Personality as a Criterion for Faculty Tenure: The Enemy It Is Us

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PERSONALITY AS A CRITERION FOR FACULTY TENURE:
THE ENEMY IT IS US

PERRY A. ZIRKEL*

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Faculty tenure, whether viewed as a momentous decision of million-dollar proportions or as a relatively routine matter of academic freedom, has been the subject of continuing concern and controversy in American higher education.¹ Problems in this area, including the lack of definitive standards for evaluating tenure candidates, have been highlighted by the recent downturn in the economy and the resultant decline in both enrollment and employment in colleges and universities.²

This trend is actively demonstrated by the Fourth Circuit Court of Appeals decision in Mayberry v. Dees.³ The plaintiff was an assistant professor of romance languages at a public university. At the end of his fourth year in this position, his department chairman concluded: "If reduction in staff is forced upon us, [I] would hesitate to give him tenure. Otherwise, [I] would not object." In the plaintiff's fifth year, during which the university's "up or out" review was customarily conducted, his personality problems with several colleagues, particularly the department chairman, came to a head.⁴ The need to reduce the number of faculty members pro-

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² See e.g., Freeman, The Job Market for College Faculty, in Academic Rewards in Higher Education 76-77 (D. Lewis & W. Becker eds. 1979).
⁴ Id. at 506.
⁵ For example, one of his departmental colleagues had evaluated him earlier as "adolescent in his insistence on 'my personal freedom.'" Id. He had a continuing conflict with the department chairman about the use of English in Spanish classes. Id. at 506 n.13. During his fifth probationary year, he expressed his complaints to and solicited criticism from de-
ficient in Spanish, due to declining enrollment, also came to the fore. The department chairman recommended, and the university's chancellor decided, to deny tenure to Mayberry. In sustaining the university's decision, the Fourth Circuit cited and extensively relied on the report of the Commission on Academic Tenure in Higher Education, commonly referred to as the Keast Commission. Explaining the standards for tenure, the court enumerated four criteria which were taken into account: scholarship; teaching; service; and "developing collegiality—the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests." Accepting the unavoidable subjectivity of this fourth criterion and invoking a judicial posture of abstention or deference to academic decisions, the court concluded that "Mayberry's case . . . must be decided against him." This Article advocates and proposes a more exacting judicial review of faculty tenure cases that are based on collegiality or other such personality criteria. Initially, the operational context of faculty tenure cases will be reviewed. Next, an overview of the legal context for such cases, including the linked concepts of academic freedom and judicial abstention will be provided. Part III will present a summary analysis of the case law to date. Finally, Part IV will propose an approach to be utilized in place of that applied by the Mayberry court.

I. Operational Context of Faculty Tenure Cases

In practice, there are important distinctions between nontenured and tenured faculty, and between contract nonrenewal and termination, that help to place the denial or conferral of tenure in perspective. Typically, tenure is awarded after successful completion of a probationary period. Nonrenewal occurs only at the expiration of the contract and thus applies solely to nontenured faculty. The procedural due process requirements of nonrenewal generally are minimal, often limited to timely notice. More...

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6 Id. at 507-08.
7 Id. at 509 n.19.
8 The evaluations by Mayberry's senior colleagues were mixed. Id. at 506.
9 The Commission derives its name from its co-chairman. See generally Faculty Tenure, supra note 1.
10 663 F.2d at 514. Although it referred to the university's faculty manual which specified "constructive relationship with colleagues" as a criterion for tenure, the court gave the impression of generalization beyond the defendant-university by 1) meshing this criterion into its summary of the Keast Commission's report and recommendations (including a subsequent "in general" reference to "uncollegial"); 2) citing court cases beyond the institution and its policies; and 3) specifically referring to a page in the Keast Commission report which, upon closer examination, is part of an independent contribution which provides only indirect support at best. Id. at 514 n.26.
11 Id. at 519 n.38, 520 n.42.
over, minimal explanation for nonrenewal is required. In contrast, termination applies to both tenured and nontenured faculty and requires greater procedural protection, including specific and circumscribed reasons for dismissal. These justifications are primarily limited to personal causes, such as incompetency or insubordination, and impersonal causes, such as financial exigency or program discontinuance. Additionally, termination occurs during, as opposed to the end of, the contractual term. Thus, termination may be imposed within limited periods for nontenured faculty and at virtually any time (until retirement or resignation) for tenured faculty.12

The actions of nonrenewal and termination fit within a broader set of employment decisions that, stated adversely, form a continuum of conflict between faculty members and institutions of higher education. Generally, this continuum may be portrayed in a direct chronological and inverse hierarchical pattern. For example: 1) decision not to hire; 2) salary or assignment dispute; 3) nonpromotion; 4) nonrenewal; 5) denial of tenure; and 6) termination.13 As a result, it is apparent that denial of tenure, the focal point of this Article, is positioned between nonrenewal and termination not only in terms of timing, but also in terms of gravity.14 Moreover, the distinctions between these levels overlap to such an extent that denial of tenure may be perceived as a hybrid of nonrenewal and termination.

