern with the preparation of larger numbers for life in an advanced industrial society; they are training not primarily elites ...but the whole population, and their chief concern is to maximize the adaptability of that population to a society whose chief characteristic is rapid social and technological change.\textsuperscript{783}
\end{quote}

\begin{itemize}
\item \textsuperscript{774} Id.
\item \textsuperscript{775} Id. at 262.
\item \textsuperscript{776} \textsc{Id. at 250}.
\item \textsuperscript{777} \textsc{Id. at 250}.
\item \textsuperscript{778} \textsc{Id. at 262}.
\item \textsuperscript{779} \textsc{Id. at 250}.
\item \textsuperscript{780} \textsc{Id. at 250}.
\item \textsuperscript{781} \textsuperscript{782} \textsc{Id. at 250}.
\item \textsuperscript{783} \textsc{Id. at 250}.
\end{itemize}
Extrapolating from Geiger's assertion that elite and mass traits, as described by Trow, are not mutually exclusive, one can similarly find common denominators among mass higher education and universal access. In other words, the move from mass higher education to universal access has the comparable goals of preparing students for technological advances; universal access simply accomplishes this goal on a larger scale.

Further, while Geiger asserts that Trow's elite typology does not fully describe American colleges and universities, some aspects of his theory comport with the growth trends. For example, NCES reports that in fall 2013, 65.9 percent of students who completed high school would enroll in college. Trow maintains that when the proportion of the college going population approaches 50%, attending higher education is perceived as a requirement rather than a right and, consequently, those students who meet their obligation are most apt to benefit from the economic rewards available. Indeed, in reflecting on the vocational purposes of higher education, it is almost unfathomable nowadays to hear that an individual has not partaken in some type of postsecondary education. This may be due to the fact that it has been acknowledged, at least since the 1990s that “as the amount of postsecondary education increases, workforce participation increases and the likelihood of being unemployed decreases.” In other words, the utilitarian role of higher education that had been steadily increasing since the beginning, has established itself among the American population as more and more citizens acknowledge the merits of obtaining a postsecondary education.

Considering the evidence of the mass growth of higher education, as discussed above, it should be no surprise that industry insiders are looking beyond mass higher education toward globalization in the twenty-first century. Globalization has been defined as “the reality shaped by an increasingly integrated world economy, new information and communications technology (ICT), the emergence of an international knowledge network, the role of the English language, and other forces beyond the control of academic institutions.” This concept should be distinguished from internationalization which can be understood as the “policies and programs that universities and governments implement to respond to globalization.”

Motivated by the opportunity for profit, the chance to enhance research and knowledge capacity, and the possibility of enhancing the competitiveness, prestige, and
strategic alliances of the institution, many U.S. colleges and universities have implemented international initiatives including study-abroad, sponsorship of foreign students to study on campus, and curriculum focus on international studies majors, to name a few. Finding means to accommodate to an increasingly global market becomes crucial for institutions of higher education in the United States. Thelin explains that although the U.S. was a trendsetter in increasing access to higher education, the system is no longer tilted in its favor. Rather, similar to the growth from elite to mass higher education that took place in this country, the effects of globalization appear inevitable. Indeed, one report notes that while currently 2.5 million students study outside their home country, this number is expected to increase to 7 million by 2020. In this field, the United States is in competition with countries such as those in the EU that have been pursuing international initiatives for more than 20 years. Thus, internationalization efforts play an important role as the United States adjusts to increased competition from countries across the globe.

This section described the meteoric rise from elite to mass education in the United States through to the concept of globalization that has taken over as an inevitable reality in the twenty-first century. It illustrates how far this country has come from having to justify and persuade the American public of the merits of higher education to obtaining a status in society wherein obtaining a postsecondary degree is almost an obligation. In light of the above, it seems clear that universities and colleges across the country will continue to play a major role in American society; the next section discusses their role with regard to social justice.

The University Campus and Social Justice

Thus far, this chapter has attempted to elucidate the roles and purposes of higher education in this country through an examination of historical events. To that end, the fact that the changes in higher education affairs reflect and respond to historical events has been previously acknowledged at the outset of this chapter and illustrated in the above discussion. In reviewing recurring themes throughout history in order to clarify the roles and purposes of higher education, one theme is particularly relevant to the instant study and will be explored in this section; discrimination against minorities in higher education.

The previous chapter provided a discussion on the enactment of Title VII of the Civil Rights Act of 1964 citing severe and pervasive discrimination against minorities as the impetus for the legislation. That chapter further discussed the 1972 amendments to the Civil Rights Act of 1964 wherein Congress found it appropriate to bring educational institutions

791 Thelin, supra note 634 at 374.
792 Altbach, Reisberg & Rumbley, supra note 788 at viii.
793 Altbach & Knight, supra note 790 at 293.
794 Trow, supra note 780 at 17.
under the purview of the statute. The examination of the legislative history of the Equal Employment Opportunity Act of 1972 revealed the rampant discrimination against both women and racial minorities that existed in higher education at the time of the amendments. In a similar way, this section will examine the development of educational opportunities for both women and African Americans in this country.

However, while a brief history of women’s opportunities in higher education will be provided, this section is substantially focused on higher education campuses and their ability to promote social justice. Social justice relies on a strong value system and has been defined as “the view that everyone deserves equal economic, political and social rights and opportunities.”

In this section, an examination of social justice will be provided through an analysis of relevant case law that illustrates the legal higher education issues germane to the provision of equal opportunity in education for African American students.

**Higher Education for Women**

This chapter thus far has illustrated that for a long time, higher education has been a privilege almost exclusively enjoyed by young, privileged, white men. Indeed, initially, women were statutorily prohibited from attending college during the colonial period. The thought was, a woman had no need for higher learning, and even if it could be justified, a woman did not have the intellectual ability to meet the rigors of collegiate study. Rudolph explains that colonials felt women were “intellectually inferior, incapable, merely by reason of being a woman, of great thoughts. Her faculties were not worth training. Her place was in the home where man had assigned her a number of useful functions.”

This theme of patriarchal attitudes would influence women’s access to collegiate education for years to come.

By the nineteenth century, the situation was slightly better for those who wished to pursue collegiate education. College was still not approved as an appropriate venue for women, however during the beginning half of this decade, education for women would begin to make strides in the industry. During this time, education for women would take place in “academies,” “female institutes,” or “seminaries for women;” none of the institutions were called colleges. And, between the 1830s and the 1860s, several developments would contribute to an increase in women’s education.

First, several women’s seminaries were founded setting a precedent for women’s education. Of these, arguably the most influential was the founding of Mount Holyoke.

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796 The LIN, supra note 634 at 30.
797 RUDELPH, supra note 628 at 308.
798 Id. at 310.
799 The LIN, supra note 634 at 56.
800 RUDELPH, supra note 628 at 310-11.
Female Seminary by Mary Lyon, in 1836. This institution was set up to cater to mature, middle-class women who could be trained as future teachers, and who would be exposed to an evangelical environment that focused on science, literature, and refinement. If the success of this institution can be gauged by enrollments and completion, Mount Holyoke may not be considered a successful endeavor by modern standards. Between 1837 and 1850, 1,400 women enrolled; this represents an average of 106-107 students per year. Of those 1,400, only 350 persisted through to graduation. A vast majority of these graduates would become teachers; however, even those who did so would only work temporarily until they married. Thus, career and family were seemingly mutually exclusive ideas during this period.

Second, in 1837 Oberlin College in Ohio would initiate the move toward coeducation. There, women were educated to pursue the traditional B.A. which was revolutionary at the time since many contemporary institutions in other regions focused their pedagogical methods toward literary and artistic refinement. Even at Oberlin, patriarchal attitudes toward education were revealed in the "special Ladies Course" offered there and recognized by diploma. Indeed, although inception of the coeducational program at Oberlin was a boon to the movement toward women’s education, equal education was not necessarily always encouraged, illustrated by their failure to allow women to prepare for public speaking and for public life.

Finally, in the South, the establishment of the Georgia Female College, chartered in 1836, would help spawn the creation of several other colleges in the region catering to women’s higher education. Although the South Carolina Female Collegiate Institute, a private institution, was founded approximately eight years prior, the establishment of Georgia Female College would represent a trend toward state support of women’s higher education. This school would later become known as Wesleyan Female College.

Southern colleges for women also suffered from a lack of an intellectually challenging course of study; rather many times these institutions spent substantial efforts in providing remedial education for those who were not prepared for college study before dedicating the last two years of college on college-level subjects. Even then, female students would take courses in music, art, embroidery, and foreign languages in fulfillment of the southern
educational goal of refinement. And similar to northern schools, at four southern female institutions, graduation rates were low, at 15 percent.

By the mid-1800s, women's education would be proliferated through land-grant and state universities. University of Iowa and University of Wisconsin opened their doors to women in 1855 and 1863, respectively, followed by Indiana, Missouri, Michigan, and California. Indeed, in the 1860s, there were at least 45 institutions that offered collegiate level studies for women. The course of study offered to women in these institutions varied widely; some offered vocational training or genteel finishing school programs while others offered professional education or liberal arts education.

Significantly, this period saw the creation of "high-grade women's colleges:" Vassar, Smith, and Wellesley. The creation of these institutions proved important because of the decision of their founders to provide women students an equal education with men, focused around the classical course of study.

Overall, a proliferation of women's education would characterize this mid-nineteenth century period. This may be due the fact that although women's education was by no means popular among the public, nor was it deemed absolutely necessary, there seemed to be less obstacles placed in front of the movement. One college visitor noted,

It is too late, amid the noontide splendours of the nineteenth century, to ignore the claims of women to higher education... Whatever shall make her wiser and better, that she may learn; whatever knowledge she may be able to use, either in adding to her own happiness, or in promoting the happiness of others - that knowledge she may rightfully acquire.

This type of attitude would carry the women's collegiate education movement toward the twentieth century and to the creation of new women's institutions such as Bryn Mawr College in 1888 and Washington Trinity College in 1900. This period, toward the end of the nineteenth century would also see the establishment of co-ordinate colleges wherein traditional all-male institutions would confer degrees or certificates for work done in institutions associated with the sponsoring college. Tulane would establish Sophie Newcomb College with this aim in 1886, and many other institutions would follow in their co-

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814 Id.
815 Id. at 213.
816 Id. at 213.
817 RUDOLPH, supra note 628 at 314.
818 Id.
819 Id. note 634 at 83.
820 Id. at 84.
821 Id. at 317-18 (explaining that classical courses replaced courses that catered to women needs such as homemaking as a career, science of the home, problems in needlework, and interior decorating as ways to a man's heart).
822 Id. note 634 at 84.
823 RUDOLPH, supra note 628 at 316.
824 Id. at 317-18.
825 Id.
826 Id.
827 Id.
828 Id.
ordinate education endeavors. Brown established Pembroke College (1891); Case Western Reserve established Flora Stone Mather College (1891-92); Harvard established the Harvard Annex, later known as Radcliffe College in 1893; Barnard College at Columbia University followed in 1889; and Tufts University also jumped into this arena with its offering, Jackson College for Women in 1910.

Further, coeducation would proliferate during this period. Coeducation was introduced at Cornell, and in 1872, women were voted equal rights at that institution. Other institutions that took advantage of this opportunity to provide equal education included University of California, University of Michigan, Northwestern and University of Chicago, buttressing Thelin’s assertion that coeducational opportunities were usually based at Midwest and West universities. Although co-ordinate education and coeducation represented successes in spreading women’s education, women suffered second-class citizenship on many of these campuses experiencing exclusion from student activities amongst other indignities.

Moving forward to 1940, women were well represented in higher education, making up approximately 40% of college enrollment that year. Thelin notes that women had much more access to higher education in 1940 than 30 years prior. Another point of good news during this period was that despite the fears that women’s pursuit of higher education would decrease marriage prospects and increase ‘lesbian relations,’ cultural conservatives were relieved to find that “the American college woman appeared not to have forfeited her prospects for marriage and motherhood.” By contrast, the challenge that revealed itself during this period was the exclusion of significant opportunities for women in professional fields and graduate study; indeed, few women had the opportunity to attend law or medical school and business school was almost exclusively male.

Despite the challenges in women’s collegiate education that existed in the 1940s and prior, women would continue to make gains in higher education and would even come to surpass men. Thelin notes the enforcement of Title IX of the Education Amendments of 1972 would play an important role in the increases of women at all levels of education. By the early 2000s, Thelin reports that women represented the majority of bachelor’s degree holders in biology, anthropology, and health sciences. Women also made strides at the professional and graduate levels, comprising approximately 50% of law and medical students, and by 2007

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827 Thelin, supra note 634 at 180-81.  
828 Id.; Rudolph, supra note 628 at 320.  
829 Rudolph, supra note 634 at 182.  
830 Thelin, supra note 634 at 182.  
831 Id. at 181-182.  
832 Id. at 226.  
833 Id.  
834 Id. at 231.  
835 Id. at 230.  
836 Id. at 370-71.  
837 Id. at 371.
were awarded 44% of the doctoral degrees in biological sciences, 29% of doctoral degrees in geology and mathematics, and 33% of the doctoral degrees in chemistry. Women also made strides at the undergraduate level evinced by the most recent NCES report which indicates that as of fall 2013, women make up 56% of total undergraduate enrollment at 9.8 million. Thus, from humble beginnings in higher education, women have succeeded in becoming a steady and significant presence in postsecondary institutions.

This section provided a brief examination of the evolution of women's higher education in the United States. The above clarifies that the challenges women faced came in the form of limited access and patriarchal, sexist attitudes that worked to thwart women's successes in this area. The evolution of women in higher education is an important facet in the history of the system, however, it is not discussed here as a function of social justice as defined in this study. Indeed, Thelin explains,

> The commitment to increasing education opportunities for women did not entail a commitment to reducing discrimination, according to class, ethnicity, or race. Sarah Lawrence College, for example, relied on a strict quota system in the 1930s that discreetly (and effectively) limited the number of Jewish women admitted...[T]he historic women’s colleges known as the Seven Sisters – Wellesley, Radcliffe, Smith, Mount Holyoke, Vassar, Barnard, and Bryn Mawr – had acquired a collective reputation as the alma maters of a talented, privileged elite of American women. *It was an identity that gave little attention to social justice matters of race or economic class...*[Indeed, prior] to World War II, these seven women’s colleges had graduated only a few hundred black women although their total alumnae ranks numbered over ten thousand.*

Therefore, this section on women in higher education is discussed here for its historical significance; the discussion below on African Americans in higher education will elucidate the function of higher education institutions as sites for social justice as described at the outset of this section.

**Higher Education for African Americans**

The National Association for Social Workers (NASW) has defined social justice as a strong value system wherein the view is that “everyone deserves equal economic, political and social rights and opportunities.” This definition is beneficial for providing a basic understanding of the concept and its focus on equality. However, in the field of higher education, the concept of social justice is extremely complex and the above definition merely

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838 Id.
840 HELIN, supra note 634 at 227.
841 Social Justice, supra note 795.
scratches the surface of what social justice means within this realm. Indeed, it has been noted that:

[s]ocial justice within the higher education policy world may have become a grab-bag of values, rationales and strategies with ambivalent ideological underpinnings which satisfy different stakeholders whose normative and ideological positions are not necessarily commensurable. Its pragmatic mix of meanings, rationales and strategic routes contains diverse elements which are instantly familiar (like widening participation) or normatively ambiguous in terms desired outcomes of (widening participation again) or strategically contestable (prioritizing economic benefits and private good imperatives over public good concerns). In such a case, it is possible that social justice may be invested with more meanings than can coherently be held together or more seriously that some interpretations narrowly linked, for example, to private gains are in fact trumping other social goals. 842

While a full discussion of the complexities of social justice in higher education is beyond the scope of this study, this section will attempt to clarify its role in the field, particularly as a function of access to higher education for African Americans.

In higher education, the achievement of equity and social justice can be examined in two ways: (1) looking outward to determine what higher education does to achieve equity and social justice across society; or (2) looking inward at the system of higher education, specifically the social composition of higher education’s student population, to determine whether the system has failed or succeeded in becoming more socially representative. 843 For the purposes of this study, the analysis of whether higher education has achieved equality and social justice will proceed in the latter fashion. Specifically, this section proceeds with a brief examination of historical events in the education of African Americans in this country and an analysis of relevant case law which highlight the barriers to African Americans’ access to postsecondary education.

Considering the history of African Americans in this country, it should not be a surprise that the education of this population still presents major issues in higher education. The conditions of slavery and some of its future effects on African Americans were discussed in the previous chapter and, therefore, will not be repeated here. However, the discussion of the incidents of slavery that took place in the previous chapter provided a foundation for an examination of the obstacles to the economic well-being of African Americans manifested by employment discrimination. The proceeding discussion contrastingly focuses on the obstacles to the attainment of education for African Americans from slavery to the present.

In his study of the origins of slavery, Joseph Boskin indicates that the available
evidence suggests that slaves did not receive formal education in the seventeenth century in
the colonies. 844 Indeed, the terms “Negro” and “slave” were nowhere to be found in the
education statutes for the period leading to the conclusion that slaves were regarded as
ineducable. 845 It appears that this was the pervasive thought for almost two centuries.
Toward the end of this period however, in the midst of developing an educational system in
the colonies subsequent to the American Revolution, Thomas Jefferson would argue for the
emancipation and education of slaves. Urban and Wagoner explain,

It was in connection with his desire to bring an end to slavery that
Jefferson gave consideration to the systematic education of
African Americans. In 1778 he prepared for the Virginia
legislature a plan for the gradual emancipation of slaves. He
proposed that all children of slaves born after a certain date be
offered training at public expense in farming, the arts, or the
sciences, according to their abilities. 846

Jefferson’s ideas failed to gain acceptance and he would soon resign himself to the effects of
slavery on American society. 847

Despite the dearth in the extant literature regarding the methods of educating African
Americans in the eighteenth century, there is evidence that at the very least, some form of
education took place in the latter portion of that century and entering into the nineteenth
century. It is well-documented that the first African American to obtain a higher education
degree was Alexander Lucius Twilight as early as 1823 suggesting that some type of primary
and secondary system of education must have been available prior to then. 848 However, the
literature appears to be silent on this matter.

According to the Journal of Blacks in Higher Education, six or seven additional African
Americans would obtain bachelor’s degrees (and in one case a professional degree) from
several higher education institutions between 1823 and 1850. 849 However, by 1850, all
southern states statutorily prohibited African Americans from obtaining an education. 850

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845 Id.
846 URBAN & WAGONER, supra note 617 at 99.
847 Id.
850 Susan Bragg, *Knowledge is Power: Sacramento Black and the Public Schools 1854-1860*, 75 AFR. AMER. CAL. 214, 216 (1996) (explaining that despite the prohibition many slaves did learn to read and write through clandestine studies or secret schools).
According to William Goodell, the first such statute was enacted in South Carolina as early as 1740.\textsuperscript{851}

Black students would continue to sporadically graduate from institutions of higher education until the establishment of what is now known as Lincoln University, the first higher education institution for black men.\textsuperscript{852} Other schools would provide higher education for black students including: Berea College in Kentucky established in 1855 which was both coeducational and integrated; Wilberforce University established in Ohio in 1856 which catered to black students; and Oberlin College, established in 1833 and integrated in 1835.\textsuperscript{853} Despite the achievement of providing opportunities for black students to obtain postsecondary education where there previously were none, by the signing of the Emancipation Proclamation in 1862, only 27 students besides Alexander Twilight had obtained undergraduate degrees.\textsuperscript{854}

The end of the Civil War and the resultant emancipation of approximately four million slaves would only cause chaos in the field of education, specifically in the south.\textsuperscript{855} Deprived of meaningful education, these newly freed citizens would take advantage of the many schools that cropped up to serve this population that were understandably focused on literacy needs as well as primary education.\textsuperscript{856} Concurrently, however, the 1870s and 1880s saw the creation of approximately 200 black private and denominational institutions, most of which eventually shut down for lack of financial support.\textsuperscript{857} Indeed, only 40 of these institutions still existed after the turn of the century.\textsuperscript{858} These schools provided secondary-level rather than college-level education despite the founders’ initial intent to provide black students a classical education similar to their white counterparts at predominantly white colleges.\textsuperscript{859}

The second Morrill Land Grant Act would serve as the impetus for the creation of black land-grant colleges in the south by the 1890s.\textsuperscript{860} Lucas indicates that the second Act served the additional purpose of providing an alternative to the “much-dreaded prospect of racial

\begin{footnotesize}
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\item \textsuperscript{851} William Goodell, The American Slave Code in Theory and Practice: Its Distinctive Features Shown By Its Statutes, Judicial Decisions and Illustrative Facts 319 (2nd ed. 1853) (explaining that the statute read as follows: “Whereas, the having slaves taught to write, or suffering them to be employed in writing, may be attended with great inconveniences, Be it enacted, that all and every person and persons whatsoever, who shall hereafter teach or cause any slave or slaves to be taught to write, or shall use or employ any slave as a scribe, in any manner of writing whatsoever, hereafter taught to write, every such person or persons shall, for every such offense, forfeit the sum of one hundred pounds, current money”).
\item \textsuperscript{852} JBHE Chronology, supra note 849 at 77 (explaining that 17 years prior, what is now Cheyney University, was established to education free black students, but did not become a degree-granting institution until 1932, 95 years after it was established).
\item \textsuperscript{853} Id.
\item \textsuperscript{854} Lucas, supra note 1 at 122.
\item \textsuperscript{855} Geiger, supra note 614 at 467.
\item \textsuperscript{856} Id (explaining that the Freedman’s Bureau, the American Missionary Association, northern churches, and Reconstruction governments were responsible for the establishment of these schools).
\item \textsuperscript{857} Lucas, supra note 1 at 168.
\item \textsuperscript{858} Id. (Harper et al. explain that Fisk, Morehouse, Hampton, Howard, and what is now Spelman College were historically black colleges and universities that were established between 1865 and 1890. Harper et al., supra note 848 at 394).
\item \textsuperscript{859} Id.
\item \textsuperscript{860} Thelin, supra note 634 at 135.
\end{itemize}
\end{footnotesize}
integration in higher education.” Seventeen black land-grant institutions were established in the south as a result of the legislation, and similar to the institutions opened just decades prior, suffered from lack of adequate funding causing deficiencies in facilities, salaries, and staffing.

Amidst these achievements in growing the number of institutions that provided African Americans with the opportunity to pursue higher education, the endeavors would be dealt a blow that would affect access to higher education for African Americans for years to come. The setback came in the form of the Supreme Court decision, *Plessy v. Ferguson*, which was promulgated in 1896 during the height of the Jim Crow Era and is credited with setting forth the “separate but equal” doctrine.

In that case, the plaintiff, Plessy, protested a Louisiana statute which provided that railway companies carrying passengers must provide equal but separate accommodations for white and black passengers. Plessy asserted that the statute was a violation of both the Thirteenth and Fourteenth amendments to the United States Constitution which abolished slavery and guaranteed equal protection of the laws, respectively. It is the Fourteenth Amendment and its provision of equal protection of the law that will be discussed here.

In analyzing the constitutionality of the Louisiana statute based on the Equal Protection Clause, the Court found that the statute, which required separation of the races in public conveyances, was not unreasonable. It was not any more unreasonable, the Court reasoned, than the congressional act requiring separate schools for black children in the District of Columbia. The Court explained,

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro [Sic] except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to

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861 LUCAS, supra note 1 at 170.
862 THELIN, supra note 634 at 116.
863 Plessy, supra note 7.
864 Under the doctrine, “equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate.” Brown v. Board of Education of Topeka, supra note 6.
865 Plessy, supra note 7 at 540.
866 Id. at 542
867 Id. at 550.
868 Id. at 551.
meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals...This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed. Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.\textsuperscript{869} (Emphasis added).

The bulk of the Court’s rationale is reproduced here to draw attention to the irony inherent in the last statements of the passage. After endorsing the strictures of the Louisiana statute in question, and indirectly endorsing the congressional act calling for segregation in schools, the Court chose to take a hands-off approach in helping to eradicate the social and political problems that arose as a result slavery. The irony is that this indirect endorsement of the congressional act worked to apply the separate but equal doctrine to the field of education but the subsequent case law reveals that the Supreme Court would play an active role in trying to correct the misconception that separate could be equal, particularly in the field of higher education. What follows then is an analysis of several Supreme Court decisions that implicate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution\textsuperscript{870} in an effort to illustrate the Court's attempts to achieve social justice in higher education.

By the time the \textit{Plessy} decision was handed down, the Supreme Court had already invalidated the Civil Rights Act of 1875, as discussed in the previous chapter. This action worked to sanction the \textit{de facto} discrimination that the legislation sought to outlaw. The \textit{Plessy} decision would provide the impetus for the eleven southern states to codify the Jim Crow system into law.\textsuperscript{871} Jerrold Packard, who advances several reasons for this move explains that: (1) southerners were less threatened by northern opposition to the way they handled “the Negro problem;” and (2) southern whites grew more afraid of African Americans; by the end of the century, many African Americans had no personal experience of slavery and

\textsuperscript{869} \textit{Id}. at 551-52.
\textsuperscript{870} The Fourteenth Amendment to the U.S. Constitution provides in relevant part: “No State shall...deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, §1.
thus posed a dangerous challenge to white supremacy.\textsuperscript{872} Shifting from \textit{de facto} to \textit{de jure}
discrimination would ensure that any potential challenge to white supremacy would be quelled by law.\textsuperscript{873}

Further, the \textit{Plessy} decision and its “separate but equal” formula had disastrous effects in the field of education. Packard explains,

\begin{quote}
[t]he “equal” half of the couplet never approached parity with the “separate” half. The reality of “equality” meant that the Negro [Sic] part of everything would be indisputably and often grotesquely inferior to its white counterpart: black schools almost never achieved – and rarely even approached – equality with those for whites...[and there] was nothing “separate but equal” about the libraries from which blacks were barred entirely...\textsuperscript{874}
\end{quote}

Serious threats to Jim Crow would not take place until the late 1950s;\textsuperscript{875} until then segregation and the doctrine of “separate but equal” would remain the law of the land as illustrated by these first cases under review: \textit{State of Missouri et rel. Gaines v. Canada}\textsuperscript{876} and \textit{Sipuel v. Board of Regents of University of Oklahoma}.\textsuperscript{877}

The facts of the two cases, tried a decade apart, are substantially similar and demonstrate how the “separate but equal” doctrine manifested itself in higher education at the time. In both cases, African American students were denied admission into law school. Each student filed suit against the State University of Missouri and the University of Oklahoma, respectively, alleging that the denial of admission was solely because of their color in violation of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{878} In Gaines’ case, he had obtained his bachelor’s degree at Lincoln University, a historically black university, which did not have a law school.\textsuperscript{879} Sipuel similarly sought a legal education in a state that only had one law school.\textsuperscript{880}

When Gaines applied to law school at the State University of Missouri, there was a statute in place that authorized the board of curators to arrange for black students in Missouri to attend a university,

\begin{quote}
[of any adjacent state to take any course or to study subjects provided for...which are not taught at the Lincoln university and to pay the reasonable tuition fees for such attendance, provided that whenever the board of curators deem it advisable they shall have the power to pen any necessary school or department.\textsuperscript{881}
\end{quote}

\begin{footnotes}
\item[872] Id.
\item[873] Id.
\item[874] Id. at 87-88.
\item[875] Id. at 85.
\item[876] 305 U.S. 337 (1938).
\item[877] 332 U.S. 631 (1948).
\item[878] Gaines, supra note 876 at 343; Sipuel, supra note 877 at 632.
\item[879] Gaines, supra note 876 at 342.
\item[880] Sipuel, supra note 877 at 632.
\item[881] Gaines, supra note 876 at 343.
\end{footnotes}
This statute provided alternative means for African American students because it was against the law and policy of the state of Missouri to admit African Americans at the University of Missouri.\textsuperscript{882}

Adhering to the “separate but equal” doctrine announced in \textit{Plessy}, the state of Missouri asserted that in fulfilment of their obligation to provide equal advantages to both white and black students, they had become pioneers as the only state in the Union to establish a separate institution for African Americans on the same level as white students.\textsuperscript{883} The Court noted that despite their current efforts and the state’s ability to build a law school for African Americans, as evinced by the above-referenced statute, the fact remained that there were currently no opportunities for black students to obtain a legal education in the state of Missouri.\textsuperscript{884} Thus, the issue under consideration for the Court was whether the provision for legal education in other states, as set forth the Missouri statute, satisfied the strictures of the constitutional mandate for equal protection.\textsuperscript{885} The court answered this question in the negative, finding:

The basic consideration is not as to what sort of opportunities, other states provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes [Sic] solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups in the State...We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination but cannot serve to validate it.\textsuperscript{886}

The Court was not persuaded by arguments that there was a limited demand for legal education for African Americans in Missouri, responding that the right to equal protection is an individual and personal one.\textsuperscript{887} Thus, the Court reasoned, the state was obliged to furnish Gains within its borders a substantially equal legal education as it furnished to white students.\textsuperscript{888} The university further argued the Missouri statute allowing for the provision of tuition for African American students to attend school elsewhere was a temporary measure.\textsuperscript{889} Again, the Court was unpersuaded, responding that this temporary measure could continue indefinitely at the discretion of the board of curators should they find it “unnecessary and

\textsuperscript{882} Id.
\textsuperscript{883} Id. at 344-345.
\textsuperscript{884} Id. at 345-346.
\textsuperscript{885} Id. at 348.
\textsuperscript{886} Id. at 349.
\textsuperscript{887} Id. at 351.
\textsuperscript{888} Id.
\textsuperscript{889} Id.
impracticable to provide facilities for the legal instruction of negroes [Sic] within the State.\footnote{Id. at 352.}

Thus, the Court held that Gaines was entitled to admission at the University of Missouri since there were no alternative means for him to obtain a legal education within the state.\footnote{Id.}

A decade later, Sipuel challenged the decision of the University of Oklahoma, denying her admission into their law school. The Supreme Court, citing Gaines, held:

The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group.\footnote{Sipuel, supra note 877 at 632.}

The collective holdings of Gaines and Sipuel demonstrate how the Court was dealt with the effects of the Plessy decision while concurrently charged with enforcing the Equal Protection Clause. The Court had to walk a fine line in appeasing the strictures of both laws. “Separate but equal” gave permission for schools to segregate, causing situations such as those above wherein equal opportunity was often not available for African American students to pursue a particular course of study. Rather than denouncing the doctrine in light of the unfairness that resulted therefrom, the Court’s stance at this time directed colleges and universities to find “some way” to afford students equal opportunity to an education.

In the Sipuel case, the cause was remanded to the Oklahoma Supreme Court who eventually issued an order consistent with the Sipuel decision and directed the Oklahoma District Court to comply with the Supreme Court’s mandate.\footnote{Fisher v. Hurst, 333 U.S. 147 (1948).} In doing so, the Oklahoma District Court issued an order providing the University of Oklahoma two options to conform to the Sipuel decision. The District Court order indicated that unless and until the University of Oklahoma established a functioning separate school of law for African Americans with “advantages for education substantially equal to the advantages afforded to white students,” the University of Oklahoma was obliged to either: enroll Sipuel until the separate law school is established and functioning, or do not enroll any applicant of any group until the separate school is ready for operation.\footnote{Id. at 149-50.} The District Court further stipulated that if the separate law school is established and ready to function, the board of regents was directed not to enroll Sipuel at the University of Oklahoma.\footnote{Id. at 149-50.} Between the several courts, it appeared that segregation was a practice that must be adhered to. However, the next cases represent a bit of a shift in ideals when it came to segregation in education.
Sweatt v. Painter\textsuperscript{896} and McLaurin v. Oklahoma State Regents\textsuperscript{897} both represent cases wherein the Supreme Court seems to question the effects of segregation on the learning process and in the educational environment, not only for the isolated minority, but for the majority of students at the institution as well. Both cases, decided on the same day, would interpret the Fourteenth Amendment in a manner that took into consideration that minority students separated from other students do not enjoy equal opportunity for an education as their white counterparts. Specifically, the issue presented in both cases asked, to what extent the Equal Protection Clause of the Fourteenth Amendment limited the power of a state to distinguish between students of different races in graduate or professional education settings.\textsuperscript{898}

Sweatt involved a student applying for admission to Texas Law School who was denied because of his race.\textsuperscript{899} Similar to the previous cases, no law school in Texas admitted African Americans, and when Sweatt filed suit to compel his admission, rather than requiring his admission, the trial court continued the case for 6 months to allow the state to provide substantially equal facilities.\textsuperscript{900} At the end of the 6 months, Sweatt’s writ was denied due to the newly opened law school for African Americans.\textsuperscript{901} After an unsuccessful appeal to the court of Civil Appeals, Sweatt appealed the decision to the Supreme Court who undertook an examination of the facilities provided for African American students at the new law school to determine whether they could actually provide these students with an equal educational experience.\textsuperscript{902}

The University of Texas Law School had 16 full-time and 3 part-time professors, some of whom were well-recognized in the field. The student body consisted of 850 students and the campus provided them with an extensive library of over 65,000 volumes as well as facilities for moot court, law review, and etc.\textsuperscript{903} By comparison, the new law school had no independent library or faculty; rather, approximately 10,000 volumes from the Texas Law School were ordered transferred to the new school and instruction was to be carried out by four members of the Texas Law school faculty.\textsuperscript{904} Further, the new law school was not accredited.\textsuperscript{905} However, since the time of trial, the conditions at the new law school had improved marginally: the number of faculty increased from 4 part-time to 5 full-time

\textsuperscript{896}339 U.S. 629 (1950).
\textsuperscript{897}339 U.S. 637 (1950).
\textsuperscript{898}Sweatt, supra note 896 at 631.
\textsuperscript{899}Id.
\textsuperscript{900}Id. at 632.
\textsuperscript{901}Id.
\textsuperscript{902}Id.
\textsuperscript{903}Id. at 632-33.
\textsuperscript{904}Id. at 633.
\textsuperscript{905}Id.
professors; the school was on its way to accreditation; and the library books increased from 10,000 to 16,500.\textsuperscript{906}

Despite these improvements, the Court was unpersuaded that the new law school could provide an equal education finding the facilities at the Texas Law School vastly superior than the newly created facilities.\textsuperscript{907} However, what proved determinative were the intangible qualities including school reputation, experience of the administration, tradition, and prestige that were not available at the new law school.\textsuperscript{908} The Court further noted that the practice of law could not be effective when a student is isolated from the individuals and institutions with which the law interacts. Further, the practice of law required the exchange of diverse views and connection to the lawyers, witnesses, jurors, judges, and other officials with whom students would one day interact as lawyers.\textsuperscript{909} In so finding, and reiterating the holding in \textit{Sipuel}, the Court found that the new law school provided by the state of Texas was inadequate to provide Sweatt with a legal education equal to that offered to other students in the state.\textsuperscript{910}

Similarly, in \textit{McLaurin}, the Court examined the effects of isolation/segregation on a minority student in an educational environment. McLaurin, who filed suit for entry into a Ph.D. program in Education, was eventually admitted to the program by order of the District Court of Oklahoma in recognition of McLaurin’s rights to equal protection under the law.\textsuperscript{911} Once admitted, however, McLaurin was subject to particular rules and regulations in order to uphold the rule of segregation at the University of Oklahoma.\textsuperscript{912} McLaurin was made to sit in a particular desk in an anteroom adjoining the classroom, to sit at a particular desk on the mezzanine floor of the library, and to sit a particular table and eat at a different time from other students in the school cafeteria.\textsuperscript{913} McLaurin was further prohibited from using the desks in the regular reading room of the library.\textsuperscript{914} The Court found that these requirements work to set “McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.”\textsuperscript{915}

The Court made another finding that seems to foretell the direction in which the Court would be going within the next few years with regard to segregation in higher education. Chief Justice Vinson explained:

\textsuperscript{906} \textit{Id.}
\textsuperscript{907} \textit{Id.}
\textsuperscript{908} \textit{Id.}
\textsuperscript{909} \textit{Id.} at 634.
\textsuperscript{910} \textit{Id.} at 635.
\textsuperscript{911} \textit{McLaurin}, supra note 897 at 639.
\textsuperscript{912} \textit{Id.} at 640.
\textsuperscript{913} \textit{Id.}
\textsuperscript{914} \textit{Id.}
\textsuperscript{915} \textit{Id.} at 641.
Our society grows increasingly complex and our need for trained leaders increases correspondingly. Appellant’s case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State imposed restrictions which produce such inequalities cannot be sustained.\textsuperscript{916}

Having made this determination, the Court held that differences in treatment, such as those experienced by McLaurin, constitute a violation of the Fourteenth Amendment.\textsuperscript{917}

Thus, the \textit{Sweatt} and \textit{McLaurin} decisions represent a shift from the strict adherence from the “separate but equal” doctrine to a fuller understanding of what constitutes equal protection under the laws in the higher education setting. In these cases, the Court found that even when minority students enjoy the benefits of equal facilities, they can be subjected to treatment that makes the experience unequal, particularly when sanctioned by the state.\textsuperscript{918} These ideals would form the basis for the decisions of the Court four years later in \textit{Brown I}\textsuperscript{919} and \textit{Brown II}.\textsuperscript{920}

The several facts of these two cases will not be discussed in this study since the particulars involve events that took place at public elementary and high schools. However, these cases are cited here for their historical significance to education as a whole. \textit{Brown I} can be distinguished from the previously-discussed cases in that the issue presented in that case directly challenged segregation and the “separate but equal” doctrine; the previous cases framed the issue around whether particular actions by the state satisfied the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{921} In other words, the former challenge assumes the deficiencies inherent in a segregated education system while the latter challenge assumes the validity of the “separate but equal” doctrine and seeks ways to uphold segregation while simultaneously providing “equal” opportunity.

In making its determination, the Court discussed the development of education since the “separate but equal” doctrine was promulgated and noted the crucial place education had come to hold in society. The Court acknowledged its position as the “foundation of good

\textsuperscript{915} Id.
\textsuperscript{916} Id. at 642.
\textsuperscript{917} Id. (explaining that “[t]he removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits”).
\textsuperscript{918} \textit{Brown v. Board of Education of Topeka, Kansas}, supra note 6.
\textsuperscript{920} \textit{Brown I}, supra note 6 at 493 (indicating the issue in this case as, “[d]oes segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?”)
citizenship” and as a “principle instrument in awaking the child to cultural values” and “preparing him for later professional training.”

