Civil Rights -- Academic Freedom, Secrecy and Subjectivity as Obstacles to Proving a Title VII Sex Discrimination Suit in Academia

R. Joyce Burriss Garrett

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation
R. Joyce B. Garrett, Civil Rights -- Academic Freedom, Secrecy and Subjectivity as Obstacles to Proving a Title VII Sex Discrimination Suit in Academia, 60 N.C. L. Rev. 438 (1982).
Available at: http://scholarship.law.unc.edu/nclr/vol60/iss2/8

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
Civil Rights—Academic Freedom, Secrecy and Subjectivity as Obstacles to Proving a Title VII Sex Discrimination Suit in Academia

Sex discrimination in academic employment has been found to be both appalling and blatant. In 1958 the consensus of the academic community was that "women scholars are not taken seriously and cannot look forward to a normal professional career." Since 1962 the federal government has attempted to combat sexism in academic employment through three major statutes and an executive order. The most important of these efforts was the Equal Employment Opportunity Act of 1972, which amended Title VII of the Civil Rights Act of 1964. Title VII originally exempted educational institutions from the federal mandate forbidding employment discrimination. When the Equal Employment Opportunity Act of 1972 was debated, however, Congress concluded that public policy did not justify exemption of educational employees from Title VII coverage. Senator Allen argued that to subject academic institutions to federal antidiscrimination legislation would be to risk their academic freedom, but this argument was rejected by a substantial margin.

Despite the clear intent of Congress to eliminate sex discrimination in

---

1. The United States Congress has recognized the acute nature of the problem:
   It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotyped categorizations which in turn would lead to future patterns of discrimination. Senate Comm. on Labor and Public Welfare, Equal Employment Opportunities Enforcement Act of 1971, S. Rep. No. 415, 92d Cong., 1st Sess. 12 (1971).
8. 118 Cong. Rec. 946, 1993 (1972). Senator Allen was joined by Senator Ervin in his attempts to have religious and academic institutions exempted from Title VII coverage. See id. at 1977-95.
9. Id. at 1995. The vote was 55-25.
employment in federally funded institutions, courts have shown reluctance to intervene in academic personnel decisions.\textsuperscript{10} A number of cases have been brought since antibias legislation was made applicable to colleges and universities in 1972.\textsuperscript{11} In the early cases, plaintiffs were generally denied relief. The theme of the early decisions, as set forth in \textit{Green v. Board of Regents}\textsuperscript{12} and as emphasized in \textit{Faro v. New York University},\textsuperscript{13} was that courts should abstain from intervening in hiring, promotion, tenure and salary decisions made by colleges and universities.

As the judiciary’s experience with academic employment matters increased, however, its articulated policy began to change. In January 1978 the United States Court of Appeals for the First Circuit decided \textit{Sweeney v. Board of Trustees}.\textsuperscript{14} In \textit{Sweeney} a state college professor alleged sex discrimination as the basis for her failure to obtain promotion at an earlier date and for the disparity between salaries of males and females on the faculty. In backdating Dr. Sweeney’s promotion and concomitantly adjusting her salary for the intervening years, the court voiced “misgivings over . . . [the recurrent] notion that courts should keep ‘hands off’ the salary, promotion, and hiring decisions of colleges and universities.”\textsuperscript{15} The court acknowledged that decisions concerning hiring, promotion and tenure rights require subjective evaluation and that such evaluation can most appropriately be made in the academic setting but cautioned against “permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of sex discrimination in institutions of higher learning as readily as for other Title VII suits.”\textsuperscript{16}


\textsuperscript{12} 474 F.2d 594 (5th Cir. 1973). A female associate professor claimed she was refused promotion to full professor because of her sex. The Court of Appeals for the Fifth Circuit stated that “the University’s standards are matters of professional judgement” and that the findings of the trial court must be sustained unless clearly erroneous. Id. at 596.

\textsuperscript{13} 502 F.2d 1229 (2d Cir. 1974). A female Ph.D. was terminated from the university after she refused to accept an appointment she regarded as a demotion. The court stated that “[o]f all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.” Id. at 1231-32.

\textsuperscript{14} 569 F.2d 169 (1st Cir. 1978).

\textsuperscript{15} Id. at 176.

\textsuperscript{16} Id.
In November 1978 the United States District Court for the Eastern District of Pennsylvania analogized academic institutions to industry in Kunda v. Muhlenberg College. In Kunda a female college teacher alleged that sex discrimination was the basis for the college’s refusal to grant her promotion and tenure. The court declared that “[t]he decision to grant or deny a promotion to a college faculty member is not substantially different from a similar decision in business or industry.”