The scope and standards of the reasons justifying the denial of tenure are more stringent than those for routine nonrenewal and yet are less strict than those for termination for cause. The customary criteria for denying or granting tenure based on individual performance15 are research,

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12 This description is deliberately simple and skeletal in order to provide an overall framework of "generally applicable, nationwide principles." Id. at 513. It is not the author's intention to cloud the extensive variety of institutional policies and practices nor to underestimate the complexity of the evolving law in such areas as fiscal exigency or program discontinuance. The relevant literature is voluminous, with the references in note 1, supra, serving as a convenient starting point. See, e.g., S. STROUP, N. VAN GIESON, & P. ZIRKEL, DEFICITS, DECLINES AND DISMISSALS: FACULTY TENURE AND FISCAL EXIGENCY (1982); Clague, Jimenez v. Almodovar: Program Discontinuance as a Cause for Termination of Tenured Faculty in Public Institutions, 9 EDUC. L. REP. 805 (1983).
13 An ultimate step, not discussed within the scope of this Article, is mandatory retirement.
14 Timing and gravity correlate within this continuum generally, but not perfectly. Thus, for example, termination can occur prior to the tenure decision, however, it is generally regarded as a more damaging decision than the denial of tenure.
Although denial of tenure is the focus of this discussion, cases from other areas are included in this Article for a fuller perspective. As one commentator pointed out: "The governing principles vary not only with the constitutional or statutory provision involved, but also depending on the nature of the practice and the context in which it occurs." Runyan, Employment Decision-Making in Educational Institutions, 26 WAYNE L. REV. 955, 956 (1981).
15 Similar to but less strict than termination for impersonal cause, tenure may be denied
Personality is a factor that is separate and independent of these three criteria and is generally not, officially at least, a major consideration in tenure decisions. It should be noted, however, that the defendant institution in *Mayberry v. Dees* was one of the relatively few institutions which officially designated a personality factor as a separate and significant criterion in tenure decisions.

II. Legal Context of Faculty Tenure Cases

A. The Primary Legal Bases

The legal bases in faculty tenure cases vary widely and include the constitutional safeguards of freedom of expression, due process, equal protection, and the statutory protections guaranteed in the civil rights acts. The defendant institutions have prevailed in approximately eighty percent of recently reported faculty employment cases, with a higher percentage in race and national origin discrimination and procedural due process cases and the lowest proportion of victories (62.5%) in the first amendment cases.

Inasmuch as personality may be regarded as an intangible characteristic, it becomes a concrete issue when manifested in the form of behavior. In these cases, the issue usually involves the form of the faculty member’s purportedly protected expression or, less often, the form of the institution’s allegedly discriminatory acts. Thus, specifically with regard to denial-of-tenure cases involving personality factors, the two major legal bases for faculty plaintiffs are the first amendment and, to a lesser extent,
Title VII.  
The critical test for first amendment cases, derived from the Supreme Court’s decision in *Mt. Healthy City Board of Education v. Doyle,* as related to denial of tenure (D/T) can be summarized by the following steps:

1) Plaintiff faculty member has the initial burden to show that:
   a) his conduct was protected by the first amendment, and
   b) this conduct was a substantial or motivating factor in the D/T decision.
2) Burden then shifts to the defendant college or university to show that it would have reached the same decision in the absence of the protected conduct.

In *Pickering v. Board of Education,* a first amendment decision that clarifies the applicability of the *Mt. Healthy* test, the Supreme Court established that protected conduct for a public school teacher is determined by striking “a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” Using this balancing test, the Court con-
cluded that protected conduct includes accurate statements of public concern which are not insubordinate and erroneous public criticisms of the employer which do not impede the teacher’s classroom performance or the school’s regular operation. In Perry v. Sinderman, the Court made it clear that the Pickering public-issue protections extend to faculty members of public institutions of higher education. In Givhan v. Western Line Consolidated, the Court further established that this protected conduct includes not only public but also private expression and that the second step in Mr. Healthy amounts to a “but for” test.

To the more limited extent that D/T based on personality can be linked to discrimination (in terms of disparate treatment of protected classes) rather than expression (in terms of unwarranted infringement of protected conduct), Title VII is applicable. Basing D/T on sex-stereotyped personality traits serves as an appropriate example.

The central test for Title VII disparate treatment cases as related to D/T and as derived from McDonnell Douglas Corp. v. Green, can be summarized as follows:

1) Plaintiff faculty member has the initial burden to show that prima facie case that:
   a) he belongs to a class protected by Title VII (e.g., women or minorities);
   b) he sought and was qualified for tenure;
   c) despite his qualifications he was denied tenure; and
   d) after the denial of tenure, the institution sought to fill his position with persons of similar qualifications.

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28 The Court did not specifically use, much less define the term “insubordinate,” but suggested possible exclusions from protected conduct for: 1) “maintaining either discipline by immediate superiors or harmony among coworkers,” and 2) maintaining “close working relationships for which it can be persuasively claimed that personal loyalty and confidence are necessary to . . . proper functioning.” Id. at 570 and n.3; see also Connick v. Myers, (1983)(dispute concerning internal office policy did not pass Pickering test).
29 391 U.S. at 573.
30 408 U.S. 593 (1972).
31 Id. at 598.
33 Id. at 413-16. The Court, however, noted that when a teacher privately confronts his immediate superior, it is not only the content, but also the manner, time and place of his message that must be taken into account in the Pickering balance. Id. at 415 n.4.
34 Id. at 410.
35 See infra note 95 and accompanying text.
36 Title VII disparate impact analysis, which usually is not used in individual D/T cases, is derived from Griggs v. Duke Power Co., 401 U.S. 424 (1971). See Note, Title VII on Campus: Judicial Review of University Decisions, 82 Colum. L. Rev. 1206, 1208-10 (1982).
37 411 U.S. 792 (1973) (re-hiring case within a private industry context).
38 It is unclear whether this fourth step applies to D/T cases because the McDonnell Douglas test was formulated with regard to hiring decisions; in fact, the Court stated that this formulation could differ in other factual situations. Id. at 802 n.13. Lower courts have
2) Burden then shifts to the college or university to articulate some legitimate, nondiscriminatory reason for the D/T. 38

3) Burden then shifts back to the plaintiff-faculty member to show that the institution’s stated reasons for the D/T was in fact a pretext for discrimination. 40