Ultimately, the Court explicitly overruled *Plessy* and concluded that,

[i]n the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

The decision of the Court in *Brown I*, announced almost 60 years after the *Plessy* decision, and while still in the midst of the Jim Crow Era, would represent a large step toward achieving social justice in education. Indeed, in *Brown II*, the Court would acknowledge the logistical difficulties that associated with de-segregating the several public schools in the subject states of Kansas, South Carolina, Virginia, and Delaware. Nonetheless, the Court explicitly incorporated its previous holding by reference, that racial discrimination in public education is unconstitutional, and urged courts to utilize their powers of equity in order to facilitate the transition. Therein, the Court noted that, “[c]ourts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.”

The effects of the *Brown* decision cannot be overstated. It has been opined that the *Brown* decision changed the landscape of civil rights law. Indeed, George Rutherglen posits that the development of employment discrimination law “is deeply influenced by the active role taken by the judiciary in enforcing the constitutional principle against discrimination derived from *Brown*.” As a catalyst for change in civil rights law as applied to education institutions then, it would certainly have an effect on the next major case to influence social justice in higher education, *Regents of the University of California v. Bakke*.

If the cases prior to *Brown I* assumed the validity of the “separate but equal” doctrine, *Bakke* represents a major education case that now assumed the validity of the relatively new national policy against racial discrimination influenced by *Brown* and codified by the Civil

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922 Id. at 493.
923 Id. at 494-95.
924 *Brown II*, supra note 920 at 300.
925 The decision would be implicated again almost 40 years later when the Court was called upon to determine whether Mississippi had met its obligation to desegregate its public university system in *U.S. v. Fordice*, 505 U.S. 717 (1992). This case is significant in that it analyzed a public university system that continued a policy of *de jure* segregation even after *Brown I* and *Brown II*. In general, the Court found that “if policies traceable to the *de jure* segregation are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices. *Id.* at 729.
926 Rutherglen, supra note 23 at 1.
927 Id.
Rights Act of 1964. The facts in the Bakke case surround the implementation of an admissions program at the Medical School of the University of California at Davis. The plaintiff-respondent, Allan Bakke, a white male applicant, took exception to the affirmative action plan\footnote{Affirmative action has controversially been used as a means of achieving social justice by acting as a means of increasing access to higher education for historically underrepresented minorities. However, a full discussion of affirmative action is beyond the scope of this study. It is incidentally discussed here in the details of these cases as a part of the larger discussion of higher education institutions as a potential site for social justice.} employed by the medical school that failed to compare racial-minority candidates against the general applicants by keeping a certain number of spaces open for these “special candidates.”\footnote{When the class size was 50, the committee left open 8 spaces for special candidates; at a class size of 100, the number doubled to 16 special admissions. Bakke, supra note 928 at 275.}

The procedural history of this case is extensive and thus, for purposes of clarity will not be repeated here. Before the Supreme Court, defendant-petitioner, University of California defended its use of racial quotas citing four major purposes for the policy including:

“(i) ‘reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,’…(ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.”\footnote{Bakke, supra note 928 at 306.} The Court was unpersuaded by all but the final justification for the university policy that took race into consideration.

There are several lessons we take from Bakke.\footnote{Specifically, the Court would clarify that all restrictions that curtail the civil rights of a single racial group are immediately suspect and subject to strict scrutiny. Bakke, supra note 928 at 291. Further, in order to justify the use of a suspect classification, the Court explains, strict scrutiny means that a State must show that its purpose or interest is both constitutionally permissible and substantial and that its use of the classification is necessary to the accomplishment of its purpose or the safeguarding of its interest. Id. at 305.} However, it is understood that this case stands for the proposition that the interest of diversity is a compelling one in the context of a university’s admissions program.\footnote{Bakke, supra note 928 at 314.}

The Court clarifies:

It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner’s special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.\footnote{Id at 315.}

Twenty-five years later, a similar question would be asked in Grutter v. Bollinger,\footnote{539 U.S. 306 (2003).} and Justice Powell’s contention that student body diversity serves a compelling state interest that
can justify the use of race in university admissions would be fully endorsed by the Court.\footnote{\textid at 325.} The \textit{Grutter} Court would reiterate that the applicable level of scrutiny for race-based decisions in admissions programs is strict scrutiny, explaining that “when race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.”\footnote{\textid at 327.} Based on these strictures, the Court would be called upon to assess the validity of race-based admissions policies most famously in \textit{Grutter},\footnote{In \textit{Grutter}, the Court upheld a law school admissions policy that considered the race of applicants as one factor in its holistic review of each applicant. The Court explained that race could be considered a “plus” factor in the context of individualized consideration. Since the law school’s policy adhered to the narrowly-tailored requirement, it was upheld. \textit{Grutter, supra} note 935 at 341.} \textit{Gratz v. Bollinger},\footnote{539 U.S. 244 (2003) (explaining that by contrast, the Court invalidated the admissions policy at University of Michigan’s College of Literature, Science and the Arts which, in its review of underrepresented minority candidates, considered race as a factor and automatically assigned 20% of the points needed for guaranteed admission to African American, Hispanic, and Native American students. The Court found that the University of Michigan’s admissions policy was not suitably narrowly tailored to survive strict scrutiny despite the school’s assertion that the policy was justified to ensure a diverse student body).} and more recently in \textit{Fisher v. University of Texas}.\footnote{133 S.Ct. 2411 (2013) (holding that the Court of Appeals did not apply the correct standard of scrutiny in its evaluation of the admissions policy, and remanding the case for further consideration). This case was once again reviewed by the Fifth Circuit Court of Appeals who found for the University of Texas at Austin. Currently, the petitioner, Abigail Noel, has once again filed an appeal which will once again be heard by the Supreme Court.} The several cases discussed in this section illustrate the Court’s commitment to interpreting the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution in a manner that shies away from the post-\textit{Plessy}, pre-\textit{Brown I} period. That is, the Equal Protection Clause should never again be analyzed within the constraints of a doctrine that presupposes that separate can be equal, particularly in the realm of education. They can also be viewed as a commitment toward achieving social justice as discussed at the outset of this section. Or, as Thelin proposes, these cases represent a challenge to university autonomy and provide the impetus for a response to social justice issues on campus.\footnote{\textit{Thelin, supra} note 634 at 343 (asking “if government regulation and intervention were not invoked, how would colleges and universities respond to problems of social justice when left to their initiative?”)} In any event, the examination of these cases was necessary as part of looking inward at higher education to determine what means institutions are utilizing to achieve social justice; the cases reveal that institutions generally respond by trying to increase access.

However, despite the progress that has been made, witnessed by the major shift in policy represented by \textit{Plessy} through to \textit{Brown I}, there is still much to be done in achieving social justice in higher education. Indeed, increasing access is not a panacea for racial inequality in higher education. Singh explains:

\begin{quote}
examples of social justice gains from expanded access (massification) like increases in social mobility and greater opportunities for women had to be seen in relation to other trends which were reproducing inequality. One such trend is the
\end{quote}
increasing level of differentiation within systems, which opens up mass access to non-traditional participants but to different institutions within a reputational hierarchy. In sum, the research literature on the theme of higher education and social justice clearly points to the fact that massification does not automatically reduce social inequality and may in fact benefit those who are already advantaged.  

Singh’s assertion comports with Bok’s description of the United States’ differentiated system of higher education. For a system with deep traditions of prestige, of the 4,500 different colleges and universities, the most prestigious, research universities only account for 200 of them. Indeed, community colleges account for more than 40% of undergraduate enrollments. Thus, while more students are going to school, the questions center on the quality of education they receive and whether they persist to graduation. For example, Bok reports that only 20-25% of those who choose to attend a community college will transfer to a four-year college to obtain a bachelor’s degree. When one considers that 45% of students in community colleges are minorities, it seems that social justice in higher education realistically translates into ‘some education is better than none.’

The purpose of this discussion was to illustrate the means in which higher education sought to achieve social justice as an overall theme observed in today’s postsecondary system. The history of higher education, as previously discussed, does not reveal a societal institution that was necessarily concerned with achieving equality, catering as it did for so long almost solely to white men. When attempts were made to rectify this situation, the system responded by: creating land-grant institutions and HBCUs that were comparatively underfunded and under-sourced; placing barriers to higher education based on race; enforcing a doctrine that would have far-reaching repercussions in higher education, and once that doctrine was overturned; focusing on achieving mass access to higher education through policies such as affirmative action or through a differentiated higher education system while seemingly ignoring quality of education. Whether or not higher education has achieved social justice or equality, the on-going discussion represents a major theme in higher education today. In *Grutter*, Justice O’Connor contemplated that perhaps in 25 years, race-conscious admissions policies may no longer be necessary to further the compelling interest of a diverse

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942 Singh, *supra* note 842 at 484.
943 Bok, *supra* note 711 at 9-10.
944 *Id.* at 11.
945 *Id.* at 12.
946 *Id.*
947 The author acknowledges that the discussion in this section limits the achievement of social equality to a discussion of African Americans’ history in higher education. The author further acknowledges that a full discussion of social justice should involve a focus on other minorities as well. The instant discussion was focused on African Americans due to the historical significance of the plight of this population with regard to higher education in this country.
student body.\textsuperscript{948} Perhaps by 2028, the American system of higher education will have made even more significant strides in accomplishing this goal.

\textit{The University as an Employer}\textsuperscript{949}

The preceding sections in their collective capacity attempt to paint a holistic view of higher education institutions in the United States by highlighting the historical origins of trends that recur in the American system. The several sections paint a picture of an imperfect system with diversified institution types and curricular focuses, one that always seeks prestige and embodies elitism in various ways. On the one hand, it is a powerful organization in its local and state community; it is often the largest employer in a “college town.”\textsuperscript{950} The American institution is one that is financially vulnerable and is thus alternately supported by state and federal funds as well as private donors. The system has gained acceptance in this country as an institution that helps educate as well as socialize young adults in preparation to move about in society and to hold positions in business, politics, and a host of other areas. Finally, the system is one that hasn’t necessarily achieved social justice, but has come a long way from its tumultuous beginnings. To paraphrase Rudolph, “all these things a university is; all these purposes the university serves.”\textsuperscript{951}

In today’s society, these large multi-purpose institutions also serve as employer to thousands of people, depending on the size of the institution. Campuses employ several different types of employees under different contractual arrangements to do the work of the university. For example, faculty, who perform the primary function of educating students are often hired under different types of contracts. Adjunct professors have been utilized more and more on university campuses and are often hired under term contracts which specify a contractual agreement for a particular time period.\textsuperscript{952} On the other hand, many professors work toward tenure, which is a form of continuing contract.\textsuperscript{953} Universities also employ “classified personnel” who carry out various functions; this type of employee includes clerks, secretaries, groundskeepers, maintenance persons, security officers, nurses and medical assistance, bus drivers and more.\textsuperscript{954} Finally, another classification of employees on campus, Administrative and Professional (A&P) Personnel, consists of university presidents, provosts, vice-presidents, deans, directors, engineers, and curators and is characterized by relatively
low job security. These various employment arrangements and the different types of employees provide another indication of how diversified university campuses have become in their roles and functions. In part, it is this diversification that serves as the basis for the opinions regarding the metamorphosis of the traditional university to a more business-like entity.

In this portion of the study, the university’s function as an employer is examined. Thus, the first part of this section is devoted to an examination of the more traditional, unique employment aspects of the university campus such as academic freedom and tenure. This analysis encompasses a discussion of the deference judges afford universities in light of these concepts. The second portion of this section involves a discussion of the corporatization of higher education. This discussion is an attempt to elucidate the hybrid qualities today’s university embodies: not all business and not simply education. The author makes no attempt to come to a conclusion as to the validity of the theory of corporatization in higher education. Rather, the theory is presented and explained in order to provide a basis of understanding for the analysis of American jurisprudence which takes place in the next chapter. Through this analysis the author attempts to discover whether the principles of corporatization theory manifest themselves in the case law.

In their collective capacity, these concepts serve as independent variables, if you will, on the manner in which employment discrimination law is generally applied. This study seeks to determine whether the application of these variables in this special environment result in the development of special rules and considerations in employment discrimination law that apply only on university campuses. Each of these concepts is discussed below, in turn.

**Academic Freedom, Academic Deference & Tenure**

The previous chapter discussed the law of employment discrimination; through an examination of relevant case law, the applicable burdens of proof and means of proving discrimination in the workplace were explained. When the defendant in an employment discrimination claim is an institution of higher education, the plaintiff has two more burdens to overcome: academic freedom and academic deference. Moreover, if that plaintiff is, for example, challenging a tenure and promotion decision, her burdens become much heavier.

A plaintiff in an employment discrimination case against a university defendant must understand the first foundational hurdle she must overcome. Upon receipt of the claim, a reviewing court will analyze the case understanding the unique fundamental right of universities to academic freedom. This right is so fundamental to higher education, one would think it originated with the establishment of the first higher education institutions.

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955 Id. (explaining that A&P personnel are at-will employees, also known as exempt employees, whose employment terms are specified by contract).
Rather, academic freedom was a concept derived from Germanic principles transplanted to America by education reformers such as Andrew White and Daniel Gilman.\footnote{GEIGER, supra note 608 at 328.}

The Germanic principle of \textit{Lehrfreiheit}, or “freedom to teach” forms the basis for the concept of academic freedom in higher education. The freedom provides professors with autonomy over the classroom as well as over their research interests; that autonomy allowed for freedom to pursue knowledge without fear of interference.\footnote{ELLEN SCHRECKER, \textsc{The Lost Soul of Higher Education: Corporatization, the Assault on Academic Freedom, and the End of the American University} 11 (2010).} Schrecker further explains that “freedom to teach” is also interpreted to provide professors with the autonomy to carry out their professional responsibilities.\footnote{Id. at 10.} She explains that academic freedom is a “professional prerequisite.”\footnote{Id.} As such, when the professional association for faculty members, the American Association of University Professors (AAUP), sought to establish the rights and ethics of their profession, they incorporated academic freedom into their 1915 \textit{Declaration of Principles}.\footnote{American Association of University Professors (AAUP), \textsc{1940 Statement of Principles on Academic Freedom and Tenure}, \url{http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure}} These freedoms would be endorsed once again in the 1940 Statement of Principles on Academic Freedom and Tenure.\footnote{Id.}

Legally speaking, academic freedom has been recognized by the Supreme Court of the United States as being rooted in First Amendment freedoms.\footnote{Michelle Chase, supra note 17 at 158.} The Court in \textit{Sweezy v. State of N.H.}\footnote{354 U.S. 234 (1957).} acknowledged academic freedom finding that “[t]he essentiality of freedom in the community of American universities is almost self-evident…”\footnote{Id. at 250 (continuing to say, “No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made...Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die”).} But \textit{Sweezy} is most known for its articulation of the four essential freedoms inherent in academic freedom.\footnote{Id.}

Justice Frankfurter explained in his concurring opinion that,

\begin{quote}
In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes a tool of Church or State or any sectional interest...Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge...It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail \textit{‘the four essential freedoms’ of a university - to determine for itself on academic grounds who may teach, what

\end{quote}
may be taught, how it shall be taught, and who may be admitted to study.966 (Emphasis added).

A decade later, the Court would have another occasion to examine an alleged restriction of academic freedom and reaffirmed the principle as a protected First Amendment Right. The Court in *Keyishian* held:

> [o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. ‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools…’ The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.967

The collective holdings in *Sweezy* and *Keyishian* provide powerful support for the autonomy of professors over their professional responsibilities inherent in academic freedom. Further, the aggregate statement on education’s place in society is a succinct expression of the ideals that have evolved through the history of higher education, as discussed above. And, if indeed this right is a special concern of the First Amendment, theoretically, it is a right that cannot be regulated without passing strict scrutiny.968 Thus, the employment discrimination plaintiff has her work cut out for her in overcoming this hurdle; as stated, recognizing academic freedom as a special concern of the First Amendment, judges will automatically be on their guard.

In light of the concept of academic freedom that is implicated in an employment discrimination case wherein the university is a defendant, a judge may proceed cautiously in his initial review of the case. However, the hypothetical plaintiff in this scenario who is challenging a tenure and promotion decision will likely have to overcome another burden, academic deference. Although academic deference is not derived from a constitutional right, it represents a very heavy burden for her. Indeed, the Supreme Court in *Sweezy* affirmed the autonomy of the university in decisions regarding who may teach; thus, our plaintiff faces a high hurdle.

Likely derived from the “four essential freedoms” as expressed by Justice Frankfurter in *Sweezy*, the academic deference doctrine was articulated in *Kunda v. Muhlenberg College*969

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966 Id. at 262-63.
968 Id. at 604 (explaining that because First Amendment freedoms need breathing space to survive, governments may regulate in the area only with narrow specificity).
969 *Kunda*, supra note 20.
by the United State Court of Appeals for the Third Circuit. In that case, Kunda, an instructor sued Muhlenberg College alleging employment discrimination based on her race in their failure to promote and their denial of tenure.\textsuperscript{970} In its analysis, the court considered an argument from the institution asserting academic freedom.\textsuperscript{971} Although the court eventually affirmed the trial court’s finding that the institution had discriminated against Kunda,\textsuperscript{972} they articulated the concept of judicial deference as follows:

Wherever the responsibility lies within the institution, it is clear that courts must be vigilant not intrude into that determination, and should not substitute their judgment for that of the college with respect to qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.\textsuperscript{973}

The academic deference doctrine then affirms Justice Frankfurter’s finding that decisions about who can teach should be made by academicians. While the adherence to this doctrine represents an endorsement for the academy and a respect for its inner-workings, it also has several controversial implications. A full discussion of these issues will be held in the next chapter during an analysis of employment discrimination cases filed against educational institutions. However, briefly, judges are accustomed to informing themselves in order to render judicial opinions on obscure or unfamiliar issues as a matter of course. Thus, the court’s willingness to take a hands-off approach, particularly in cases where anti-discrimination statutes are implicated, is troubling. In light of the nation’s policy against discrimination, it would seem that any accusation of disparate treatment would be accorded proper attention. In the next chapter, the researcher will attempt to determine to what extent these academic-specific doctrines influence employment discrimination decisions against institutions of higher education.

The final academic-specific concept our employment discrimination plaintiff will have to contend with deals with her requested relief: obtaining tenure. In the review of the plaintiff’s claim of discrimination, she will have to once again battle past academic-specific concepts that serve as barriers to a full review of her claim.

Tenure is essentially at type of employment contract the term of which is indefinite, designed to create a contractually enforceable institutional commitment to appointment that

\textsuperscript{970}\ Id. at 535.
\textsuperscript{971}\ Id. at 547.
\textsuperscript{972}\ Id. at 551.
\textsuperscript{973}\ Id. at 548.
can only be terminated for good cause. However, if plaintiff were dealing with a simple employment contract, her task would be infinitely easier. The other aspect of tenure is that its essential function is to protect academic freedom. Indeed, tenure was created in order to prevent administrators from interfering in the academic responsibilities of the faculty.

Further, similar to academic freedom, tenure was provided for in the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure. Therein, it is noted that tenure is meant to ensure freedom of teaching and research as well as provide economic security.

The decision whether or not to grant tenure is high stakes; it generally represents an “up-or-out moment” that shapes the rest of the faculty member's career. Although the tenure process can differ by department, the general process is the same. Faculty members undergo a probationary review which generally happens in or around four years after the initial appointment. Later, a tenure review occurs about five to seven years into the faculty member's appointment. These reviews are conducted by the faculty member's colleagues or peers who make their decision on three main criteria: teaching, scholarship, and service.

Generally, the scholarship portion is evaluated by both the faculty within the department as well as scholars within the faculty member's field of study. Finally, a decision is made by the faculty member's department subject to the review of another committee who makes an independent determination on whether the junior faculty member should be granted tenure.

Because of the high-stakes nature of a tenure decision, the denial of tenure often times results in litigation against the university; many of the claims proceed under a Title VII employment discrimination theory. As discussed throughout this section, a tenure-denial claimant has an uphill battle in making a case. If she can successfully move passed the academic freedom and academic deference aspects to her claim, she will likely have to make out a prima facie case as described in the previous chapter. Once she has carried her burden, the defendant-university must proffer a legitimate non-discriminatory reason for their employment decision. In challenging that proffered reason as pretext, the plaintiff may encounter further difficulties. Indeed, making her case presents two issues that often arise in denial of tenure and promotion decisions.

974 Venters, supra note 952 at 71.
975 Schrecker, supra note 957 at 25.
977 AAUP, supra note 960 at 14.
978 Id.
979 Id.
980 Id. at 28.
982 Id.
983 Id.
985 Id.
986 Id. at 245-46.
First, the claimant will have to prove that she was discriminated against. Many times, in order to do so, the plaintiff will, during discovery, request the peer review evaluations in order to determine whether the denial was due to discrimination. Some universities have asserted a qualified privilege, citing academic freedom, as a reason for denying the discovery request.  

University representatives have claimed that peer-review documents should remain confidential in order to protect the integrity of the process; the thought is that, without confidentiality, faculty and peer reviewers will be reticent or less candid in their evaluations. Thus, the competing interests between the university’s assertion of academic freedom, and the plaintiff’s right to documents that may help make her claim for employment discrimination, is revealed. One can only imagine the difficulties of attempting to prove that a university’s proffered reason for their decision is pretext for discrimination without the peer review documents that contain the basis for the adverse employment decision. On the other hand, faculty members/peer reviewers may not want to be held to a legal standard in their review of tenure candidates.

Second, some critics have spoken out about the highly subjective nature of tenure decisions. Dekat explains that “[p]olitical affiliations, the expression of unpopular opinions, race, gender, and appearance are almost never referred to in the review process. Nevertheless, because faculty members are human, unfair and extraneous factors sometimes affect tenure decisions.” Bias can find its way into the tenure decision at several points during the process; and it may present itself during the department review, at the college level, or, at the university level. This represents another hurdle in plaintiff’s attempt to prove that the proffered legitimate non-discriminatory reason is pretext due to the subjective nature of the decision-making process.

The above discussion of academic-specific concepts: academic freedom, academic deference, and tenure sought to highlight the issues that may arise where these concepts meet the strictures of employment discrimination law. A full analysis of Title VII cases, where the defendant is a college or university, will take place in the next chapter. In the next section, another concept specific to higher education that may be a factor in the judicial analysis of employment discrimination cases will be discussed: corporatization of higher education.

*The Corporatization of Higher Education*

The plaintiff in the employment discrimination case discussed in the previous section has high burdens to overcome in the previously-mentioned concepts. However, she would do well to prepare a defense that recognizes that the university setting plays a role in her

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987 Dekat, *supra* note 982 at 245.
discrimination claim. Specifically, in trying to overcome the academic deference hurdle, the plaintiff may benefit by pointing out the changing nature of the higher education institution and questioning whether academic deference is still appropriate.

It has been said, “the university is not ‘like’ a business corporation; it is a ‘corporation.’ The once slow to change, conservative institution – the university dating back to the thirteenth century - has undergone a ‘revolution’ that has changed it from a community of scholars and students to an entrepreneurial university.”

This description and others like it, speaking of a metamorphosis of the university from a traditional, scholarly-focused entity to a business-like structure, may be the root of the controversy behind the term “corporatization” as applied to higher education. In it, the speaker assumes a fundamental change has taken place where some scholars don’t necessarily agree that one has. If that is the case, then the characterization of the modern university as a business corporation may be controversial due to its inaccuracy. Another potential contributor to the divisiveness created by the term is revealed in the extant literature which fails to provide a common definition of the term, nor do scholars necessarily agree about what aspects of the modern university make it a corporatized entity.

For the purposes of this study, the researcher adopts a basic definition of the term corporatization gleaned from several provided in the extant literature. Henry Steck defines the term as, “substantial change – perhaps fundamental – in the direction of a university that displays the culture, practices, policies and workforce strategies more appropriate to corporations.”

Leon Fink indicates that the term “etymologically, likens developments in higher education to those in the business world.” And James Andrews describes the phenomenon as, “the growing influence of free-market business practices on the operation of colleges and universities.”

These definitions were chosen as they provide a basic understanding of the term and allow for flexibility in the upcoming discussion of the concept. From these several descriptions, the instant study recognizes ‘corporatization’ as the influence and/or implementation of business practices in the field of higher education.

For a term with several interpretations, there seems to be a consistent negative response to the concept. Schrecker argues that due to corporatization, undergraduate teaching is degraded, faculty members are marginalized, and the mission of the academy as an institution devoted to the common good is imperiled.

Steck similarly responded to the concept indicating that corporatization poses a unique threat to institutional values and

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988 Henry Steck, supra note 15 at 67 (quoting Bill Readings’ The University in Ruins).
989 Id.
990 Leon Fink, Corporatization and What We Can Do About It, 41 HIST. TCHR. 229 (2008).
992 SCHRECKER, supra note 957 at 3.
And Nicolaus Mills noted that Bill Readings sounded the alarm almost 20 years ago warning of the perils of corporatization. Just what exactly is everyone afraid of? The following provides a review of the diverse aspects of corporatization in higher education drawn from the extant literature in an attempt to delineate the parameters of this concept.

Corporatization is Nothing New

If corporatization involves the application or influence of business practices to higher education, the concept cannot be news to higher education scholars. Indeed, scholars Gerda Lerner and Leon Fink describe corporatization as an on-going process that has been in the making at least since the beginning of the twentieth century. Further, Thelin describes the philanthropy of wealthy benefactors who served as the captains of erudition during the latter part of the nineteenth century in creating the great American universities. He explains the influence of industry on the creation of these universities discussing how perhaps due to the fact that the benefactors financing these institutions had made their fortunes in business, the new university campuses would be influenced by the corporate model of hierarchy with offices for faculty and staff as well as a proliferation of industrial leaders as trustees on university boards. Also, by the 1930s, over 73% of board positions at private institutions were made up of corporate executives, corporate lawyers, and bankers; these individuals accounted for 65% or more of the administration at state universities, private universities, and technical institutes. Thelin notes that these numbers are twice the representation of these professions on academic boards in 1880.

Moreover, far from the negative response to corporate influence on university campuses, former Massachusetts Institute of Technology (MIT) president, Henry Pritchett, advocated for the use of the corporate model on campus in order to improve financial accuracy in accounting as well as to improve the overall efficiency of the university. Thus, the influence of the corporate model on higher education was felt over a century ago.

“Purely” Academic

Lucas describes two models of the university: the purist and vocational models. Of the purist model, Lucas notes that it harkens the traditional ideals of the university; it “calls always for refurbishing the ivory tower and reinforcing its monastic isolation from the...
world.” The purist model connotes “learning for learning’s sake...for itself as a self-contained, intrinsic good.”

When corporatization meets the purist model, the goal of higher education conforms to the second model of the university, the vocational model. Indeed, in light of the concept of corporatization, Steck warns against “recalling a distant time when the university was pure, was in the world but not of it.” Tuchman elaborates:

These and other treatments of grand trends insist that higher education is one of the last revered Western institutions to be “de-churched”; that is, it is one of the last to have its ideological justification recast in terms of corporatization and commodification and to become subject to serious state surveillance. Universities no longer lead the minds of students to grasp the truth; to grapple with intellectual possibilities; to appreciate the best in art, music, and other forms of culture; and to work toward both enlightened politics and public service. Rather they are now to prepare students for jobs. They are not to educate but to train.

The argument that Tuchman puts forth appears to implicate themes previously discussed in this chapter during the education reform of the nineteenth century. In essence, the argument is that corporatization is the mechanism that takes higher education away from its purist origins.

However, as previously discussed, the idea of utilitarianism in higher education began to make its mark after the American Revolution and influenced higher education in varying degrees throughout the nineteenth century moving forward. Specifically, certain institution types would espouse purist ideals more than others; for example, the re-emergence of liberal arts colleges in the early twentieth century strongly endorsed purist notions as evinced by their embodiment of liberal culture. Simultaneously, land-grant, state, and research universities emerging at the time appeared to cater more to the vocational model. Thus, themes of corporatization manifested through a utilitarian focus in several institution types going back to the late 1700s. If it is a matter of degrees, it can be stated that the modern university, in its utilitarian focus, advances the argument that corporatization has influenced the institution as career goals and professionalization are powerful motivations for today’s college student and today’s institutions cater to this “consumer” need.

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1003 Id.
1004 Id.
1005 Id. at 300.
1006 Tuchman, supra note 733 at 41.
Businessmen vs. Faculty: Who’s Running the Show?

Today, the influence of business professionals on governing boards has many implications for the way today’s higher education institution is run. Andrews explains that the presence of business professionals on university governing boards may lead to the appointment of business-minded presidents and administrators who are more likely to feed into the idea that the university should be more profit-oriented. This profit-oriented mentality has caused university leaders to view students as customers and has resulted in decisions such as: decreasing the number of faculty, eliminating programs and courses, and developing distance/online learning options which allow colleges to do more with less.

This represents a departure from the academic tradition of shared governance which is characterized by faculty participation in decisions on campus on issues including teaching, research, and quality of academic life. The shift of authority on traditionally academic issues from the faculty to administrators is the result of factors directly associated with corporatization in higher education.

Faculty authority may shift to administrators because of a decrease in tenured faculty. Lerner explains that research and private institutions especially focus their faculty searches on “stars” who may help improve the ranking and prestige of the institution. These faculty “stars” become highly sought after amongst research universities allowing the faculty members to negotiate very competitive salaries. When this happens, it results in the overall decrease in the number of tenured faculty on campus. The institution responds by providing high salaries to a select, few tenured faculty and simultaneously relying more and more on contingent and part-time faculty to fill the gap in instruction. This causes two particular problems.

First, as explained above, the dearth of tenured faculty threatens the tradition of shared governance. Since tenured faculty handle most of the responsibility for committee work and participation in governance, a decrease in tenured faculty accompanied by an increase in contingent faculty results in increased administrative power over traditional academic issues such as hiring, programs, class size, workload, and schedules. Second, heavy reliance on contingent and part-time faculty to carry the weight of instructional duties decreases the quality of education provided by higher education institutions.

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1008 Andrews, supra note 991 at 17.
1009 Id.
1011 TUCHMAN, supra note 991 at 26.
1012 Lerner, supra note 995 at 219.
1013 Id.
1014 Id.
1015 Id. at 220; Jones, supra note 1010 at 215.
1016 Jones, supra note 1010 at 215.
Thus, universities are being run more and more by professional administrators who were hired from the national labor pool rather than faculty who moved up the ranks to hold administrative positions. Not only are these professional administrators unlikely to understand the effects that corporatization has on traditional academic ideals, even if they did, they would perceive the changes as an improvement since they believe they are better equipped with the first-hand knowledge of relevant issues to the successfully run the university.

**Corporate Sugar Daddies**

Perhaps the aspect most associated with the corporatization of higher education is the institution’s shift to research as a profit generator. There are several facets to this trend. Post World War II, there would be a mass infusion of federal research funding. Thelin explains that by 1960 a select number of institutions of higher education had received approximately $1.5 billion to conduct research. A couple of components in the previous statement require further explanation. First, the concentration of federal money amongst these select few “federal grant universities” created a system of the “haves and the have nots” in higher education. Approximately 20 universities in the country received 79% of the federal research grant dollars. Being one of the select few institutions to obtain a grant became synonymous with power and prestige, a recurring theme in higher education. Indeed, as Steck explains, “the university became the primary locus for research and development, and the elite research university emerged almost as a new kind of institution and one that served as a model for less distinguished institutions.” Soon after, this would create a spirit of competition amongst second and third tier institutions seeking more prestige and their place amongst the elite federal grant universities. Second, the money obtained by these federal grants would become a significant portion of the receiving institution’s operating budget, sometimes up to 80%, creating a dependence on federal grants as a source of income.

As a result of the discovery of this new source for profit, the federal government would provide additional aid in the form of legislation that opened up other avenues to realize a profit from scholarly research. Also known as the University and Small Business Patent Procedures Act of 1980, the Bayh-Dole Act, was a federal uniform patent policy that allowed: (1) universities to file a patent on any discoveries it chose to own; (2) universities to

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1017 TUCHMAN, supra note 733 at 72.
1018 Id.
1019 Id.
1020 THELIN, supra note 634 at 278.
1021 Id.
1022 Id.
1023 Id.
1024 Id.
1025 Steck, supra note 15 at 73
1026 SCHRECKER, supra note 957 at 168.
1027 THELIN, supra note 634 at 278.
collaborate with commercial concerns to promote the use of inventions; and (3) the federal
government a non-exclusive license to produce the invention.\footnote{TUCHMAN, supra note 733 at 58.} The Act allowed universities
to profit from research conducted on its campus, but soon, individual professors would profit
from the arrangement as well.\footnote{SCHRECKER, supra note 957 at 169.} Shrecker explains that the downsides to the Act included: an
environment shrouded in secrecy as sponsors’ commercial interests came in direct conflict
with the scientific community's tradition of sharing and publication of findings; decreased
opportunities for professors and their graduate students to share their work and potentially
publish; a shift away from curiosity-driven investigations toward a focus on the needs of the
private sector.\footnote{Id. at 170-71.}

Research is definitely a profitable commodity; in 2007 the business sector provided
upwards of $2.7 billion for academic research and development expenditures.\footnote{Katalin Szelényi & Richard A. Goldberg, Commercial Funding in Academe: Examining the Correlates of Faculty's Use of Industrial and Business Funding for Academic Work, 82 J. HIGHER EDUC. 775, 776 (2011).} Considering
the enormous potential for profit, this aspect of corporatization has a massive influence on
higher education, its practices, and its priorities. This is particularly true because there
seemed to be no comparable grant support to fund the traditional function of higher
education: teaching.\footnote{THELIN, supra note 634 at 279.} Thus, the competition for federal grants remains a staple of higher
education and is not likely to be changed any time soon functioning as it does as a major
contributor to universities’ operational budgets.

Miscellaneous Corporatization Characteristics

Finally, there are several characteristics of the modern university that produce a
visceral reaction, reminding the onlooker of a corporation rather than the traditional
university.

First, non-profits, such as higher educational institutions, enjoy tax benefits including
exemption from property taxes.\footnote{Id. at 358.} However, considering the multifunctional purpose of
today’s universities, Thelin poses salient questions regarding whether universities should
continue to benefit from those exemptions. He states, “Why should a college that has a travel
agency or a computer sales center in its student union bet treated any differently from a
private business? Similarly, the property-taxing authorities asked, Why should a university
arena that is often used for rock concerts be exempted as an “educational facility?”\footnote{THELIN, supra note 634 at 358.} Thelin’s questions illustrate the hybrid nature of today’s university that embodies both
traditional and commercial characteristics. Today's institutions are so intertwined with
consumer ventures, it’s hard to categorize them as we used to; are all the commercial ventures entered into by university campus truly focused toward an educational end?

Steck indicates that when these hybrid universitites and corporatization meet, the isolated campus of old transforms into a commercial meeting space, or for lack of a better term, a mall complete with Starbucks, McDonalds and/or Taco Bell. In that meeting space, supported by corporate sponsorship, marketing agreements, sales, signs, and licensing deals, the campus meeting space loses its identity as a community of scholars and students. Rather, it becomes a site for consumerism.

This is nothing to the complicated business of football on university campuses and the commercial contracts it brings to the university. An ESPN correspondent noted that in 2010, the top five earning institutions made between $30-$45 million in football ticket sales alone; this figure does not include millions of dollars earned from radio and internet rights as well as the revenue earned from playing in away games. Michigan State, Ohio State and UCLA, for example, each made more than $3 million playing in away games. Schools like Tennessee, Oklahoma and West Virginia spend more than $1.5 million recruiting football players while Notre Dame spent upwards of $2.3 million. Although college football enjoyed immense popularity from the start, the massive draw of football to today’s institutions many times blurs the lines of the ultimate purpose of the higher education institution.

Second, as discussed previously, universities are always seeking means to increase the prestige of their institutions. Nicolaus Mills explains that a sign of corporatization manifests itself through the universities’ competition to win high rankings on the U.S. News & World Report. The business characteristics of competition and recruitment occupy a great deal of universities’ time and resources as they openly and actively solicit students who have

1033 Steck, supra note 15 at 77.
1034 Id.
1035 The ubiquitous nature of football on university campuses implicates other legal questions. For example, their hybrid nature implicates whether they constitute a public forum or limited public forum for First Amendment free speech purposes.
1037 Id.
1038 Id.
1039 T HELIN, supra note 634 at 177.
1040 Perhaps this blurring of the lines can most clearly be evinced by the 2011-2012 scandal at Penn State scandal involving Jerry Sandusky who was convicted of multiple counts of child abuse. It was found that several coaches and administrators were aware that their former defensive coordinator, Sandusky, was engaged in this illegal activity. One result of the scandal was a sanction by the NCAA which fined the institution $60 million and banned the institution from postseason play including bowl games for four years; 112 of their wins from 1998-2011 were also vacated as a result of the ban. At the time NCAA president Mark Emmert stated, “No matter what we do here today, there is no action that we can take that will remove pain and anguish. What we can do is impose sanctions that both reflect the magnitude of these terrible acts and that also ensure Penn State will rebuild an athletic culture that went horribly awry. Our goal is not to be just punitive, but to make sure the university establishes an athletic culture and daily mindset in which football will never again be placed ahead of education, nurturing and protecting young people.” Colleen Kane, NCAA Punishes Penn State: Penn State Will Pay A $60 Million Fine, is Banned from Postseason Play for Four Years and Will Vacate 112, CHICAGO TRIBUNE (July 23, 2012), http://articles.chicagotribune.com/2012-07-23/sports/ct-spt-0724-penn-state--20120724_1_david-joyner-penn-state-ncaa-president.
1041 Mills, supra note 994 at 6.
performed well on their SATs. To what end are all of these efforts? Universities, particularly middle and upper tier schools, compete for higher rankings to increase prestige. When corporatization is taken into consideration, a prestigious institution is able to increase its educational market share; this represents massive opportunities for expansion and profit.