The court recognized that under Title VII the “disparate treatment” theory of McDonnell Douglas Corp. v. Green and the “disparate impact” theory of International Brotherhood of Teamsters v. United States are applicable to academic institutions as well as to industry. Applying these theories, the Kunda court concluded that the denial of tenure to the female teacher was the result of the college’s discriminatory acts in failing to inform her that a master’s degree was required for promotion. The court’s remedy was to mandate that the college should allow the female teacher two years to complete the required degree and, upon completion, award her tenure.

Sweeney and Kunda are significant for their potential effect on challenges to sex discrimination in academia. The Sweeney court expressly rejected the prevailing abstention policy of Faro and was the first court specifically to order promotion as the appropriate remedy when a female had been a victim of discrimination in academia. The Kunda court was the first to present a thorough, systematic analysis in which criteria used to evaluate the legality of employment decisions in industry were made applicable to employment decisions in academia.

The United States Supreme Court has not specifically addressed the applicability of the academic freedom defense to enforcement of legislation ensuring equal opportunity in appointment, promotion and tenure decisions.

18. Id. at 307.
19. 411 U.S. 792 (1973). Under the disparate treatment theory, a plaintiff must demonstrate that the defendant’s actions were based on a discriminatory motive. See text accompanying notes 29-38 infra.
22. Id. at 313.
23. Id.
25. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the United States Supreme Court addressed the legality of race-conscious admissions programs. Justice Powell, announcing the judgment of the Court, cited with approval the four essential university freedoms which Justice Frankfurter had expounded in Sweezy v. New Hampshire, 354 U.S. 254, 263 (1957) (Frankfurter, J., concurring) (who may teach, what may be taught, how it shall be taught, and who may be admitted to study). 438 U.S. at 312. See notes 69-72 and accompanying text infra. Justice Powell perceived that deciding who may be admitted to study may constitute a constitutional interest protected by the first amendment but concluded that there are limits to the exercise of this aspect of academic freedom. 438 U.S. at 314. In Justice Powell’s view, academic freedom could be used to justify a flexible admissions plan premised on many factors including race and ethnic status. Id. In contradistinction, establishing a quota-type methodology for select-
It is reasonable, however, to anticipate that the Court would apply the criteria set forth in *McDonnell Douglas Corp. v. Green* and in *International Brotherhood of Teamsters v. United States* to evaluate an allegation of employment discrimination brought against a college or university. Although these cases involve industrial employers, lower federal courts have already applied their reasoning in employment discrimination cases against academic institutions.

If the *McDonnell Douglas* formula for evaluating discrimination in hiring is applied, the female who alleges disparate treatment may establish a prima facie case by proving that she is a member of a protected group, that she applied and was qualified for a job for which the academic institution was seeking applicants, that she was rejected despite her qualifications, and that the academic institution continued to seek applicants from persons with her qualifications. *McDonnell Douglas* does not require that the plaintiff provide "direct proof of discrimination"; it merely requires a showing that "rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." In accordance with the *McDonnell Douglas* formula, a female denied promotion may establish a prima facie case of discrimination by proving that she was a faculty member, that she was qualified for promotion, that she was considered for and denied promotion, and that males with comparable qualifications were granted promotion. A female denied tenure may establish a prima facie case by showing the first three elements of a cause of action for discrimination in promotion.

After the female has established her prima facie case of discrimination in

---

28. See notes 17-23 and accompanying text supra.
29. The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by 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. 411 U.S. at 802.
30. 431 U.S. at 358 n.44.
32. Id. at 308. An additional requirement in a tenure case may be the showing that males with similar qualifications were granted tenure during the time in which the female was considered or that there were significant procedural irregularities in the processing of the female's tenure application. Id. See Huang v. College of the Holy Cross, 436 F. Supp. 639 (D. Mass. 1977); EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152 (D. Mass. 1975).
hiring, promotion or granting of tenure, the academic institution has the burden of presenting a "legitimate, nondiscriminatory basis for the employment decision." If the institution rebuts the prima facie case, the female has the burden of showing "that the defendant's stated reason . . . was pretextual" and that the disparate treatment to which she was subjected "constituted purposeful discrimination on the basis of sex."

The ultimate burden of persuasion rests on the plaintiff. The academic institution may attempt to hinder plaintiff's preparation of her case by resorting to three major obstacles: (1) secrecy in decision-making processes; (2) subjectivity in evaluation criteria; and (3) notions of academic freedom. Direct evidence of sex discrimination will be rare because of the level of sophistication in academia. Inferential proof of discriminatory motive may be used, but the plaintiff must present that proof in her case.