Other relevant Supreme Court Title VII decisions which clarify the McDonnell Douglas test include: Furnco Construction Corp. v. Waters, 41 Board of Trustees of Keene State College v. Sweeney, 42 and Texas Department of Community Affairs v. Burdine. 43

In Furnco, the Court ruled that once the employee establishes a prima facie case of discrimination, the defendant bears the burden of showing a legitimate, although not optimal, nondiscriminatory reason for the dismissal. The Court also held that statistics are admissible for this purpose. 44 In Sweeney, the Court further refined this burden; the defendant is not required to prove an absence of discriminatory motive. 45 Finally, in Burdine, the Court added that the defendant’s burden is one of production, not one of persuasion. 46

B. Academic Freedom and Abstention

Academic freedom, like its handmaiden faculty tenure, 47 is admittedly an evolving and somewhat amorphous concept. 48 Nevertheless, a close ex-

48 cases tend to include this step using, for example in sex discrimination cases, the defendant institution’s subsequent tenuring of comparatively qualified men as evidence of discrimination. See, e.g., Lieberman v. Gant, 630 F.2d 60, 63 (2d Cir. 1980); Kunda v. Muhlenberg College, 621 F.2d 532, 545 (3d Cir. 1980).

41 411 U.S. at 802.

44 Id at 804.

43 438 U.S. 567 (1978). Furnco was a hiring case in private industry.

42 439 U.S. 24 (1978). Sweeney was a nonpromotion case in higher education.

45 450 U.S. 248 (1981). Burdine was a nonpromotion and termination case involving a state government.

44 438 U.S. at 576-77, 580.

45 439 U.S. at 25.

46 450 U.S. at 257-58. The Court also noted that in a hiring context this intermediate burden requires only that the defendant-employer show that the qualifications of the person selected were equal to those of the plaintiff. A showing of superiority was not necessary. Id at 259-60.

47 See, e.g., Tucker & Mautz, Academic Freedom, Tenure and Incompetence, 63 EDUC. REC. 22 (1982).

48 See, e.g., Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 552-53 (5th Cir. 1982), cert. denied, 457 U.S. 1106 (1982). The Court noted:

Hillis’ attorneys, in support of their claim for additional attorney’s fees claim: “Academic freedom is an amorphous field about which a great deal has been said in esoteric law journal articles and academic publications, but little determined in explicit, concrete judicial opinions." This is nearer the mark [than his procedural due process claim]. While academic freedom is well recognized . . . its perimeters are ill-defined and the case law defining it is inconsistent.
amination reveals that academic freedom has two distinct strains: institutional autonomy and individual autonomy. The tradition of institutional autonomy developed in response to threats of outside interference including, in the name of academic abstention or the deference doctrine, that presented by judicial intrusions. The tradition of individual autonomy provides protection against outside governmental interference. However, the individual autonomy strand of academic freedom, because of its intraintitutional quality, also provides protection against internal interference, i.e. that from the college’s (or university’s) administration and from the faculty member’s peers. Thus, as the Yale University president forcefully stated in 1972: “In strong universities, assuring freedom from intellectual conformity coerced within the institution is even more of a concern than is the protection of freedom from external interference.”

[T]he tattered secret that faculty members may devise a pattern of departmental appointments that shuts out significant schools of thought, may enter into a Faustian bargain with the grant-givers that trades off mental independence for a larger bank roll, and may make political judgments when reviewing the professional merits of their peers.

Id at 552-53 [citations omitted].

For a detailed historical overview, see R. HOFSTADTER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955). For a compilation of AAUP procedures and policy statements, see ACADEMIC FREEDOM, supra note 1.

See, e.g., Note, Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege, 69 CALIF. L. REV. 1538, 1546-51 (1981); Pincoffs, Introduction, in THE CONCEPT OF AMERICAN FREEDOM (E. Pincoffs ed. 1972)(distinguishing between freedom of the academy and freedom of academics); cf. Cooper v. Ross, 472 F. Supp. 802, 813 (E.D. Ark. 1979)(“The present case is particularly difficult because it involves a fundamental tension between the academic freedom of the individual teacher to be free from restraints from the university administration, and the academic freedom of the university to be free of governmental, including judicial, interference.”).


See, e.g., H. EDWARDS & V. NORDIN, supra note 50, at 14-18.


See, e.g., R. MACIVER, ACADEMIC FREEDOM IN OUR TIME 6 (1955); Tucker & Mautz, supra note 45, at 22-24.

Incursions upon academic freedom by one’s colleagues is not theoretical or static. For example, a comprehensive survey of social science faculty members during the McCarthy era found that a majority of them felt that professors who were admitted Communists should be fired. See P. LAZARSFELD & W. THEILENS, THE ACADEMIC MIND 392 (1958).

Brewster, On Tenure, 58 AM. ASS’N. PROFESSORS BULL. 381, 382 (1972)(emphasis in original).

Judicial support for academic freedom has developed through a long line of Supreme Court decisions. The core concept, as decisively expressed by a unanimous Court in Keyishian v. Board of Regents and as repeated by the lead opinion in Regents of the University of California v. Bakke, is the protection of "the robust exchange of ideas." Threats to the robust exchange of ideas come from fellow faculty members as well as administrators and outsiders.

This Pogo-like overlap between the individual and institutional strands of academic freedom is further evidenced by the judicial demarcation of faculty authority. Frankfurter's oft-cited quotation in Sweezy v. New Hampshire: "'[T]he four essential freedoms' of the university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study'" is strikingly similar to the controlling contours of faculty authority demarcated in NLRB v. Yeshiva University, in which faculty members were held to be managers and, thus, were not covered by the NLRA.