Finally, corporatization has drastically changed the focus of higher education. This is not to say that universities no longer perform their primary function of educating students; however, the means in which it now accomplishes this task is vastly influenced by corporations. Lucas calls it nothing short of a corporate takeover, wherein the university sells its research services to corporations and state agencies for profit. This we know from the above discussion. However, in carrying out its mission, universities increasingly engage in traditional business practices in order to achieve these goals. “In their internal workings, many academic institutions of higher learning appeared to have taken on much of the trappings of large-scale business organizations: mission statements, strategic planning, elaborate budgeting systems, meticulous record-keeping, cost effectiveness analyses, marketing research, public-relations efforts, total-quality-management, hierarchical governance structures and pyramidal bureaucracies…”

“Business” permeates the way universities do business; even their jargon has changed to mimic corporate language. In other words, in order to carry on the multiple purposes of the university, those that have little to do with the traditional role of the higher education institution, they have had to implement business tactics to ensure the success of this pricey endeavor. As Thelin notes, “universities have wandered into a state of continual expansion characterized by overextension of functions without clarity of purposes, a pattern that has fostered administrative bloat and other spending excesses.” It seems then, as long as universities continue to expand indiscriminately, and move further and further away from their traditional focus, they indeed metamorphose into a different entity altogether, a corporate entity.

In examining the theory of corporatization of higher education, it appears that different aspects of the concept manifested themselves early on in the history of American higher education. However, as the American system has proliferated and diversified, aspects of the theory show up in differing degrees across institution types. The preceding discussion on corporatization in higher education illustrated the influence of business ideals and practices on the American system of higher education. The several characteristics discussed
do appear to represent a fundamental change in the focus of higher education institutions. Whether or not those changes are beneficial to the system is not the point of this discussion. Rather, does the influence of business practices and culture change the nature of the university to the extent that the courts should reconsider its status as an entity deserving of special deference? In other words, have the inherent aspects of higher education that justified judicial deference been washed away by corporatization?

**Pulling It All Together: Framing the Research Question**

It has been the goal of this chapter to provide a historical analysis of the history of higher education in the United States from inception through to the present day. The purpose analyzing the history of higher education was to elucidate how the American system of higher education developed into the massive system in place today and how it would come to claim such an important place in American society.

Thus, the discussion of the system from 1776 through 1860 provided insight into the proliferation of colleges and challenges to the curriculum, presaging the recurring theme of growth in higher education and the differentiated system we currently have in place that caters to different curricular focuses. The subsequent discussion of higher education after the Civil War provided further discussion on how the system continued to grow to include the different types of institutions that still exist today. And the discussion of the mystique of higher education explained American's fascination with college life and the proliferation of student activities on campus such as fraternities and sports (i.e., football.) The final section provided a look at two major trends that further factor into a holistic view of the American system of higher education through a discussion of the move to mass higher education as well as the achievement of social justice in higher education.

Understanding the history of higher education in this way provided a good foundation for the subsequent discussion on the corporatization of the system. Understandably a controversial term, there are those scholars who believe that the system of higher education has metamorphosed into an entity more characteristically similar to a business. Thus, discussing the American system of higher education was necessary in order to illustrate the comparisons between the two entities. If indeed institutions of higher education bear more resemblance to businesses than the traditional college or university, what legal status should they hold for the purposes of the application of federal statutes such as Title VII of the Civil Rights Act of 1964?

For example, recall the discussion of the previous chapter regarding what employers are covered under the protections of Title VII. The statute simply provides that employers with 15 or more employees must adhere to the strictures of the Act. This includes businesses of most types, and after 1972 state and local governments as well as educational institutions. However, throughout American jurisprudence, educational institutions have been recognized
as having a particular mission in society and are thus accorded particular deference in light of
their particular status. If however, educational institutions have become corporatized, and in
so doing look more like typical employers, are they still deserving of the academic deference
accorded to them by the courts?

The enactment of the Civil Rights Act of 1964 announced a policy of anti-
discrimination in all facets of American society. Further, the Equal Employment Opportunity
Act of 1972 expressed a congressional intent to remove the history of discrimination that
permeated the education field. The questions posed in this study are particularly salient since
the legislature made specific findings of rampant racial and sex/gender discrimination in
higher education before bringing educational institutions under the protections of the statute.
However, in according deference to educational institutions, could the courts be turning a
blind eye to discriminatory employment practices that may be exacerbated by academic-
specific concepts? The preceding sections discussed the concept of corporatization of higher
education institutions as well as academic deference as a function of academic freedom as
well as tenure to help clarify how discrimination may manifest in light of these factors.
Chapter five will provide an analysis of American jurisprudence. The cases under analysis are
set at higher education institutions and implicate Title VII of the Civil Rights Act of 1964.
Each case will be examined taking note of the setting, the implicated statute, and the presence
of any of the variables previously discussed: academic deference and tenure. Additionally,
cases that do not implicate these variables will be examined to provide insight into any
noticeable trends with regard to the application of Title VII in this special environment. The
methodological approach to the analysis of these cases is further delineated in the next
chapter.
CHAPTER FOUR
METHODOLOGY & PROCEDURES

As institutions of higher education have modernized in the last several decades, university campuses have developed into large corporation-like entities employing thousands of individuals including: faculty, staff, and students (both graduate and undergraduate.) Pursuant to the 1972 amendments to the Civil Rights Act of 1964, which brought both educational institutions as well as state and local government employees under its purview, all of these employees are protected by Title VII’s proscription against discrimination in employment based on race, color, sex, religion and national origin. Therefore, it is not uncommon for Title VII to be implicated in the various employment situations that arise on university campuses. The purpose of this study is to determine whether applying Title VII to this special environment yields any special rules, concerns, or considerations that are different as compared to other employment environments. This study is guided by the following questions:

1. How has the law of employment discrimination been applied within the environs of institutions of higher education with respect to claims of discrimination based on race, color, and gender? and
2. What changes should be made, if any, to how the law of employment discrimination is applied in the field of higher education considering the emergence of the modern corporatized university and the special concerns associated therewith?

The forthcoming sections will discuss the method of analysis employed in this study. However, in order to do so, it is important to understand the foundational principles that guide legal analysis and legal reasoning. This will help the reader gain a better understanding of the court cases under evaluation in this study. Thus, the subsequent portions of this chapter proceed with an explanation of the concepts underlying the legal analysis and legal reasoning processes that will aid in comprehending the subsequent discussion on the particular methodology utilized in this study.

Legal Analysis

Legal analysis is built upon the concepts of: source of law, precedent, stare decisis, the court system, jurisdiction, and types of authority. Each will be discussed below.

In the American legal system, there are two sources of law: statutes and case law.1 A statute is the result of action by a legislature that governs conduct. Case law, on the other

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1048 Id.
hand, is the result of action by the judiciary. Specifically, it is comprised of the common law as well as judicial opinions interpreting enacted laws. When speaking of common law, it generally means, judge-made law and consists of judicially-created legal doctrines.

When the judiciary is engaged in making law, it is important to remember that they do so within the bounds of a particular geographical region (i.e., within their jurisdiction) or within a particular subject area of the law (i.e., within their subject-matter jurisdiction.) In other words, when a judge makes law, it is the law of that particular jurisdiction only. Further, judges oftentimes have authority in specific areas. For example, a federal bankruptcy court judge may form the law on bankruptcy but has no subject-matter jurisdiction over the criminal matters.

Understanding these preliminary concepts, it is now appropriate to discuss the doctrines that guide judges in making the law: precedent and *stare decisis.* Under the doctrine of precedent, when a court is engaged in resolving a dispute between parties, it is also setting precedent to be followed in future cases. The doctrine of *stare decisis* requires courts to follow precedent when deciding similar cases. The name comes from the Latin maxim: *stare decisis et quieta non movere,* which translates into “those things which have been so often adjudged ought to rest in peace.” Romantz and Vinson explain that while the concepts are related, they are distinct concepts: “*Stare decisis* requires courts to follow their prior decisions when deciding like cases. Precedent is the decision itself. Precedent is the substance behind *stare decisis.*

Thus, pursuant to the above, judges create the common law. In doing so, it is not only constrained by jurisdictional issues, but precedential concepts as well. Court decisions are further influenced by the concept of authority. To understand the authoritative weight or value of a particular decision, a brief discussion on the hierarchy of courts will be useful.

In the United States there are two levels in the judicial system: the federal level and the state level. Within each level, there is a hierarchy of courts that consists of three levels. At the lowest level is the trial court. In these courts, a judge decides questions of law, while juries decide issues of fact. However, if at the trial level, it is a bench trial, meaning that

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1049 Id. at 5.
1050 Id. at 5-6.
1051 Romantz & Vinson explain that a court can make law in three ways: it may declare that a general legal doctrine is enforceable within that court’s geographical reach; it may decide cases that interpret legal doctrine, or it can interpret legislative enactments. Id. at 6.
1052 Id. at 7.
1055 Id. & supra note 1047 at 8.
1056 Id.
1057 BARKAN, MERSKY & DUNN, supra note 1054 at 3.
1058 Id.
there is no jury, then the trier of fact is the judge and he will decide issues of fact as well as questions of law. At the next level is the intermediate appellate court. Generally, a party who did not prevail in the trial court has a right to one appeal. Bast & Hawkins explain that if a case is appealed to the intermediate appellate court, that court must hear the appeal. Finally, the court of last resort, or a supreme court is the highest appellate court.

At the federal level, the hierarchy consists of: the United States District Courts which are the trial courts, the United States Courts of Appeals which are the intermediate appellate courts, and the Supreme Court of the United States which is the court of last resort. At the state level, most states have a three-tier system similar to the one described above.

It is important to note that there are some issues over which the federal court has exclusive jurisdiction and there are some issues over which the federal court and state courts have concurrent jurisdiction. For example, the instant study discusses employment law pursuant to Title VII of the Civil Rights Act of 1964. Pursuant to §706(f) of the 1964 Act, exclusive jurisdiction over Title VII cases is vested in the U.S. District Courts. If a party does not prevail, as explained above, he could appeal to the U.S. Court of Appeals of the appropriate circuit.

Understanding the hierarchy of the U.S. court system aids in the understanding of how a judge may determine the particular weight to give a particular precedent. Recall from the discussion above, a judge is bound by the doctrine of *stare decisis* to follow prior decisions of like cases. This dictate is partially dependent on a particular court and where it stands in the hierarchy of courts. Thus, state trial courts are bound by the decisions of the intermediate appellate courts in their state. Intermediate appellate courts in each state are bound by the court of last resort in each state. Concurrently, all U.S. District Courts are bound by the decisions of the U.S. Courts of Appeals. Further, all courts (state and federal) are bound by the decisions of the U.S. Supreme Court.

A decision of a higher court on the hierarchy represents mandatory or binding authority that must be followed pursuant to *stare decisis*. However, sometimes within a particular jurisdiction, an analogous case with similar critical facts cannot be found (i.e., there is no precedent in that particular jurisdiction on that particular issue.) In those cases, the decisions of courts in different jurisdiction represent persuasive authority; a court is not required to follow the decision of those types of cases. For example, where an employment

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1061 *Id.* at 106.
1062 *Id.* at 108.
1063 *Id.*
1064 *Barkan, Mersky & Dunn, supra* note 1054 at 4.
1065 See *Bast & Hawkins, supra* note 1060 at 109.
1066 *Id.* at 117-18.
1067 *Barkan, Mersky & Dunn, supra* note 1054 at 4.
1068 See *Bast & Hawkins, supra* note 1060 at 26.
1069 *Id.*
discrimination case tried in a U.S. District Court of Florida and there is no precedent, an analogous case found in a U.S. District Court of Georgia represents persuasive authority.

By this description, it is evident how the concepts of precedent, *stare decisis*, the hierarchy of the courts as well as mandatory and persuasive authority work together. Having discussed the principles that guide the decision-making of the judiciary, we now turn to a discussion of legal analysis.

Legal analysis involves four steps. Bast and Hawkins indicate that:

First, one must find all authority relevant to the problem...[r]elevant material, once found, must be read and synthesized, [t]he next step...is to apply the rule of law to the facts of the problem...[a]nd [t]he last step is to reach a conclusion by tying the rule of law and the application of law to facts together.  

In order to proceed with legal analysis in the manner that Bast and Hawkins suggest, it is important to understand that analogical analysis forms the basis for this process. In turn, the concept of precedent forms the basis for analogical analysis. An analogy, Romantz and Vinson explain, “is an inference that if two or more facts or characteristics are similar in one respect, they will be similar in other respects.” The authors offer two analogical strategies: narrow and broad analogies.

Narrow analogies involve finding substantial similarities and distinctions between the facts of the instant case and the facts of the controlling authority. The point is that if the cases resemble each other in specific ways, they should also be similar in their outcome. This then comports with the idea of *stare decisis*.

The broad analogy, rather than focusing on comparing facts, focuses on the common denominator derived from the critical facts in the precedents. The broad analogy “draws general comparisons that relate to, but are not necessarily parallel to, the...facts.” Broad analogies, the authors explain, are appropriate in two situations: “first...when the case-at-bar arises under unique or unusual facts... [and] second...when the analysis requires the integration of a large body of law.” As to the second situation, it is noted that many times, it is necessary to synthesize several cases to identify a basis of an analogy. The explanations of these two strategies, the narrow and broad analogy, illustrate their utility in accomplishing several of the steps in the legal analysis process as explained by Bast and

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1071 Romantz & Vinson, *supra* note 1047 at 34.
1072 *Id.* at 34.
1073 *Id.* at 43.
1074 *Id.*
1075 Shapo, Walter & Fajans, *supra* note 1053 at 34.
1076 Romantz & Vinson, *supra* note 1047 at 49.
1077 *Id.*
1078 *Id.* at 50.
1079 *Id.*
Hawkins. For instance, the strictures of the narrow analogy will aid in steps one and three of the legal analysis process where finding relevant cases and applying the rule of law to the facts of the problem are required.

Extrapolating from the definitions of the two types of analogies, it becomes apparent that forming these analogies requires two skills: identifying critical facts and synthesizing cases. Critical facts, Romantz and Vinson explain, are those facts from the controlling precedent that the court found dispositive in resolving a dispute. Identifying these critical facts requires an analysis of the rationale of the prior case; this will help in culling out those facts that proved important in resolving the issue.

The second skill important to forming analogies is synthesizing cases. This process involves the review of several cases and relating them to one another such that relevant principles emerge that will help solve the legal problem. Searching for a common denominator among the various opinions and holdings is the goal of case synthesis. Thus, developing the skill of identifying critical facts would be helpful to the first step in legal analysis which requires gathering relevant facts. And, synthesizing cases would be helpful in the second step of legal analysis which requires taking a holistic view of the precedent and synthesizing them.

It is evident from the above that legal analysis is a process that is based on several concepts. The above description reveals how the concepts of precedent, stare decisis, jurisdiction and authority inform the legal analysis process. In turn, in proceeding with legal analysis, the above illustrates the function of broad and narrow analogies and the skills required to make these analogies. Thus, each concept built upon the other in order that an understanding of the basic process of legal analysis emerged.

**Legal Reasoning**

This section involves a discussion on the legal reasoning judges use in making particular decisions and rendering an opinion. Two thoughts form the basis for the forthcoming discussion on legal reasoning. First, one author explains that “[r]easoning is a process of thought aimed at reaching or justifying a conclusion. The process involves a consideration of facts and impressions, experiences and principles, objectives and ideals.” Second, “[t]he basis of legal reasoning is the case. We may think of the law as a compilation of rules, but it would be more accurate to think of the law as an accumulation of cases.”
The extant literature on this matter indicates that legal reasoning can happen in two ways: reasoning by example or deductive reasoning. It does not appear that the two concepts are widely disparate; however, each concept is distinct enough that each will be discussed in turn such the process of legal reasoning is adequately explained.

Levi explains that reasoning by example, or reasoning from case to case is a three-step process that is also built upon the doctrine of precedent. The three steps proceed as follows: “similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case.” He further explains that reasoning by example is a function for the judge in each particular case.

Alternatively, deductive reasoning involves reasoning from the general to the specific. Similarly, deductive reasoning is a three-step process that proceeds as follows: “identifying the rules that may apply to a particular fact pattern... state the facts in terms of the rule...reach a conclusion, after analyzing the relationship between” the rule and the facts. It seems that the idea of deductive reasoning may be based on syllogism as described by Zelermeyer wherein: “[t]he major premise sets forth a proposition, the minor premise states a fact related to the proposition, and the conclusion automatically follows.”

It appears that Levi’s description of reasoning by example is more specifically in tune with the concept of precedent and the reasoning process that judges should employ when deciding cases, while deductive reasoning appears to be a fundamental concept that is not necessarily tailored to legal reasoning and may be applied in general. However, each provides a viable explanation for the process of reasoning in which judges engage when making decisions and attorneys engage when making an argument. Each alternative accomplishes the goal of “fitting...a particular situation into the fabric of legal history.”

As such, Zelermeyer explains that legal reasoning will often involve consideration of the following questions, “Has there been a similar situation in the past?...Has such treatment been consistently followed?...Are there any significant distinctions between the present situation and those of the past?...Have there been any analogous situations?...What effect will a decision in this matter have upon the future?”

The basic idea of legal reasoning seems to involve similar considerations to those employed during legal analysis. However, a noted difference seems to be that legal reasoning is more concerned with the consideration of particular facts and reaching a logical conclusion.

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1087 EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1949).
1088 Id. at 2.
1089 Id.
1090 Id. at 2.
1091 BAST & HAWKINS, supra note 1060 at 27.
1092 Id.
1093 Id. at 4.
1094 Id. at 5.
1095 Id. at 5-6.
whereas legal analysis is concerned with breaking down the components of a case (or several cases) to gain an understanding of the issue at hand. Both concepts have their place in the process of understanding and applying the law.

**Legal Research**

Several issues must be taken into consideration when conducting legal research. This section discusses how legal research is conducted, important guidelines for conducting legal research, and the tools used to conduct research.

There are differing suggestions as to how to approach legal research. One involves a four-step process wherein the researcher: (1) identifies and analyzes the significant facts, (2) formulates the legal issues to be researched; (3) researches the issues presented; and (4) updates the legal research. This process formalizes what is an intuitive process.

Conducting research generally proceeds depending upon the amount of information the researcher has about the topic. Thus, a researcher can take an overview approach when she has little knowledge about the subject-matter. Here, the researcher conducts research of secondary sources to familiarize themselves with the topic at hand. Alternatively, if the researcher does have some knowledge of the issue, she can begin her search with primary sources to locate other primary sources. Finally, if the researcher is starting with a known primary source, she can begin her research there and link to other research tools for further information. The second approach, which focuses on the amount of information a researcher has, implicates a discussion of the different sources that legal researchers have available to them.

Primary sources include cases, statutes, constitutions, and administrative regulations. Cases are generally found published in reporters, loose leaf publications, or advance sheets and organized chronologically. Secondary sources, on the other hand, include treatises, legal periodicals, and legal encyclopedias. Treatises are similar to textbooks that provide information on a particular legal subject. Legal periodicals contain law review and legal periodical articles that provide commentary on a particular subject and are good secondary sources of information. Finally, legal encyclopedias provide specific explanations about a particular area in the law. During any research endeavor, any combination of these primary and secondary sources may be utilized. As previously

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1095 Barkan, Mersky & Dunn, supra note 1054 at 15.
1096 Bast & Hawkins, supra note 1060 at 267.
1097 Id. at 269.
1098 Id.
1099 Shapo, Walter & Fajans, supra note 1053 at 213.
1100 Bast & Hawkins, supra note 1060 at 142.
1101 Id. at 270.
1102 Id. at 269.
1103 Id. at 269.
mentioned, the choice of a particular source may depend on the amount of information the researcher knows about the subject at the start.

In discussing the two types of sources, it is also important to know that each type represents a particular type of authority. Recall the discussion of mandatory and persuasive authority with regard to the hierarchy of the courts. This concept is somewhat different, but related. Here, primary sources – cases, statutes, constitutions – represent the law. Secondary sources – legal periodicals, legal encyclopedias, treatises – all comment on the law. Primary sources are primary authority; secondary sources are secondary authority. The type of authority tells a researcher (or a court) whether a particular source must be followed or whether it is mere guidance. Thus, primary binding authority is any case/law a court must follow. For instance, the U.S. Constitution is primary binding/mandatory authority that all courts must follow. Note that differentiating between the types of sources and their authority requires a consideration of both source type and jurisdiction. Thus, case law (a primary source) from another jurisdiction is merely primary persuasive authority. As such, in conducting legal research, it is important to keep in mind what source the researcher is using and what authority that source has on a particular issue; is it a primary or secondary source and does it represent binding/mandatory authority or merely persuasive authority?

Another consideration in conducting legal research is whether the research is current. Cases may be overturned, or superseded by statute and thus need to be updated to reflect any changes within the law. Several tools exist that help legal researchers quickly update their research.

Finally, there are two main legal databases that are available online to aid in legal research: LexisNexis and Westlaw. West Publishing Company began creating its computer legal database in 1973 and was launched in the spring of 1975. However, it was not positioned to compete with Lexis until the following year. Westlaw now provides access to both primary and secondary legal research sources and further provides the means for updating cases and statutes.

The above sought to provide a brief discussion on the, legal analysis, legal reasoning, and the legal research process in order to provide a foundation for the subsequent discussion.

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1105 ROMANTZ & VINSON, supra note 1047 at 14.
1106 Id.
1107 Id.
1108 See BAST & HAWKINS, supra note 1060 at 225-59 (discussing the Shepardizing procedure for statutes and cases and the Key Cite procedure for cases).
1109 As Westlaw is the database used for the instant study, the following provides a brief description of this research tool.
1110 Currently, the company is known as, West Group, Inc.
1111 BAST & HAWKINS, supra note 1060 at 279.
1112 Id.
1113 Id.
on the particular methodology employed in the instant study. A discussion of the research methods proceeds below.

**Methodology**

This study proceeded by conducting a review of the extant literature on Title VII of the Civil Rights Act of 1964. The review provided historical analysis of the significant events that pre-dated the passage of the 1964 Act including a review of its legislative history. Further, the review provided an extensive decade-by-decade examination of the judicial, legislative, and regulatory environment as it pertained to subsequent changes in Title VII law. Next, a historical analysis of the American system of higher education was provided in order to reveal how it came to claim such an important place in society. In the aggregate, the topics discussed in the two-chapter literature review provide a basis for understanding the analysis of the legal cases that take place in the forthcoming chapter.

The procedure for the research in this study proceeded as indicated by Bast and Hawkins which entails four steps: (1) finding all relevant authority; (2) case synthesis of relevant authority; (3) application of the rules of law to the facts of the problem; and (4) drawing a conclusion based on the rule and the facts. 1114

In completion of the first step in legal analysis as described above, the researcher used the Westlaw computer research database to search primary sources - cases - that interpret Title VII of the Civil Rights Act of 1964. The manner in which the search for applicable case law was conducted is described in detail below.

Pursuant to Title VII, the federal courts have exclusive jurisdiction over Title VII claims. Therefore, the researcher searched for cases limited to all federal jurisdictions: the U.S. District Courts, the U.S. Circuit Courts of Appeal as well as the Supreme Court of the United States. In order to ensure accuracy, and yield cases that appropriately answered the research question, an “advanced” search was conducted. Proceeding in this manner allowed the researcher to build a search query by answering several questions; as terms were added and excluded the search query was being built in the search box. The researcher requested that “any of these terms” be searched: race, color, sex, and gender. Next, the researcher asked for this “exact term:” Title VII. The researcher chose to “exclude” the following terms: wage, ADEA, ADA, EPA, sexual harassment, and retaliation. The researcher then limited the cases to those that had the following terms in the “title” or “party name:” college, university, board of trustees, and board of regents. Finally, the researcher limited cases to those that arose after December 31, 1971 in order that only cases following the extension of Title VII to educational institutions would yield.

1114 Bast and Hawkins, supra note 1060 at 38-39.
The researcher acknowledges that the cases returned are directly based on the manner in which the search query is conducted. Excluding certain terms may have the effect of not returning cases that may be relevant. For example, the researcher was not seeking cases that implicated claims based on §§1981 and 1983. However, excluding “1981” and “1983” from the search query would have resulted in the exclusion of any reference to those numbers, including cases that were tried in those years or cases that referenced those years in the explanation of the facts. Therefore, those cases implicating §§1981 and 1983 were manually removed. It was felt that the research query described above struck a good balance between excluding irrelevant terms and yielding relevant cases for analysis.

The second step in legal analysis required the researcher to begin the process of case synthesis, as described by Romantz and Vinson, wherein the researcher found numerous opinions that are on-point with the topic.\footnote{Romantz & Vinson, supra note 1060 at 40.} There, “[w]hile the number of cases may seem overwhelming, case synthesis provides an effective tool for [researchers] to integrate a large body of case law into one holistic analysis. It helps [researchers] identify the common denominator among the precedents and streamlines the body of law into a workable cornerstone of analysis.”\footnote{Id.} The first research question asks how the law of employment discrimination has been applied to higher education. This question is concerned with the rules, themes, and considerations that emerge in that body of case law that are particular to higher education.

In this phase of the analysis, the researcher engaged in analogical analysis of the broad type as explained by Romantz and Vinson. Analysis of these cases entailed broad analogies wherein, as explained previously, the analogy drew general comparisons that relate to, but are not necessarily parallel to, the critical facts. Broad analogies look for the common denominator derived from the critical facts in the precedents.\footnote{Id. at 49.} This tact “requires the integration of a large body of law…to identify a basis of an analogy.”\footnote{Id. at 50.} At this step then, the researcher was concerned with yielding cases that applied Title VII to higher education as a common denominator.

When the search was conducted, as described above, the Westlaw database yielded 1,230 total cases. The researcher first filtered the cases such that only “reported” cases could be considered.\footnote{The Westlaw legal database yields cases that are both reported and not reported in the Federal Supplement. However, those cases that are not reported have no binding, precedential effect, as discussed in previous portions of this chapter. Therefore, those cases were excluded from this study.} This brought the total number of cases down to 569 cases. Finally, the cases were filtered to yield only cases that were tried at the U.S. Courts of Appeals and U.S. Supreme Court level. It was felt that consideration of cases at all levels of federal jurisdiction

\footnote{Id. at 49.}
would yield a prohibitively voluminous amount of cases. Therefore, only the 212 cases tried at those levels were reviewed to determine their relevance to the study.

Reviewing the case summary provided by Westlaw at the beginning of each case allowed the researcher to ensure that the central legal question in each case in the sample interprets Title VII in the manner required by this study. In a second round of reviews, each case was “opened” and quickly reviewed to determine the major issue in the case in order to gauge relevance to this study. Specifically, the researcher searched for cases wherein Title VII analysis took place. Of the 212 cases, 70 cases were determined to be relevant to this study. The excluded cases included: cases that were overruled by a higher court, abrogated, superseded by statute, or found to be irrelevant to the instant study. Those deemed irrelevant were: cases that answered ancillary procedural questions rather than engaging in Title VII analysis or cases that were not on-point with the research question. In this way, the researcher was able to synthesize the sample of cases by making broad analogies amongst those cases that alleged violation(s) of Title VII.

Synthesizing the cases in the manner described above required, as part of the process, identifying the critical facts of each case. This was accomplished by “examining the reasoning of the precedent. The reasoning explains the legal basis of the court’s decision…The reasoning of the case determines which facts are significant or dispositive.”

Each case was then read thoroughly for content. In so doing, each case was briefed identifying the issue, rule, analysis, holding, and dicta of the case. Organizing the cases in this way was part of case synthesis that is commonly undertaken by legal scholars. This process has been reduced to what is known as IRAC: issue, rule, application and conclusion. Barkan, Mersky, and Dunn explain:

> The outline of the rule of law forms the outline of the analysis. For each issue and sub-issue, the writer identifies the rules of law and any elements that must be met. Next the writer applies the rule to the key facts, showing how these facts meet (or do not meet) the required elements. Finally the author states a conclusion. The writer also determines whether cases or authorities that go against her position can be distinguished.

Applying this organizational tool allowed the researcher to keep tabs of relevant issues, rules, and rationales that emerged in the studied body of cases. This allowed the researcher to more easily conduct the third step of the analysis process which entailed applying the facts to the problem. Specifically, this study is concerned with how the strictures of Title VII apply in
the higher education environment. Applying the facts of employment discrimination cases that take place in higher education institutions, then, required consideration of several factors.

Thus, during the application portion of the analysis, certain aspects were taken into consideration to determine, for example, whether the case concerned, hiring, firing, tenure or other tangible employment decisions and what rules, themes, or considerations were observed in each type of case. Another aspect under consideration was the particular jurisdiction of the court. The researcher looked to determine whether a particular circuit employed specific legal analysis in a tenure case, for example, that differed from another circuit in any significant respects. Further, the researcher noted the year of the decisions analyzing Title VII keeping in mind first, whether any subsequent legislative amendments had been made, and second, whether a time period represents a particular trend in analyzing Title VII cases as opposed to another time period. Finally, although stare decisis directs that all like cases should be decided similarly, the role of the judiciary is to interpret the law, and it is not uncommon that different circuits differ on how a particular law should be interpreted. Therefore, the researcher also made of how a particular jurisdiction analyzed and applied the law in their particular district or circuit.

Specifically, once the search yielded cases applying Title VII to higher education, the cases were sub-categorized into several categories. In reviewing the cases each one was marked with an “F” to denote that the case involved a faculty member or an “NF” to denote that the case did not involve faculty. Further, the cases were color-coded to indicate the jurisdiction of the case. Herein, only 2 applicable Supreme Court cases were returned; therefore, the majority of cases were tried in the U.S. Courts of Appeals.

Cases were also marked to specify whether the plaintiff alleged “race” discrimination, “gender” discrimination, or both. Gender cases were tabbed with a red flag, while race cases were tabbed with a green flag. Further, several considered subcategories were color-coded for easy identification. For example, the researcher created subcategories to indicate cases that alleged discriminatory intent or impact in: failure to hire, failure to promote, and/or termination decisions. As indicated, a separate review of the sample of cases focused on the basis of discrimination alleged as well as the implicated protected class to determine whether any further analogies can be drawn from this sample.

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1124 Although two Supreme Court cases were returned, one merely discussed the question of a qualified privilege for peer-review documents in tenure decisions. The other discussed an ancillary issue to a Circuit Court of Appeals case that the Court remanded back to the lower court for further proceedings. Thus, although they will be discussed in the next chapter, the majority of the analysis is of Circuit Courts of Appeals cases.

1125 Different color tabs were used to mark relevant issues to the study. Thus: failure to hire cases were tabbed in yellow; failure to promote cases were tabbed in light blue; termination cases were tabbed in violet; “other” cases were tabbed in dark blue; and cases wherein the plaintiff requested peer-review documents during discovery were tabbed in blue.
The researcher also conducted a search of secondary sources – law review articles and higher education literature - that provide commentary on the application of Title VII to higher education employment discrimination cases. This search was conducted to provide a holistic view on the subject-matter and to buttress any trends observed in the review of the applicable case law. In proceeding in this manner, the researcher adhered to legal-historical precepts.

“The legal-historical scholar must first isolate a topic of relevance, and then, through the use of primary and secondary sources, identify the judicial decisions that contribute to the definition of the construct from which the topic evolved.” Thus, providing a full view of the application of Title VII to higher education through a review of both primary and secondary sources is in line with legal historical methods.

Finally, taking all the information garnered from the above-outlined process, the researcher was able to complete the analysis process by drawing a conclusion based on the results of the analysis. It was hypothesized that taking the special environment into consideration would yield special rules and themes that apply when Title VII cases are tried against institutions of higher education.

CHAPTER FIVE

TITLE VII IN HIGHER EDUCATION

Thus far, this study has sought to situate the law on employment discrimination as well as the American system of higher education in a manner that illustrates how the two areas many times intersect. For example, recognizing the rampant racial and gender discrimination that took place in educational institutions, Congress took affirmative steps with the Equal Employment Act of 1972 by adding these institutions as employers covered by the protections of Title VII of the Civil Rights Act of 1964. In turn, the previous chapter and its discussion on social justice reveal how the law interacts with higher education institutions when colleges and universities sought to increase access to higher education for underrepresented minorities. The previous discussion in the aggregate further acts as a foundation for the analysis that takes place in this chapter. Specifically, in response to the first research question, this chapter analyzes the applicable case law to determine just how Title VII responds to the special employment environment that is the institution of higher education with its special concerns of academic freedom, academic deference, and tenure.

For the purposes of this chapter, the cases under review have been sub-categorized in order to facilitate analysis as well as to expose the rationale of the courts in various types of employment discrimination claims. First, the cases were separated by “faculty” and “non-faculty” cases depending on the status of the plaintiff. Second, as previously explained, although Title VII protects individuals from employment discrimination based on their race, color, sex, religion, or national origin, this study limited its review to cases that alleged discrimination based on race, color, and gender. Thus, amongst the several types of claims of discrimination, the implicated protected class was noted. Third, cases were then sub-categorized by the type of adverse employment decision taken within each case. The following types of employment decisions were noted within the sample of cases: (1) failure to hire; (2) denial of tenure; (3) failure to promote; (4) termination of employment; and (5) other. The “other” category encompasses cases with causes of action that allege claims such as salary decreases or conversely, failure to increase salary. Thus, analysis of the case law will proceed grouping the cases in the following manner:

1127 Although the case law uses the term “sex” interchangeably to refer to cases that allege sexual harassment as well as cases that allege discrimination based on gender, this study limited its analysis to those cases that alleged discrimination on an individual’s gender. As set out in the limitations, all sexual harassment claims were excluded from the study.

1128 Some cases alleged discrimination based on the plaintiff’s status in two protected classes, such as a claim which alleges discrimination based on both race and national origin. Where the analysis differed by protected class, only the analysis focused on race, color, or gender was examined for the purposes of this study.
Faculty Claims

a) Denial of Tenure based on Race
b) Denial of Tenure based on Gender
c) Failure to Promote and/or Termination (Non-Renewal) based on Gender
d) Termination based on Race and/or Gender
e) Failure to Hire based on Race and/or Gender
f) “Other” decisions based on Race and/or gender

Non-Faculty Claims

a) Failure to Promote based on Race and/or Gender
b) Failure to Hire based on Race and/or Gender
c) Termination based on Race and/or Gender

It should be noted that the proceeding analysis does not involve an exhaustive description of every case reviewed. Rather, within each category, cases that are factually similar and result in similar decisions will be discussed concurrently or not at all. Conversely, cases with distinctive analyses or rationales will be more fully discussed to highlight how different jurisdictions approached particular problems. Further, although the categories are separated by protected class, the researcher noticed no significant differences in the legal analyses of these claims whether they claimed discrimination based on gender or based on race. Thus, the categories as delineated above merely conform to the manner in which the cases were initially reviewed and were retained for increased facility in reporting the findings.

This section of the chapter will conclude with a discussion on how academic deference revealed itself in the case law under review. This examination will necessarily include a discussion on those cases wherein the claimant requested peer review documents in order to determine how the courts handle this particular issue. Finally, the chapter concludes with a discussion of non-faculty decisions in order to determine how the college or university acts as an employer wherein academic questions are not implicated. Having delineated how the analysis in this chapter will proceed, the discussion begins by clarifying preliminary matters.

The Appellate Courts and the Standard of Review

The cases under analysis in this study are almost entirely U.S. Courts of Appeals cases. As discussed in the previous chapter, Circuit Courts of Appeals cases were chosen since adding District Court cases to the search would have yielded a prohibitively voluminous number of cases.\footnote{During the initial search for subject cases, the researcher included U.S. District Court cases in the search. This query yielded over 5,000 cases, over 1,800 of which were reported cases that serve as binding precedent. For this reason, only Circuit Courts of Appeals cases were reviewed.} Cases that are reviewed in an appellate posture are different from the manner in which they are reviewed at the trial court. In other words, it is not always the function of an appellate court to re-try a case on the merits. Rather, in reviewing a case, an
appellate court, in certain circumstances, has a rather narrow view of the case before it. Thus, in order to understand the manner in which the Circuit Courts of Appeals reviewed the cases under analysis, a brief discussion of the standard of review of appellate courts is warranted.

It should first be recognized that the trial court (U.S. District Courts in Title VII cases) is the original fact finder. In fact, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure (FRCP), the district court is required to make specific findings of fact. This means that an appellate court will not review the facts of a case and determine questions of credibility and what weight to give particular testimony and evidence. This is the purview of the trial court alone. The Supreme Court explains:

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge’s position to make determinations of credibility. The trial judge’s major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge’s efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much…[T]he trial on the merits should be “the ‘main event’…rather than a ‘tryout on the road.’”

In a Title VII case, aside from making findings of facts with regard to testimony and evidence, the ultimate question of whether the defendant intentionally discriminated against the plaintiff is a factual inquiry to be determined by the District Court.

Findings of fact are to be distinguished from conclusions of law. As one scholar explains, “[a] determination that A struck B is clearly a pure question of fact; a determination that A is liable in tort to B is just as clearly a question of law.” Similarly, Rule 52(a) of the FRCP governs conclusions of law and requires that trial courts (herein, the District Court) “in actions tried without a jury or with an advisory jury…state separately their conclusions of law…”

These distinctions are important to know because they represent two ways in which matters come before an appellate court, and each of them requires a different standard of review. The standard of review is, as one scholar describes, the appellate judge’s "measuring..."
The standard of review “define[s] the parameters of a reviewing court’s authority to determine whether a case warrants reversal...it will control the outcome of the appeal.” Thus, dependent on the situation or the posture in which a case comes before it, an appellate court will make a determination about which standard of review to apply.

In analyzing the cases under review, the researcher noted that the majority of cases reached the appellate court under three different postures. Each will be described below and the applicable appellate standard of review will be briefly explained.

Several cases were presented wherein the plaintiff appealed the denial of a preliminary injunction. For example, in *Faro v. New York University*, the plaintiff filed for a preliminary injunction against the defendant to keep them from changing her employment status during the pendency of her Title VII claim against them. When the district court denied her motion, the plaintiff appealed the decision before the Second Circuit Court of Appeals who affirmed the decision of the district court. In making the decision, the appeals court agreed with the trial court that the “plaintiff [had] failed to show either irreparable harm or the likelihood of success on the merits.”