Academic decisions concerning appointment, promotion and tenure traditionally have been veiled in secrecy. Paralleling the increase in the number of discrimination suits filed against colleges and universities has been an increase in resistance on the part of academicians to revealing the bases for employment decisions. For example, in EEOC v. University of New Mexico, an associate professor alleged illegal discharge because of national origin and sought access to personnel files during the preparation of his case. The university refused to comply with a subpoena duces tecum requesting files of present and previously terminated members of the college faculty. The United States District Court for the District of New Mexico, however, ruled that the university must produce the personnel files even though the college considered them to be confidential and sensitive. The Supreme Court of Appeals of West Virginia also narrowed the use of secrecy in academic decision-making in

34. Id. at 310. Accord, McDonnell Douglas Corp. v. Green, 411 U.S. at 804.
37. 569 F.2d at 175. But see Broad, supra note 24, at 1121 (describing a situation in which a University of Minnesota chemistry professor, as part of his evaluation of a female applicant for a faculty position, declared in writing, "I have to state that she would have problems because she is a woman. I guess I am a male chauvinist pig.").
38. 569 F.2d at 177.
39. Middleton, Academic Freedom vs. Affirmative Action: Ga. Professor Jailed in Tenure Dispute, Chronicle of Higher Educ., Sept. 2, 1980, at 1, col. 2. See also Fields, The U.S. vs. Berkeley over Affirmative Action, Chronicle of Higher Educ., Sept. 22, 1980, at 4, col. 1 (The Labor Department's Office of Federal Contract Compliance Programs has contended that the University of California at Berkeley has "engaged in maneuver after maneuver frustrating investigatory efforts." For example, the university has refused to reveal confidential letters of recommendation to investigators in the Office of Civil Rights.). Cunningham & Brodie, Academic Freedom & Tenure: St. Mary's College (California), 62 Am. Ass'n U. Professors Bull. 70, 74 (Spring 1976) (The President of the College "had received, and intended to follow, the advice of his legal counsel not to give reasons so as to make it difficult for Professor Versluis to litigate against the denial of tenure in a civil court suit.").
40. 7 Fair Empl. Prac. Cas. 653 (D.N.M. 1973), aff'd, 504 F.2d 1296 (10th Cir. 1974).
41. Id. at 654.
State ex rel. McLendon v. Morton. In McLendon an assistant professor alleged that she was denied due process when the college denied tenure. McLendon had six years of full-time employment in academic teaching, thus meeting the objective eligibility criteria enunciated by the college. The court held that she had a sufficient entitlement to prohibit denial of tenure on the issue of competency without procedural due process, including a notice of the reasons for denial and an opportunity to rebut the evidence relevant to those reasons.

Academicians argue that destroying secrecy in academic employment decisions chills candor in discussions and criticisms of colleagues' professional competence. This argument, however, is of little merit. There is no evidence of a chilling effect resulting from federal legislation requiring higher educational institutions to open their academic files to students. Furthermore, increased openness would not increase liability for defamation since evaluations made in good faith and as part of institutional responsibilities are privileged. Openness in decision-making processes would alleviate suspicion that employment decisions are based on impermissible reasons, and, such fears mitigated, females would not feel compelled to resort to litigation for relief.

Another obstacle facing the female alleging sex discrimination in academic employment is the use of subjective criteria in academic decisions concerning appointment, promotion and tenure; the use of subjectivity makes it difficult to prove discriminatory motive. The United States District Court for the Northern District of Illinois pointed out in Lewis v. Chicago State College that teaching ability is clearly a matter of subjective judgment. In

42. 249 S.E.2d 919, 925 (W. Va. 1978).
43. Id.
44. Id. at 926. A similar conclusion was reached by the United States Supreme Court in Perry v. Sindermann, 408 U.S. 593 (1972).
46. Id. at 40. The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (1976), provides that students who attend institutions of higher education must be given access to their education records and must be provided an opportunity for a hearing to challenge information in those records that is "inaccurate, misleading, or otherwise in violation of the privacy or other rights of students." Id. § 1232g(a)(2). See generally Schatken, Student Records at Institutions of Post-Secondary Education: Selected Issues Under the Family Educational Rights and Privacy Act of 1974, 4 J.C. & U.L. 147 (1976-77).
50. "A professor's value depends upon his creativity . . . . his teaching ability, and numerous other intangible qualities which cannot be measured by objective standards." Id. at 1359. See also Fishbem, The Academic Industry—A Dangerous Premise, in Government Regulation of
Peters v. Middlebury College\textsuperscript{51} another district court permitted the use of subjective criteria in an academic reappointment decision because “evaluation of . . . teaching ability is necessarily a matter of judgment.”\textsuperscript{52} Judicial approval of the use of subjective criteria is consistent with decisions involving use of subjective evaluations in industrial settings. For example, in Rogers v. International Paper Co.,\textsuperscript{53} a nonacademic racial employment discrimination case, the Court of Appeals for the Eight Circuit ruled that subjective criteria were not unlawful per se.\textsuperscript{54} Nevertheless, the Court of Appeals for the Fifth Circuit, in the industrial case of Rowe v. General Motors Corp.,\textsuperscript{55} cautioned that subjective criteria provide “a ready mechanism for discrimination.”\textsuperscript{56}