III. RELEVANT CASE LAW

Evidence of personality or collegiality is not subject to precise measurement because personality itself is intangible; it is seen only indirectly in the form of behavior and its infringement. Moreover, due to the protected

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\(^{58}\) 385 U.S. at 603.

\(^{59}\) 438 U.S. at 313 (Powell, J., concurring).

\(^{60}\) Id.

\(^{61}\) See supra notes 55-56 and accompanying text.

\(^{62}\) "We has met the enemy, and it is us." W. Kelly Pogo (1951).


\(^{64}\) 354 U.S. 234, 263 (Frankfurter, J., concurring)(quoting The Open Universities in South Africa 10-12).

\(^{65}\) Id.

\(^{66}\) 444 U.S. 672, 686 n.23 (1980).

\(^{67}\) One author has predicted that this overlap will lead to claims of institutional academic freedom by faculty members. Note, supra note 49, at 1547 n.63. This protection against outside intrusion, however, would seem superfluous in light of the more firmly entrenched scope of individual academic freedom. Id. at 1546. In fact, this overlap points to the threat of faculty authority exercised in the area of employment decisions; the danger arises from the fact that determinations are made by less than the entire faculty, such as intradepartmental tenure committees. See Gray, Confidentiality of Faculty Peer Review, 11 Educ L. Rep. 11 (1983).
status of expression and discrimination, it is often covert. As a result of
the imprecise and indirect evidence of personality, its frequency and
treatment in the case requires a broad net. When thus viewed broadly,
examples of judicial review of faculty employment decisions that are
based, at least in part, on collegiality or other such personality factors are
more common than one might expect. Although partially, and then only
peripherally, covered in articles addressed to the first amendment and
Title VII rights of faculty members, the faculty employment cases rest-
ing on personality factors have not been compiled, must less analyzed,
elsewhere. One method of illustrating their scope and direction is to tabu-
late the frequency and outcome of the decisions which address these is-
issues. Table I (below) presents such a numerical compilation, grouping
cases according to courts’ reliance on the first amendment, Title VII, and
“other” legal bases, such as procedural due process or state law. Cases
are further categorized in terms of the outcome for the plaintiff-faculty
member as follows: “+” = decision for; “-” = decision against; and
“Inc.” = inconclusive decision. Decisions categorized as inconclusive were
those involving a preliminary ruling, such as denial of defendant’s motion
for summary judgment, or an appellate remand. The aforementioned

88 See, e.g., Hodges, Postsecondary Faculty Members’ Rights of Free Speech, 9 J.C. &
89 See, e.g., Note, supra note 36.
70 Since there were often multiple legal bases offered within a given case, the decisions
are classified according to what appears to be the primary rationale. The only case tabulated
according to two classifications, because both rationales seemed to be equally important,
was Hill v. Nettleton, 455 F. Supp. 514 (D. Colo. 1978). Here the first amendment and Title
VII are categories used generically and include expression or discrimination decisions rely-
ing on other grounds. See, e.g., Van de Vate v. Boling, 379 F. Supp. 925 (E.D. Tenn. 1974);
471 (1975).

Other sources of approximation included:
1) the inclusion of four cases involving plaintiffs who were only partially or pe-
riminately faculty members. See, e.g., Duke v. North Texas State Univ., 469 F.2d
829 (5th Cir. 1972)(teaching assistant); Lux v. Board of Regents, 95 N.M. 361, 622
2) the inclusion, by analogy, of several cases into the closest step of the opera-
tional continuum. See, e.g., Dewey v. University of New Hampshire, 694 F.2d 1
(1st Cir. 1982)(retirement categorized as termination); Adams v. Lake City Com-
Community College, 404 So. 2d 148 (Fla. App. 1981)(written reprimand case placed in
salary/assignment category).
3) the allocation of the few partial outcome, non-remand cases into “+” or “-”
category. See, e.g., United Carolina Bank v. Board of Regents, 665 F.2d 553 (5th
Cir. 1982)(upholding judgment but modifying liability award, thereby categorized
as “+”).
4) the designation of “inconclusive” decisions. See infra note 71.
5) the classification of multi-level employment decisions. See infra note 72.
71 All of the judgments except those issued by the Supreme Court are technically incon-
cclusive with respect to possible future judicial determinations. However, only those deci-
sions specifically reserved or remanded for further judicial review were categorized as incon-

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continuum of employment decisions supplied the remaining subclassification dimensions.

TABLE 1: Outcome of Faculty Employment Cases Involving Personality Factors

<table>
<thead>
<tr>
<th>Amendment I</th>
<th>Title VII</th>
<th>Other</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>+ - Inc.</td>
<td>+ - Inc.</td>
<td>+ - Inc.</td>
<td>+ - Inc.</td>
</tr>
<tr>
<td>Hiring</td>
<td>0 2 0</td>
<td>0 1 0</td>
<td>0 0 0</td>
</tr>
<tr>
<td>Salary</td>
<td>0 2 1</td>
<td>0 0 0</td>
<td>0 1 0</td>
</tr>
<tr>
<td>Nonpromotion</td>
<td>0 0 2</td>
<td>1 1 0</td>
<td>0 0 0</td>
</tr>
<tr>
<td>Nonrenewal</td>
<td>9 14 7</td>
<td>2 2 0</td>
<td>0 0 0</td>
</tr>
<tr>
<td>D/T</td>
<td>3 5 3</td>
<td>0 5 4</td>
<td>0 1 0</td>
</tr>
<tr>
<td>Termination</td>
<td>5 8 3</td>
<td>1 1 0</td>
<td>0 1 0</td>
</tr>
<tr>
<td>TOTALS</td>
<td>17 31 16</td>
<td>4 10 4</td>
<td>0 3 0</td>
</tr>
<tr>
<td>(%)</td>
<td>(35) (65)</td>
<td>(29) (71)</td>
<td>(0) (100)</td>
</tr>
<tr>
<td>n</td>
<td>64 18 3</td>
<td>0 0 0</td>
<td>85 85</td>
</tr>
</tbody>
</table>