Thus, the trial court in considering a request for a preliminary injunction has one issue before it: “whether the applicant is entitled to the preservation of the status quo of the subject matter of the suit pending a trial on the merits.” Hall further explains, that a plaintiff requesting a preliminary injunction must show: (1) a probable right to recovery; (2) that imminent and irreparable harm will occur in the interim if the request is not granted; and (3) that no adequate remedy at law exists. On appeal, then, the applicable standard of review of this type of case is “abuse of discretion.”

The abuse of discretion standard is applicable to those cases wherein the trial court was called upon to make a decision that involved balancing various interests or factors. Metos explains that “[the] application of the abuse of discretion standard requires the appellate court to consider all of the relevant public and private interest factors and balance those factors reasonably.” As such, the appellate court’s review is limited to the question of whether the trial court abused its discretion in making its final determination.

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1136 Id. at 867-868.
1137 Id. at 868.
1138 502 F.2d 1229 (2d Cir. 1974).
1139 Id. at 1230.
1140 Hall, supra note 1135 at 874.
1141 Id. at 874-75.
1142 Id. at 875.
1144 Id.
In several other cases, the plaintiff appealed their case challenging the findings of the trial court. For example, in *Banerjee v. Board of Trustees of Smith College*, the plaintiff challenged the findings of the trial court as to whether the defendant had articulated a legitimate non-discriminatory reason for the employment decision in fulfillment of the *McDonnell Douglas* framework. The appellate court reviewed the trial court determination under the “clearly erroneous” standard of review. The “clearly erroneous” standard is used to review factual issues, as discussed above.

The “clearly erroneous” standard is a very high burden and is thus, very difficult to overcome. The Court in *Anderson* explains that an appellate court can only overturn findings of a district court when, “although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” Indeed, the decision of the trial court must “be more than just maybe or probably wrong, it must…strike us as wrong with the force of a five-week-old, unrefrigerated fish.” Thus, an appellate court reviewing a case under the “clearly erroneous” standard cannot overturn a decision simply because it would have found differently; if there are two reasonable views of the evidence, the trial court’s choice of one of those views cannot be clearly erroneous.

Finally, several cases under review were presented to the appellate court upon a motion for summary judgment. Pursuant to Rule 56(c) of the FRCP, a grant of summary judgment will be upheld if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” The grant or denial of a motion for summary judgment is a purely legal issue that is reviewed by the courts *de novo* or anew. In this type of review, the appellate court does not give any deference to the decision of the trial court.

The burden is on the party who moves for summary judgment to show that there is no genuine issue of material fact as to one or more of the essential elements of the plaintiff’s cause of action. Once the movant has carried his burden the burden shifts to the non-movant to present any issues that would preclude a grant of summary judgment. Further,

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1145 648 F.2d 61 (1 Cir. 1981).
1146 Id. at 63.
1147 Id. at 648.
1149 *Anderson, supra* note 1131 at 573.
1150 Hall, *supra* note 1135 at 868.
1151 *Anderson, supra* note 1131 at 574.
1152 *Rudin v. Lincoln Land Community College*, 420 F.3d 712 (7 Cir. 2005).
1154 Id.
1155 Id.
1156 Id. note 1135 at 882.
in reviewing a motion for summary judgement, all facts are viewed in a light most favorable to
the non-moving party.\textsuperscript{1157}

The above sought to provide a brief explanation for the applicable standards of review
that were applied to the cases under analysis. It is hoped that the explanation provides some
clarity with regard to the manner the several Circuit Courts of Appeal reviewed the decisions
of the district court. Thus, the above discussion should make clear the difference between
questions of fact and conclusions of law as well as the “clearly erroneous,” “abuse of
discretion,” and “\textit{de novo}” standards of review. This should assist in the comprehension
of the proceedings as described in the analyses below.

\textbf{Title VII Cases with Faculty Plaintiffs}

As discussed at the outset of this chapter, the cases wherein a faculty member was the
plaintiff were sub-categorized into several categories. The various types of cases will be
discussed below, in turn.

\textit{Denial of Tenure Based on Race}

The plaintiffs in the cases discussed in this section came before the court on
substantially similar claims, challenging the denial of tenure based on their race. Further,
each case similarly made use of the \textit{McDonnell Douglas} framework which, as we will see, is
ubiquitous in these employment discrimination claims. However, this is where the similarities
end. The cases, alleging distinct facts, at different time periods, and before four separate
Circuit Courts of Appeal, did not always come to similar decisions.

The cases commonly made use of a modified \textit{McDonnell Douglas} framework which
-teaches that the analysis should be flexible to accommodate for cases with differing facts.\textsuperscript{1158}
The \textit{McDonnell} Court clarifies that the prima facie case as specified therein will not always be
applicable in every respect to differing factual situations.\textsuperscript{1159} However, each circuit stated the
prima facie case for tenure denial decisions in slightly dissimilar ways.

In \textit{Banerjee} the court stated the prima facie case as follows:

\begin{enumerate}
\item that plaintiff is a member of a racial...minority;
\item that plaintiff was a candidate for tenure and was qualified under Smith College
standards, practices or customs;
\item that despite his qualifications was rejected; and
\item that tenure positions in the Department of English at Smith College were open at the time plaintiff was
denied tenure, in the sense that others were granted tenure in the department during a period relatively near to the time plaintiff
was denied tenure.\textsuperscript{1160}
\end{enumerate}

This is somewhat different from the requirement by the court in \textit{Tanik v. Southern
Methodist University} who merely required a showing of three facts to establish a prima facie

\textsuperscript{1157} Rudin, supra note 1152 at 719.
\textsuperscript{1158} McDonnell Douglas, supra note 290 at 802.
\textsuperscript{1159} Id.\textsuperscript{.}
\textsuperscript{1160} Banerjee, supra note 1145 at 62.
Therein, plaintiff was merely required to prove that he was a member of a protected group; that he was qualified for tenure; and that he was denied tenure in circumstances permitting an inference of discrimination. The court in *Sun v. Board of Trustees of the University of Illinois,* adhered to this prima facie case, but added the fourth prong which required the plaintiff to further prove that a similarly situated applicant not in the protected class was granted tenure. Finally, the court in *Chuang v. University of California Davis,* *Board of Trustees* revised the final two prongs of the prima facie case requiring the plaintiff to prove that he was subject to an adverse employment action and that similarly situated individuals outside his protected class were treated more favorably.

Thus, the several Circuit Courts of Appeal took note of the Supreme Court’s mandate to adjust the *McDonnell Douglas* framework, as necessary, and ran with it. Further analyzing these different requirements to establish a prima facie case of discrimination reveals that plaintiffs in different jurisdictions are subject to slightly different burdens. For example, as to the second prong, the 1st Circuit requires that the plaintiff show that he was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, he need show only that his qualifications were at least sufficient to place him in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decision making body.

Thus, a plaintiff in that circuit has a more defined means of proving that he was qualified for tenure than the other jurisdictions under review. Moreover, as to the fourth prong, while at least three of the jurisdictions require that the plaintiff show that another individual, not in the plaintiff’s protected class was treated “differently,” “more favorably,” or was “granted tenure;” only the 1st Circuit explicitly required that there be a showing that the disparate treatment took place relatively near in time to the adverse employment decision.

Finally, in a denial of tenure case based on race, in *Chuang,* the Ninth Circuit explains that “the requisite degree of proof necessary to establish a prima facie case for Title VII...on summary judgment is minimal and does not even arise to the level of a preponderance of the evidence.” This is significant because although this is not the only summary judgment case discussed in this section, it is the only jurisdiction that specifically delineates the level of the burden of proof required for establishing a prima facie case. A more-detailed examination of

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1161 116 F.3d 775 (5th Cir. 1997).
1162 *Id.* at 776.
1163 473 F.3d 799, 814 (7th Cir. 2007).
1164 225 F.3d 1115, 1123 (9th Cir. 2000).
1165 Banerjee, supra note 1145 at 63.
1166 *Id.* at 62.
1167 Chuang, supra note 1164 at 1124.
illustrative cases will reveal further dissimilarities amongst the circuits as to how tenure denial decisions are reviewed.

In Banjeree, the 1st Circuit reviewed this denial of tenure under a “clearly erroneous” standard of review. This would suggest that the court review the findings of the district court to determine whether a mistake had been made, as previously discussed. However, in an abundance of caution, the court applied the standard on two levels considering both the individual facts as well as the court’s opinion at large. The court noted that a plaintiff bears the burden of showing that a district court’s finding is clearly erroneous through the proffer of direct or indirect evidence of some underlying error of law.

First, the plaintiff attacked the district court’s finding that the defendant-college had articulated a valid legitimate non-discriminatory reason for denying tenure. Smith claimed that the plaintiff was denied tenure for three reasons: that he did not receive the requisite number of votes; that since it was a group decision, no single reason could be provided as to why the Committee voted in that fashion; and that the breadth and depth of plaintiff’s scholarship and considering the quality of his teaching and service did not merit the award of tenure. Plaintiff argued that the proffered reasons were ambiguous; that the claim that he had not received the requisite number of votes as meant to supply an explanation, provided no explanation at all; and contended that Smith’s assertion that Plaintiff’s scholarship did not merit the award of tenure was invalid.

The court rejected all of the plaintiff’s arguments while acknowledging that the proffered reason for the denial of tenure was susceptible to the argument that it resulted in inadequate specificity. The court noted that the Supreme Court had spoken on this matter mandating that, with regard to the offered legitimate non-discriminatory reason, “articulation is required to enable the plaintiff to know what to meet in order to prove pretext; the best way of proving a bad reason...[is] to show the incorrectness of the claimed good one.” Notwithstanding this mandate, the court found that it was not necessary for the entire committee to agree on a single reason; rather, as to the ultimate decision, the committee should not reach this by improper means.

Second, in response to an amicus brief provided by the Equal Employment Opportunity Commission (EEOC), the court undertook another round of inquiry as to whether the district court’s decision on the evidence as a whole was clearly erroneous. Among other arguments,
it was asserted that the district court should have made findings as to the specific reasons underlying the decisions of the individual members of the tenure committee.\textsuperscript{1176} However, the court found that this was unnecessary; the duty of the district court, it found, was to determine whether the tenure and promotion committee, or enough of its members, voted against the plaintiff as a result of a discriminatory intent.\textsuperscript{1177} Thus, the court ultimately found that pursuant to the “clearly erroneous” test, whether they looked for individual error or the district court opinion holistically, the plaintiff had failed to meet his burden warranting a reversal of the district court’s opinion.\textsuperscript{1178}

This case illustrates the difficulty in reviewing tenure denial decisions. The court, operating from a narrow view of the claim, was called on to determine whether or not the trial court had erred in its final decision without disturbing the findings of fact of the lower court. The plaintiff had to contend not only with the high burden of the “clearly erroneous” standard of review, but in his arguments, his sense of frustration is evident in his inability to have the appellate court review the individual decisions of the tenure and promotion committee. From the plaintiff’s perspective, the trial court had erred in its finding that he had failed to show that any members of the committee voted against tenure because of his race. Because of the applicable standard of review, this question was not properly before the appellate court; rather, the appellate court would review the findings of fact by the trial court as to the individual decisions of the committee only to determine whether a mistake had been made. This was not the finding of the appellate court. Instead, they acknowledged:

> It is understandable...that the clarity of articulation for reasons refusing tenure by such collegial decision-making apparatus as that involved here may differ from that given by a business employer. But if Smith's answer to the interrogatory was inadequate, we are satisfied that the evidence introduced at the trial more than meet the requirements.\textsuperscript{1179}

Thus, factors such as the high standard of review, the type of decision under review (denial of tenure) and, as the court acknowledges, the collegial decision-making apparatus specific to educational institutions were determinative in this decision. However, another case reviewing a denial of tenure based on race, made a similar finding that the plaintiff had failed to prove discriminatory intent even where the standard of review was much lower and the reach of the appellate court’s review was much more extensive. In \textit{Sun}, the plaintiff appealed the trial court’s grant of summary judgment in favor of the defendant. Recall that a review of a grant

\textsuperscript{1176} \textit{Id.} at 65.  
\textsuperscript{1177} \textit{Id.}  
\textsuperscript{1178} \textit{Id.} at 66.  
\textsuperscript{1179} \textit{Id.} at 64.
of summary judgment is reviewed anew by the appellate court and the trial court ruling is given no deference.\footnote{Metos, supra note 1143 at 31.}

In that case, Plaintiff Sun, a native of China, was an assistant professor in the College of Engineering Department when he came up for tenure review in his fifth year of employment.\footnote{Sun, supra note 1163 at 801.} Significantly, in his fourth year of employment, Sun had received a prestigious Teacher of the Year award wherein traditionally, the winners of the award made the decision for the next year’s award recipient. The head of the department, John Weaver, strongly suggested to Sun that he select him for the award.\footnote{Id.} After Sun, and the previous award winner chose another faculty member as the winner for the award, Weaver advised Sun that he would no longer receive the funding generated by his online teaching as a result of a change in policy; however, this change in policy only affected the plaintiff.\footnote{Id.}

When Sun’s tenure review arrived, fellow faculty member, Joseph Green, was chosen to be part of the Promotion and Tenure Committee (PTC). Green was considered a powerful member of the department due to his substantial federal funding. During a faculty meeting, Green was heard saying that he would not accept any Chinese graduate students and that he would not interview them.\footnote{Id. at 802. When pressed about his statement by Weaver, Green claimed that this was a “throwaway remark” intended to express his dissatisfaction with the length of discussion on recruiting international students. Id.}

Robert Averback, another faculty member, was also chosen to serve on Sun’s PTC and was given the task of collecting external evaluators for the plaintiff.\footnote{Id. at 803.} Although school policy prohibited a faculty member from vetoing external reviewers, tenure candidates were allowed to nominate potential external evaluators and may indicate individuals whom he believes may be biased; however, this is limited to one or two individuals.\footnote{Id. at 802.} Averback indicated that due to the difficulty in obtaining a sufficient amount of letters, he was forced into picking two of the potentially biased evaluators named by Sun.\footnote{Id. at 803.}

Ultimately, two faculty meetings were held to discuss Sun’s candidacy for tenure.\footnote{Pursuant to department policy, all tenured faculty members, not just the PTC, voted on the tenure decision and provided a recommendation for or against tenure to the department head, John Weaver.} During the first meeting, Sun’s qualifications were discussed wherein he was found lacking in certain departmental standards. Additionally, Weaver indicated that if faculty members did not know which way to vote, that they should vote not to grant tenure.\footnote{Id.} Further, during that meeting Weaver and Green made negative remarks about Sun and downplayed the importance...
of teaching in a tenure decision. During the second meeting, Weaver actively attempted to interfere with the vote, speaking to at least two other faculty members several times in an attempt to discourage them from granting Sun tenure. Sun was eventually denied tenure. Sun appealed the negative decision requesting that the faculty reconsider their decision.

Meanwhile, another incident between Sun and Weaver occurred when Sun requested from the department secretary the contact information for a member of the alumni. Weaver responded to Sun's request by entering his office and shouting, "Don't f*ck with people outside the University!; " Don't f*ck with alumni; " You are screwing yourself; " and "Five minutes ago I thought you had a good brain to pass on to your children. I don't think so anymore!" This incident was memorialized by Sun in a letter to Weaver.

Finally, Sun spoke with the college dean, Dean Daniel, complaining that Weaver had improperly influenced his bid for tenure and requested that a different committee hear his appeal. After Dean Daniel investigated Sun's allegations, he contacted Sun to advise that Weaver's behavior was not inappropriate and that his appeal would be heard by the original decision makers, the department faculty.

On October 30, 2002, the faculty met once again to consider Sun's tenure application and voted against it. Subsequently, Sun would file two grievances, one to the Chairman of the Faculty Advisory Committee (FAC) and one to the College of Engineering Grievance Committee. The FAC chose to defer its investigation during the pendency of Sun's grievance process with the college's grievance committee. In his grievance to the college committee, Sun protested the tenure decision based on the incident with Averback and the Teacher of the Year award, the several incidents with Weaver, as well as the fact that the same committee considered his appeal. The committee denied a second appeal. Based on the grievance committee's denial for another appeal, Dean Daniel drafted a letter to Sun advising him that he would not be reappointed.

1190 Id.
1191 Id. at 804. Although Weaver was ultimately unsuccessful in affecting the faculty members' decisions, the faculty voted against tenure; 13 against and 6 in favor of tenure. A further vote of the PTC yielded a 4-0 vote against tenure. Id.
1192 Id. In support thereof, 21 letters from persons (some well-known in Sun's field) provided letters advocating his candidacy for tenure. Weaver, after consulting with the college dean sent an email to the faculty members suggesting that the emails were not appropriate and should not be considered in Sun's appeal. However the letters were ultimately considered during the appeal. Id.
1193 Id.
1194 Id.
1195 Id.
1196 Id. The faculty voted by secret ballot; 9 voted to grant tenure, 9 voted against granting tenure, and one faculty member abstained from the vote.
1197 Id. at 805.
1198 Id. In a six-page report, the College of Engineering Grievance Committee acknowledged that the process could have been handled better but ultimately decided that there were no procedural problems that resulted in an unfair/tainted adjudication of Sun's promotion case. Id.
1199 Id.
1200 Id.
Conversely, the FAC completed its investigation of Sun’s claims, and on May 15, 2003 issued a six-page report finding that Sun’s promotion and tenure dossier had not been fairly considered based on Weaver’s actions, particularly with regard to his attempt to influence the other faculty members’ votes.\textsuperscript{1201} Further, having noticed a number of procedural irregularities and the application of more exacting standards than previous candidates, the FAC recommended that another, more fair and impartial, consideration of Sun’s dossier take place.\textsuperscript{1202}

In the meantime, Weaver had resigned as department head and was replaced by Interim Department Head, Ian Robertson. When the faculty reconsidered Sun’s application on July 8, 2003, it was Robertson who was provided additional materials regarding Sun’s professional activities since the previous vote on his candidacy. However, Robertson considered the additional information to be “marginal at best” and did not add the material to Sun’s dossier.\textsuperscript{1203}

After a number of procedural checks under Robertson’s helm, the faculty once again voted against promotion and tenure.\textsuperscript{1204} Robertson reduced the faculty’s justification to a letter to Dean Daniel wherein he indicated that despite his excellent service as a teacher and his ability to produce high-quality work, Sun had been unable to sustain a high-quality research program.\textsuperscript{1205} Further, Robertson noted that Sun’s total level of funding for the last 6 years was $462,501 when the department average annual funding level per faculty member was $250,000. While these figures were not necessarily determinative, Robertson continued, considering that Sun continued to submit and re-submit proposals on similar topics, the faculty was not convinced he had learned from his failures and that he would be any more successful in securing future funds.\textsuperscript{1206} Finally, Robertson noted that Sun failed to meet the “indicators of high-quality work” as evidenced by number of invited presentations at international and national meetings as well as invitations to join conference organizing committees, etc.\textsuperscript{1207}

Dean Daniel forwarded Robertson’s report as well as Sun’s dossier to the College Promotion and Tenure Committee of which Weaver was a member.\textsuperscript{1208} The Committee affirmed the department’s decision not to promote Sun.\textsuperscript{1209} Dean Daniel then conducted his own review

\textsuperscript{1201} Id. at 806.
\textsuperscript{1202} Id.
\textsuperscript{1203} Id.
\textsuperscript{1204} Id. at 806-807.
\textsuperscript{1205} Id. at 807.
\textsuperscript{1206} Id.
\textsuperscript{1207} Id.
\textsuperscript{1208} Id. Sun complained about Weaver’s participation in his tenure decision at the college level as well.
\textsuperscript{1209} Id.
of Sun’s dossier and agreed with both the Committee and the department’s decision not to grant tenure and promote Sun and advised the Provost and Sun of the same by letter.\textsuperscript{1210}

Later, the provost was advised by the head of the FAC that members of the College and Promotion Tenure Committee were also members of the Grievance Committee that considered Sun’s appeal. In an abundance of caution, the provost appointed an ad hoc committee to determine whether the unfavorable recommendation was justified on the merits or whether the decision warranted higher levels of review.\textsuperscript{1211} The ad hoc committee undertook an examination of Sun’s dossier and similarly determined that Sun was undeserving of tenure and promotion voting 3-1 against him.\textsuperscript{1212} The provost then advised Sun of the decision and confirmed that Sun would not be reappointed.\textsuperscript{1213}

Sun then appealed to Chancellor Nancy Cantor complaining once again about procedural abnormalities including the fact that his list of conference proceedings was not considered by the ad hoc committee. However this appeal was also unsuccessful and Cantor advised Sun by letter that there was no cause to overturn the tenure decision.\textsuperscript{1214}

Sun then instituted action against the University of Illinois alleging violations of Title VII as a result of the tenure decision. At trial, the trial court granted summary judgment in favor of the defendant institution. On appeal, Sun challenges this decision claiming genuine issues of material fact remain as to whether he was denied tenure on the bases of his race.\textsuperscript{1215}

The circuit court began its appellate analysis by explaining that to establish a claim of disparate treatment, a plaintiff may proffer either direct or indirect evidence.\textsuperscript{1216} Direct evidence must show that defendants were motivated by racial animus when they denied his promotion and tenure.\textsuperscript{1217} In the Seventh Circuit, a plaintiff attempting to prove intentional discrimination may do so by providing either direct or circumstantial evidence. Circumstantial evidence in that circuit, the court explains, comes in three forms:

1. Suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group;
2. Evidence, whether or not rigorously statistical, that similarly situated employees outside the protected class received systematically better treatment; and
3. Evidence that the employee was qualified for the job in question but was passed over in favor of a person outside the protected class and the employer’s reason is pretext for discrimination.\textsuperscript{1218}

\textsuperscript{1210} Id. at 808.
\textsuperscript{1211} Id.
\textsuperscript{1212} Id.
\textsuperscript{1213} Id.
\textsuperscript{1214} Id. at 809. Upon investigation, Chancellor Cantor determined from several department faculty members (some of whom were supportive of Sun’s tenure) as well as members of the ad hoc committee that consideration of the conference proceedings was not an important factor to the final decision.
\textsuperscript{1215} Id.
\textsuperscript{1216} Id. at 812.
\textsuperscript{1217} Id.
\textsuperscript{1218} Id.
Sun proffered evidence regarding the PTC’s voting record as well as Green’s comments about Chinese students as circumstantial evidence of discrimination that would raise a genuine issue of material fact under the direct method. The court found that this evidence fell under the first two categories.\textsuperscript{1219}

As to the first category, Sun, conceding that Green’s remark was not direct evidence of discrimination against him, he claimed it revealed Green’s prejudice against Chinese people. However, the court pointed to precedent in the circuit wherein it has been held that “stray remarks that are neither proximate nor related to the employment decision are insufficient to defeat summary judgment.”\textsuperscript{1220} On the other hand, the court also noted that statements from one who does not control the ultimate decision may be probative of intentional discrimination if that person exercised significant influence over the contested decision.\textsuperscript{1221} The court ultimately found that the entire grievance process at various levels made Green’s remarks too attenuated to influence the ultimate decision to deny Sun tenure. In other words, after all of Sun’s appeals to different committees at different levels, Green’s influence on the final decision was diminished.\textsuperscript{1222} As such, the court noted “when the causal relationship between the subordinate’s illicit motive and the employer’s ultimate decision is broken, and the ultimate decision is clearly made on an independent and a legally permissive basis, the bias of the subordinate is not relevant.”\textsuperscript{1223}

Having failed to prove his claim under the direct method by proffer of circumstantial evidence, Sun turned to the indirect method which was analyzed under the \textit{McDonnell Douglas} framework. The court recognized several difficulties in Sun’s ability to establish his claim. First, the court noted Sun would have difficulty in making the second and fourth prongs of the prima facie case which required him to show that he was qualified and that a similarly situated applicant, not in the protected class, was granted tenure.\textsuperscript{1224} The second prong asserting Sun was qualified was aggravated by the “layered and subjective nature of the tenure process...[and the fact] that such decisions are based on the fine ‘distinction between competent and superior achievement.’”\textsuperscript{1225} With respect to the fourth prong, Sun pointed to a non-Chinese tenure candidate, Pascal Bellon, who was promoted and granted tenure.

However, a comparison review of Bellon’s and Sun’s dossiers showed that Bellon’s dossier was

\textsuperscript{1219} Id.
\textsuperscript{1220} Id. at 813.
\textsuperscript{1221} Id.
\textsuperscript{1222} Id. at 813-14.
\textsuperscript{1223} Id. at 813. Sun also failed in his attempt to prove his claim under the second category of circumstantial evidence wherein the court considered Sun’s assertion that for the decade between 1993 and 2003 the PTC voted on 19 promotion candidates, two of whom were from China and the rest of whom were Caucasian. Sun noted that he and another Chinese candidate were denied tenure while almost all of the Caucasian candidates were granted tenure unanimously by the PTC. The court recognized that the sample size was too small to be reliable, but that the pattern of the PTC’s voting record was probative of intentional discrimination. However, the court noted that a questionable pattern of promotion, by itself, was insufficient evidence to withstand summary judgment. \textit{Id.}
\textsuperscript{1224} Id. at 814.
\textsuperscript{1225} Id.
superior in several categories including funding and invited presentations.\textsuperscript{1226} The court reasoned that the comparison identifies differences between the candidates rather than showing that they were not at least “similarly situated.”\textsuperscript{1227}

The court found that even if Sun could make a prima facie case, the university had proffered a legitimate non-discriminatory reason for the employment decision that Sun failed to prove was pretext. Specifically, the university found Sun “inadequate” and the court recognized that “tenure cases require something more than mere qualification; the department must believe the candidate has a certain amount of promise.”\textsuperscript{1228} Ultimately, what appeared to sway the court was the fact that Sun had had reviews of his dossier at multiple levels by numerous committees. The court thus held, “the indirect method of proving discrimination attempts to isolate the cause of an adverse employment action in order to determine whether it was motivated by discrimination. Where, as here, a plaintiff is afforded process sufficient to eliminate potentially discriminatory motives, summary judgment in favor of the defendants is proper.”\textsuperscript{1229}

There are several takeaways from the previously-discussed case. First, the Seventh Circuit uniquely provides a somewhat complicated review of tenure-denial cases on summary judgment allowing plaintiffs to prove discrimination both directly and indirect methods. Although this makes for a lengthy analysis, perhaps it strikes a good balance of providing a plaintiff in an academic case several methods to prove his claim in consideration of Congress’ intent to eradicate discrimination in academia as expressed by the 1972 amendments. Second, this case reveals the extensive \textit{de novo} review of a claim that takes place once a claimant challenges a grant of summary judgement. The appellate court here is free to review all of the facts in making its determination. Third, a carefully-crafted grievance procedure, such as the one employed by Sun, may help to insulate institutions from liability or a determination of intentional discrimination, at least in the Seventh Circuit. In this case, the fact that Sun’s dossier had been reviewed at multiple levels by different individuals (despite the irregularities along the way), swayed the court in its determination that those incidents that were probative of discriminatory intent did not influence the final decision to deny Sun tenure and promotion. Finally, it proved fortuitous for the court that Sun had been granted several levels of consideration because the opinion displayed the court’s lack of certainty as to how to deal with tenure denial decisions. Acknowledging that the decisions are largely subjective, the court took a hands-off approach and chose not to “second-guess the expert

\textsuperscript{1226} Id.
\textsuperscript{1227} Id.
\textsuperscript{1228} Id. at 815.
\textsuperscript{1229} Id.
decisions of faculty committees." Thus, Sun’s exhaustion of the grievance procedure provided alternate grounds for the court to affirm the trial court’s grant of summary judgement.

The next case under review examines a denial of tenure case under a disparate impact theory. In Carpenter v. Board of Regents of the University of Wisconsin, the plaintiff was a black male who challenged his denial of tenure. Carpenter was appointed to a tenure-track position in 1972 in the Afro-American Studies Department. Faculty at University of Wisconsin-Madison (UW-M) must “achieve a minimal level of competence and demonstrate a reasonable likelihood of future growth and performance in teaching, in research and scholarly writing and in service to the university community and to the larger community” in order to achieve tenure. Tenure track faculty were considered for tenure at the end of the seventh year of service, but in practice, tenure materials were required to be submitted after 5 ½ years; failure to achieve tenure resulted in termination. On appeal, Carpenter challenges this seven-year rule as having a disparate impact on black faculty members.

The Afro-American Studies Department was relatively new having been established in 1971. It was first established in 1969 as the Afro-American Studies Center as a result of pressure from the black student community to “recognize the importance to our society of black culture and history.” UW-M maintained a policy of hiring only African Americas as faculty members in this department.

Carpenter was hired to work in this department and undertook a significant amount of responsibility therein. Specifically, because the department was new, Carpenter was required to do extensive work in curriculum development, even developing courses outside of his expertise. Carpenter assumed much of the heavier administrative duties in the department as well. Additionally, Carpenter served as Chairman of the Director of the Afro-American Studies Department for the 1975-1976 academic year. Further, because of the department’s position in the community, Carpenter was required to engage in a significant amount of counselling and advising activities to meet the special needs of the black students at this predominantly white institution. When compared to more established departments,
the faculty in those departments were not responsible for as much work. Ultimately, in
devoting his time to those endeavors, Carpenter was not able to concentrate on the scholarly
work required of him to attain tenure. In recognizing his situation, Carpenter requested
that his tenure consideration be deferred, but this request was denied.

Thus, Carpenter prepared his tenure materials and was recommended at both the
departmental and college levels to be granted tenure. The recommendation was then
forwarded to the Dean of Professions whose committee also recommended Carpenter for
tenure. However, when the tenure application was returned to the dean of the college for
review, an associate dean advised his superior, Dean Halloran, that there was a problem with
Carpenter’s application. Specifically, the associate dean, and Halloran later agreed, that
“deficiencies in Carpenter’s scholarly writing precluded him from supporting the application
for tenure.” The court took note of the district court finding that while Halloran considered
Carpenter’s record of teaching and service was acceptable, Halloran, in good faith found
Carpenter’s materials evincing his research and scholarship “were not of sufficient quality to
support a recommendation of Carpenter’s tenure.” As such, Carpenter was denied tenure,
and subsequent appeals to the top of the UW-M system proved unsuccessful.

As mentioned previously, on appeal, Carpenter claims that the district court erred
when it failed to find that the application of the seven-year tenure rule made it more difficult
for African Americans to attain tenure. The court explains plaintiff’s burden of proof in a
disparate impact claim:

[Plaintiff] would have had to prove that the tenure requirements resulted
in a disproportionate failure rate for black applicants...If he succeeded in
proving this prima facie case, [Defendants] would then be required to
prove that the tenure requirements were job related. If [defendants]
showed job relatedness then “it remain[ed] open to [Plaintiff] to show
that other tests or selection devices, without a similarly undesirable racial
effect, would also serve the employer’s legitimate interest in ‘efficient
and trustworthy workmanship.’ Such a showing would be evidence that
the employer was using its tests merely as a ‘pretext’ for
discrimination.

In attempting to make his case, Carpenter asserted that it was inevitable that the
facially-neutral standards of the university would have a disparate impact on black faculty
members because of the additional burdens in the teaching and service areas. He further
averred that the increased burden on black faculty members was due to the racial

1241 Id.
1242 Id.
1243 Id.
1244 Id.
1245 Id.
1246 Id.
1247 Id. at 914.
1248 Id.
characteristics of the faculty making it “impossible” for him to meet his scholarly requirements within the prescribed time period. 1249

The court was unpersuaded by Carpenter’s qualitative evidence; they ultimately found it was too speculative to prove his claims. First, the court had little information with regard to new departments with white faculties and whether they were significantly less burdened by comparison leading to the inevitable result in proportionately fewer black faculty members receiving tenure. 1250 Second, the court found that Carpenter’s argument failed to show how the seven-year rule specifically kept him from attaining tenure. 1251 The court agreed with the trial court that “a plaintiff in a disparate impact case must show that he or she was really injured by the policy to have had a disparate impact.” 1252

In any event, the court noted that even if the plaintiff had carried his burden of making a prima facie case for disparate impact, there was “no question that UW-M [had] a legitimate business interest in ensuring that its tenured professors are competent in the three competency areas.” 1253 Further, Carpenter made no showing that the proffered defense was a pretext for racial discrimination. 1254 In the face of Carpenter’s inability to prove his claim, and the UW-M’s business defense, the court affirmed the judgment of the district court finding no error in their determination. 1255

We learn a few lessons from Carpenter v. University of Wisconsin. First, this case provides an example of how disparate impact theory operates in a tenure denial decision in the academic setting. It sets forth the applicable burdens of proof as stated by the Supreme Court in the relevant case law. 1256 Second, the rule of the case clarifies that there must be a sufficient nexus between the complained of neutral policy and the purported discriminatory effect it has on an individual based on a protected class.

Finally, the court in Carpenter finds that even if Carpenter had proved discriminatory impact, UW-M successfully stated a defense that the tenure standards, as employed by the university, are “job related” relying on the conclusions of the district court. However, the court peculiarly undertook no independent analysis to determine whether this was so. Rather, they simply accepted the tenure criteria were job related because the university said so. In an

1249 Id.
1250 Id.
1251 Id. at 915.
1252 Id.
1253 Id. (Compare Campbell v. Ramsay, 484 F. Supp. 190, (E.D. A.R., W.D. 1980) (explaining the Fourth Circuit Court of Appeals follows the “Kirby Standard” for determining whether a practice is justified by business necessity which provides that “If a facially neutral employment practice falls more harshly on one sex than the other, the burden shifts to the employer to show that the practice is justified by business necessity…the proper standard for determining whether ‘business necessity’ justifies a practice which has a …discriminatory result is not whether it is justified by routine business considerations but whether there is a compelling need for the employer to maintain that practice and whether the employer can prove there is not alternative to the challenged practice”).
1254 Id. at 914.
1255 Id.
1256 Albermarle, supra note 319.
exercise of judicial deference, the court noted that “to conclude that UW-M should have
granted tenure would be to 'replac[e] [the] university's judgment about academic employment
with judgments made by the judiciary.'” In this case, the effect of academic deference on
decisions within a university is glaringly apparent. While the Supreme Court in Griggs, the
seminal case on discriminatory impact, conducted an extensive investigation into whether the
employed policies were job or business related, this court does not question the policies of
the institution. Rather, their criteria are accepted with no argument as to their validity. While
the researcher does not make any arguments for or against the university’s criteria in this
case (or any case) it is noteworthy that the court, charged with routing out instances of
discrimination made no investigation at all into the matter. Even under a “clearly erroneous"
standard of review, it would have been within the court’s authority to review the district
court’s finding on this point.

The final case under review in this section, Kumar v. Board of Trustees, University of
Massachusetts, illustrates what happens when the district court gets it wrong. In other
words, under what circumstances will a circuit court of appeal reverse the decision of the
district court? In this case, the appellate court felt that in several instances, the district court
erred in making its findings since they were not supported by the evidence and that it had
exceeded its authority in making findings by substituting its judgment for that of the
university professionals.

Prem Kumar was a non-tenured assistant professor with a one-year appointment in the
School of Business Administration at the University of Amherst. In the 1975-1976
academic year, he came up for tenure review. Pursuant to university guidelines, a grant of
tenure is based on “[c]onvincing evidence of excellence in at least two, and strength in the
third, of the areas of teaching; of research, creative or professional activity; and of service.”
University policy further indicates that a tenure decision undergoes six levels of successive
reviews: departmental, department chairman, the faculty personnel committee of the school,
the dean of the school, the provost, and the chancellor. These university representatives
review the faculty member's: annual evaluations by students and faculty regarding teaching
ability; engagement in and publication of scholarly work; service activities; letters of
recommendation; and judgements of those who have previously reviewed the file.

Kumar’s file had reached Associate Provost Bischoff with favorable votes
recommending tenure by the department, department chairman, school committee, and the

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1257 Carpenter, supra note 1231 at 915.
1258 Griggs, supra note 289.
1259 774 F.2d 1 (1st Cir. 1985).
1260 Id. at 2.
1261 Id.
1262 Id.
1263 Id.
The file further contained a letter from the dean of the college who had recommended tenure, but who noted that he as well as the associate dean had an issue regarding Kumar’s teaching. Specifically, the letter made note of a concern that Kumar, foreign born, had received lower ratings among non-majors in core courses. Upon Bischoff’s review of the file, it was observed that Kumar exhibited strength, possibly excellence, in scholarship, but that there was no convincing evidence of strength in teaching or service. He was inclined to recommend that Kumar be denied tenure unless his perceptions about Kumar’s teaching ability could be changed. These opinions were reduced to a memorandum and forwarded to Dean Odiorne, dean of the School of Business Administration.

In response, Dean Odiorne drafted a reply, reiterating his recommendation of Kumar as well as that of the department and the school personnel committee. However, this document made reference to issues that the court noted was not considered by the district court. Specifically, in investigating Kumar’s case further, master’s level students were provided a questionnaire that rated the MBA’s five highest and lowest professors. It was found that Kumar appeared among the lowest more than a dozen times. Opinions by the students supported these ratings and interviews with the Student Cabinet revealed that students found Kumar to be “excessively theoretical” and difficult to follow among other complaints. Further, it was determined that several MBA students had visited the Dean demanding that Kumar be fired.

Based on this new information, Assistant Provost Bischoff contacted Dean Odiorne by memorandum advising of the decision that he would not recommend Kumar for tenure finding that although he may be excellent in his scholarship, he was only an average teacher and that his service was simply “adequate.” Assistant Provost Bischoff further advised that he would be recommending that Kumar not be reappointed. Based on this information, the provost and the chancellor, upon review of Kumar’s file both recommended against tenure and that he should be given a one-year terminal appointment for the 1976-1977 academic year. Each memorandum expressing the administrators’ decisions were substantially similar in that they noted Kumar’s deficiency in teaching as the reason for the denial of tenure.

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1264 Id. at 3.
1265 Id.
1266 Id.
1267 Id.
1268 Id. at 4.
1269 Id.
1270 Id.
1271 Id. at 5.
1272 Id. at 5-6.
1273 Id.
Kumar challenged the decision, making use of the university's grievance procedure. As part of the process, the chancellor re-reviewed Kumar's file. However, even after gathering documents on teaching and service that were missing from the original review, Chancellor Bromery once again recommended against tenure. Thus, the university president advised Kumar of the decision explaining that the Chancellor's decision exhausted the appeal process. Kumar filed suit with the EEOC claiming that the denial of tenure violated Title VII.