Because discriminatory practices can easily be disguised,\textsuperscript{57} the use of subjective criteria has been one of the major obstacles for women in proving their claims against academic institutions. The judiciary has been reluctant to intercept its opinion into matters of promotion and tenure, preferring to “leave such decisions to the Ph.D.’s in academia.”\textsuperscript{58} For example, the Court of Appeals for the Fourth Circuit, in Clark v. Whiting,\textsuperscript{59} refused to make a comparative inquiry into either the quantity or the quality of the work of a male faculty member who alleged an equal protection violation, stating that “courts may not engage in ‘second-guessing’ the University authorities in connection with faculty promotions.”\textsuperscript{60} This decision reflects the traditional belief that courts should defer to the academician’s judgment on qualifications for appointment, promotion or tenure.\textsuperscript{61} At the same time, the judiciary recognizes that sex discrimination in academic employment cannot be prevented unless courts are willing to become involved once a plaintiff establishes a prima facie case. For

\begin{flushleft}
Higher Education 57, 62 (W. Hobbs ed. 1978) (a scholar cannot be evaluated by quantitative and visible standards).
52. Id. at 868.
53. 510 F.2d 1340 (8th Cir. 1975) (a civil rights action brought against a wood-paper mill alleging racial discrimination in employment and promotion in skilled craft jobs).
54. Id. at 1345.
55. 457 F.2d 348 (5th Cir. 1972) (blacks alleged racial discrimination in promotion and transfer practices at auto plant).
56. Id. at 359.
57. Sweeney v. Board of Trustees, 569 F.2d at 175. “When overt discrimination becomes illegal, it often goes underground in the beliefs of employers, labor leaders, educators, etc. Covert forms of discrimination are traps that spring on women, like blacks, along paths marked by ‘equal opportunity’ signs.” M. Butler & W. Paisley, Women and the Mass Media 30 (1980). See generally Dipboye, Arvey & Terpstra, Sex and Physical Attractiveness of Raters and Applicants as Determinants of Resume Evaluations, 62 J. Applied Psychology 288 (1977) (raters’ evaluations of applicants’ resumes are affected by sex and physical attractiveness); Schmitt & Hill, Sex and Race Composition of Assessment Center Groups as a Determinant of Peer and Assessor Ratings, 62 J. Applied Psychology 261 (1977) (ratings of women appear to vary according to the proportion of men in the evaluation group).
58. Broad, supra note 24, at 1121.
59. 607 F.2d 634 (4th Cir. 1979) (male associate professor sued university because of denial of his request for promotion to full professor in violation of his equal protection and due process rights).
60. Id. at 640.
61. See Green v. Board of Regents, 474 F.2d 594 (5th Cir. 1973) (academic standards are matters of professional judgments); Lewis v. Chicago State College, 299 F. Supp. 1357 (N.D. Ill. 1969) (academic promotion decisions are not usually justiciable).
\end{flushleft}
example, the court in *Clark* stated that the judiciary may review a university's evaluations of quantity and quality of scholarly work performed by a female alleging sex discrimination.\(^\text{62}\) And in *Sweeney* the court allowed several witnesses to testify that Dr. Sweeney had been qualified for promotion several years before it was granted by the university and that her qualifications had not substantially changed between the time she was denied promotion and the time, several years later, when she was granted promotion via normal university peer review.\(^\text{63}\)

A third major obstacle facing the female alleging sex discrimination by colleges and universities is the notion of academic freedom. Academic freedom, as practiced in American institutions,\(^\text{64}\) was adapted from the nineteenth century German ideals of *Lehrfreiheit* (freedom to teach) and *Lernfreiheit* (freedom to learn).\(^\text{65}\) Freedom to teach ensured that faculty could conduct research independently and convey the results of that research, as well as

\(^\text{62}\) 607 F.2d at 640-41.

\(^\text{63}\) 569 F.2d at 178 n.18.