A review of Table I reveals that approximately eighty-five faculty em-
ployment cases involving personality factors have been decided since


I/NR/Inc: McDonough v. Trustees of Univ. System of New Hampshire, 704 F.2d 780 (1st Cir. 1983); Peacock v. Duval, 694 F.2d 644 (9th Cir. 1982); Eichman v. Indiana State Univ., 597 F.2d 1104 (7th Cir. 1979); Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976); KAPEL v. Texas Women's Univ., 509 F.2d 133 (5th Cir. 1979); Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972); Duke v. North Texas State Univ., 469 F.2d 829 (5th Cir. 1972).


I/T/-: Smith v. Kent State Univ., 696 F.2d 476 (6th Cir. 1983); Dewey v. University of New Hampshire, 694 F.2d 1 (1st Cir. 1982); Skehan v. Board of Trustees, 669 F.2d 142 (3d Cir. 1982); Steward v. Bailey, 556 F.2d 261 (5th Cir. 1978); Adamian v. Lombard, 608 F.2d 1224 (9th Cir. 1979), cert. denied, 446 U.S. 938 (1980); Shaw v. Board of Trustees, 549 F.2d 929 (4th Cir. 1976); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970); Jordan v. Board of Reports, 583 F. Supp. 23 (S.D. Ga. 1983).

I/T/Inc: Heath v. Cleary, 798 F.2d 1376 (9th Cir. 1983); Trotman v. Board of Trustees, 635 F.2d 216 (3d Cir.), cert. denied, 451 U.S. 986 (1981); Starsky v. Williams, 512 F.2d 109 (9th Cir. 1975).


1969. Paralleling the pattern of the study mentioned above, the defendant-institution prevailed in an estimated sixty-eight percent of the conclusive cases, with a slightly less favorable ratio for the first amendment decisions. This latter area accounted for over three-quarters of the cases. Across legal bases, D/T and its immediately neighboring levels accounted for most of the cases, due to the greater stake of plaintiffs' interest. Specifically with regard to D/T, the plaintiff-faculty member was successful in only three (22%) of fourteen conclusive decisions. Success for the defendant institutions in this area may be partially attributable to the courts' general reluctance to award relief in the form of granting tenure.

In two of the D/T cases where the plaintiff-faculty member was victorious, the appellate courts did not have to decide the issue as a result of the death of the plaintiff in one case and the acquisition of employment elsewhere in the other.

Another way to summarize the relevant case law is to describe the characteristic behaviors of the faculty-plaintiffs that illustrate what is meant by collegiality. Support for teacher organizations, Marxist philosophy, or other "non-Establishment" causes is often associated with a disfavored, or uncollegial, personality. Personality problems, however, are not limited to visible affiliation or activism. In fact, a common locus of personality disputes is the department in which the faculty member is active, the clash focusing on colleagues or, more frequently, the chairperson.


See supra notes 27 and 28 and accompanying text.

For the major case in which such relief was debated and provided, see Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980).

United Carolina Bank v. Board of Regents, 665 F.2d 553 (5th Cir. 1982).


See e.g., Megill v. Board of Regents, 541 F.2d 1073, 1084 (5th Cir. 1976)(teacher opposition to annual evaluation); Ofsevit v. Trustees, 21 Cal. 3d 763, 582 P.2d 88, 89, 148 Cal. Rptr. 1, (1978)(active participation in local teachers' union).

See, e.g., Cooper v. Ross, 472 F. Supp. 802, 805 (E.D. Ark. 1979)(professor was entitled to reinstatement because his communist beliefs were a substantial and motivating factor in his non-reappointment); Carr v. Board of Trustees, 465 F. Supp. 886, 894 (N.D. Ohio 1979)(communist-oriented writings and textbook selection were alleged to be motivating factors in tenure denial).


See, e.g., Citron v. Jackson State Univ., 456 F. Supp. 3, 6 (S.D. Miss. 1977)(alleged race, religion and national origin discrimination and retaliation for filing EEOC complaint), aff'd mem., 577 F.2d 1132 (5th Cir. 1978); Watts v. Board of Curators, 495 F.2d 384, 386 (8th Cir. 1974)(professor nonrenewal partly because of refusal to take on teaching assign-
Deans and presidents of the college or university also constitute focal points of personality clashes. The subject matter of the disputes varies widely and includes curricular policies, student interactions, administrative rules, and use of university funds. Common catch-alls or charges for the targeted kinds of conduct are: "clashes of personality," "lack . . . [of] 'sense of camaraderie,'" "troublemaker," "anti-administrative attitude," "inability . . . to maintain harmony," and "uncooperative attitude." Moreover, female faculty members who are consid-

ments and failure to cooperate with colleagues and administration).


See, e.g., United Carolina Bank v. Board of Regents, 665 F.2d 553, 556 (5th Cir. 1982)(nonrenewal by university president because of professor's allegation of misuse of research funds); Trotman v. Board of Trustees, 635 F.2d 216, 220 (9th Cir. 1976) (university president wrote letters threatening action if professors continued to publicly criticize university policy), cert. denied, 451 U.S. 986 (1981).