In analyzing the case, the district court made use of the modified McDonnell Douglas framework employed in Banerjee as stated above, and concluded that Kumar had established his prima facie case. However, in analyzing the university’s proffered non-discriminatory reason for the denial of tenure (failure to satisfy the University criteria of excellence in two and strength in the third areas of research, serving and teaching) the district court made specific findings and determined that the articulated reason was pretextual. Specifically, the district court found that University Policy had been violated resulting in the exclusion of supportive data from his file and the inclusion of improper materials adverse to his case. Further, the district court found that the evidence and the inferences drawn therefrom supported their finding that the denial of tenure was the result of intentional discrimination based on race and that the university was liable to Kumar for the same.

In its review of the district court’s decision, the circuit court acknowledged that they were limited to a “clearly erroneous” standard of review as the case involved mixed questions of law and fact. However, the court indicated that “[w]e shall look carefully…to detect infection from legal error, and of course the clearly erroneous standard does not shield findings that are unsupported or arbitrary.”

1274 Id. at 6.
1275 Id. at 7.
1276 Id.
1277 Id.
1278 Id. The ultimate finding of the district court was made on the following stated grounds: 1) the chancellor had not given any substantive weight to Bischoff’s initial favorable recommendation dated February 2, 1977; 2) the chancellor's statements regarding Kumar's research and service lacked credibility and undercut the chancellor's credibility on the issue of teaching; 3) the chancellor's disparagement of Kumar's teaching was (a) in conflict with the "peer assessment of Kumar's teaching" and (b) based upon statistical compilations of anonymous student course evaluations undertaken pursuant to University procedures and compiled on University forms, (4) while "the heavy emphasis placed upon plaintiff's teaching in the review of his tenure case [suggests that it] was in and of itself a pretext for denying tenure...The court does not find that the emphasis placed on teaching was necessarily pretextual..."the articulated reason of 'no strength in teaching' is not credible...The carefull assessment made by Kumar's peers, the evaluations of the advanced courses, letters of support from students, and the assessment made by a fellow faculty member who actually observed Kumar's teaching first hand were all strongly supportive and indicated excellence, or at the very least strength in teaching," (5) "the statistical compilations were relied upon...as a pretextual means of denying tenure" (7) "the Wolf Report did provide a means for the discriminatory attitudes of some students to pervade the decision-making in plaintiff's case," and (8) the failure of University officials to expunge the document from Kumar's file indicated racial bias against Kumar. Kumar, supra note 1259 at 7.
1279 Id. at 8.
1280 Id.
1281 Id. at 9.
1282 Id.
In its analysis, the circuit court took issue with the district court’s finding that Kumar had established a prima facie case. In doing so, the district court found that Kumar was “qualified for the position.” However, the circuit court reviewed the university requirement that a tenure candidate must show excellence in two and strength in the third areas of teaching, service and research. They found that:

it was clearly erroneous for the district court to have found that the chancellor was wrong in concluding that both in service and in teaching Kumar was not “excellent.” So even if we assume Kumar was “excellent” in scholarship, he was not “qualified”, (Sic) and it was “clearly erroneous” for the district judge to have found otherwise.1284

In support thereof, the circuit court found that there was a “barely plausible” case based on the opinions of Kumar’s brightest students that he was an “excellent teacher.” However, the circuit court noted the unanimous decision of the administrators, teachers, and other students who found Kumar an average or below average teacher.1285 The circuit court found that it was impermissible for the trial court to find that Kumar was a strong teacher, if not an excellent one, solely based on the opinions of his advanced and brightest students.1286

The circuit court next found that the trial court was clearly erroneous, not only in its finding that the chancellor lacked credibility, but also in its finding that the chancellor’s articulated reason for the denial of tenure was pretext.1287 The court found that the lower court based its finding on improper evidence and that ultimately, it was the chancellor’s right and duty to select in good faith faculty who met the university requirements.1288 The court explained,

It seems to us that the district court...treated Title VII of the Civil Rights Act of 1964 as though it were an affirmative action statute, and so proceeded on the theory that once a candidate was “qualified” under the standards of the university, it would be pretextual for the university’s administrator not to appoint him on the ground that he did not measure up to the administrator’s vision of the ideal teacher. But this overlooks the difference between the selection of a craftsman and of a professional...[I]n the selection of a professor, judge, lawyer, doctor, or Indian chief, while there may be appropriate minimum standards, the selector has a right to seek distinction beyond the minimum indispensable qualities.1289

1281 Id.
1284 Id.
1285 Id.
1286 Id. at 10.
1287 Id.
1288 Id. at 11.
1289 Id. at 10-11.
Based on all of these findings, the circuit reversed the district courts finding that the university had intentionally discriminated against the plaintiff and was therefore liable for the same.

In reviewing *Kumar*, two lessons are learned. First, in that case, the circuit court seemed frustrated by the findings of the district court in that they were based on a lack of evidence. In its view, there was no evidence to support a finding that there was a discriminatory motive on the part of the defendant-university. Therefore, in response to the question posed at the outset of this review, a court of appeal will reverse the decision of a lower court when it finds, as it did here, that the findings of the trial court are not based on the evidence before it.

Secondly, *Kumar* illustrates an interesting trait in Title VII denial of tenure cases. The facts above indicate that in order to make a prima facie case, one prong requires the plaintiff to show that he is qualified. The plaintiff, in attempting to make his case may opine that he is indeed qualified for the position. However, if the defendant-university asserts that the plaintiff was unqualified as the basis for their decision to deny him tenure, how does the plaintiff ever make a prima facie case? The plaintiff’s attempt to make a prima facie case is intertwined with the university’s proffer of a legitimate non-discriminatory reason for the adverse employment decision. This conundrum has been addressed by the First Circuit in *Banerjee*, as explained above. Specifically, at the outset of this section, the researcher pointed to a requirement in this circuit that illustrates how the appellate court addresses this issue. As stated previously, in order to make out a prima facie case and show he is qualified, a plaintiff must:

show that he was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, he need show only that his qualifications were at least sufficient to place him in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decision making body.  

In this way, the plaintiff is able to proceed with making his prima facie case and, having done so, can shift the burden to the defendant-university to articulate a legitimate non-discriminatory reason for its decisions.

The cases under review in this section analyzed fact patterns wherein plaintiffs alleged discrimination based on race in denial of tenure decisions. The discussion sought to illustrate the difference in analysis between cases reviewed under different standards of review. For

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1290 *Banerjee, supra* note 1145 at 63. *Compare Zahorik v. Cornell University*, 729 F.2d 85, 93-94 (1984) (explaining that in the Second Circuit, in order for a plaintiff making a prima facie case to prove they are qualified, they may show that some significant portion of the departmental faculty, referants or other scholars in the particular field hold a favorable view on the question).
example, we saw two different courts come to similar results under different standards of review. The *Sun* case was reviewed de novo, or anew, and involved an extensive review of the facts in order to determine whether the lower court had abused its discretion in awarding summary judgment whereas the *Banjeree* case was reviewed under the clearly erroneous standard wherein the court was unwilling to disturb the findings of facts made by the lower court. While the courts came to similar conclusions and affirmed the decisions of the lower court, it seems apparent that the plaintiff whose case is reviewed under a clearly erroneous standard has a higher hurdle to climb, and may ultimately be denied the satisfaction of an appellate review where the appellate court refuses to disturb the findings of the lower court.

Further, the discussion included a review of a disparate impact claim in the academic setting as distinguished from disparate treatment claims. This case illustrated the required nexus between the complained of policy and the alleged effect it has on the minority plaintiff in a disparate impact claim. It further illustrated the difficulty in overcoming a university’s showing that a particular practice is job-related; in this case, the court took the university’s word at face value and conducted no investigation into the job-relatedness of the policy.

Finally, the review demonstrated the circumstances under which an appellate court would/could reverse the findings of the district court. In this instance, the appellate court found that the findings of the lower court were based on a lack of evidence and overturned the district court’s decision finding the university-defendant liable for discrimination. This case further illustrates the plaintiff’s burden of proof in an academic setting when attempting to make a prima facie case, he must prove he is qualified which requires an extra showing in order to shift the burden to the defendant-university.

Overall, the cases were able to illustrate that sometimes, the application of Title VII in the academic setting, particularly in tenure decisions, is like trying to fit a square peg in a round hole. It seems that the applicable standard of review has particular repercussions for plaintiffs in this setting, as stated above, and that attempting to apply certain theories of discrimination are somewhat more difficult than in a traditional employment environment. The difficulties in applying Title VII to denial of tenure classes is further illustrated in the next section which reviews denial of tenure cases based on plaintiff’s gender.

**Denial of Tenure Based on Gender**

The denial of tenure cases in the sample are factually similar to the denial of tenure cases in the previous section. Specifically, although the plaintiffs in these cases allege discrimination based on a different protected class, the analysis of the claims are not substantially distinguishable from the previously-discussed cases. Thus, rather than provide an exhaustive recitation of the facts of each case, the discussion in this section will highlight particular rules that arise in the litigation of Title VII claims particularly in the academic setting.
Gutzwiller v. Fenik

In Gutzwiller, the plaintiff sued defendants, The University of Cincinnati, alleging denial of tenure based on gender. Briefly, Gutzwiller was hired as an assistant professor on the tenure track in September 1978. Her initial contract of two years was renewed twice resulting in six years of service. Interestingly, at the time of her hire, Gutzwiller was the only female faculty on tenure track, and until 1982 when another female faculty member was awarded tenure, no female had ever been tenured in her department.

Gutzwiller was considered for tenure in her sixth year at the university. By this time, she had already had several incidents with the department heads who 1) indicated to her that she would need to publish another book, independent of her Ph.D. dissertation and that this would weigh heavily in her consideration for tenure; 2) denied her request for leave to work on the book it was suggested that she write until just one quarter prior to when she was to apply for promotion and tenure; and 3) advised her that as a result of a perceived imbalance between Latinists and Hellenists in the department, only one person between she and the only other female faculty member would receive tenure.

During her tenure review, Gutzwiller claimed several procedural irregularities including the use of a particular scholar as an outside reference despite her specific request not to use him because of his consistent negative criticism. In the end, she was denied tenure, primarily due to perceived deficiencies in her scholarship. Gutzwiller made use of the grievance procedure, but was ultimately unsuccessful in obtaining, what she felt, would have been a fair re-evaluation of her file for tenure. Thus, she filed suit against the university and the five members of the tenure and promotion committee.

At trial, the jury found for Gutzwiller, but the trial court advised the parties that he was entering a judgment in favor of the defendants in the Title VII claim and ultimately dismissed Gutzwiller's claim. Gutzwiller challenges this decision by the trial judge.

In analyzing her Title VII claim, the 6th Circuit explained that a plaintiff in these types of claims must prove by a preponderance of the evidence that she was the victim of intentional or purposeful discrimination in order to prevail. This case is significant in that there is no McConnell Douglas analysis; rather, in order to prove her claim of discrimination,

1291 860 F.2d 1317 (6th Cir. 1988).
1292 Id. at 1320.
1293 Id.
1294 Id. at 1321
1295 Id.
1296 Id. at 1322.
1297 Id.
1298 Id. at 1324. (Gutzwiller protested the use of the same promotion and tenure committee to review her file pursuant to a grievance committee finding that she should have her file re-evaluated by a new committee.)
1299 Id.
1300 Id.
1301 Id. at 1325.
the court sets forth the burden on the plaintiff as previously stated. The court further provided that,

A plaintiff cannot meet this burden simply by introducing evidence of discriminatory intent and suggesting that such intent could have played a role in an adverse employment decision. Rather, a plaintiff is required to demonstrate that the adverse employment decision would not have been made “but for” her sex. Put differently, the plaintiff must show that the “discriminatory intent more likely than not was the basis of the adverse employment action.”

Ultimately, the court found that the trial court was correct in denying defendants’ request for a new trial since there was ample evidence for the jury to conclude that defendants had intentionally discriminated against the plaintiff based on her sex. However, this case is discussed here for its significance as a case that does not employ the McDonnell Douglas framework in a post-McDonnell world in order to prove disparate treatment. Rather, the 6th Circuit relies on a but-for causation analysis in order to show discrimination.

Further, this case discusses the equitable remedies a court has available to it in Title VII claims and makes clear that the goal of these remedies are to make the plaintiff whole for the injuries suffered as a result of the unlawful discrimination. For example, back pay including salary, any raises the plaintiff would have received but for the discrimination, sick leave, vacation pay, pension, and other fringe benefits may be a remedy that could redress the economic injury the plaintiff has suffered.

However, another equitable remedy in the form of reinstatement is discussed with some reluctance. While this remedy would undoubtedly make the plaintiff whole, the court discusses that many times, as in the instant case, a plaintiff seeks reinstatement with tenure. They explain,

a few courts have indicated a willingness to award reinstatement with tenure as a remedy in discrimination cases [but] we believe such relief will, in most cases, entangle the courts in matters best left to academic professionals…[S]uch relief should be provided in only the most exceptional cases…when the court is convinced that a plaintiff reinstated to her formal faculty position could not receive fair reconsideration.

Finally, the court notes that if reinstatement is not possible under the conditions outlined above, the remedy of front pay can be considered in order to make the plaintiff whole.
Thus, *Gutzwiller* is significant first, for articulating alternate means by which Title VII plaintiffs may prove intentional discrimination. Pursuant to *Gutzwiller*, in the Sixth Circuit, a plaintiff may use a causation theory rather than the prima facie framework in *McDonnell* that creates a rebuttable presumption of discriminatory intent. Secondly, the case is significant for its discussion on the appropriate means of providing remedies for those who have been found to be victims of intentional discrimination. The court grapples with the competing interests in awarding a wronged plaintiff reinstatement with tenure in yet another exercise of academic deference to university decisions. As such, the court discusses the possibility of front pay as an alternative to disrupting decisions that, as the court says, are “best left to academic professionals.”

*Zahorik,* *Namenwirth,* and *Blasdel* *What’s In A Tenure Decision?*

The cases in this section illustrate that the several circuit courts seem to have a good grasp on what tenure is and what it entails. However, understanding the employment contract does not necessarily provide any clarity for the courts in determining how to handle it within the confines of an employment discrimination claim. This section provides a summary of the significant factors of tenure decisions as understood by the courts.

In each of the three referenced cases, women challenge the denial of tenure as being the result of intentional discrimination. In *Zahorik*, the four plaintiffs also allege that the institution’s tenure process has a disparate impact on women. While the details of the individual claims will not be discussed here, it should be noted that in each case, the judgement of the lower court finding no discrimination was affirmed under both the “clearly erroneous” as well as the “de novo” standards of review. Thus, again, understanding the complex and amorphous nature of tenure decisions does not necessarily translate into successful claims for the plaintiff.

Judge Winter, in *Zahorik* provided a cogent discussion of tenure decisions as distinguished from employment decisions generally. He points to five elements of tenure decisions that make them difficult to evaluate for the purposes of routing out discrimination. Each element will be discussed in turn with input from the other two cases under review.

**Length and Nature of the Tenure Contract**

Judge Winter notes that the decision to grant tenure necessarily involves the consideration of the character of the individual candidate because of the length of the

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1307 Id.
1308 Zahorik, supra note 1290.
1309 Namenwirth v. Board of Trustees of the University of Wisconsin System, 769 F.2d 1235 (7th Cir. 1985).
1310 Blasdel v. Northwestern University, 687 F.3d 813 (7th Cir. 2012).
1311 The court therein rejected the plaintiffs’ disparate impact claim indicating that plaintiffs had failed to prove that there was a causal connection between the challenged selection criterion and the disparate impact itself. The court explains that this is a high burden. “Where the challenged selection criteria are facially neutral and there is no evidence of a discriminatory intent, courts have insisted upon clear and convincing evidence of a substantially discriminatory effect before applying the disparate impact theory.” *Zahorik*, supra note 1290 at 96.
Indeed, Judge Posner in the Seventh Circuit realizes the importance of this factor given that mandatory retirement is now unlawful. Thus, a tenure contract involves a lifetime commitment for the university, but also for the faculty members who would potentially have to work with the candidate. Judge Winter expounds: “[l]ifetime personal contracts are uncommon outside the protected civil service but even there difficulties on professional relationships can be eased by transfers among departments. Professors of English, however, remain in that department for life and cannot be transferred to the History Department.” As such, factors such as an individual's personality and ability to get along with his colleagues play an important role in the decision-making process as they will be “stuck together” for a significant period of time.

Tenure Decisions are Mostly Non-Competitive

Oftentimes, in “regular” employment environments, a decision to hire one person represents the simultaneous decision not to hire another individual; this aspect is not present in tenure decisions. Judge Winter explains then that “a decision to grant or not to grant tenure to a particular person does not necessarily affect the future of other tenure candidates.” Even where the number of tenure slots is fixed within a department, a candidate who is denied tenure has no assurance that he would have been granted tenure had a slot been available. Further, tenure decisions in a particular department may occur quite irregularly.

This poses a problem for reviewing judges. For example, in the Namenwirth case, the determination of whether the institution had intentionally discriminated against the plaintiff involved a comparison between the plaintiff and a similarly situated individual, not in the claimant’s protected class. The Namenwirth court explains, “[t]o prove the proffered motive is not worthy of belief, evidence of a comparative sort is appropriate: if others were hired or promoted though by the same reasoning they ought to have been excluded, then the motive is a “pretext.” The fact that the tenure decision is non-competitive and that the decisions are made infrequently and irregularly can create difficulties in finding a comparable employee for the purposes of drawing inferences as to the (non)presence of an invidious influence in the tenure decision.
Decentralized Nature of Tenure Decisions

The final decision to grant tenure is often made after several different committees have weighed in on the decision. Judge Winter notes that the process begins at the departmental level and that this decision is granted great deference as the candidate’s file travels up the chain of authority since the department has the highest stake in the decision and is most familiar with the candidate. The Blasdel court explains the problems this decentralized decision-making process can create for a reviewing judge:

Even if invidious considerations play a role in the department’s recommendation for or against tenure, they may play no role in the actual tenure decision, made at a higher level. In the present case the tenure decision was made by Northwestern’s provost, and there is no evidence that he was influenced by the fact that Blasdel is a woman. So she can prevail only by showing that the provost’s decision was decisively influenced by someone who was prejudiced.

This same phenomenon was previously discussed in the Sun case where he was unable to prove that the department head’s improper influence on the departmental level vote had any effect on the final decision which was made at a much higher level.

However, if it is true that the department-level vote is granted deference, those decisions should be highly scrutinized by a reviewing court for improper discrimination. That the final decision is made by someone who is far removed from the department decision does not remove the possibility that the final arbiter can be influenced by prejudices that existed at the lower level. The recommendations in the file may be the result of discriminatory considerations which administrators at a higher level unwittingly adopt as they grant deference to the department decision. Thus, if the process starts with impermissible considerations, the candidate is not likely to get a fair evaluation of his file at any successive level. Further, as the candidate’s file moves further up the chain of authority, it is subject to bias at each level for differing reasons. The decentralized nature makes a determination of discrimination difficult, but not impossible.

Multi-factored Decision

The Namenwirth court best expresses this problem. “Mere qualification depends on objective measures—the terminal degree, the number of publications, and so on. Tenure requires something more; it requires that the department believe that the candidate have a certain amount of promise.”

1320 Zahorik, supra note 1290 at 92.
1321 Blasdel, supra note 1310 at 817.
1322 Sun, supra note 1163.
1323 Namenwirth, supra note 1309 at 1242.
subjective/amorphous factors, each decision-maker applying different weights to those factors as they see fit.

A faculty tenure decision does consider concrete variables such as the ability to obtain grants, teaching skills, and scholarly writing. However, as Judge Posner relates, office politics, and professional jealousies can influence a tenure decision. Judge Cudahy also notes that winning the esteem of one’s colleagues is an essential part of attaining tenure. This may be difficult where, Judge Posner relates, there is sensitivity to criticism that invades the decision-making process. A grant or denial of tenure can also be influenced by departmental needs for particular specialties, and a desire for “star” faculty members. A promotion and tenure committee is further influenced by the candidate’s intelligence, imagination, willingness to work. No decision to grant or deny tenure is made without considering all of these factors and more. Given that each member of the committee has their own ideas of what factors are most important, the candidate walks a fine line in trying to please everyone.

Disagreement Abounds

Finally, Judge Winter notes that tenure decisions are commonly the source of great disagreement. He states, “[b]ecause the stakes are high, the number of relevant variables is great and there is no common unit of measure by which to judge scholarship, the dispersion of strongly held views is greater in the case of tenure decisions than with employment decisions generally.” The potential for disagreement is high as there is so much to disagree upon: what the most promising areas of research are, what the needs of the department are, and whether the candidate has academic potential. Judge Cudahy notes that this increases the difficulty in the process since there is “no algorithm for producing [these] judgements.” The problem is exacerbated by the host of people who weigh in on the tenure decision including department faculty, faculty from other departments, faculty from other institutions, administrators, and students. With so many cooks in the kitchen, an unpalatable dish can hardly be unexpected or uncommon.

Judge White discusses the effect of these factors in a claim of discrimination based on gender or race. He explains:

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1324 Blasdel, supra note 1310 at 817.
1325 Zahorik, supra note 1290 at 92.
1326 Blasdel, supra note 1310 at 817.
1327 Blasdel, supra note 1310 at 1243.
1328 Blasdel, supra note 1310 at 817.
1329 Zahorik, supra note 1290 at 92.
1330 Id.
1331 Id., at 93.
1332 Blasdel, supra note 1310 at 817.
1333 Zahorik, supra note 1290 at 93.
1334 Namenwirth, supra note 1309 at 1243.
1335 Id.
1336 Zahorik, supra note 1290 at 93.
No tenure candidate is without blemishes and a resort to illegitimate considerations can be hidden in the weighing of the numerous factors which are relevant to a tenure decision. Because of the decentralized nature of the decision-making process, comparisons which might tend to show unlawful discrimination are hard to come by. A denial of tenure by an English department simply cannot be compared with a grant of tenure in the physics or history departments. Even within a single department comparisons are difficult because the number of decisions within a particular period may be quite few, the decisions may be non-competitive and tenure files typically contain positive and negative evaluations, often in extravagant terms, sufficient to support either a grant or denial of tenure.\textsuperscript{1337}

Judge White paints a picture of a decentralized, multi-faceted, amorphous decision-making process that in the end could go either way. At this juncture, most courts appear to throw up their hands and cite academic deference to the university decision as the courts did in two of these cases.\textsuperscript{1338} Of course, the researcher does not mean to convey that the judiciary means to be flippant; rather, the frustration brought on by the complexities of the issue as well as the lack of a bright-line approach to resolving the conflict many times forces the courts to leave the ultimate decisions in the hands of those who they feel are more apt to make those decisions.\textsuperscript{1339}

Having explained the difficult task a reviewing judge has in determining whether discrimination took place in a tenure denial decision, the outlook may look grim for those plaintiffs who attempt to prove that an improper decision was made. However, judges across several jurisdictions have carved out particular rules that may aid in their review of these cases. The several tools are discussed below, in turn.

\textit{Tools of the Trade}

As discussed, reviewing courts have quite a task before them in reviewing claims of discrimination that may have taken place in the context of a tenure denial decision. What follows is a brief description of rules that the court has employed in its analyses of these cases that help toward reaching an equitable decision in these claims.

Although the previous section highlighted the complexities involved in the tenure decision-making process, the several cases under review substantially show that faculty candidates are commonly reviewed along three measures: teaching, service, and scholarship.

\textsuperscript{1337} \textit{Id.}
\textsuperscript{1338} \textit{Namenwirth}, supra note 1309 at 1243 (explaining that “[g]iven the similar research output of two candidates, an experienced faculty committee might – quite rightly – come to different conclusions about the potential of the candidates. It is not our place to question the significance or validity of such conclusions”); \textit{Zahorik}, supra note 1290 at 94 (finding that “[a]bsent evidence sufficient to support a finding that such disagreements or doubts are influenced by forbidden considerations such as sex or race, universities are free to establish departmental priorities, to set their own required levels of academic potential and achievement and to act upon the good faith judgments of their departmental faculties or reviewing authorities”).
\textsuperscript{1339} As previously mentioned, a full discussion on academic deference in employment discrimination cases will take place toward the end of this chapter.
Further, each case seems to show that institutions have written procedures delineating the procedures for the review of a candidate’s file. Thus, the first tool that judges employ is to discern whether irregularities took place; that is, whether the department and institution as a whole adhered to its stated procedures.

Thus, in *Manning v. Tufts College*, the plaintiff challenged the decision to deny her tenure and in support thereof, pointed to irregularities in the process. The plaintiff in that case was reviewed for tenure two years after obtaining an appointment as assistant professor at Tufts College. Both the department and college-level subcommittee who reviewed her file unanimously recommended the plaintiff for tenure. However, two members of the college-level subcommittee had some reservations about the depth of her scholarship and presented their concerns to the full Tenure and Promotion Committee. That committee authorized the professor to seek an outside confidential expert to review the plaintiff’s file. Significantly, the outside expert chosen to review plaintiff’s file was one that plaintiff had previously objected to as a potential outside reader on the grounds that the expert lacked personal knowledge of the plaintiff’s work.

When the expert returned a “lukewarm affirmative” and buttressed her decision with remarks regarding the marginal quality of plaintiff’s scholarship, the committee members who had previously had reservations about her scholarship reversed their positive votes and the committee ultimately voted unanimously to deny plaintiff tenure. This decision was affirmed by two independent evaluations by the dean and the provost. The plaintiff’s challenge of these proceedings was framed as follows:

> Plaintiff argues that the irregularities in her tenure decision-making process the solicitation of a “secret” outside reader to whom she had previously objected, the unanimous reversal of the subcommittee’s unanimous recommendation, and the switching of positions by the two professors who were both on the committee and the subcommittee indicate, in light of her qualifications for tenure, that the review was a sham to shield the university’s real reason for denying her a permanent position: namely, that she was a woman in a field where women already predominated.

On appeal, the court reviewed testimony in the record that showed that a confidential review by an outside evaluator was a common practice. Further, the court found that the unanimous reversal of the subcommittee had precedents; it had happened to a male applicant the year prior. Thus the circuit court agreed with the trial court that the college had

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1340 613 F.2d 1200 (1st Cir. 1980).
1341 *Id.* at 1203.
1342 *Id.*
1343 *Id.*
1344 *Id.*
1345 *Id.*
1346 *Id.* at 1204.
adhered to its internal processes and that there was no improper consideration of plaintiffs gender that influenced the final decision not to grant her tenure.\textsuperscript{1347}

Similarly, in \textit{Brousard-Norcross v. Augustana College Ass'n},\textsuperscript{1348} plaintiff protested what she felt were irregularities in her tenure review process. Specifically, one stated reason for the denial of her tenure was negative student evaluations.\textsuperscript{1349} The policy of the Personnel Counsel was to consider student evaluations from the spring preceding the fall semester in which the candidate made her tenure application.\textsuperscript{1350} However, when the Personnel Council was made aware of a student complaint against the plaintiff, the Vice President for Academic Services sent student evaluations forms to students in the plaintiff’s fall class.\textsuperscript{1351} The plaintiff protested this “special evaluation” as a departure from procedure that raised a dispute as to whether the reasons for the tenure denial were pretext.\textsuperscript{1352} The court did not agree and referenced \textit{Zahorik} in their decision on this issue. In that case, the court specified that “[d]epartures from procedural regularity, such as a failure to collect all available evidence, can raise a question as to the good faith of the process where the departure may reasonably affect the decision.”\textsuperscript{1353} In this instance, the court found that an effort to obtain additional student evaluations was not a deviation in the process that would give rise to an inference that the institution’s proffered reason was pretext.\textsuperscript{1354}

Another rule courts employ commonly arises when faculty members make improper or inappropriate remarks toward one another. When one faculty member later sues for discrimination, those previously uttered words become evidence of discriminatory intent. In \textit{Krystek}, the plaintiff attempted to use the words of Interim Dean Waltman against the institution in his Title VII claim.\textsuperscript{1355}

Specifically, when Krystek went up for tenure his department voted to grant tenure but to deny promotion. This was due to concerns about his scholarship (i.e., his publishing record.)\textsuperscript{1356} Waltman and the dean of the department, Ron Marquardt, supported Krystek’s application and suggested to him during a meeting that he should take a two-year extension to publish more articles in an effort to increase his chances for tenure. It was also suggested that Krystek abstain from teaching during the summer and devote time to writing.\textsuperscript{1357}

In response, Krystek complained that another assistant professor, Kathanne Green, had obtained tenure. Interim Dean Waltman allegedly responded, “That’s a problem. There

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\item \textsuperscript{1347} \textit{Id.}
\item \textsuperscript{1348} 935 F.2d 974 (8th Cir. 1991).
\item \textsuperscript{1349} \textit{Id.} at 976.
\item \textsuperscript{1350} \textit{Id.}
\item \textsuperscript{1351} \textit{Id.} at 977.
\item \textsuperscript{1352} \textit{Id.}
\item \textsuperscript{1353} \textit{Zahorik, supra} note 1290 at 93.
\item \textsuperscript{1354} \textit{Brousard-Norcross, supra} note 1348 at 977.
\item \textsuperscript{1355} \textit{Krystek v. University of Southern Mississippi}, 164 F.3d 251 (5th Cir. 1999).
\item \textsuperscript{1356} \textit{Id.} at 254.
\item \textsuperscript{1357} \textit{Id.}
\end{itemize}
\end{footnotesize}
are different standards for males and females.”\textsuperscript{1358} Krystek later sued the institution charging that they discriminated against him because of his gender in violation of Title VII. Specifically, he claimed that two females in the department were treated more favorably than he was.\textsuperscript{1359}

Before the circuit court, Krystek pointed to Waltman’s alleged comments to support his claims that he was subjected to discrimination based on his gender. He claimed that the comments amounted to evidence that the decision to deny tenure was motivated by gender. However, the court was unpersuaded by his argument and dismissed the argument as a matter of law. The court explained,

in order for comments in the workplace to provide sufficient evidence of discrimination, they must be '1) related [to the protected class of persons of which the plaintiff is a member]; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue.'\textsuperscript{1360}

Waltman’s alleged statements were made two years prior to the tenure decision and he did not take part in the ultimate decision to deny Krystek tenure. Thus the court held that in light of the lack of evidence that Waltman sought to enforce a different standard for men rather than women (or that such a policy existed at the institution), the comments would be construed as stray remarks rather than evidence of discriminatory intent.\textsuperscript{1361}

Next, it is often the case that in making a case for discrimination, statistical evidence will be proffered in support of the claim. Although a more thorough discussion of statistics will arise again in the next section, a brief note about statistics is appropriate here since the court in \textit{Lynn v. Regents of the University of California} held that statistics can be “particularly helpful in the academic context, where the tenure decision is highly subjective.”\textsuperscript{1362} Without providing the facts of that case, the court in its evaluation of the claim noted as follows:

[General statistical data] is relevant despite the fact that the data may not be directly probative of any of the four specific elements set forth by \textit{McDonnell Douglas} and \textit{Smith}. Proof of a general pattern of sex discrimination is, in any event, evidence which tends to establish that it is “more likely than not” that a University’s decision to deny tenure was based on sex, “a discriminatory criterion illegal under the Act.”\textsuperscript{1363}

Thus, in these very complicated Title VII claims, have some tools that may prove helpful in coming to a conclusion as to whether discrimination influenced a particular employment
decision. While the tools are not always effective, as in the proffer of unsophisticated statistics, they illustrate the courts' effort to analyze the objective factors of this largely subjective decision in order to come to a conclusion with regard to the presence of discriminatory animus.

**Failure to Promote and/or Termination (Non-renewal) Based on Gender**

This next category of cases concentrates on causes of action that alleged that the institution failed to promote the plaintiff based on the individual's gender. In these types of cases, the *McDonnell Douglas* framework has been once again modified to fit the specific circumstances. *Laborde v. Regents of the University of California* sets forth the framework. Thus, in the cases discussed in this section, a plaintiff alleging discrimination based on gender in a failure to promote claim must establish the following: 1) she is a member of a class protected by Title VII, 2) she met the minimum qualifications to be considered for promotion to full professor, 3) she was denied promotion, and 4) men with similar qualifications have been promoted to full professor.  

Further, similar to the denial of tenure cases discussed above, the courts have discussed the subjectivity that pervades the decision-making process when it comes to promotion decisions in academic settings. In *Jespen v. Florida Board of Regents*, the court acknowledged that claims of discrimination by a faculty member against a university is more complex than a claim against a faculty or union due to the subjectivity involved in evaluating professors. This statement was a specific finding of the trial court who elaborated on that thought. The trial court noted that,

> The court cannot tell a university that it has set its standards too high for its employees. Instead, the claim must be reviewed in light of the standards used by the university and the court must be convinced that there has been uniform application. In evaluating any faculty member for a raise or a promotion there will invariably be some amount of subjectivity in the judgment. The nature of the profession precludes a rigid objective formula, but the standards used must still be as objective as the nature of the function performed will allow.

Thus, it seems that the subjectivity that pervades the tenure decision similarly influences promotion decisions. Indeed, where the qualifications of the faculty are concerned, the ultimate employment decision appears to be a complex one. Similarly, a decision to

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1364 It should be noted that the sample yielded no failure to promote claims based on race. Because the sample size of the cases is low, the researcher cannot make any statements regarding the absence of cases of this type.
1365 686 F.2d 715 (9th Cir. 1982).
1366 Id. at 717. It should be noted that the phrasing of the prima facie case as set forth was modified for the specifics of the instant case. Thus, the framework may be modified for those seeking promotion from assistant to associate professor. Further, the use of the feminine pronoun therein reflects the sex of the plaintiff. The framework applies equally to males.
1367 610 F.2d 1379 (5th Cir. 1980).
1368 Id. at 1381.
1369 *Jespen v. Florida Board of Regents*, et al., 1977 WL 15341. It should be noted that this is not a published opinion and therefore has no binding precedential effect. It is cited here for the specific purpose of discussing the findings of the court with regard to the subjective nature of promotion decisions in academia.
promote a faculty member can involve several levels of review and is subject to many of the same concerns as denial of tenure claims.

Finally, as previously mentioned during a discussion of the *Krystek* case, the courts have been receptive to the use of statistics in support of their claims. However, the proffer of statistics has not always been successful as the figures provided do not always create the desired inference of discrimination. For example, in *Dugan v. Ball State University*, the ultimate issue was whether the plaintiff was qualified for promotion to associate professor. In that case, the plaintiff, a tenured faculty member, applied for a promotion at the institution, but was denied because she did not have a doctorate degree or fit the requirements of an “equivalency.” Her several appeals to overturn the decision at the department, college, and university levels, as well as to the Board of Trustees were ultimately unsuccessful. Plaintiff eventually filed a claim of discrimination based on sex in violation of Title VII.

Dugan challenged the requirement for an equivalency, asserting that the same was a pretext for discrimination. She provided statistical evidence that 17 males at Ball State had been promoted to associate and full professor on the basis of equivalencies, while only 2 women were similarly promoted. The court conceded that if indeed the plaintiff made a showing that a job requirement was a cover for unlawful discrimination, then the requirement could not serve as a qualification necessary to establish a prima facie case for discrimination. However, the court found deficiencies the proffered statistics; the statistics applied to the university at large rather than for the Mathematics department where Dugan worked. It is well-settled that gross or university-wide statistics are insufficient to withstand summary judgment since, due to the nature of promotion decisions, gross statistics are meaningless without a departmental breakdown.

Based on this understanding, the circuit court found that at Ball State, individual departments make recommendations for promotions; as such the most probative statistics would show data regarding the individual department. Further, the court was unimpressed by the offered statistics which provided no information about how many men and women attempted to gain promotion using the equivalency and failed. Finally, since the statistics also failed to specify a particular time period when the promotions using equivalencies were made, the totality of the information was insufficient to conclude that women were less likely

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1370 15 F.2d 1132 (7th Cir. 1987).
1371 *Id.* at 1133 (explaining that pursuant to the Faculty Handbook, an equivalency describes conditions under which “other educational experiences and/or professional experiences are as appropriate as formal academic work.” An equivalency is initiated by a department).
1372 *Id.*
1373 *Id.* at 1136.
1374 *Id.*
1375 *Id.*
1376 *Id.* at 1137.
1377 *Id.*
to receive the benefit of an equivalency.\textsuperscript{1378} Certainly, the statistics could not support an inference that the equivalency was a pretext for discrimination.\textsuperscript{1379} Thus, the court affirmed the decision of the district court granting summary judgment in favor of the defendants.\textsuperscript{1380}

The plaintiff in \textit{Dugan} suffered from the use unrefined statistics to prove her case. However, others have employed sophisticated statistical measures in order to make out a discrimination claim. For example, in \textit{Ottaviani v. State University of New York (SUNY)},\textsuperscript{1381} the plaintiffs in that case, four female faculty members, alleged that the university discriminated against female members of its faculty in their grant of promotions, among other areas.\textsuperscript{1382} The plaintiffs attempted to prove a pattern of ongoing discrimination by objective statistical evidence in the form of multiple regression analysis.\textsuperscript{1383}

The Supreme Court has upheld the use of statistics in disparate treatment claims holding that,

where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination. The threshold question in disparate treatment cases, then, is: “[A]t what point is the disparity in selection rates sufficiently large, or the probability that chance was the cause sufficiently low, for the numbers alone to establish a legitimate inference of discrimination?”\textsuperscript{1384}

In disparate treatment claims of gender discrimination, then, multiple regression analysis has been used to isolate the influence of gender on employment decisions in relation to a particular job or job benefit.\textsuperscript{1385} While the discussion of how the plaintiffs in this case used multiple regression analysis is too voluminous for repetition here, the court provided guidance as to how to use these types of statistics in general. First, the court explained, all possible legitimate non-discriminatory reasons that are likely to affect the dependent variable and which could account for disparity of treatment by gender should be specified. The court explains,

[b]y identifying those legitimate criteria that affect the decision making process, individual plaintiffs can make predictions about what job or job benefits similarly situated employees should ideally receive, and then can measure the difference between the predicted treatment and the actual treatment of those employees. If there is a disparity between the predicted and actual outcomes for female employees, plaintiffs in a disparate treatment case can argue that the net “residual” difference represents the unlawful

\textsuperscript{1378} \textit{Id.}
\textsuperscript{1379} \textit{Id.}
\textsuperscript{1380} \textit{Id.} at 1138.
\textsuperscript{1381} 875 F.2d 365 (2d Cir. 1989).
\textsuperscript{1382} \textit{Id.} at 366.
\textsuperscript{1383} \textit{Id.} (explaining that multiple regression analysis is a statistical tool used to determine the influence that various independent, predetermined factors (independent variables) have on an observed phenomenon).
\textsuperscript{1384} \textit{Id.} at 371.
\textsuperscript{1385} \textit{Id.} at 367.
effect of discriminatory animus on the allocation of job or job
benefits. They may also proffer their own statistics that attempts to show how the challenged practices did not result in disparate treatment. If a defendant is successful in doing so, the plaintiffs have the opportunity to show that the defendant’s proof is inadequate or that the explanation is pretext for discrimination.