See, e.g., Hildebrand v. Board of Trustees, 662 F.2d 439, 440 (6th Cir. 1981) (teacher criticized social science curriculum including its standardized examinations), cert. denied, 456 U.S. 910 (1982); Eichman v. Indiana State Univ. Bd. of Trustees, 597 F.2d 1104, 1108 (7th Cir. 1977) (faculty member wrote interdepartmental memoranda which were hostile to department's planned courses).

See, e.g., Daulton v. Affeldt, 678 F.2d 487, 489 (4th Cir. 1982) (professor marred student and developed rift with administration); Texton v. Hancock, 359 So.2d 895, 896 (Fla. Dist. Ct. App. 1978) (students complained of professor's immoral and unprofessional conduct).

See, e.g., Whiting v. Jackson State Univ., 616 F.2d 116, 124 (5th Cir. 1980) (failure to follow university's personal phone call and notification rules); Cussler v. University of Maryland, 430 F. Supp. 602, 608 (D. Md. 1977) (university allegedly did not consider its own promotion and assignment criteria).


See, e.g., Smith v. Losee, 485 F.2d 334, 336 (10th Cir. 1973) (professor had discussed improper use of funds by the school administration with his students), cert. denied, 417 U.S. 908 (1977).


See, e.g., Daulton v. Affeldt, 678 F.2d 487, 489 (4th Cir. 1982) (problems stemming from professor's association with students).
ered to be demurely "old fashioned" or modishly "assertive" are particularly susceptible to charges that their personality interfered with their job performance.89

The descriptions of these types of conduct tend to be somewhat vague and, thus, amorphous. The overlap with overt criteria, such as service, and the tendency for personality problems to commence or compound after an initial adverse employment action, thus escalating hostilities in moving across the above-mentioned continuum,89 further contributes to the inevitably imprecise contours of these cases. Nevertheless, the fact exists that a substantial number of cases well within these confines have been litigated and the substantial weight of judicial resolution has been rendered against the faculty-plaintiffs, as is particularly notable in D/T cases.

IV. ALTERNATE APPROACH FOR REVIEWING COURTS

The customary judicial approach in faculty-employment cases generally,97 and faculty-tenure cases specifically,88 is academic abstention, a doctrine deeply rooted in the tradition of institutional autonomy.89 The purpose of this tradition is to provide protection for the "free and full exchange of ideas"100 in their unique milieu, colleges and universities. As the Fourth Circuit Court of Appeals cogently stated: "[O]ur universities must serve as great bazaars of ideas where the heavy hand of regulation has little place. Like other bazaars, they may seem rude, cacophonous, even distasteful at times; but they are necessary predicates to the more


90 See, e.g., Peacock v. Duval, 694 F.2d 644, 647 (9th Cir. 1982) dispute over allocation of funds received for the college's professional medical services); Poddar v. Youngstown State Univ., 480 F.2d 192, 193 (6th Cir. 1973)(continuing dispute over university promotion practices).

91 See, e.g., Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974). The court 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. Id. at 1231-32.


93 See supra notes 50-51 and accompanying text. The rationale often given by these courts is the subjectivity and difficulty of such decisions, however, judicial expertise has been applied to comparably complex and subjective decision-making in other contexts, such as the employment of professionals and managers in private industry and in government.

orderly market of ideas in our public life."\textsuperscript{101}

Recently, several courts have carved out limited exceptions to this "hands off" policy in Title VII discrimination cases.\textsuperscript{102} This judicial attitude, although intuitively moving in the right direction, is not directly applicable nor particularly principled with regard to faculty-tenure cases that rest, at least in part, on personality factors. Rather, an approach that pierces the veil of institutional autonomy when there is a threat to individual autonomy is necessary. The college or university abdicates its protection from judicial interference with the robust exchange of ideas when it interferes with this same free flow of views. Such interference is evident where the institution, via the employment actions of its administrators or faculty members, discriminates against or otherwise infringes upon the expression of professional personalities. As the Third Circuit recently stated:

The academic process entails, at its core, open communication [which leads] to reasoned decisions. Our society assumes, in almost all cases with good reason, that different views with the academic community will be tested in an atmosphere of free debate.

It is the dialectic process which underlies learning and progress.\textsuperscript{103}

As the Fifth Circuit added in \textit{In Re Dinnan}:\textsuperscript{104} "Ideas may be suppressed just as effectively by denying tenure as by prohibiting the teaching of courses."\textsuperscript{105}

This Article's thesis does not dictate judicial resolution in favor of faculty-plaintiffs in collegiality and other personality related D/T cases. Rather, this thesis merely advocates removal of the special protection conferred upon institutions of higher education when its justification has

\textsuperscript{101} Kim v. Coppin State College, 662 F.2d 1055, 1064 (4th Cir. 1981)(citing Wieman v. Updegraff, 344 U.S. 183, 194 (1952) (Frankfurter, J., concurring)).

\textsuperscript{102} See, e.g., Kunda v. Muhlenberg College, 621 F.2d 532, 548 (3d Cir. 1980); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1383 (5th Cir. 1980); Davis v. Weidner, 596 F.2d 726, 731 (7th Cir. 1979); Powell v. Syracuse Univ., 580 F.2d 1150, 1153 (2d Cir.), cert. denied, 439 U.S. 984 (1978); Sweeney v. Board of Trustees, 569 F.2d 169, 176 (1st Cir.), vacated and remanded, 439 U.S. 24 (1978). \textit{But see} Lieberman v. Gant, 630 F.2d 60, 64 (2d Cir. 1980).

\textsuperscript{103} The legislative history of Title VII includes a marketplace-of-ideas rationale for its amended application to academic institutions:

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


\textsuperscript{104} Trotman v. Board of Trustees, 635 F.2d 216, 218-19 (3d Cir. 1980), cert. denied, 451 U.S. 986 (1981); \textit{see also} Kunda v. Muhlenberg College, 621 F.2d 532, 547 (3d Cir. 1980); Mabey v. Reagan, 537 F.2d 1036, 1047, 1050 (9th Cir. 1976).

\textsuperscript{105} Id. at 430.
been lost. In these cases, the faculty-plaintiffs are left in the position of other employers covered by the first amendment or Title VII who must clearly legitimate their employment actions when and if the burden is placed upon them. Further, it ought to be understood that, under this approach, institutions of higher education retain those contextual peculiarities that are relevant to an evaluation of their own actions, such as the dual authority system for academic governance and the peer review process for the awarding of tenure.

For public institutions of higher education and others shown to have the requisite "state action" to be covered by the first amendment, the Pickering-Mt. Healthy test would be applied without any special deference to the defendant institutions, and with special reference to their marketplace-of-ideas mission. Specifically, the use of this approach at Step One would emphasize the special breadth of plaintiff's conduct protected by the first amendment, and its use at Step Two would require the specific sufficiency of defendant's "but for" decision. For public and private institutions of higher education covered by Title VII, the McDonnell Douglas-Furnco test would be similarly applied when a personality basis is shown and Step One is fulfilled so that special emphasis is given to the sufficiency and specificity of the defendant-institution's Step Two proof of legitimate, nondiscriminatory reasons for dismissal. Inasmuch as academic freedom is not an absolute right and must be balanced against other important interests, covered institutions of higher education could rely on insubordination or incompetency as a valid reason for adverse employment action. Insubordination, typically testable in nonrenewal or termination cases involving personality...
factors, should require proof of substantial and material disruption of the faculty member's classroom performance or the defendant institution's operation. Further, the *Pickering* exception for "the kind of close working relationships for which it can be persuasively claimed that personal loyalty and confidence are necessary to their [sic] proper functioning" should not be applied broadly in the context of higher education since, as Justice Brennan subsequently pointed out, "undivided loyalty to management is antithetical to the whole concept of academic freedom." Within these narrow confines, uncollegial personality is a justifiable basis for denial of tenure or other similar employment action.

Incompetence, often relevant to termination or D/T cases involving personality factors, similarly should require specific proof at Step Two by the institution of insufficient teaching, scholarship, or service. Institutions should assiduously avoid the use of collegiality and other personality factors unless they are legitimately part of these performance criteria. Moreover, courts should not be awed by the seemingly esoteric expertise required to evaluate these factors. For example, colleges and universities do not typically rely on direct and empirical evidence, such as classroom visitation or videotaping and student achievement, to evaluate teaching. Similarly, the evaluated scope of service ranges widely across campus, community, and professional activities and scholarship assumes an ascertainable hierarchy with the highest weight to refereed journals. Further, the review process typically extends beyond the expertise of the candidate's department to college-wide or university-wide faculty committees. Thus, the process gravitates towards reliance on the evaluations of relatively few specialists either within or outside of the candidate's institution. Judges and juries do not stand, in fact, so far from the rest of the candidate's colleagues and their academic administrators in the reviewing process, as listeners or readers of these specialists' opinions with regard to the candidates' performance in teaching, scholarship, and service. These secondary reviewers have no monopoly on the ability to read and interpret such summary sources of data, and they should be

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121 *Id.* at 6.


123 *See* Zirkel, *Faculty Review in its Promotion and Tenure Process Beyond the Departmental Level*, J. GEN. EDUC. (in press).

124 *See* N. WHITMAN & E. WEISS, *Faculty Evaluation: The Use of Explicit Criteria for Promotion, Retention and Tenure* 23 (1982).
held accountable at Step Two to articulate to judges and juries any specialized knowledge that they may have employed. Similarly, they ought to be prepared to explain the legitimacy of any personality evidence used to evaluate these criteria if the plaintiff faculty member makes out a Step One case; such evidence is surely not beyond the ken of most judges and juries.

Where an institution adopts a separate collegiality/personality criterion, it should be defined clearly and interpreted narrowly so as not to impede the robust exchange of ideas. This explicit arrangement offers the advantage of fair warning and the opportunity for shared formulation; the danger, however, of being stretched or manipulated to stifle dissent and discourage debate would seem to outweigh its advantages. Reviewing courts should be vigilant in keeping such criteria within the narrow boundaries of their supporting policy and evidence.

An "almost paradoxical" argument is that emphasizing one school of thought in a department might contribute to the "robustness" of the debate within the larger community of colleges and universities. Although there is some merit in the notion of such specialization, the potential for abuse should warn against overestimating the weight of this theory. Further, it is only applicable to the limited number of personality cases based on a particular academic viewpoint. At least for the public and nonreligious institutions covered by the first amendment and Title VII, courts should avoid deferential acceptance of this one-school argument, putting the clear Step Two burden on the institution to provide justification when personality evidence is at issue. Thus, a particular theoretical perspective for faculty members might be justifiable for certain advanced courses or research projects, but its use to limit discussion or debate in other campus forums is highly suspect.

The long-term consequence of an award of tenure should not deter judges from utilizing the proposed approach in D/T cases involving personality factors. Depending on the circumstances, the court may fashion less drastic relief, such as monetary damages or a special judicially-imposed extension of the probationary period. Further, if the candidate is qualified for tenure, granting such complete relief would merely be providing what he deserved and what the institution would have done but for its unwarranted infringement. Finally, the institution would still have the safeguard of termination proceedings if the candidate's performance constituted incompetence, insubordination, or other personal cause.