In an illustrative case, the plaintiff in *Sweeney v. Board of Trustees of Keene State College* was able to use statistics effectively to obtain an eventual final judgment in her favor. This case has a complicated procedural history which will be briefly summarized here. The trial court’s decision resulted in a judgment in favor of the plaintiff. The defendant-university appealed the decision, and the circuit court, reviewing the case on a “clearly erroneous” standard of review affirmed the decision of the lower court. However, the Supreme Court of the United States granted a petition for certiorari and reversed the decision of the Court of Appeals since it had improperly stated the burden of the defendant with regard to articulating a legitimate non-discriminatory reason for the employment decision. The case was then remanded back to the district court, who affirmed their initial decision the defendants once again appealed. It is this case that is under review for the purposes of this study. However, where necessary, the previous cases may be referred to relate the pertinent facts of the case.

Sweeney began an appointment as associate professor at Keene State College in 1969. All went well until 1971 when there was an incident regarding an England trip wherein Sweeney had been selected by a committee within her department to accompany a group of students there in the fall. However, ultimately, the dean of the college, Dean Clarence, refused to allow Sweeney to accompany the students and refused to provide a reason for his

1386 *Id.*
1387 *Id.* at 370.
1388 *Id.*
1389 604 F.2d 106 (1st Cir. 1979).
1391 *Sweeney v. Board of Trustees of Keene State College, et al.*, 569 F.2d 169 (1st Cir. 1978).
1392 *Board of Trustees of Keene State College, et al. v. Sweeney*, 439 U.S. 24 (1978) (explaining the burden on the defendant in a claim of discrimination is to articulate some legitimate, non-discriminatory reason for the employee’s rejection rather than having to “prove” the absence of discriminatory motive as was required by the circuit court). Further, the district court in *Felton v. Trustees of the California State Universities and Colleges* made a similar mistake in requiring that the defendant prove by clear and convincing evidence, that even in the absence of the discrimination, she would not have been hired for the position. Pursuant to *Burdine*, the appeals court clarified that the burden on the defendant was one of production and that the burden of persuasion rests at all time with the plaintiff. *Felton v. Trustees of the California State Universities and Colleges*, 708 F.2d 1507 (9th Cir. 1983).
1394 *Sweeney, supra* note 1393.
1395 *Sweeney, supra* note 1391 at 172.
decision. A female alternative who had been chosen went instead. Despite this incident, Sweeney was granted tenure in 1972 without any apparent problems. Later that year, she applied for promotion to full professor.

Promotion decisions in Sweeney’s department are sent to the dean of the college, who forwards the matter to the Faculty Evaluations Advisory Committee (FEAC). This committee is an annually-elected, 5-member group made up of faculty of the highest ranks. The FEAC reviews the application and makes a recommendation to the dean for or against promotion. If the dean, who generally defers to committee recommendations, concurs with a positive decision, he will forward it to the Board of Trustees for final approval. However, if he concurs with a negative decision, the applicant can appeal the decision to the dean and the FEAC and, if unsuccessful, to the Faculty Appeals Committee (FAC).

As stated, Sweeney unsuccessfully applied for promotion in the 1972-73 academic year wherein and all-male FEAC unanimously voted against her promotion. Sweeney was given no reasons for the decision, and an appeal to the FAC – citing the incident with the England trip and other evidence of unfairness – ultimately proved unsuccessful despite the FAC’s recommendation to the college president that she be re-considered by the 1973-74 FEAC. As a result, Sweeney filed suit with the EEOC alleging sex discrimination against the university.

Meanwhile, in 1974-75 Sweeney again unsuccessfully applied or promotion when another all-male FEAC unanimously voted against her promotion. Sweeney once again appealed to the FAC alleging sex discrimination in response to the reasons she had been given for the negative decision. The FAC found the treatment of Sweeney unprofessional and reduced its findings to a letter to President Redfurn advising she be provided more details regarding the decision not to promote her. As a result, the FEAC produced a list of reasons for the negative decision citing allegations that Sweeney “had narrow, rigid, and old-fashioned views, tended to personalize professional matters, kept minutes of the graduate faculty meeting which fell below a professional caliber, and emphasized to her students the importance of an even height of window shades in a classroom.”

Finally, Sweeney applied for promotion a third time in 1975-1976 and the FEAC now composed of four men and a woman, voted unanimously in her favor. Sweeney’s claim to

1396 Id.
1397 Id.
1398 Id.
1399 Id.
1400 Id.
1401 Id. at 172-73.
1402 Id. at 173.
1403 Id.
1404 Id. at 173.
1405 Id. at 174.
for discrimination then, alleges that she should have been promoted the first time she tried and seeks a backdating of her promotion to her first attempt and the accompanying salary adjustment for the intervening years.\footnote{Sweeney, supra note 1389 at 107.}

During the first appeal before the First Circuit Court of Appeals, it was determined that Sweeney was permitted to prove pretext through statistics. The appeals court affirmed this decision.\footnote{Id. at 177.} Further the court noted that the McDonnell Douglas framework was applicable in this case.\footnote{Id.}

Thus, Sweeney proffered statistics that showed that only four women in the history of Keene State College had ever achieved the rank of full professor. Further, since 1968, plaintiff showed that there was never more than two women professors in any academic year, and since that time only one woman had achieved the top rank.\footnote{Id. at 178.} By contrast, Sweeney was able to show that the number of male professors steadily increased from ten in 1960-70 to 23 in 1975-76. Similar contrasts existed at the associate professor level. Also, women outnumbered men at the instructional levels\footnote{Id. at 179.} Ultimately, the defendants attempts to rebut the statistics proved unsuccessful as the appeals court noted that there was enough evidence for the trial court to have inferred a discriminatory pattern.\footnote{Id. at 179.} Further, at trial, Sweeney provided evidence in the form of testimony from several witnesses who claimed that sex discrimination influenced promotion decisions at Keene.\footnote{Sweeney, supra note 1389 at 113.} Thus the university appealed the decision of the trial court.

However, due to the appeals court’s misstatement of the burden on the defendants to requiring them to “prove” a legitimate non-discriminatory reason for their decision, the district court and then the circuit court were once again called upon to hear an appeal in this matter. On appeal, the First Circuit Court again found in favor of Sweeney. The defendants averred that Sweeney had not proved that she did not obtain the support of the FEAC in 1974-75 because she was a woman. The court disagreed. They found,

[although there was no direct evidence, we think that the district court could have inferred that FEAC...were biased in light of the nature and weakness of the reasons given for her non-promotion coupled with the evidence of the statistical composition and general character of the institution and of the insensitivity of many...to the concerns of the faculty.]

\footnote{Sweeney, supra note 1389 at 107.}
The appellate court concluded that while it was a close call, the district court had not committed clear error in concluding that Sweeney had been wrongfully denied a promotion because of her sex.

This case illustrates the courts’ willingness to accept statistics as evidence of disparate treatment in failure to promote claims. However, Sweeney, in contravention of the dictates in Ottaviani, successfully made use of gross statistics to make her case. She may have succeeded first, because her claim was tried a decade prior to the Ottaviani decision; and second, because the statistics she provided were so striking. Indeed, if for over a decade, no more than two women at a time were faculty members at Keene State College, this says a lot about what was going on at the departmental level.

Thus, these cases in their collective capacity reveal a tool available to Title VII plaintiffs who allege discrimination in an academic setting. Statistics can be quite helpful in the college or university setting where it is acknowledged that “direct evidence of sex discrimination will rarely be available.” Considering the difficulties involved in proving discrimination, as discussed above, particularly where subjective decision-making is the rule rather than the exception, statistics provide a measure of objectivity that may help plaintiffs succeed in their claims. The next cases under review are not as complicated but are just as controversial: termination claims.

**Termination Based on Race and/or Gender**

In this section, termination claims in an academic setting will be reviewed. As previously stated, only those cases that illustrate nuances in the law as applied to the higher education setting will be discussed. As this study proceeds, the ubiquitous McDonnell Douglas framework pervades the analyses of the majority of these cases and will not be repeated herein. However, as above, where the prima facie case has been modified for a particular theory, it will be noted.

As such, the Eleventh Circuit Court of Appeals in *Lincoln v. Board of Regents of the University of Georgia*, articulates the means for establishing a prima facie case for discrimination in termination claims. The court explains, “the plaintiff can make a prima facie case by establishing that he is a member of a minority, that he was qualified for his job, that he was discharged, and that he was replaced by a member of the majority race.”

With slight differences in the verbiage, the Sixth Circuit has similar requirements for the establishment of a prima facie case alleging termination based on race. In *Carter v. University of Toledo*, the court had before it the appeal of a visiting professor who alleged that the University failed to renew her contract as a visiting professor on account of her race.

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1414 Sweeney, supra note 1391 at 175.
1415 697 F.2d 928 (1983).
1416 349 F.3d 269 (6th Cir. 2003).
Carter began an appointment as a visiting professor in the 1999-2000 academic year along with three other visiting professors: Louis Barsi, Brenda Lanclos and Richard St. John, all of whom were Caucasian.\textsuperscript{1417} After that year, Carter was apprised that the university would not be renewing her appointment. Upon speaking with Charlene Czerniak, who had hired her, Carter learned that the university had met its hiring needs and would not be extending the appointment.\textsuperscript{1418} Indeed, two other visiting professors, St. John and Mary Anne Stibbe were also not reappointed. However, for the 2000-2001 Barsi and Lanclos were rehired albeit, to work in a different department. Interestingly, three visiting professors were hired to work in Carter’s previous department for the 2000-2001 academic year: two of whom were Caucasian.\textsuperscript{1419}

When she did not hear about being rehired, Carter contacted several administrators, among them Vice-Provost Murry. Upon following up with him regarding the position, he advised her that “[Czerniak] is trying to whitewash the college of education and I am not going to let her do this;” and that “[Czerniak] was trying to get rid of the black professors and that he was in a struggle with her involving the appointment of an additional black professor.”\textsuperscript{1420} During a final follow up phone call, Vice-Provost Murry allegedly stated, “I don’t know what’s going on, they’re a bunch of racists over there.” However, Murry denies making these comments.\textsuperscript{1421}

Thus, Carter sued the University of Toledo alleging discrimination based on her race which resulted in a grant of summary judgment in the defendant’s favor.\textsuperscript{1422} On appeal of the grant of summary judgment, the issue is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”\textsuperscript{1423}

On appeal, Carter argued that the comments allegedly made by Vice-Provost Murry constituted direct evidence of racial discrimination. However, the Sixth Circuit adheres to the rule, as stated previously that “comments made by individuals who are not involved in the decision-making process regarding the plaintiff’s employment do not constitute direct evidence of discrimination.”\textsuperscript{1424} Since Murry did not have decision-making authority with regard to Carter’s employment status, the statements could not be considered as direct evidence of racial discrimination.

\textsuperscript{1417} Id. at 271. \textsuperscript{1418} Id. \textsuperscript{1419} Id. \textsuperscript{1420} Id. at 272. \textsuperscript{1421} Id. \textsuperscript{1422} Id. \textsuperscript{1423} Id. \textsuperscript{1424} Id. at 273.
Carter next sought to make her claim by circumstantial evidence, establishing a prima facie case for racial discrimination under the *McDonnell Douglas* framework. Defendant-university provided several legitimate non-discriminatory reasons for not retaining Carter as a visiting professor including: failure to apply to an advertised tenure track position in 2000; lack of Ohio connections to aid in University recruiting; devotion of substantial time providing consulting services to the operators of charter schools in Detroit; and occasional unavailability to students due to those charter school activities.\textsuperscript{1425}

In this circuit, to prove pretext, the plaintiff must demonstrate that the “defendant’s proffered reason ‘(1) has no basis in fact, (2) did not actually motivate the defendant’s challenged conduct, or (3) was insufficient to warrant the challenged conduct.’”\textsuperscript{1426} Carter argued that Vice-Provost Murry’s alleged comments indicate that the university’s proffered reasons did not actually motivate its conduct.\textsuperscript{1427} However, to be able to consider those hearsay comments the court engaged in an analysis of the statement and ultimately determined that the comments were admissible non-hearsay. As such, the court found, contrary to the district court, that the statements, made in direct response to Carter’s inquiries as to why she was not rehired could not be considered isolated, stray remarks.\textsuperscript{1428}

The court held that a genuine issue of material fact existed with regard to whether Carter could show pretext on the part of the University. Thus the decision of the district court was reversed and remanded.\textsuperscript{1429}

This case was reviewed in order to provide an example of a termination claim in an academic setting. Compared with the other employment decisions in this study, these decisions seem to be susceptible to a routine analysis under the *McDonnell Douglas* framework, where applicable.\textsuperscript{1430} Thus, we may now turn to failure to hire decisions to uncover how those claims fare in the academic setting.

**Failure to Hire Based on Race and/or Gender**

The failure-to-hire claims reviewed herein provide a few more lessons on the nuances of Title VII jurisprudence. However, as an initial matter, in order for a plaintiff to establish a prima facie case in a failure to hire claim, she must allege that “she was female, qualified, duly applied, and a male was hired.”\textsuperscript{1431} The court in *Gore v. Indiana University*,\textsuperscript{1432} places a caveat on this rule when it is applied to men.

\textsuperscript{1425} *Id.* at 273-74.
\textsuperscript{1426} *Id.*
\textsuperscript{1427} *Id.* at 274.
\textsuperscript{1428} *Id.*
\textsuperscript{1429} *Id.*
\textsuperscript{1430} This contention is based on the cases yielded in the sample. The researcher makes no assertions that all termination claims are substantially similar to the one reviewed herein, simply that those in this research study could be characterized as stated above.
\textsuperscript{1431} *Lyford v. Schilling and Pan American University*, 750 F.2d 1341 (5th Cir. 1985).
\textsuperscript{1432} 416 F.3d 590 (7th Cir. 2005).
In that case, a communications course adjunct professor applied for an advertised position as a lecturer within his department. When he was ultimately passed over for the position, he filed a claim alleging gender discrimination. However, the district court viewed this claim as a reverse discrimination claim and explained that in these cases, “something more” is required to establish a prima facie case. Indeed, male plaintiffs alleging gender discrimination must show something more than the fact that he is gendered. Instead, “the first prong of the McDonnell test cannot be used.’ Rather, the plaintiff in such cases ‘must show background circumstances that demonstrate that a particular employer has reason or inclination to discriminate invidiously against whites [or men] or evidence that there is something 'fishy' about the facts at hand.” The purpose of employing this method, the court explains, is to determine whether the protected characteristic actually affected the employment decision. The plaintiff in this case was unable to meet this added burden, particularly in light of the fact that in failing to hire him, the institution had hired a male prior to hiring two more females. As such, the plaintiff could not prevail on appeal.

In Maguire v. Marquette University, another nuance is revealed as Title VII applies to a Catholic university. The plaintiff in this case applied several times for an associate professor position with the institution and after several denials brought this Title VII action against the University.

It should be noted that the institution was founded “under the auspices of the Society of Jesus, a religious order affiliated with the Roman Catholic Church.” Further, Jesuits make up eight of the 29-member Board of Trustees and hold positions as the president and vice president of the university. As such, Jesuits have the numbers to influence decisions made by the Board of Trustees. Finally, 70 of the 500-member faculty are Jesuits. These facts are significant because although the university has implemented an affirmative action plan, in the theology department half of the faculty members are Jesuits, who are by definition male, and only one of the 27 full-time faculty positions is held by a woman.

At trial, the defendant-university filed a motion for summary judgment which argued that the policy in giving preference to Jesuits did not constitute discrimination based on sex in violation of Title VII; rather, being a Jesuit, the university claimed, was a bona fide occupational qualification (BFOQ) for the position of theology professor. Ultimately, the
trial court dismissed the claim holding that Marquette University qualified or the religious-
employer exemption pursuant to 42 U.S. C. §2000e-2(e)(2) which states in pertinent part that
an employer may “hire and employ employees of a particular religion [if it is] in whole or
substantial part, owned, supported, controlled, or managed by a particular religion or by a
particular religious corporation, association, or society.”

On appeal, the circuit court chose not to deal with the difficult question as to whether
Marquette qualified as an exempted religious employer and found for the university on other
grounds. Specifically, the appeals court found that the plaintiff failed to establish a claim of
discrimination based on sex under Title VII.

As justification for the employment decision, the university contends that plaintiff’s
credentials were less competitive than other applicants and, moreover, it was likely she would
have been rejected in any case due to “her perceived hostility to the institutional church and
its teachings, and to the goals and missions of Marquette.” The court explains,

Where the defendant has offered a legitimate, non-discriminatory
reason for rejecting the plaintiff, the order of proof then would
impose upon the plaintiff the burden of proving that the reasons
advanced were a pretext and that a motivating or substantial
factor in the defendant’s decision was discrimination and but for
that discrimination the plaintiff would have been appointed...[Further,] even where the plaintiff demonstrates that
discriminatory intent is a motivating factor in employment
decision, employer can still avoid liability under Title VII by
proving that the same decision would have been made even in the
absence of discrimination.

Here, the defendants were able to prove that the substantial or motivating factor in the
employment decision had to do with plaintiff’s views on abortion. Indeed, plaintiff had
admitted the same in her memorandum opposing the defendant’s motion for summary
judgment conceding that the record in this case revealed that “her views concerning ‘the
moral theology of abortion and the public policy of abortion in a pluralistic society and the
relationship between the two...substantially motivated’” Marquette’s employment decision.
Her admission was the basis for the circuit courts finding that plaintiff’s case failed as a
matter of law.

The discussion of this case provided a view of a unique application of Title VII as it
relates to religious institutions. The case revealed the difficult question courts must contend
with in determining whether an institutional employer qualifies for the religious exemption
contained within Title VII. Indeed, the appeals court passed on the question even in light of

1444 Id. at 1216.
1445 Id.
1446 Id. at 1217.
1447 Id.
1448 Id. at 1218.
1449 Id. at 1217.
the district court’s careful consideration of the claim. Finding for the defendants on different grounds allows a look into the issues that arise at religious institutions when there is a claim of employment discrimination.

This section reviewed Title VII as applied in failure to hire cases that were set in unique circumstances: the first, a reverse-discrimination case that required that the plaintiff make a more specific showing in his prima facie case, and the second, a case that potentially implicates the religious employer exemption in Title VII. The next and final section of this review of faculty cases similarly provides an opportunity to examine another distinction in Title VII law.

“Other” Decisions Based on Race and/or Gender

The sample of cases only yielded two cases that fit into this category: Ray v. Peabody Institute of the Johns Hopkins University Conservatory of Music and Farrell v. Butler University. Each case is substantially concerned with salary, the first plaintiff claiming that his salary decrease was due to his race and the second plaintiff claiming that her failure to obtain a raise was due to her gender.

Since most of the cases throughout this review thus far, have sounded in disparate treatment theory, the first case is discussed here because it proceeds on a disparate impact theory. In Ray, the 67-year-old the plaintiff was a voice instructor at Johns Hopkins’ music conservatory. The conservatory assigns matriculating students to the studio of their choice complete with a faculty member to instruct them. Plaintiff had consistently been unable to attract a full class of 14 students to his studio. This was the root of the problem in light of the conservatory’s implementation of policy that partially tied faculty salary to enrollment. Even though he had not attained full enrollment, the conservatory paid plaintiff his full salary for the first three years of his employment. However, plaintiff was advised in 1985 by Dean Cline, that his salary would be adjusted thereafter to reflect the enrollment in his studio. Dean Cline’s edict did not take affect the following year, but when in 1986-87 the enrollments for plaintiff’s studio had decreased to 10 and continued to decline down to six students in 1988-89, Dean Cline recommended not to renew plaintiff’s contract effective July 1, 1989.

However, this recommendation was rejected and plaintiff’s contract was renewed for the 1989-90 academic year. That year, the Conservatory adopted guidelines, equally applicable to the entire faculty, which tied faculty salary to enrollment even further. Between 1990 and 1993, plaintiff’s enrollments successively decreased from seven, to four, and finally to one student in 1993. During that time, the Conservatory applied the new guidelines

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1450 11 F.3d 31 (4th Cir. 1993).
1451 421 F.3d 609 (7th Cir. 2005).
1452 Id. at 32.
1453 Id.
1454 Id. at 32-33.
leniently only reducing plaintiff’s salary by five percent, then by 50% before converting plaintiff to part-time faculty paid hourly.\textsuperscript{1455}

As a result of the change in his salary, plaintiff instituted this action claiming that the salary change was due to his race. Specifically, proceeding on a disparate impact theory, plaintiff alleged that the compensation plan, though neutral on its face, disparately affected minorities. The appeals court disagreed. They found that Johns Hopkins had implemented a neutral educational policy “with established tradition in higher education.”\textsuperscript{1456} Further, the court noted that plaintiff failed to introduce evidence to support his claim that the policy, which had been applied to all faculty members regardless of their race, had a disparate effect on minorities. The court held:

the mere fact that the plan happened to affect adversely one member of a protected class through its eve-handed infusion of healthy competition into the salary calculus is not sufficient to permit Ray to withstand a motion for summary judgment…Title VII does not “require an employer to adopt a life of economic altruism and thereby immunize protected class members from discharge or demotion despite their poor performance.”\textsuperscript{1457}

This case once again cautions plaintiffs against challenging policies when there is an insufficient nexus between the complained-of policy and the impact it has on the minority.

The final case under review, Farrell, presents an interesting fact situation in which the plaintiff challenges the non-receipt of an award (salary-raise) as a violation of Title VII based on her gender. Plaintiff advanced discrimination claims based on both disparate treatment and disparate impact theories. The facts of the case are as follows.

Plaintiff began work at Butler University in 1987 as a tenured, full professor of English and served as head of the department in 1989 when she resigned as department head and continued on as faculty.\textsuperscript{1458} Despite her resignation, she continued to earn the same salary she had when she served as head of the department.\textsuperscript{1459}

In 1996 Butler University sought to address concerns regarding disparities in the salary with respect to gender by creating a Faculty Compensation Task Force (FCTC).\textsuperscript{1460} At the conclusion of its investigation, the FCTC determined that male professors on average earned more than female professors at all rank levels. As such, Butler created and implemented the Professional Excellence Program (PEP) to reward professors who had been tenured for at least five years and who had demonstrated excellent scholarship, teaching, and service.\textsuperscript{1461}

\begin{footnotesize}
\begin{enumerate}
\item[1455] Id. at 33.
\item[1456] Id.
\item[1457] Id. at 34.
\item[1458] Farrell, supra note 1451 at 611.
\item[1459] Id. at 611-12.
\item[1460] Id. at 612.
\item[1461] Id.
\end{enumerate}
\end{footnotesize}
Farrell unsuccessfully applied for the award both in 2000 and 2001. Interestingly, she was the only female faculty member in the College of Liberal Arts and Sciences who was eligible to apply. During those years, the awards went to male faculty members. After Farrell failed to win the award after her second attempt she filed a grievance with the university and ultimately filed suit charging the institution with discrimination based on gender in violation of Title VII. At trial, the district court granted summary judgment in favor of the institution. On appeal, Farrell challenges the grant of summary judgment.

In her disparate treatment claim, Farrell proceeded to offer circumstantial evidence of discrimination through the McDonnell Douglas framework. The court indicated that in order to establish a prima facie case, the plaintiff had the burden to show that she “(1) is a member of a protected class, (2) is performing her job satisfactorily, (3) suffered an adverse employment action, and (4) was treated less favorably than at least on similarly-situated male colleague.”

The court explained that once plaintiff successfully carried her burden, and once the prima facie case was rebutted by the proffer of a legitimate non-discriminatory reason for the decision, Farrell would bear the burden of proving pretext. Pretext, the court explained, “requires more than showing that the decision was ‘mistaken, ill-considered or foolish, [and] so long as [the employer] honestly believed those reasons, pretext has not been shown…’ Pretext 'means a dishonest explanation, a lie rather than an oddity or an error.'”

First, the court determined that Farrell had carried her burden in establishing a prima facie case. However, with regard to the third prong, the court engaged in a bit of analysis. Farrell is challenging her failure to win an award, a circumstance defendants claim do not constitute an “adverse employment decision.” In support of their argument, defendants characterized the award as a bonus rather than a raise; this contention, if accepted, would prevent Farrell from making her claim since the court has previously held that a denial of a raise is an adverse employment decision for the purposes of Title VII analysis. The court disagreed, characterizing the award as a raise based on precedent wherein raises were distinguished from bonuses in that “‘bonuses generally are sporadic, irregular, unpredictable, and wholly discretionary on the part of the employer’ while ‘[r]aises are the norm for workers who perform satisfactorily.’” In determining that the award was a raise rather than a bonus, the court was persuaded by the fact that the award was not sporadic or irregular, but
awarded annually and that the PEP award grants the winner a permanent increase in salary.\textsuperscript{1469} In so finding, the court held that Farrell had made her prima facie case.

As a legitimate non-discriminatory reason for not awarding Farrell, the institution explained that in 2001 and 2001 the award committees had determined that her record of scholarship, teaching and service were exceeded by other applicants, and in particular, that Farrell was weak in her record of service to the university.\textsuperscript{1470}

In her showing of pretext, Farrell averred that there was an “old boys club” network at the university that influenced the PEP committee; specifically, she alleged that one recommender was a lifelong friend of one of the award recipients. However, the court was not impressed by this evidence.\textsuperscript{1471} Among other arguments, Farrell claimed that her record was better than the previous award recipients. The court reiterated a previous holding wherein it stated, “evidence of the applicants’ competing qualifications does not constitute evidence of pretext ‘unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue.’”\textsuperscript{1472} The court here could not make such a finding; indeed, the court noted a fair selection process and a diligent review of each submitted application.\textsuperscript{1473} Finally, the court cited academic deference as a reason for not inquiring too deeply into the merits of the academic honor decision in question, continuing the policy of the circuit.\textsuperscript{1474} Therefore, Farrell failed in her disparate treatment claim.

With regard to her disparate impact charge, defendants argued that Farrell should not be permitted to argue this theory since it was not pled in her EEOC charge, as required.\textsuperscript{1475} However, the court, noting its liberal stance on reviewing the scope of an EEOC charge, read the pleadings to encompass a disparate impact complaint.

Proceeding with its analysis however, the court found that plaintiff was unable to establish a prima facie case of disparate impact discrimination.\textsuperscript{1476} The court ruled that:

[in] order to advance a disparate impact claim, the plaintiff must first establish a prima facie case by proving by a preponderance of the evidence that the employment policy or practice had an adverse disparate impact on women on the basis of their gender...The plaintiff must first “isolate and identify the specific employment practices that are allegedly responsible for any observed statistical disparities” and second demonstrate causation by offering “statistical evidence of a kind and degree sufficient to show that the practice in question has caused the

\textsuperscript{1469} Id.
\textsuperscript{1470} Id.
\textsuperscript{1471} Id. at 615.
\textsuperscript{1472} Id.
\textsuperscript{1473} Id.
\textsuperscript{1474} Id. at 616
\textsuperscript{1475} Id.
\textsuperscript{1476} Id. at 616-17.
Farrell asserted that the eligibility requirements and evaluation methods of the PEP have a disparate impact on female faculty. However, the court found that Farrell had no standing to assert this claim since she met the eligibility requirements of the award. She further argued that the evaluation methods of the PEP committee tended to favor males, and in support thereof, indicated that the committee had failed to consider her alternative and supplemental submissions regarding her teaching activities. Ultimately, the court was unpersuaded that these accusations rose to the level of disparate impact and affirmed the district court’s grant of summary judgment in favor of the defendants.

*Farrell* provides further clarity with regard to making a prima facie case in this context, showing pretext in a disparate treatment claim, as well as the requirements to make out a disparate impact claim. The collective discussion of *Ray* and *Farrell* provide examples of somewhat non-traditional Title VII claims that arise in higher education settings and illustrate the modifications that must be made in order to analyze these cases pursuant to Title VII jurisprudence. One particular factor of interest in *Farrell* was the articulation of the seventh circuit’s policy with regard to academic deference, particularly in light of the non-traditional employment decision (non-receipt of an award) it was evaluating. The court noted that since the award was based on a determination of excellence in teaching, scholarship, and excellence, it was not for them to make such a determination. This court engaged in no evaluation of the plaintiff’s qualifications as compared to the two award recipients to even potentially determine whether plaintiff’s assertions that her record was superior to previous award recipients were justified; rather they focused on the evaluation methods of the PEP committee and found that gender was not taken into consideration. Without a thorough investigation, this determination seems conclusory. Thus, this case evinces that courts may rely on the practice or policy of academic deference where difficult or uncomfortable questions arise and broadens the scope of cases that academic deference influences. A more detailed discussion of this doctrine takes place in the proceeding section.

**Academic Deference**

As alluded to in the previous section the doctrine of academic deference finds its way into a significant number of Title VII claims in the college and university setting. However, the previous discussion only provided hints of its influence in anticipation of a more robust discussion of the topic in this section. Because an explanation of the doctrine has previously been provided, this portion of the discussion analyzes how the doctrine manifested itself in the

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1477 *Id.* at 616.
1478 *Id.* at 617.
1479 *Id.*
case law under review. Further, the researcher incorporates relevant secondary sources in the form of law review articles in order to come to an overall conclusion regarding the doctrine’s place in higher education.

Of the 70 cases analyzed in this study, 21 cases referenced the doctrine in a significant manner (i.e., as a part of the analysis of the Title VII claim.) This represents about 30% of the cases and is even more significant when other factors are considered such as the limited scope of review on appeal. In other words, if academic deference works to permit judges not to engage in the analysis of an employment decision, and the scope of review on appeal of claims is limited to whether a district court judge is clearly erroneous or whether he has abused his discretion, is the intent of the 1972 amendments being carried out by the courts in a meaningful way?

It started with *Faro* in 1974.1480 The *Faro* court, in review of a termination claim alleging discrimination based on gender, presented the conundrum courts found themselves in in the review of claims of discrimination in the academic setting. He stated:

> Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision. Dr. Faro would remove any subjective judgments by her faculty colleagues in the decision-making process by having the courts examine ‘the university’s recruitment, compensation, promotion and termination and by analyzing the way these procedures are applied to the claimant personally’...Such a procedure, in effect, would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry at the behest of unsuccessful and disgruntled candidates as to why the unsuccessful was not as well qualified as the successful. This decision would then be passed on by a Court of Appeals or even the Supreme Court. The process might be simplified by a legislative enactment that no faculty appointment or advancement could be made without the committee obtaining a declaratory judgment naming the successful candidate after notice to all contending candidates to present their credentials for court inspection and decision. This would give ‘due process’ to all contenders, regardless of sex, to advance their ‘I’m just as good as you are’ arguments. But such a procedure would require a discriminating analysis of the qualifications of each candidate for hiring or advancement, taking into consideration his or her educational experience, the specifications of the particular position open and, of great importance, the personality of the candidate.1481

The predicament is made clear at once and, objectively speaking, raises valid concerns. However, it is the facts of the case that make Judge Moore’s concerns seem somewhat exaggerated and misplaced. The context of this statement was in a termination claim; unlike a

1480 *Faro*, supra note 1138.
1481 *Id.* at 1231-32.
failure to promote claim or a denial of tenure claim that requires a subjective evaluation of a faculty member's fitness for employment within the institution, a termination claim seems more focused on whether there was an improper motive in the decision-making process, or whether the decision was unfair in light of the treatment of a similarly-situated employee. Thus, Judge Moore's concerns about “taking over” faculty appointments seem misplaced. This is especially true where the claim takes place in a jurisdiction where employment is at-will; in this instance, a faculty member who is terminated or whose contract is not renewed is not owed an explanation for the employment decision. Therefore, the analysis that judges are reluctant engage in doesn’t take place to the same extent in termination decisions. While he does raise valid claims regarding judicial review of academic decisions, again, this concern would seem to make more sense within a denial of tenure claim, or a failure to promote claim rather than the termination claim discussed therein.

Perhaps some of these concerns may have occurred to Judge Moore, because four years later in *Powell v. Syracuse University*, he appeared to backtrack from his previously-firm position in favor of academic deference. By this time, other courts had begun to cite to *Faro* as precedent for the application of academic deference. However, notably, in the First Circuit, another judge cautioned against broad application of the doctrine. Judge Tuttle in *Sweeney* voiced concerns about the “hands-off” approach courts had been taking in the salary, promotion, and hiring decisions at universities. He expressed, “we caution against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress.”

These thoughts were reiterated and expanded upon by Judge Moore in *Powell*. In that case, he realized that his initial concerns had been taken too far. He noted,

> This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear however, that the common-sense position we took in *Faro*, namely that courts must be ever-mindful of relative institutional competences, has pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964.

In *Powell*, one can hear the anxiety in the tone of Judge Moore’s opinion. His tone is of one who has sent a car downhill toward a busy town with inoperable brakes - he can anticipate the damage, but is powerless to stop it. Indeed, Judge Moore expressly agrees with Judge Tuttle's

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1482 580 F.2d 1150 (2d Cir. 1978).
1483 Id. at 1153.
1484 *Sweeney, supra* note 1391 at 176. Recall, this judgment has been vacated by a subsequent appeal. The conversation of Judge Tuttle herein is mentioned here as a larger discussion of academic deference rather than a substantive discussion of the merits of the case.
1485 Id.
1486 *Powell, supra* note 1482 at 1153.
more cautious approach and almost apologizes for the manner in which Faro had been interpreted and applied noting, "[i]t is our task, then, to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior. Faro does not and was never intended to indicate that academic freedom embraces freedom to discriminate."  

However, it appears as if the doctrine was going full speed ahead, particularly since the Third Circuit had announced its opinion in Kunda two years later expounding on the concept of academic freedom. Kunda is often cited for the proposition that judges should not intrude into the faculty employment decisions that take place on university campuses.  

Ironically, the courts seem to ignore that despite the admonishment in that case, the Kunda court did engage in a detailed review of the evidence and affirmed the district court's opinion which found in favor of the plaintiff in a case that alleged discrimination based on gender. It appears that what remains sharp in the minds of the court was the warning cautioning against interfering in academic decisions; this is revealed throughout the studied case law.  

Indeed, of the cases reviewed in this study, the Seventh Circuit Court of Appeals seems to have the most incidents of references to academic deference in their case law. Cases that range in time from 1979 through to 2012 consistently applied the doctrine across case types including termination claims and denial of tenure claims. Davis v. Weidner, case decided in 1979, seemed to understand and empathize with Judge Moore's second discussion on the doctrine. Recognizing the problem as stated in Powell, the Davis court noted,

Judicial hesitance to perform this task cannot be justified by an aversion to reviewing university decision-making per se; rather, judicial deference is legitimate only to the extent it is based on a desire to avoid replacing a university’s judgments about academic employment with judgments made by the judiciary. And although this problem arises in all contexts in which courts enforce fair employment laws, the problem is particularly acute in academia where the standards used to evaluate personnel are, in some sense, subjective and certainly defy easy measurement by objective criteria. Thus, a court reviewing an academic employment decision is unable to rely on easily ascertainable, objective criteria to determine whether the reasons given for the decision are legitimate or pretextual. The reviewing court finds itself faced with the apparent dilemma of either neglecting its statutory responsibility of insuring fair employment practices in institutions of higher education or usurping the task of the university by making relatively unstructured judgments about the qualifications of academic personnel.