The next logical step would be to extend this approach to institutions that are not covered by the first amendment and to conduct that is not

129 See supra note 80 and accompanying text.
130 Kunda v. Muhlenberg College, 621 F.2d 532, 549 (3d Cir. 1980).
covered by Title VII. Several courts have attempted to creatively import constitutional protections based on common law or state action into the sphere of private institutions of higher education and similar organizational entities. A more readily available basis for extending such an approach to private institutions of higher education, and reinforcing it in public institutions, is through both contract and tort actions based on the employment contract; this includes institutional polices and particularly, but not exclusively, in collective bargaining contexts past practices. Such claims in faculty-employment cases to date have been largely inconclusive or, citing the academic abstention doctrine, unsuccessful. Nevertheless, under the approach advocated in this Article, without the unwarranted protection of academic abstention, such claims may be more promising.

Regardless of its extension beyond the coverage of the first amendment and Title VII, the approach within the scope of coverage for faculty-employment cases should balance the requirement for specificity of plaintiff's Step One claims with a requirement for careful scrutiny of defendant's Step Two reasons. Perhaps, as several commentators contend, the blindspot lies in the eyes of some judges; while juries generally seem able to see through superficial defenses of colleges and universities, their decisions are sometimes subsequently overturned by deferential judges. In any event, such an approach would provide a better balance between

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128 See, e.g., Ezekial v. Winkley, 20 Cal. 3d 267, 572 P.2d 32, 142 Cal. Rptr. 418 (1977)(surgical resident in a private teaching hospital is entitled to common law right of fair procedure prior to dismissal; cf. Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 95 Harv. L. Rev. 1816 (1980).

129 See Braden v. University of Pittsburgh, 552 F.2d 948, 965 (3d Cir. 1977).


131 See Eichman v. Indiana State Univ. Bd. of Trustees, 597 F.2d 1104, 1110 (7th Cir. 1979).


Further, these claims have been largely limited to public college and university settings making their usefulness somewhat superfluous. See, e.g., Endress v. Brockdale Community College, 144 N.J. Super. 109, ___, 364 A.2d 1080, 1102 (N.J. Super. Ct. App. Div. 1976).


134 See Yurko, supra note 16, at 491; Note, supra note 36, at 1213 and n.40.

135 See, e.g., Peacock v. Board of Regents, 597 F.2d 163 (9th Cir. 1979), rev'd and remanded, 694 F.2d 644 (9th Cir. 1982)(affirming the overturning of a jury verdict for $470,000 on a first amendment count in a faculty demotion/suspension case); Hildebrand v. Board of Trustees, 662 F.2d 439 (6th Cir. 1981) (upholding district court's judgment notwithstanding the verdict for faculty-plaintiff in a D/T case), cert. denied, 456 U.S. 910 (1982); Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981) (affirming district court's reversal of jury verdict of $81,885 in a D/T first amendment case), cert. denied, 103 S. Ct. 69 (1982); Scagnelli v. Whiting, 554 F. Supp. 77 (M.D.N.C. 1982)(setting aside a jury verdict of $500,000 on a first amendment claim in D/T case).
the interests of the individual and the institution, with an appropriate emphasis on their ultimate and mutual interest in the robust exchange of ideas. Such an approach also extends an emerging trend among both courts and commentators toward a more balanced position in the limited and related area of Title VII litigation to squarely and specifically address faculty employment cases involving collegiality or other personality factors.

V. Conclusion

This Article advocates an approach under which courts would not provide colleges and universities with the insulation of academic abstention where the institution commits an infringement upon an individual faculty member's academic freedom. In such instances, the threat is propagated from within the institution rather than from without. In the collective sense of the institution, "the enemy it is us." Thus, in Mayberry v. Dees, the court incorrectly resorted to academic abstention and not fully applying the Mr. Healthy test. More specifically, the Mayberry court viewed the scope of the plaintiff's protected conduct and the legitimacy of the institution's reasons for dismissal as if the analogy to the business world were complete, and as if the Keast Commission had recommended the use of collegiality as a criterion. Rather, the court should have protected Mayberry's academic freedom, narrowly construed the collegiality criterion, and strictly scrutinized the evidence regarding his qualifications for tenure. Whatever the result, this reasoning would be more in line with the tradition and mission of higher education.

[The university] campus [is] a forum whose chief and high purpose is the robust exchange of ideas . . . . But academic freedom

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136 See supra note 102 and accompanying text; see also Gray v. Board of Higher Educ., 692 F.2d 901 (2d Cir. 1982), cert. denied, 457 U.S. 1106 (1982).

137 See, e.g., Gray, supra note 67, at 29 (supporting Second Circuit's balancing approach for confidentiality of tenure committee votes and deliberations in Title VII cases); Roukis, Halpern & Zeichner, Sex-Based Discrimination in Higher Education, 34 Lab. L. J. 229, 236 (1983) (recommending explicitly weighted criteria and public proceedings in Title VII tenure cases); Yurko, supra note 16, at 506, 536 (proposing qualified deference based on intermediate organization theory for Title VII cases, including minimal deference where collegiality is at issue); Note, supra note 36, at 1229 (advocating the extension of Title VII disparate treatment analysis to require demonstration at Step 1 that university's autonomy interest is insignificant); Note, supra note 49, at 1567 (recommending qualified privilege for tenure determinations in civil rights cases).

138 See supra note 62 and accompanying text.

139 663 F.2d at 502; see supra notes 3-11 and accompanying text.

140 See supra note 23 and accompanying text.

141 See 663 F.2d at 507 n.16. Even the majority in NLRB v. Yeshiva Univ., 444 U.S. 672 (1980), recognized that the analogy to industry is incomplete. Id. at 689; see also EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152, 157 (D. Mass, 1975).

142 See supra note 9.
is illusory when it does not protect faculty from censurious prac-
tices but rather serves as a veil for those who might act as
censors. 143

143 692 F.2d at 909.