1487 Id. at 1154.  
1488 Kunda, supra note 20 at 548.  
1489 596 F.2d 726 (7th Cir. 1979).  
1490 Id. at 731.
In response to this dilemma, the dilemma between enforcing non-discrimination policy pursuant to Title VII and interfering in academic decisions, it appears that concerns for academic autonomy prevail. This is evinced in the several subsequent cases tried before the Seventh Circuit Court of Appeals that more often than not mentions the proscription against interfering in university decision-making than upholding Congress’s mandate against discrimination in educational institutions.\textsuperscript{1491}

The Fifth Circuit Courts of Appeals also displays some inconsistency with regard to the doctrine. While in 1980, the court recognized a “traditional reticence” to interfere with university affairs in \textit{Whiting v. Jackson State University},\textsuperscript{1492} the court later acknowledged that “[t]enure decisions are not...exempt from judicial scrutiny under Title VII.”\textsuperscript{1493}

However, this is where the inconsistency ends. Across the several circuits and through several decades, there is an almost stubborn adherence to the doctrine wherein courts have consistently refused to have a role in university employment decisions.\textsuperscript{1494} This sentiment is probably best expressed by Chief Judge Campbell of the First Circuit Court of Appeals in a concurring opinion for a termination claim:

\begin{quote}
I believe that courts must be extremely wary of intruding into the world of university tenure decisions. These decisions necessarily hinge on subjective judgments regarding the applicant’s academic excellence, teaching ability, creativity, contributions to the
\end{quote}

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{1491}]
\item See \textit{Carpenter}, supra note 1231 at 915 (stating, “For us to conclude that UW-M should have granted tenure would be to ‘replace the university’s judgment about academic employment with judgments made by the judiciary...we may [later] be required to make such judgments, but this is not the case.”); \textit{Namenwirth}, supra note 1309 at 1243 (finding, “[t]enure decisions have always relied primarily on judgments about academic potential...It is not our place to question the significance or validity of such conclusions.”); \textit{Farrell}, supra note 1451 at 616 (holding, “[w]e previously recognized that scholars are in the best position to make the highly subjective judgments related with the review of scholarship and university service.”); \textit{Sun}, supra note 1163 at 815 (finding “Given the nuanced nature of [tenure] decisions, we generally do not "second-guess" the expert decisions of faculty committees.”); \textit{Blasdel}, supra note 1310 at 816 (noting, "we must not ignore the interest of colleges and universities in institutional autonomy.")
\item 616 F.2d 116 (5th Cir. 1980).
\item \textit{Tanik}, supra note 1161 at 776.
\item See \textit{Lynn}, supra note 1362 at 1344-45 (expressing, "addressing the University’s arguments at the first step of the analysis would increase the possibility that courts will be required to engage in evaluations of the performance of faculty members, a task to which others are better suited.); \textit{Lynn v. Regents of University of California}, 1979 WL 71 (noting, "For this court to say to a university ‘you cannot deny tenure on the grounds that you do not like the scholar’s subject of study’ is the equivalent of ordering that tenure committee must exercise its professional judgment in a particular way. This gets very near a First Amendment problem. Free exercise of scholarly judgment is a part of academic freedom); \textit{Jespen}, supra note 1367 at 1381 (quoting the lower court’s findings, “[it] would require extremely compelling circumstances for this court to undertake to dictate the administrative policy of a state agency, or to sit as a court of appeals and review decisions of administrative officials. Absent a clear abuse of discretion, it is not the function of this court to substitute its judgment for that of the officials involved); \textit{Gutzwiller}, supra note 1291 at 1326 (finding that, “[t]he trial judge properly admonished the jury that it was not to act as a “super tenure committee” and decide for itself whether Gutzwiller had the qualifications to be promoted); \textit{Hankins v. Temple University (Health Sciences Center)}, 829 F.2d 437, 443 (1987) (determining, “[u]niversity faculties...must have the widest discretion in making judgments as to the academic performance of their students” in a termination claim where a student was fired from her fellowship); \textit{Brousard-Norcross}, supra note 1348 at 975-76 (holding that, “[o]ur review of a tenure decision is approached with trepidation...We do not profess to possess the expertise required to evaluate such decisions for their merit. While Title VII unquestionably applies to tenure decisions, judicial review of such decisions is limited to whether the tenure decisions was based on a prohibited factor...[w]e will not sit as a “super personnel council” to review tenure decisions); \textit{Jiminez v. Mary Washington College}, 57 F.3d 369 (4th Cir. 1995) (noting, “[i]n other employment contexts, we have explained that Title VII is not a vehicle for substituting the judgment of a court for that of the employer...Title VII, therefore, is not a medium through which the judiciary may impose professorial employment decisions on academic institutions).
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university community, rapport with students and colleagues, and other factors that are not susceptible of quantitative measurement. Absent discrimination, a university must be given a free hand in making such tenure decisions. Where, as here, the university’s judgement is supportable and the evidence of discrimination negligible, a federal court should not substitute its judgment for that of the university.\footnote{Kumar, supra note 1259 at 12.}

Adherence to the academic deference doctrine, as expressed by Judge Campbell, is noteworthy especially in light of the 1991 Supreme Court decision, \textit{University of Pennsylvania v. Equal Employment Opportunity Commission.} In that case, the Court considered the following issue: “whether a university has special privilege, grounded in either the common law or the First Amendment, against disclosure of peer review materials that are relevant to charges of racial or sexual discrimination in tenure decisions.”\footnote{493 U.S. 182 (1990).} The short answer to the question is, “no.”

The case arose from a claim of discrimination by Rosalie Tung, an associate professor on the Wharton faculty who alleged that the chair of her department had sexually harassed her; she sued the institution for violations of Title VII based on race and sex.\footnote{Id. at 184.} While the EEOC was investigating her charge, a subpoena was issued for Tung’s tenure review files as well as the files of five male faculty members identified in the charge.\footnote{Id. at 185.} The commission hoped to obtain: confidential letters written by the plaintiff’s evaluators; the department chair’s letter of evaluation; documents reflecting the deliberations on Tung’s tenure; and comparable files of the five male faculty members.\footnote{Id. at 186.}

The University initially responded by denying the request for the documents urging the commission to “adopt a balancing approach reflecting the constitutional and societal interest inherent in the peer review process” and to “resort to all feasible methods to minimize the intrusive effects of its investigations.”\footnote{Id. at 186.}

Communications between the university and the commission went back and forth in this manner until the commission indicated that it would seek to enforce the subpoena in court.\footnote{Id. at 187.} The district court ordered the university to produce the documents, and after an appeal, the court of appeals similarly ordered the production of the requested documents.\footnote{Id. at 187-88.} The university appealed the matter to the Supreme Court who granted certiorari limited to the consideration of the above-referenced issue.\footnote{Id. at 188.}
First, the university requested that the Court fashion a privilege to protect the peer-review process in light of the university’s status as a special environment that functions as “centers of learning, innovation, and discovery.”\textsuperscript{1505} The Court noted that in responding to this request, they are guided by the rule that a privilege cannot be created and applied unless it “promotes sufficiently important interests to outweigh the need for probative evidence.”\textsuperscript{1506}

The Court denied the request to recognize a privilege in light of the specific congressional intent to eradicate discrimination in the field of education evinced by the extension of Title VII to educational institutions with the 1972 Amendments. The Court noted that Congress intended that tenured decisions be subject to the same enforcement procedures as other employment decisions.\textsuperscript{1507} Pursuant thereto, Congress provided the EEOC with broad subpoena powers in order to obtain evidence of those being investigated for unlawful employment practices.\textsuperscript{1508} The Court discussed the fact that the EEOC, in its charge to investigate claims of discrimination, was granted access to all material that is “relevant” to a charge.\textsuperscript{1509} Understanding that, the Court found that Congress knew that in extending Title VII to educational institutions these documents would come under the category of documents the EEOC had access to in the course of an investigation; Congress made no provision to protect these documents and the Court was unwilling to do so either.\textsuperscript{1510}

The Court further discussed that peer-review documents would likely be the best evidence of the considerations that took place during a tenure review.\textsuperscript{1511} Citing the Court of Appeals for the Third Circuit,

\begin{quote}
Clearly, an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may be necessary for an agency investigation. There may be evidence of discriminatory intent and of pretext in the confidential notes and memorandum which the [college] seeks to protect. Likewise, confidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure or that some pattern of discrimination appears... [T]he peer review material itself must be investigated to determine whether the evaluations are based in discrimination and whether they are reflected in the tenure decision.\textsuperscript{1512}
\end{quote}

Thus, allowing a university to keep these documents confidential may well frustrate Congress’ intent as well as the mission of the EEOC to remove discrimination from the field of

\textsuperscript{1505} Id. at 189.
\textsuperscript{1506} Id.
\textsuperscript{1507} Id. at 190.
\textsuperscript{1508} Id. at 191.
\textsuperscript{1509} Id.
\textsuperscript{1510} Id. at 191-92.
\textsuperscript{1511} Id. at 193.
\textsuperscript{1512} Id.
higher education. The Court was unwilling to recognize such a privilege that would “place a potent weapon in the hands of employers who have no interest in complying with the Act…” Further, the Court was reluctant to recognize such a privilege for fear of a wave of similar requests from employers in other fields who also play significant roles in society in the area of speech and learning. “What of writers, publishers, musicians, lawyers?,” the Court asked. 

Second, the university framed their request as a right derived from the First Amendment citing cases that had noted that academic freedom was a “special concern” thereof. The university explained that the grant of tenure is an extension of the right to determine “who may teach” as set forth in Sweezy. That right then, naturally extends to the peer review process, they argued, which is “the most important element in the effective operation of a tenure system.” The university's argument proceeded as follows:

A properly functioning tenure system requires the faculty to obtain candid and detailed written evaluations of the candidate's scholarship, both from the candidate's peers at the university and from scholars at other institutions. These evaluations...traditionally have been provided with express or implied assurances of confidentiality. It is confidentiality that ensures candor and enables an institution to make its tenure decisions on the basis of valid academic criteria.

Thus, confidentiality ensures candor, the university argued, and breaching this confidentiality would have a “chilling effect” on faculty evaluations.

In response, the Court had to clarify the meaning of academic freedom and its relation to the First Amendment. The court explained that the reference to “who may teach” was a reaction to content-based regulations. Since the university was not alleging that the subpoenas were intended to direct the content of university discourse, the argument was inapposite. Further, the cases the university relied upon referring to academic freedom as a concern of the First Amendment involved direct infringements on the right to determine who may teach; the Court determined that the EEOC subpoena for documents was not a direct infringement in that it is not providing criteria that the university must use in selecting teachers. The Court further explains:

That the burden of which the University complains is neither content-based nor direct does not necessarily mean that petitioner has not valid First Amendment claim. Rather, it means

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1513 Id. at 194.
1514 Id.
1515 Id. at 195.
1516 Id. at 196.
1517 Id.
1518 Id. at 197.
1519 Id. (noting that both Sweezy, supra 963 and Keyishian, supra note 967 involved the attempt to control or direct the content of the speech engaged in by the university or those affiliated with it).
1520 Id. at 198.
1521 Id.
only that the petitioner’s claim does not fit neatly within any right of academic freedom that could be derived from the cases on which petitioner relies. In essence, petitioner asks us to recognize an expanded right of academic freedom to protect confidential peer review materials from disclosure. Although we are sensitive to the effects that content-neutral government action may have on speech, and believe that burdens that are less than direct may sometimes pose First Amendment concerns, we think the First Amendment cannot be extended to embrace petitioner’s claim.\textsuperscript{1522}

In so finding, the Court failed to accept both arguments advanced by the university in support of its claim that peer review records should be privileged documents undiscoverable by subpoena. In this study, only three plaintiffs requested peer review documents.\textsuperscript{1523} While two appeals judges denied the request on the grounds that the employment decisions were not based on information in the peer-review documents,\textsuperscript{1524} one case overturned a district court’s denial of the plaintiffs request for the documents.\textsuperscript{1525} In \textit{Lynn}, the court noted that in making the determination of whether peer evaluations are privileged, “it is necessary to consider the importance of enabling plaintiffs to prove that discriminatory conduct has occurred, the difficulty of obtaining direct proof of discriminatory motivation and the strong national policy against discrimination in educational employment.\textsuperscript{1526} This dictate seems in accord with the considerations the Supreme Court discussed in the previous case.

Why then did \textit{University of Pennsylvania v. EEOC} not act as a death knell to academic deference? If indeed, academic freedom is not necessarily supported by the First Amendment in the manner the university suggests, and in light of the Court’s recognition of Congress’s calculated decision not to recognize any such privilege, why do courts continue to defer to university employment decisions in a consistent fashion?

Indeed, this study cites several cases that implicate the doctrine of academic deference subsequent to the Supreme Court’s decision in \textit{University of Pennsylvania v. EEOC}. As one scholar points out, higher education is not the only field wherein “evaluation of performance is discretionary and entails highly specialized knowledge.”\textsuperscript{1527} Moss explains that employment discrimination claimants have prevailed in: accounting partnerships, administrative law

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1522} \textit{Id.} at 199 (explaining that the argument that the university advances is too attenuated: “it argues that the First Amendment is infringed by disclosure of peer review materials because disclosure undermines the confidentiality which is central to the peer review process, which in turn is the means by which petitioner seeks to exercise its asserted academic-freedom right of choosing who will teach. To verbalize the claim is to recognize how distant the burden is from the asserted right”). \textit{Pennsylvania}, \textit{supra} note 1496 at 199-200.
\item \textsuperscript{1523} \textit{Lynn}, \textit{supra} note 1362 at 1345; \textit{Jesp}en, \textit{supra} note 1367 at 1381; \textit{Keyes v. Lenoir Rhyne College}, 552 F.2d 579 (4th Cir. 1977).
\item \textsuperscript{1524} \textit{Jesper}n, \textit{supra} note 1367; \textit{Keyes}, \textit{supra} note 1523.
\item \textsuperscript{1525} \textit{Lynn}, \textit{supra} note 1362.
\item \textsuperscript{1526} \textit{Id.} at 1347. (It should be noted that in overturning the district court’s decision, the Lynn court did not reject the holdings in the \textit{Jesp}en and \textit{Keyes} courts. Rather, the fact situation in Lynn allowed for the review of the court documents whereas the other two were distinguishable in that the basis for the employment decision was not related to the materials contained in the peer review documents).
\end{itemize}
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judgeships; law enforcement; engineering; computer programming; as well as hard sciences such as chemistry.\footnote{Id. at 6-7.} If a reviewing court can delve into the intricacies of the decision as to who makes a proper judge or police officer – decisions that also involve intangible characteristics that can best be recognized by those in their respective industries – what keeps them from questioning the decisions of educators in an environment where it has been acknowledged by congress is rampant with gender and race discrimination?

There are several reasons that may explain this continued refusal to interfere in university employment decision making. First, as alluded to in the outset of this section, one judge proffered the idea, and subsequent judges ran with it. The common law is a body of cases that relies heavily on precedent. As discussed in the previous chapter, the concepts of precedent and \textit{stare decisis} govern judicial decision making. Recall, \textquotedblleft \textit{stare decisis} requires courts to follow their prior decisions when deciding like cases. Precedent is the decision itself. Precedent is the substance behind \textit{stare decisis}.\footnote{Romantz & Vinson, \textit{supra} note 1047 at 8.} Once the idea was articulated in \textit{Faro}, it seems as though judges have stubbornly held on to the idea, only some breaking away from blind adherence to the doctrine.\footnote{One author notes, \textquotedblleft [i]t appears that while the majority of courts articulate the academic deference argument, some move past it and others do not.\textquotedblright Dekat, \textit{supra} note 982 at 257.}

Secondly, judges are part of the society that fell under the mystique of higher education institutions. In chapter three of this study, the researcher attempted to highlight the manner in which higher education became to be venerated amongst society. The thought was advanced that the collegiate revolution during the late 1890s and early 1900s was the genesis of America’s fascination with colleges and universities. In the case law, several Supreme Court decisions use flowery and lofty language to describe these institutions and their mission as integral to American society.\footnote{See \textit{Sweezy}, \textit{supra} note 963; \textit{Keyishian}, \textit{supra} note 967; \textit{University of Pennsylvania}, \textit{supra} note 1496.} And, the Circuit Court of Appeals for the Eleventh Circuit notes the \textquotedblleft level of sophistication is likely to be much higher [in a college or university setting] than in other employment situations.\textquotedblright\footnote{Sweeney, \textit{supra} note 1392 at 175.} As such, it can be no surprise that, as one scholar notes, deference to academic decisions [have] been linked to an assumption held by judges and juries that university administrators and faculty, some of America’s most educated citizens, are above sexism or racism. Furthermore, since most universities have formal policies against discrimination...judges have the impression that discrimination is not tolerated in higher education.\footnote{Chase, \textit{supra} note 17 at 160.}

Third, as previously indicated, it has been commonly accepted, and discussed herein, that tenure decisions are subjective. If nothing else, academic employment decisions are concededly complex. Where subjectivity and discrimination can affect the tenure review
process at any number of levels, it becomes difficult for a reviewing court to determine what actions serve as proof for discrimination. Perhaps in these situations, academic deference is the more convenient choice, in some cases, between engaging in an admittedly frustrating review of the evidence and leaving the decision in the hands of the professionals.

The three reasons proffered to explain the courts’ adherence to the doctrine can be summarized as habit, fascination, and laziness. As a result, “Title VII academic cases suggest that the court has two duties: to settle the employment dispute and to preserve academic freedom [academic deference].” When Congress extended Title VII protections to educational institutions, it is doubtful that this was their desired end.

The above discussion sought to accomplish several goals. First, cases applying Title VII to higher education institutions where the plaintiff is a faculty member were discussed and analyzed. This resulted in the delineation of how faculty plaintiffs in the several categories of cases establish a prima facie case for discrimination based on race and gender. Further, the different rules, by circuit, that govern the adjudication of discrimination claims were also discussed. This discussion of the several cases sought to expose the competing interests between a university and a Title VII plaintiff especially in consideration of academic specific concepts of tenure and academic deference. However, since this study attempts to learn more about the university as an employer, this chapter concludes by briefly discussing cases wherein the plaintiff in the Title VII action is not a faculty member.

**Title VII Cases with Non-Faculty Plaintiffs**

Similar to the previous section, case law wherein Title VII actions against university-defendants are discussed and analyzed. Herein, the plaintiffs are not faculty members and thus the concepts of tenure and academic deference are not necessarily implicated. As foundational Title VII jurisprudence has already been discussed throughout this study, the analysis of the cases in this section is limited to those factually-distinct situations that demonstrate applicable rules that have not previously been discussed. In other words, this section attempts to determine whether any particular rules arise without the influence of the previously-discussed academic concepts.

**Failure to Promote Based on Race or Gender**

The first case under analysis is discussed because of the relatively unusual occurrence of reverse-discrimination claims. One reverse discrimination claim was discussed previously, but the faculty member therein alleged gender discrimination.\textsuperscript{1534} *Zambetti v. Cuyahoga Community College*\textsuperscript{1535} is distinguishable in that the police officer in this case alleges race discrimination.

\textsuperscript{1534} *Gore*, supra note 142.

\textsuperscript{1535} 314 F.3d 249 (6th Cir. 2002).
The plaintiff, a Caucasian male, was a part-time police officer at the community college who, after some time, sought a full-time position. Plaintiff alleges that on the three occasions he applied for a full-time position, three less-qualified, African-Americans were promoted over him. However, the defendant-university explained that the three African Americans that were hired, were hired pursuant to a collective bargaining agreement between the college and the union which stated that the college was to give preference to employees with the most job classification seniority in the same job classification; the only way that a junior applicant could be hired over one with seniority is if he was more substantially qualified than the junior applicant. Claiming that he was substantially more qualified than the three applicants, plaintiff filed suit claiming discrimination based on race in violation of Title VII.

Plaintiff claimed that when the Selection Advisory Committee (SAC) interviewed each of the applicants including the plaintiff, the SAC found that plaintiff possessed “substantially greater qualifications” in two of the three instances that others were promoted above him. Plaintiff also averred that two of the candidates were not even minimally qualified for the positions they were promoted to. At trial, the district court granted judgement in favor of the defendants and plaintiff appealed.

In analyzing the claim, the Court explained that the McDonnell Douglas framework was to be modified to accommodate this reverse race discrimination claim. As such, in the place of establishing the first prong – that plaintiff is a member of a racial minority – plaintiff in this case was required to demonstrate “background circumstances [to] support the suspicion that the defendant is that unusual employer who discriminates against the majority.” Plaintiff must then establish that he was qualified and that despite his qualifications, he was rejected. Finally, as to the fourth prong – where one usually must prove that despite the qualifications, the employer sought applicants from persons of the complainant’s qualifications – plaintiff herein was required to prove that the employer treated differently employees who were similarly stated but not members of the protected group.

In order to establish the first prong, the court noted, the plaintiff is permitted to proffer evidence of the defendant’s “unlawful consideration of race as a factor in hiring in the past that justifies a suspicion that incidents of capricious discrimination against whites because of their race may be likely.” In order to satisfy this requirement, plaintiff attempted to show that in the last six years, the police chief had only hired one white police

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\[1536\] *Id.* at 253.
\[1537\] *Id.*
\[1538\] *Id.* at 252.
\[1539\] *Id.*
\[1540\] *Id.*
\[1541\] *Id.* at 255.
\[1542\] *Id.*
\[1543\] *Id.*
\[1544\] *Id.* at 256.
officer for 10-15 vacancies. However, neither the trial court nor the appeals court were convinced by this statistic since plaintiff failed to provide further information about how many white and black officers had applied for those positions.\textsuperscript{1545} Plaintiff eventually satisfied the “background circumstances” prong by establishing that the person in charge was African-American.\textsuperscript{1546} Further, both parties conceded that the plaintiff had established prongs two through 4, making out a prima facie case of discrimination. Thus, plaintiff having been provided a reason for the employment decisions – the collective bargaining agreement – had the burden to prove pretext.\textsuperscript{1547}

In order to establish pretext plaintiff was required to show that the proffered non-discriminatory reason: had no basis in fact, did not actually motivate the defendant’s conduct, or was insufficient to warrant the challenged conduct.\textsuperscript{1548} Further, because the police department employment policy involved a seniority system, the plaintiff was required to show: that the seniority system was not bona fide because the system was adopted or negotiated with a discriminatory motivation or purpose, or that the seniority system was administered in an irregular or arbitrary way with intent to harm members of a protected class.\textsuperscript{1549}

In attempting to show that the seniority system was administered in an irregular or arbitrary manner, plaintiff challenged each of the three hiring decisions. As to the first hire, plaintiff proffered testimony from one of the members of the SAC who had interviewed all of the candidates. He testified that plaintiff had scored 6-7 higher on the evaluation and that plaintiff had been recommended for the position.\textsuperscript{1550} Police Chief Harris testified in response that the point system used to evaluate the plaintiff was no longer in use and thus was not taken into consideration during the hiring decision.\textsuperscript{1551} Plaintiff countered that whether or not the point system was in use was irrelevant; the testimony of the SAC member was enough to create a genuine issue of material fact as to the plaintiff’s qualifications. The appeals court agreed.\textsuperscript{1552}

Further, the appeals court found that as to the second hire, several deficiencies in the employment decision created genuine issues of material fact.\textsuperscript{1553} First, although the second hire was required to have three references to be considered for the position, this candidate did not meet this qualification. The court found that although Chief Harris claimed he did not know about the policy, this created a genuine issue of material fact as to whether the

\textsuperscript{1545} Id.
\textsuperscript{1546} Id. at 257.
\textsuperscript{1547} Id.
\textsuperscript{1548} Id. at 258.
\textsuperscript{1549} Id.
\textsuperscript{1550} Id. at 259.
\textsuperscript{1551} Id.
\textsuperscript{1552} Id.
\textsuperscript{1553} Id.
candidate qualified for the job.\textsuperscript{1554} The court also found that evidence of this candidate’s unsatisfactory rating before the SAC as well as her lack of experience prior to obtaining the job created genuine issues of material fact to survive summary judgment.\textsuperscript{1555}

As to the third employee, the court found that this candidate’s lack of range certification where plaintiff was range certified also created a genuine issue of material fact as to plaintiff’s qualifications for the position.\textsuperscript{1556}

Finally, the court was called upon to make a determination as to whether the “same-actor inference” should apply to this case. Pursuant to this rule, “in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for adverse action taken by the employer.”\textsuperscript{1557} In this instance, there was a question as to whether Police Chief Harris was solely responsible for hiring the plaintiff, or whether plaintiff’s father, a former police chief who had approached Chief Harris about the position, had a hand in obtaining the position. In any event, plaintiff’s proffered evidence was enough to create a factual dispute. Therefore, the court found that summary judgment was improper and remanded the case to the district court.\textsuperscript{1558}

This case was discussed because of its articulation of the “background circumstances” test which applies only in reverse discrimination claims as well as the “same-actor inference” discussed toward the end of the summary. The researcher finds it troubling that the court performed little analysis into why Chief Harris’ status as an African American served as evidence of unlawful consideration of race as a factor in hiring in the past. Particularly in light of the fact that the court refused to adopt the desired inference from the statistics plaintiff offered showing Chief Harris’ hiring patterns. Further, the court took time to note that requiring reverse-discrimination plaintiffs to make a heightened showing as to the first prong in the prima facie case may be unfair.\textsuperscript{1559} The researcher questions the application of this particular rule in HBCU settings. Because of the lack of analysis, the researcher is not clear as to whether the court means to imply that African-American supervisors are inherently unfair in their hiring practices. If this is the case, it may have a chilling effect on the hiring on HBCU campuses where, in general, most of the hires are African American and a minority of the hires are Caucasian or other races.

\textsuperscript{1554} Id. at 260.
\textsuperscript{1555} Id.
\textsuperscript{1556} Id.
\textsuperscript{1557} Id. at 261.
\textsuperscript{1558} Id. at 262.
\textsuperscript{1559} Id. at 257.
Failure to Hire Based on Race or Gender

Two failure-to-hire cases will be discussed in this section: the first as illustrative a non-faculty failure-to-hire claim and the second will be briefly discussed for the articulation of a particular rule that has been applied in employment discrimination claims.

The first case, *Cerrato v. San Francisco Community College*, was brought by a white mathematics professor who applied for a ‘Dean I of Instruction’ and was denied when the institution hired an Asian-American administrator to fill the position.

When the plaintiff applied for the job, the position did not require any full-time teaching experience or any expertise in any particular area as did a previous posting for the position. In screening applicants for the position, the plaintiff placed third of three top applicants for the position. During a second screening, he placed first. Both committees testified that race was not taken into consideration in the ranking process. The recommendations were forwarded to the chancellor who screened the applicants and the plaintiff once again placed third. Ultimately, Bennett Tom was chosen for the position because: he was the only applicant with a doctoral degree; he had 6-years’ experience at the institution as an associate director (which was equivalent to the Dean I position); he had valuable labor and collective bargaining experience; and further, offering Tom the position saved the institution money since a position would be eliminated. This was contrasted with the plaintiff’s 20 years of experience as a math professor and two years as a department chair; plaintiff had no administrative experience.

Plaintiff sued the institution for violations of Title VII based on race. At trial the court ruled in favor of the defendants. Plaintiff appealed the decision and sought to prove discrimination using both disparate treatment and disparate impact theories.

In furtherance of his disparate treatment claim, the court was not very verbose in their analysis. However, plaintiff argued against SFCC’s affirmative action plan, claiming that the very existence of such a plan created an inference of discriminatory intent. The court disagreed citing precedent which held that “the mere fact of an affirmative action plan’s existence is not relevant to proving discrimination unless the employer acted pursuant to the plan.” Here, there was testimony that showed that the institution’s affirmative action plan played no part in the final employment decision.

As to the plaintiff’s disparate treatment claim, the court was equally silent except to say that the district court was not clearly erroneous in discounting plaintiff’s statistics where

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1560 26 F.3d 968 (9th Cir. 1994).
1561 *Id.* at 971.
1562 *Id.*
1563 *Id.*
1564 *Id.*
1565 *Id.* at 976.
1566 *Id.*
those statistics “did not properly take into consideration the qualifications of the applicants…employed too small a sample size, and…employed inadequate statistical techniques.”\textsuperscript{1567} As such, the decision of the district court was affirmed.

Since affirmative action plans have a prominent place in higher education, the discussion of this case seemed pertinent to clarify the fact that where an institution has an affirmative action policy in place, it cannot be considered in an employment discrimination claim if that policy was not part of the employment decision.

The second case in this section is another failure-to-hire claim wherein four plaintiffs sued the Louisiana State University Medical Center (LSUMC) alleging that the institution hired two employees who did not meet the objective hiring requirements.\textsuperscript{1568}

In this case, the positions under discussion were an ‘Accountant Supervisor I’ position as well as an ‘Administrative Manager 3’ position. The first position required that the applicants have a bachelor’s degree with 24 semester hours of accounting and three years of professional-level experience in accounting or financial auditing.\textsuperscript{1569} The second position required a bachelor’s degree with 24 semester hours of accounting and two years of professional experience in administrative services, accounting, auditing, purchasing, or staff development.\textsuperscript{1570}

The two Caucasian women chosen to fill the ‘Accounting I’ position were filled through the use of LSUMC’s restricted appointments policy. However, the policy requires that the applicants be qualified for the position.\textsuperscript{1571} After they were hired, LSUMC learned that they were not qualified for the position and thus moved them to the ‘Administrative Manger 3’ position.\textsuperscript{1572} However, at trial, it could not be determined whether either of the employees were qualified for the position as there was insufficient information about their work history in their files.\textsuperscript{1573}

Of the grouped plaintiffs, only one, Cooper, qualified for both positions at the time of hiring. At trial, the issue was whether LSUMC’s expert correctly determined that Cooper would not have appeared qualified based on a review of her file at the time of the job openings.\textsuperscript{1574} Cooper argued that LSUMC ignored its own policy regarding applicants being qualified for the position and further pointed to the fact that LSUMC did not attempt to fill the positions internally as the basis for her Title VII claim.\textsuperscript{1575} At trial, the district court found

\textsuperscript{1567} Id.
\textsuperscript{1568} Johnson v. Louisiana, 351 F.3d 616 (5th Cir. 2003).
\textsuperscript{1569} Id. at 619.
\textsuperscript{1570} Id.
\textsuperscript{1571} Id.
\textsuperscript{1572} Id. at 620.
\textsuperscript{1573} Id.
\textsuperscript{1574} Id.
\textsuperscript{1575} Id.
that the plaintiffs had not made out a prima facie case under the *McDonnell Douglas* framework and granted summary judgment in favor of the defendants.\footnote{Id. at 621.}

On appeal, the court articulated the following rule:

Employers may succeed on summary judgment by establishing that the plaintiff is not qualified for the coveted position. An employer may establish job requirements, and rely on them in arguing that a prima facie case is not established because the employee is not “qualified.” However, only objective requirements may be used in making this argument. Otherwise, an employer could “utilize wholly subjective standards by which to judge its employees’ qualifications and then plead lack of qualification when its promotion process...is challenged as discriminatory.”\footnote{Id.}

Here, in light of the above stated rule, the ultimate question did not center on whether the plaintiffs met the ultimate burden under the *McDonnell Douglas* framework. Rather, the question posed here was whether the plaintiffs were qualified as part of establishing their prima facie case.\footnote{Id.}

This question is implicated at two points in the *McDonnell Douglas* framework; during the establishment of the prima facie case, and the articulation of the non-discriminatory reason for the employment decision. In the instant case, the court points out that the “last prong of the prima facie case requires that a plaintiff establish that the employer sought other employees with the plaintiff’s qualifications.”\footnote{Id. at 624.} It would be unfair to allow an employer then to justify the employment decision by citing lack of qualifications based on the objective requirements; this, the court explained, is where the district court erred.\footnote{Id.} They explained that, “[a]llowing an employer to point to objective requirements in arguing that a plaintiff is unqualified, even though the requirements were not applied to other employees, would subvert the intent of Title VII and McDonnell Douglas.”\footnote{Id.}

The court explained that hiring an employee who does not meet the objective qualifications is a subjective decision that implies that the employee can do the job despite the lack of technical requirements. However, the court noted, “whether or not this determination by the employer was animated by race is a question to be answered by the fact-finder during trial, not by the judge at the prima facie state.”\footnote{Id.} Thus, the district court’s determination that the plaintiffs were not qualified in reliance on the fact that they did not meet the objective qualifications was erroneous. Because LSUMC had not applied the

\footnote{Id. at 621.}
\footnote{Id. at 622.}
\footnote{Id.}
\footnote{Id. at 624.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
objective requirements to the applicants they hired, they should not have been applied to the plaintiffs at the prima facie stage of making their case.\footnote{Id. at 625. This same rule was applied in a Third Circuit failure-to-promote claim, \textit{Scheidemantle v. Slippery Rock University State System of Higher Education}, 470 F.3d 535 (3d Cir. 2006) (finding, "the court was precluded from using a lack of objective qualifications defense, as previously it had ignored those posted qualifications in promoting the employee-plaintiff...by departing from a job posting's objective criteria in making an employment decision, an employer establishes different qualifications against which an employee or applicant should be measured for the position). The Eight Circuit too cites the objective qualifications rule in its analysis in \textit{Legrand v. Trustees of University of Arkansas at Pine Bluff}, 821 F.2d 478 (8th Cir. 1987) (finding, “[t]he district court also found that the plaintiffs were not qualified for the job because they were ‘unreliable,' an assessment that turned largely on subjective evidence produced by the defendant. Even if we assume that this finding is valid, it should not affect the district court’s evaluation at the prima facie stage of whether the plaintiffs have established that they are qualified for the job...the plaintiffs need only show their objective qualifications for the job").}

The discussion of this case illustrates the contrast between how subjective and objective employment qualifications apply in faculty versus non-faculty cases. In faculty tenure decisions for example, in the realm of an employment discrimination claim, it is sometimes difficult to find a similarly-situated employee because of the nature of academia: faculty members are experts in different areas and their scholarship, teaching, and service qualities will invariably be different from one another. This has presented a dilemma for reviewing judges, but has been permitted through the exercise of academic deference, as discussed above. In non-faculty positions, this case seems to illustrate that the qualifications that two applicants must be measured against must be the same, whether the objective requirements are chosen or whether the employer makes a subjective determination that an employee can do the job without meeting them. Expressing this thought in another manner: the amorphous nature of the review of a faculty member's application is a characterization that defines the tenure process - faculty members will be judged on both subjective and objective criteria and no two reviews are exactly the same. With non-faculty decisions, the courts seem to hold employers to a standard where a choice must be made: either hold employees to objective requirements or subjective requirements, but the review of the applicants must be the same.

This is particularly interesting since these two standards take place in the same "special" educational environment. This lends credence to the idea that outside of academic decisions, the university acts like any other business employer in that they are held to the same standards. Thus, despite the courts' language, as analyzed in the previous section, that discussed the university environment as the reason for special treatment, it appears that the job description may be more determinative. Perhaps special treatment is accorded if the job is "purely academic." If the job is more business related such as the accounting position discussed in the above case, special rules don't apply. However, what about the jobs in the middle such as advisors and residence hall directors who have both academic and business qualities? Are those positions accorded special treatment or should special rules be carved out for these hybrid positions?
Termination Based on Race or Gender

This final section discusses several cases that answer novel questions or articulate rules that have not been previously discussed in the study. Those that simply articulate new rules will be discussed in less detail in order to provide a more full discussion on issues of first impression.

Legrand v. Trustees of University of Arkansas at Pine Bluff and Okoye v. University of Texas Houston Health Science Center are cited here simply to note particular nuances in the establishment of a prima facie case that have not been previously articulated.

Recall that in a termination claim, the first prong of a prima facie case requires that a plaintiff establishes that he belongs to a racial minority. In Legrand, the lower court made a factual finding that since University of Arkansas at Pine Bluff (UAPB) is categorized as an HBCU, white is considered the minority race and black is the dominant race; as such, this among other reasons, kept plaintiffs from establishing their prima facie case. However, on appeal, the court reminds us that McDonnell Douglas’s framework is intended to be flexible and cites precedent which holds that “prima facie case of racial discrimination in discharge [cases] may be established even if plaintiff is replaced by [an] individual of his own race.” Thus, the court held that it is not essential that a plaintiff prove he is within a minority group to establish a prima facie case; each case should withstand an independent analysis under McDonnell.

The court in Okoye was also asked to consider the minutia surrounding establishing a prima facie case. The plaintiff, a Nigerian woman was discharged from her employment and sued the institution for discrimination based on race. In the interim, the institution had hired a Jamaican woman to replace her. The plaintiff argued that since she was Jamaican and her replacement was Jamaican, she had met the fourth prong of the prima facie case which required a showing that the plaintiff was replaced by someone outside of their protected class. By contrast, plaintiffs contended that since both the plaintiff and her replacement were black, plaintiff failed to satisfy the fourth prong. The court refused to engage in the minutia and decided the matter on the issue of pretext instead. These cases are cited to illustrate the means of establishing a prima facie claim in non-faculty termination decisions.

821 F.2d 478 (8th Cir. 1987).
245 F.3d 507 (5th Cir. 2001).
Legrand, supra note 1725 at 480.
Id.
Id.
Id.
Id.
Okoye, supra note 1585 at 510.
Id. at 513.
Id.
Id.
Id.
The next two cases discuss defining employees and supervisors in the context of Title VII claims. The latter case definition of supervisor is cited here for historical purposes since that question was recently decided in *Vance v. Ball State*,\textsuperscript{1595} as discussed in chapter two.

In *Cuddeback v. Florida Board of Education*,\textsuperscript{1596} a graduate student was terminated from her assistantship after negative interactions with her supervisor. In her claim of gender discrimination, a question arose as to whether or not the plaintiff was a student or an employee for the purposes of Title VII application. Pertinent to this discussion are the following facts: (1) much of the lab work Cuddeback was completing was in fulfillment of her dissertation requirements; (2) she received a stipend and benefits including annual and sick leave; (3) a collective bargaining agreement governed her employment; (4) during her first year, a university department funded her stipend of $15,000 with a waiver of tuition; and (5) after her first year, her supervisor’s research grant funded her work.\textsuperscript{1597}

In deciding this question of whether the plaintiff is an employee for Title VII purposes, the appeals court employed the “economic realities” test.\textsuperscript{1598} The court explained this rule as follows:

> Under this test, the term “employee” is “construed in light of general common law concepts” and “should take into account the economic realities of the situation,” “viewed in light of the common law principles of agency and the right of the employer to control the employee.” Specifically, the court should consider factors such as whether the defendant directed the plaintiff’s work and provided or paid for the materials used in the plaintiff’s work.\textsuperscript{1599}

The court acknowledged that much of the plaintiff’s work was performed in fulfillment of her dissertation, but was more persuaded by the fact that she received a stipend and benefits, she received annual and sick leave, she was under a collective bargaining agreement, and the reason why she was not re-appointed was for employment reasons.\textsuperscript{1600} Ultimately, the court found that the economic realities of this situation pointed to the conclusion that the plaintiff was a plaintiff for Title VII purposes.

This case is reviewed since it provides a review of applicable considerations in determining whether a graduate student or graduate research assistant is considered an employee for Title VII purposes. The court in *Cuddeback* notes that “[c]ourts that have considered whether graduate students constitute employees...have distinguished between their role as employees and as students, and have typically refused to treat them as “employees”

\textsuperscript{1595} *Vance, supra* note 572 (holding that a supervisor, simply stated, is one who can take tangible employment action against another employee).

\textsuperscript{1596} 381 F.3d 1230 (11th Cir. 2004).

\textsuperscript{1597} Id. at 1232.

\textsuperscript{1598} Id. at 1234.

\textsuperscript{1599} Id.

\textsuperscript{1600} Id. at 1234-35.
where their academic requirements were truly central to the relationship with the institution.”

The next case, on the other hand, discusses the previous considerations for determining whether an employee is a supervisor. In *Gay v. Board of Trustees of San Jacinto College*, Joe Razo was appointed Supervisor of Custodial Employees and as such was plaintiff’s immediate supervisor. On January 3, 1975, Razo fired the plaintiff while yelling racial epithets at her. Later, the plaintiff was notified that she was suspended for a week without pay. Plaintiff neither returned to her job the following week, nor did she acknowledge all subsequent offers of reinstatement. At trial, the court found that Razo was an agent of the college and was acting within his agency powers when he fired the plaintiff. The court therefore ordered a judgment in her favor.

On appeal, the defendant-institution protested the characterization of Razo as the plaintiff supervisor since their institutional procedures specified that only the president could fire an employee. However, the court noted that the defendant-university could not prove that plaintiff was aware of this dictate and agreed that Razo was acting as an agent of the college when he fired the plaintiff. Thus, here, the determination of whether Razo was a supervisor rested on agency principles – despite the fact that Razo had no authority to fire plaintiff, the fact that he was held out as an employee with that level of authority was enough to make a determination that he was plaintiff’s supervisor.

The final case under review in this study implicates an issue of first impression. In *Holcomb v. Iona College*, the court is presented with a unique question that asks whether Title VII protects a plaintiff/employee from racial discrimination on account of his association with a person of another race.

Holcomb was hired as an assistant coach for the Iona Gaels men’s basketball team in 1995. Three years later, a new head coach, Jeff Ruland, came on board to coach the team. Simultaneously, Holcomb became “assistant head coach.” At the time, the team was enjoying some success having won the Metro Atlantic Athletic Conference Tournament in 1998, 2000 and 2001. From 1998 through 2004 Ruland supervised Holcomb, Tony Chiles, who is African

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1601 *Id.* at 1235.
1603 *Id.* at 1.
1604 *Id.*
1605 *Id.*
1606 *Gay v. Board of Trustees of San Jacinto College*, 608 F.2d 127 (5th Cir. 1979).
1607 *Id.* at 128.
1608 521 F.3d 190 (2d Cir. 2008).
1609 *Id.* at 130.
1610 *Id.* at 132.
1611 *Id.*
American, and Rob O’Driscoll who is white. In the interim, in 2001 Holcomb who is Caucasian married an African-American woman, Pamela Gauthier.  

In 2004, the decision was made to fire both Chiles and Holcomb, while keeping on Ruland and O’Driscoll. Holcomb charges two people with having made this racially discriminatory employment decision: Shawn Brennan, Director of Athletics, as well as Richard Petriccione, Vice President. Specifically, Holcomb alleges that Brennan and Petriccione had histories of racially questionable conduct; he cites several incidents as the basis for his claim.

The first incident Holcomb cites is Brennan’s decision to ban high school students as well as Holcomb’s wife from “Goal Club” alumni/fundraising events that Brennan hosted as Director of Athletics. Between 1997 and 2003 it had been the habit of high school basketball players to attend these post-game parties; most of these high school students were black. In 2003, one such party was attended by several black high school basketball players wherein Brennan directed Holcomb to ask all the students to leave. Brennan alleges the decision was made because a player that Iona was intending to recruit was among the number of students at the party and he was scared to violate NCAA recruiting regulations. Holcomb challenges the veracity of Brennan’s story indicating that permitting high school students at these events was a “gray area” in his reading of the regulations and that contrary to Brennan’s concerns, his dictate could seriously hurt recruiting efforts. Significantly, after this event, both Holcomb’s African-American wife and Rudin’s African-American girlfriend were banned from Goal Club functions as well. Holcomb also alleges that he heard Brennan say “get these colored boys to dress like the white guys on the team.”

Second, as to Petriccione, Holcomb alleged that he had a history of making racially offensive comments. Several of them include: “[E]verybody at Fordham thinks they have these good black kids, and Iona has niggers,” addressing Holcomb, he directed him to “keep [his] niggers in line,” “[W]hat does she think she is coming from a hut in Africa and thinking she could apply for this job?” and “[Y]ou’re really going to marry that Aunt Jemima? You really are a nigger lover.”

Several events occurred which exacerbated this racially charged situation. The basketball team experienced a downturn between the years of 2001 and 2004. As a result, a report was requested by the administration evaluating the basketball program. Brennan

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1612 Id. Ruland, the head coach also dated an African American woman.
1613 Id.
1614 Id.
1615 Id. at 133.
1616 Id.
1617 Id.
1618 Id. at 133-34.
1619 Id. at 134.
1620 Id.
1621 Id. at 135.
prepared a preliminary report and a final report, the result of which was to terminate the employment of Holcomb and Chiles. While Ruland was concededly retained because of his extremely expensive contract, there was no indication in the report regarding why O'Driscoll was retained as opposed to Holcomb and Chiles. Holcomb then sued in the district court; the judge therein reviewed the case under the McDonnell Douglas framework but ultimately determined that “[e]ven if Petriccione and Brennan had previously engaged in racist conduct, Holcomb 'h[ad] not established any facts that link these alleged racist tendencies... to the administration’s evaluation of the basketball program.'”

On appeal, the court similarly reviewed the claim under McDonnell; ultimately the court found that Holcomb was able to establish a prima facie claim, that the institution had proffered a legitimate non-discriminatory reason for the employment decision, but that factual issues remained that rendered summary judgment inappropriate in these circumstances. It is the court’s decision that Holcomb was able to make a prima facie case that is the focus of this review.

In a novel argument, Holcomb alleged that the discrimination he suffered was not solely due to his own race, but also due to the fact that he was married to an African-American woman. In analyzing whether his association with his wife could satisfy the first prong of a prima facie case, the court analyzed applicable precedent. In so doing, the court noted the several cases engaged in a restrictive reading of Title VII wherein the statute was understood as on that protected an individual from discrimination because of that individual’s race. In contrast, the court herein chose a more expansive understanding of Title VII’s protections and found, “[w]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee’s own race.” In support of this conclusion, the court cited several district court cases within the Second Circuit as well as precedent found in decisions from the Fifth, Sixth, and Eleventh Circuits. Therefore, the court found that Holcomb was able to establish a prima facie case citing his interracial marriage in satisfaction of the membership-in-a-protected-class prong. The court, finding that factual issues remained to be resolved vacated the judgment of the district court to grant summary judgment in favor of the defendant-institution.

The cases cited in this section of the study attempt to elucidate how the university acts as an employer when the discrimination claims are brought by non-faculty members. In

\[1622\] Id. at 136.
\[1623\] Id. at 137.
\[1624\] Id. at 138.
\[1625\] Id. at 138-39.
\[1626\] Id. at 139.
\[1627\] Id.
\[1628\] Id.
\[1629\] Id. at 138.
furtherance of this goal, the researcher highlighted several rules applicable to the failure to promote, failure to hire, as well as termination claims. This review discussed the manner in which the prima facie case is modified in each of these instances in order to accommodate non-faculty issues. Further, concepts which had not arisen in the academic context were reviewed: reverse-discrimination claims and the manner in which the prima facie case is established; the application of the “objective qualifications” rule; the considerations that factor into the determination of whether a graduate assistant constitutes a student or an employee for Title VII purposes; and finally, the ability of a Title VII plaintiff to make a prima facie case for employment discrimination based on his association with a person of another race.

In so doing, the researcher completes the analysis of how Title VII applies in institutions of higher education in response to the first research question posed. A discussion of the conclusions drawn as well as the response to the second research question take place in the next, final chapter.
CHAPTER SIX

SUMMARY & CONCLUSIONS

Title VII of the Civil Rights Act of 1964 is the federal statute that prohibits discrimination against employees in the workplace based on race, color, religion, national origin, and sex. At the time of its passing, the federal legislation contained an exemption wherein educational institutions as well as state and local government employees were not protected under the statute. In 1972, Congress, recognizing the rampant effects of racial and gender discrimination in education, amended the statute with the Equal Employment Opportunity Act. These amendments removed the exemption and brought educational institutions under the protection of Title VII protecting upwards of 80 million more employees than it would have without the amendment. While the Act is enforced by the Equal Employment Opportunity Commission (EEOC) by congressional mandate, the number of individual claims of discrimination has increased since the statute’s enactment. A good number of those claims come from employees who work in the country’s institutions of higher education.

In the United States, the pursuit of higher education has reached massive numbers. As cited in the study, approximately 20 million students are enrolled in some form of post-secondary education. And the trends in higher education no longer speak of elite or mass higher education; rather, education experts are starting to speak in terms of globalization. The history of higher education in this country is overall characterized by extreme growth and that trend continues today. Indeed, some educational scholars theorize that institutions of higher education have gone through a metamorphosis wherein their foundational educational mission has been supplanted by business concepts and practices. This is evinced by the fact that higher education has become a multi-billion dollar industry. In fulfillment of its overall educational mission, college and university campuses have become microcosms of society offering students an education as well as a host of services that manifest the work of thousands of employees.

As such, the primary goal of this study has been to determine how the university acts as an employer. Specifically, this study sought to determine how Title VII applies within the special environment of the American institution of higher education. Employing legal-historical methods, the researcher first conducted an extensive literature review tracing both: (1) the evolution of Title VII by tracing the legislative, judicial, and regulatory changes that took place after the enactment of the federal statute; and (2) the evolution of the system of higher education in this country focusing on the events that helped clarify the purposes and goals of higher education with an eye toward determining how education came to claim such a venerated status in American society.
Having provided a foundation for understanding employment discrimination as well as the American system of higher education, the researcher undertook an extensive review of American jurisprudence wherein Title VII was implicated in the setting of a higher education institution. The object of this analysis was to determine how academic-specific concepts such as the corporatization of higher education, academic deference, and tenure influenced the application of Title VII in higher education institutions.

In order to make this determination, the legal database, Westlaw, was utilized to search federal court decisions that applied Title VII in colleges and universities and raised claims of discrimination based on gender and race. The review of cases was limited to those tried at the appellate court level. Further, the cases were categorized by claims brought by faculty members as distinguished from claims brought by non-faculty members. Claims that were filed by faculty members necessarily implicated academic concepts such as tenure and academic deference. Claims that were filed by non-faculty members were analyzed to determine how the university acts as an employer when academic specific concepts are not implicated.

Once the analysis revealed how Title VII responds to the university setting, the researcher was able to make a determination as to whether the corporatization of higher education necessitates a change with regard to the application of the statute in institutions of higher education. This determination is discussed in further detail below during the report of key conclusions of the research.

**Key Conclusions**

This study was guided by the following questions:

1. **How has the law of employment discrimination been applied within the environs of institutions of higher education with respect to claims of discrimination based on race, color, and gender?** and

2. **What changes should be made, if any, to how the law of employment discrimination is applied in the field of higher education considering the emergence of the modern corporatized university and the special concerns associated therewith?**

In response to the first research question, the researcher determined as follows:

   a) **The corporatization of higher education was only subtly manifested in the review of the case law.**

   The researcher has hypothesized that the corporatization of higher education and the attendant changes it has wrought on the traditional university structure should change how the institution is perceived for the purposes of applying Title VII to institutions of higher education. However, the manner in which judges approached academic decisions in the sample of reviewed cases leads the researcher to the conclusion that the phenomenon of corporatization has yet to *overtly* influence the several circuit courts of appeals judges.
Indeed, as discussed in the previous chapter, judges understand the institution of higher education as a venerated entity with a highly important mission in society. In Chapter Three, the researcher sought to describe the mystique of higher education and proffered several reasons for the positive visceral response society, including judges, have toward institutions of higher education. The fascination with college/university lives on in judge’s views of these institutions. Indeed, the traditional understanding of the university as a place of learning and marketplace of ideas greatly influences judicial decision making. This is manifested in opinions on academic freedom, justifying academic deference, that speak of the university in elevated terms. For example, the court in *Kunda* found, “[o]ur future, not only as a nation, but as a civilization, is dependent for survival on our scholars and researchers, and the validity of their product will be directly proportionate to the stimulation provided by an unfettered thought process.” Since this is how courts continue to view institutions of higher education, it is no wonder that corporatization has not manifested as hypothesized by the researcher.

Corporatization may however have covert or rather, implicit effects on the litigation of Title VII claims. If corporatization means the influence and application of business concepts and practices in the field of higher education, then the faculty members in particular, who file claims alleging discrimination in employment decisions such as failure to promote or denial of tenure may be influenced by business concepts themselves. In filing a claim of discrimination for a failure to promote decision for example, a faculty member may implicitly have recognized the existence of an implied contract, the terms of which promise a promotion after a certain term of service and the completion of certain tasks; the discrimination claim then, serves as a means of protesting a decision that should not have happened in the absence of some improper purpose. In other words, where a faculty member sues a university for discrimination, he may be implicating the most standard business concept of all: the business contract.

For example, the plaintiff in *Tanik* was frustrated by the proffered reasons for his denial of tenure in that they failed to specifically articulate the why the employment decision had been made. This implies a certain sophistication evinced by the expectation that the terms of the agreement between the faculty member and the university be certain and definite in compliance with contract law.

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1630 The study herein discussed the confluence of media coverage detailing the exploits of college students, college atmosphere, college football and a host of other events came to capture the imaginations of American society. *See supra* 101-103.

1631 *Kunda*, *supra* note 20 at 547.

1632 *Tanik*, *supra* note 1161. Recall that the institution asserted failure to receive the requisite number of votes, that the decision was a group decision, and that no single reason served to explain the decision except that the breadth and depth of plaintiff’s scholarship and the quality of his teaching and service did not merit the award of tenure.
However, a review of the agreement between the parties illustrates that the contractual principle that appears to characterize academic contracts is *caveat emptor* – let the buyer beware. For example, the contract for a tenure-track appointment is sufficiently definite and certain in its terms with regard to the term of employment as well as the requisite obligations of both parties with regard to duties, wages, and etc. However, the part of the contract that covers the grant of tenure is riddled with vague terms that both parties understand at the time of contract execution. In other words, a grant of tenure is subject to the discretion of several review committees and high-level administrators and based on highly-subjective criteria couched under umbrella the terms of teaching, service, and scholarship.

This subjectivity was manifested in the *Carpenter* case wherein both the departmental committee and the college-level committee unanimously voted to grant tenure, but the award was ultimately denied due to concerns from the provost. Further, the amorphous nature of tenure decisions was revealed in *Namenwirth* where tenure candidates are judged by vague qualities such as "demonstrated potential for growth." A reviewing tenure committee generally gauges the presence of these qualities based on their own barometer in a nod to Justice Stewart’s “I know it when I see it” standard.\(^{1633}\)

General contract principles will not allow a judge to nullify the terms of a contract where that contract was entered into knowingly by both parties. Understanding this, it doesn’t seem that an employee who was not granted tenure should expect general contract principles to apply to his situation. Thus, if the corporatization of higher education is manifested by expectations of faculty for more business-like contracts with more definite terms, the faculty member will be continually frustrated since the academic portion of campus affairs seems unsusceptible to corporatization concepts.

b) **Corporatization is often considered the antithesis of academic deference; but with regard to academic employment decisions, academic deference wins.**

Corporatization is the influence and application of business concepts and practices to the field of higher education. In the university setting, while the educational mission is relevant, it is only a part of the mission of the corporatized institution. As discussed herein, university campuses are often sites of consumerism manifested by the presence of fast food locations on campus and the college football business which generates millions of dollars annually – education seems like a commodity that is *also* provided on site.\(^{1634}\) The hybrid nature of the modern university campus prompted Thelin to ask, “Why should a college that has a travel agency or a computer sales center in its student union bet treated any differently

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\(^{1633}\) In an obscenity case, Justice Stewart acknowledged the difficulty in defining the term hard-core pornography. Regarding the film under review in the case, he indicated, “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.” *Jacobellis v. State of Ohio*, 378 U.S. 184 (1964).

\(^{1634}\) See *supra* 141-142.
from a private business? His question gets at the very heart of corporatization, recognizing the complex status of today’s institution of higher education.

Conversely, academic deference adheres to the purist understanding of educational institutions as described by Lucas in the outset of this study. The flowery language employed by the Court to describe the lofty mission of educational institutions is evidence of this view. This was evinced in by the Kunda court as quoted above, and can similarly be seen in Keyishian as the Supreme Court discusses the country’s commitment to protecting academic freedom. The Court stated, “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us…the First Amendment…does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of academic freedoms is nowhere more vital than in the community of American schools.” (Emphasis added.)

Throughout the analysis of the reviewed cases, academic deference revealed itself in several contexts. For example, as discussed during the discussion of judicial review in tenure denial decisions that took place in the previous chapter, the researcher noted that judges appear to have a firm grasp on the concept of tenure. Indeed, the collective opinions in Namenwirth, Blasdel, and Zahorik illustrate the courts’ understanding of the difficulties surrounding the concept of tenure. However, their inability to mold denial of tenure decisions to fit the applicable Title VII analysis often results in an application of academic deference, as previously discussed. Secondly, in Carpenter, the institution was able to assert a defense that its tenure qualifications were job related. This assertion was made without any review of the appellate court and accepted without question in an exercise of academic deference. Third, in Gutzwiller, the court considered reinstatement as a possible remedy for the successful plaintiff in a discrimination claim, however, as to tenure decisions, the court noted that such a remedy may not be the best option since it requires the courts to entangle themselves in “matters best left to academic professionals.” Thus, where academic employment decisions are concerned, it appears that academic deference remains the rule rather than the exception.

c) Academic deference does not manifest itself in non-faculty decisions.

The application of Title VII to non-faculty decisions on university campuses seems to mirror the application of Title VII to general employment situations. Thus, the hypothesis that the university environment would determine how the federal statute applies is not necessarily accurate. Rather, the type of employment decision under review determines the

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1635 Thelin, supra note 635 at 358.
1636 See Sweezy, supra note 963; Keyishian, supra note 967
1637 Keyishian, supra note 967 at 603 (speaking to the importance of education in America.)
1638 See Zahorik, supra note 1290; Namenwirth, supra note 1309; Blasdel, supra note 1310.
1639 Carpenter, supra note 1231.
1640 Gutzwiller, supra note 1291 at 1333.
application of Title VII in the university environment. This conclusion is buttressed by the court's discussion on academic freedom in *Kunda*, wherein the court stated, “[i]t does not follow that because academic freedom is inextricably related to the educational process, it is implicated in every employment decision in an educational institution.”

The several non-faculty cases under review, while illustrative of novel questions, employ rules and tests that apply in most other business environments. While the review of the non-faculty decisions answered questions that uniquely apply to the academic setting, such as whether a graduate student is an employee or a student for Title VII purpose, the rules used to answer these questions applied general Title VII employment discrimination principles. Therefore, there is a split on university campuses created by the application of academic deference to faculty decisions and the application of general Title VII principles to non-faculty decisions.

d) Other rules besides academic deference work to frustrate a finding of illegal employment discrimination under Title VII on university campuses.

Academic deference can serve as a deterrent to making a finding of impermissible discrimination as illustrated throughout this study. However, other rules as applied to the denial of tenure or failure to promote fact situations similarly deter such a finding.

For example, the application of the stray-remark rule in the context of a denial of tenure case could work to significantly frustrate the intent of Title VII. It amounts to a determination that “one apple doesn't spoil the bunch.” But in the context of a tenure review, this is not necessarily so.

As discussed previously, several courts are of the mind that the utterance of a discriminatory remark by a colleague or other employee is considered a stray remark depending on how attenuated the utterer and the comment itself is from the ultimate employment decision. Thus, a faculty member subject to discriminatory remarks by his department head may not successfully provide as proof of discrimination the utterance of those remarks because the department head is not the final decision maker in tenure decisions. However, a tenure review at each successive level allows a certain amount of deference to the recommendation of the prior level; additionally, department-level recommendations are specifically important since they know the candidate and his potential as a professor best.

Although this rule may apply well in other employment environments where a co-worker who utters discriminatory remarks is not likely to have an influence on the employment decisions regarding another co-worker, in faculty situations, a faculty member's co-workers will likely be reviewing him/her for tenure and their opinions are granted

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1641 *Kunda*, *supra* note 20 at 547.
1642 See *Sun*, *supra* note 1163; *Krystek*, *supra* note 1355.
deference at the college and university levels and may inform the decision of the next person
to grant or deny tenure. Thus, this rule and similar rules may benefit from some adjustment
in order to better suit the academic environment.

d) The **McDonnell Douglas framework reigns as the means in which judges**
   analyze employment discrimination claims.

The claims under review substantially applied the tripartite test in order to make a
determination as to whether intentional discrimination took place. Each jurisdiction applied
the test and modified the requirements for the establishment of a prima facie case according
to the type of employment decision being challenged.

In noticing the omnipresence of this analytical framework, the resultant implication is
that disparate impact cases were filed with significantly less frequency in higher education
claims. Again, the sample size was too small for the researcher to hazard a guess as to why
those claims are brought less often. But the few claims that were brought on that alternate
theory similarly attempted to use statistics in order to prove discriminatory impact. The
difficulties involved in obtaining statistics that would prove discrimination under this theory
led the researcher to believe that this was the reason why this theory was not utilized at the
same rate as the disparate treatment theory. Unfortunately, the plaintiffs in the sample of
cases were not often successful in proffering the sophisticated statistical evidence that would
lead a court to the inference that discriminatory impact resulted from an implemented policy.

f) The separation of claims by protected class yielded no trends from which to
draw any conclusions.

The research conducted in the literature review, particularly in the second chapter reveals
the rampant discrimination that existed in higher education prior to the extension of Title VII
to higher education institutions. When Congress was considering the extension,
discrimination against women as well as African Americans was well documented in the
legislative history.

In examining the claims, 37 claims alleged gender discrimination, 27 alleged race
discrimination, and 5 claims alleged both gender and race discrimination in the same claim.
Again, these are across all employment decision types and include both faculty and non-
faculty decisions. Additionally, the sample size is too small to make any inferences with
regard to the claims by protected class.

In response to the second research question, the researcher determined as follows:

a) **Judges should re-consider applying academic deference to employment**
   discrimination claims.

The researcher proffers several arguments to support this conclusion:

First, as discussed in response to the first research question, academic deference as
applied on university campuses undercuts the application of Title VII to employment
discrimination decisions. Chapter two of this study extensively discussed the presence of racial and gender discrimination amongst higher education institutions during an examination of the 1972 amendments to Title VII.\textsuperscript{1643} Congress was persuaded by witness testimony and statistics illustrating the manner in which women and racial minorities were treated in institutions of higher education. Said witness testimony and statistics showed rampant disparities in the number of female highly-ranked faculty at colleges and universities; it further showed the lack of African American faculty members in predominantly white institutions (PWIs), among other alarming facts. Therefore, the protections of Title VII were specifically and conscientiously extended to cover this area. Academic deference, which works to leave academic employment decisions in the hands of academicians subject to little or no review, goes against the congressional intent of Title VII.

Next, the case against academic deference began soon after the inception of the application of the doctrine. Chapter Five contains a discussion on academic deference wherein the origins of the doctrine are explored within the \textit{Faro} decision in 1974.\textsuperscript{1644} Soon after, Judge Moore would backpedal on his stance on academic deference, recognizing how far the doctrine had gone, noting that the ”anti-interventionist policy…rendered colleges and universities virtually immune to charges of employment bias.”\textsuperscript{1645} Later, in \textit{University of Pennsylvania v. E.E.O.C.},\textsuperscript{1646} the Supreme Court would speak definitively against allowing universities a privilege allowing institutions to withhold peer-review documents from plaintiffs in an employment discrimination claim. The Court held, ”[a] university faced with a disclosure request might well utilize the privilege in a way that frustrates the EEOCs mission. We are reluctant to ‘place a potent weapon in the hands of employers who have no interest in complying voluntarily with the Act…”\textsuperscript{1647}

Thus, the doctrine has a shaky foundation. The judge who first enunciated its principles backpedaled from them a mere four years later when it was evident that judges had taken his concerns too far. The collective decisions cited above evince a commitment to furthering congressional intent to eradicate discrimination from higher education institutions; thus, where academic works against that, the courts have expressed grave concerns about employing the doctrine as a practice.

Lastly, judicial adherence to the doctrine is a manifestation of habit, fascination, and laziness as discussed in the previous chapter. Many times, the doctrine is applied routinely, as if the presence of a university-defendant automatically requires the application of the doctrine. Further, adherence to the doctrine’s application is a result of judges’ view of

\textsuperscript{1643} See supra 36-41.
\textsuperscript{1644} Faro, supra note 1138.
\textsuperscript{1645} Powell, supra note 1482 at 1153.
\textsuperscript{1646} University of Pennsylvania, supra note 1496.
\textsuperscript{1647} Id. at 194.
colleges and universities as the isolated ivory tower, not subject to societal rules. As discussed in the previous section, as long as judges continue to venerate institutions of higher education in this manner, these institutions will not be viewed as "regular" employers subject to the strictures of Title VII and will continue to perpetuate the discrimination Congress sought to eliminate back in 1972.

However, as a final point, it should be noted that the researcher recommends curbing the application of academic deference specifically for employment discrimination decisions. This study sought to illustrate that when the interests between adhering to the doctrine of academic deference and detecting instances of discrimination compete, judges should work towards fulfilling their duties to help eradicate employment discrimination in colleges and universities. The researcher acknowledges that the application of academic deference may be appropriate in other instances that have to do with protecting faculty rights in their teaching and research endeavors, subject to the application of substantive and procedural due process rules. Thus, this finding is limited to those cases where employment discrimination issues are implicated.

b) Modern colleges and universities should implement campus anti-discrimination policies that may help combat Title VII claims of employment discrimination.

The cases reviewed in this study do not provide an indication of the policies institutions implement in order to prevent suits alleging discrimination in employment. However, the several fact patterns in this study illustrate where colleges and universities in particular become vulnerable to lawsuits. For example, the denial-of-tenure decisions discussed throughout the study are highly-subjective decisions that expose institutions to conflict when the faculty member disagrees with the employment decision made. This phenomenon was seen in Carpenter v. Board of Regents of the University of Wisconsin,\textsuperscript{1648} Kumar v. Board of Trustees,\textsuperscript{1649} University of Massachusetts, and Manning v. Tufts\textsuperscript{1650} wherein each faculty member going up for tenure passed several successive rounds of consideration before ultimately being denied tenure. This reveals two vulnerabilities of the grant-of-tenure decision-making process (and other similar employment decisions): one, even academicians may not agree amongst themselves who should be granted tenure; and two, a lack of awareness amongst department heads and administrators of the potential effects of such subjective decision-making processes.

As a result, colleges and universities would do well to shore up policies that may help make them less vulnerable to claims of discrimination in employment. First, many times academic administrators many times come up through the ranks of faculty positions; as such,

\textsuperscript{1648} Carpenter, supra note 1231.
\textsuperscript{1649} Kumar, supra note 1259.
\textsuperscript{1650} Manning, supra note 1340.
they may not have obtained management experience that may assist them with handling administrative issues as they pertain to tangible employment decision-making. Therefore, institutions should provide faculty members rising to administrative positions with annual (or bi-annual) training that allows them to become better equipped to handle these types of administrative issues that may result in litigation if improperly dealt with.

Second, institutions in recent years have been proactive in releasing non-discrimination in employment statements which are inclusive of more protected classes than even provided for by Title VII. Requiring university employees to participate in training sessions wherein relevant employment discrimination issues are discussed may go a long way toward preventing costly litigation. These sessions should be required on a regular basis such that campus employees are kept abreast of situations that may give rise to an employment discrimination claim as well as the potential remedies available to them on campus.

Finally, institutions should regularly disseminate information to employees regarding the non-discrimination in employment policies that are effect on campus through flash emails and/or bulletin boards on campus; further, human resource professionals should be more visible on campus in order to head potential issues off at the pass. Affording campus employees information regarding the grievance processes and procedures that may be available to them in lieu of litigation may save the institution money in the long run.

As initially stated, it is difficult to glean from the examined case law to what extent universities are employing any of these practices. However, these policy suggestions provide a workable solution to potentially decreasing the university’s exposure to costly litigation.

c) The manner in which academic claims of employment discrimination are handled should be overhauled.

The reviewed cases admittedly reveal the difficulties in getting beyond the subjective and determining the true motivations behind a particular employment decisions since doing so requires the proffer of witness testimony and document review in search of evidence that sometimes may not be available.

Currently, a claimant who wishes to proceed with an employment discrimination claim through legal channels must adhere to the requirements as set forth by Title VII in having the EEOC investigate the charge. A right-to-sue letter is a requirement prior to the institution of litigation within the courts. Therein, a claimant may file both federal and state claims in hopes of obtaining some type of relief. For the university campus, the litigation of this claim through to trial involves expending massive resources in the form of university general counsel, outside counsel, mediators, discovery, and other costs attendant with the process.

1651 Some institutions of higher education provide protections for gender identity and sexual identity as well as sexual orientation, for example, even where federal statutes do not.
Several claims discussed in the study revealed the intricate nature of the grievance/appeals process faculty members take advantage of after a negative employment decision. Indeed, several faculty had a non-grant of tenure decision reviewed 3-4 times after the initial review prior to instituting legal action. One case in particular, *Sun v. University of Illinois*, noted the extensive grievance process that plaintiff utilized and it played a part in the judge’s final decision that no discriminatory intent permeated the employment decision. Therefore, the researcher was able to conclude that the implementation of carefully-crafted grievance procedures that provides a complaining employee several reviews of the employment decision for improprieties, may serve to guard against a finding of liability later in court. While the grievance procedure in *Sun* did not prevent litigation of the claim, it was an integral part of the positive outcome for the university.

This suggestion works to provide the complaining faculty member with several levels of review in hopes that exhausting these measures will prevent litigation. In the instances where it does not prevent litigation, *Sun* teaches that evidence of the grievance procedure may be evidence of good faith before the court and may save the university a substantial amount of money in the long run.

The current option wherein plaintiffs come to court expecting a review of the academic decision only to be met with an academic deference response works to frustrate both the plaintiff-employee and the defendant-university. Thus, the involved parties should work to find means to settle issues out of court and use the litigation process as a means of last resort. To that end, the researcher recommends the inclusion of mandatory arbitration clauses in academic employment contracts. Several cases have discussed the use of arbitration within the context of an employment discrimination claim. Specifically, the court in *E.E.O.C. v. Luce* found, “[s]pecifically, §118 of the 1991 [Civil Rights] Act provided that ‘where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including…arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law as amended by this title.’ In terms of mandatory arbitration agreements, the *Luce* court upheld them based on precedent from several circuits finding that they were not barred by Title VII.
As mentioned previously, a faculty member, for example who alleges discrimination may engage in some form of the following process: the faculty member will likely avail themselves of the available university grievance process. If this proves ultimately unsuccessful, the faculty member may decide to sue the institution filing claims with either or both of the EEOC and their state equal opportunity enforcement agency. The faculty member will then be forced to wait until the agencies conduct their investigation and provide him/her with a right-to-sue letter. At this point, the faculty member may instigate a suit in federal court wherein the judge may order mediation in hopes of settling issues out of court. Where mediation efforts are not successful, the claim may be litigated through to final judgment. This process could take years.

Rather than engaging in that long and drawn out process, utilizing arbitration as a means of alternate dispute resolution may provide a preferable solution to the dispute. Currently, arbitration is used to resolve issues similar to those that sound in breach of contract such as denial of a summer appointment; it has not generally been used to resolve issues that involve discrimination claims on university campuses. However, the review of an employment discrimination claim by an arbitrator who specializes in cases of this sort and is well versed with the competing interests of the university as well as the faculty member may be less inclined to apply academic deference and more focused toward finding a workable solution that is palatable to both parties. The use of specialized or expert arbitrators who have sophisticated knowledge regarding employment discrimination issues as well as the special interests of university campuses may provide a viable and preferable means of alternate dispute resolution.

Requiring university employees to agree to mandatory arbitration resolves a host of issues. First, when this term is provided for at the time the employment contract is executed, it places the parties on notice of their respective rights and responsibilities in the event a claim of discrimination should arise. Second, it provides a quicker resolution than if the case were litigated and a private venue for the resolution of disputes. Third, pursuing arbitration may be less costly for both sides. While it has been noted by one scholar that arbitration costs may make this means of dispute resolution expensive, it was observed that this is often takes place with unsophisticated employees in unequal bargaining power as the employers; this seems less likely in this case of academicians who are experienced with reading and comprehending the terms of an employment contract. Fourth, it provides a

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1658 Id at 904.
means of obtaining a final decision reducing the likelihood that a disgruntled plaintiff may abuse the process currently available to obtain “nuisance” money from universities.\footnote{The researcher acknowledges that this solution may be difficult to implement in institutions where faculty members are also union members whose employment terms are covered by a collective bargaining agreement. As explained previously, arbitration is generally used in those institutions when a term under the employment contract or collective bargaining agreement is alleged to have been breached. The recommendation, as made above, would represent a suggested change for how employment discrimination issues are handled on university campuses. While arbitration may work to cap the potential for damages a plaintiff may obtain, where employees are advised that it is the only available remedy, it can also work to provide solutions that are amenable to both parties in a more timely and less expensive fashion.}

This solution would save both the university as well as the plaintiffs from expending massive financial resources, and it may work to help relieve the judiciary from a category of cases that appear to confound them.

\textbf{Limitations}

Some limitations affected the results of this research; they are delineated below:

\begin{itemize}
  \item[a)] Conducting an analysis of case law at the appellate level substantially influenced the conclusions drawn from the examined jurisprudence.
  \begin{itemize}
    \item As discussed at the outset of chapter five, cases reached the appellate court in a posture that examined the findings of the lower court with an end toward whether an error had been made rather than determining the merits of the claim. For example, several cases were reviewed under a clearly erroneous standard which required the reviewing court to determine whether a serious mistake had been made before overturning the judgment of the court. Even where the court determined that a serious mistake had been made, procedurally, the case would be remanded back to the lower court for proceedings consistent with the findings of the appellate review.
  \end{itemize}

  In light of the scope of review at the appellate level, the researcher was unable to examine the findings made by the trial court. The trial court is the ultimate fact-finder and the findings of fact and conclusions of law made at the trial court are a reflection of a judge’s ability to determine the credibility of evidence as well as witness testimony. Thus, a study of district court cases would have provided invaluable insight as to the influence of the variables under study, particularly academic deference as well as the corporatization of higher education. Specifically, the researcher may have been able to discern how district court judges view universities in general: this would have been revealed in their application or non-application of academic deference to the analysis of the matter before them.

  \item[b)] The sample size of the reviewed cases was too low to make any inferences with regard to trends that may have existed in the case law as time progressed from 1972 to the present.
  \begin{itemize}
    \item At the outset of this study, it was hypothesized that the search would yield a number of claims that may reveal any number of trends. As such, the researcher sub-categorized cases
based on protected class, employment decision type, and whether or not a faculty member brought the claim or not. It was anticipated, for example, that conclusions could be drawn about the manner in which a particular employment decision category was tried in a particular jurisdiction over a period of time. However, with only 70 cases under review, and several employment decision types over 13 appellate circuits, there were not enough cases within each category to note any particular trends.

Overall however, the researcher did notice a change in the manner in which claims came before the court. The first cases under review were tried in the early 1970s and came in the form of preliminary injunctions which requested that the court, for example, prevent an employer from firing an employee during the pendency of the trial. From the late 1970s moving forward, many claims were brought to the court challenging the findings of the lower court and wherein the appellate court was constrained to a “clearly erroneous” standard of review. Finally, in the mid-1980s and more often in the 1990s moving forward, the claims before the appellate court increasingly came as a result of a grant of summary judgment, for example, in favor of a defendant and the plaintiff was appealing the decision of the lower court. Aside from this trend and the noted difference between faculty and non-faculty claims, there were no other observable trends.

Suggestions for Future Research

This study sought to determine how Title VII applies in higher education institutions. The major finding of this study is that Title VII applies in two ways on university campuses: one manner makes special rules and considerations for academic personnel and the other follows business trends and applies Title VII as it is applied in most other employment environments. Further, this study questioned what changes should be made to how Title VII is applied to higher education institutions in light of the phenomenon of corporatization in higher education. The researcher concluded that the outmoded doctrine of academic deference should no longer be applied to academic decision-making. Further, the researcher provided suggestions on how to change the means in which employment discrimination allegations are treated within the university prior to resorting to litigation.

This study was limited in certain ways and the findings herein can benefit from further study. First, the researcher makes assumptions regarding the application of academic deference based on the incidents of application that were noted in the sample. However, perhaps a better reflection of the application of the doctrine would be gleaned by researching district court cases. As the fact-finders and the only court who provides an extensive trial of the issues in the claim, this may provide a better indicator of what factors influence judicial decisions rather than making inferences based off of the limited scope of appellate review. Researching district court cases may also provide a clearer picture of whether the concept of corporatization has manifested itself in employment discrimination case law.
This study provides a foundation for understanding how Title VII reacts to institutions of higher education. In part one of the literature review, the researcher discussed the rampant discrimination against women and African-Americans in colleges and universities that often resulted in disparities in treatment such as a dearth of minorities in higher ranking positions as well as unequal pay. The findings of this study provide a basis for more extensive studies that focus on factors that were specifically limited from this research. For example, during the hearings on the 1972 amendments to Title VII, Congress heard testimony which demonstrated that unequal pay was rampant in institutions of higher education; therefore, a study on disparity in wages would be particularly relevant in this environment.

Finally, as much to-do has been made about the application of academic deference in higher education, a detailed comparison study between cases litigated against universities as opposed to a typical corporate structure may shed some light as to whether universities are truly metamorphosing into businesses as hypothesized. Conducting research of this sort could provide a better sense of where institutions of higher education stand and how they can work to create a better balance between protecting academic interests and adhering to the national policy against discrimination in the workplace.
APPENDIX A

TABLE OF CASES BY CATEGORY

Faculty Decisions

Non-Faculty Decisions
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Marilyn S. Anglade is a doctoral candidate in the College of Education, Department of Education Leadership and Policy Studies (ELPS) seeking a Ph.D. in Higher Education. As a graduate student in the ELPS department, Ms. Anglade served as a graduate assistant for the Office of Undergraduate Research (OUR) as well as the Dean's Office of the College of Education working with the Assistant Dean for Development as well as the Dean of the College of Education.

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Ms. Anglade hopes to practice in higher education law, particularly in the defense of university in employment discrimination claims. Later, Ms. Anglade hopes to utilize her legal and higher education background to pursue a law faculty position, teaching employment discrimination and/or higher education law.