\(^\text{64}\) A senior member of the University of North Carolina faculty defined academic freedom as the "removal of fear from independent thought: freedom to teach, to do research, to participate in politics. With this freedom comes the ability to invent, to experiment, to test, to explore, to disagree." Interview with Dr. Paul D. Brandes, Professor of Speech Communication, University of North Carolina at Chapel Hill, in Chapel Hill, N.C. (Sept. 10, 1980).

An official statement, the 1940 Statement of Principles on Academic Freedom and Tenure, was formulated by the Association of American Colleges and the American Association of University Professors (AAUP), and remains effective. It provides as follows:

**Academic Freedom**

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence, he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinion of others, and should make every effort to indicate that he is not an institutional spokesman.


Courts have frequently relied on this 1940 Statement and its interpretation by the AAUP in deciding disputes arising in the academic community. See, e.g., Browzin v. Catholic Univ. of Am., 527 F.2d 843 (D.C. Cir. 1975) (court upheld AAUP's interpretation of the "suitable position" rule in the 1940 Statement); Adamian v. Jacobson, 523 F.2d 929 (9th Cir. 1975) (appellate court observed that a university regulation which allegedly was unconstitutionally vague and overbroad had been adapted almost verbatim from the 1940 Statement; the court concluded that since the regulation had been interpreted in an advisory letter by the AAUP "any overbreadth resulting in facial invalidity" was eliminated); Starsky v. Williams, 353 F. Supp. 900 (D. Ariz. 1972), aff'd in part, rev'd in part, 512 F.2d 109 (9th Cir. 1975) (district court referred to the requirements of "appropriate restraint" contained in the 1940 Statement and held that certain language used by a faculty member was not protected by the first amendment).

speak openly and freely of other matters, to their students. In Germany this privilege was not extended to citizens outside the university, nor was it extended to faculty when they were outside the university.\textsuperscript{66} In the United States, however, the federal constitution guarantees all persons the fundamental rights of \textit{Lehrfreiheit} and \textit{Lernfreiheit}.\textsuperscript{67} Because of the fundamental differences in the individual liberties afforded citizens of Germany and the United States, academic freedom in the United States has not been considered a right independent of the laws of the land as it was in Germany.\textsuperscript{68} An academic freedom interest, however, derived from the rights of association and expression guaranteed by the Bill of Rights and by the fourteenth amendment, was expressly recognized in \textit{Sweezy v. New Hampshire}.\textsuperscript{69}

In \textit{Sweezy} a faculty member refused to relate the content of a lecture he had delivered at the university. The Supreme Court, in dicta, stated that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."\textsuperscript{70} The Court feared that state inquiry into a faculty member's teaching might chill the academic environment. Justice Frankfurter wrote a forceful concurring opinion in which he set forth "'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."\textsuperscript{71} Justice Frankfurter's remarks, however, should not be interpreted to mean that academic freedom can be used as a defense to all legislative or judicial intervention in academic matters.\textsuperscript{72} In \textit{Sweezy} a faculty member's political autonomy was being invaded and the countervailing state interests were minimal. Accordingly, resort to the notion of academic freedom was appropriate.


\textsuperscript{67}Comment, Academic Freedom—Its Constitutional Context, 40 U. Colo. L. Rev. 600, 603 (1968).

\textsuperscript{68}"As a result of this constitutional 'incorporation,' the proposition that academic freedom should be considered a right with independent character as it was in Germany has not been generally accepted as a sound legal principle in the United States." Id.

\textsuperscript{69}354 U.S. 234, 250 (1957).

\textsuperscript{70}Id.

\textsuperscript{71}Id. at 263 (Frankfurter, J., concurring).

\textsuperscript{72}See id. at 265 (Frankfurter, J., concurring). Justice Frankfurter stated:

Inquiry pursued in safeguarding a State's security against threatened force and violence cannot be shut off by mere disclaimer . . . . But the inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of our kind of society that it cannot be constitutionally encroached upon on the basis of so meagre a countervailing interest of the State as may be argumentatively found in the remote, shadowy threat to the security of New Hampshire allegedly presented in the origins and contributing elements of the Progressive Party and in petitioner's relations to these.

Id.
Two years after Sweezy the United States Supreme Court ruled in Barenblatt v. United States\textsuperscript{73} that the House Committee on Un-American Activities could investigate subversive activities in education. The Court was sensitive to congressional intrusion into the constitutionally protected areas of "academic teaching—freedom and its corollary learning—freedom"\textsuperscript{74} but held that public interest superseded individual and academic immunity.\textsuperscript{75} Subsequently, in Shelton v. Tucker,\textsuperscript{76} the Supreme Court took the opportunity to articulate clearly a two-pronged test for evaluating the appropriateness of the government's intrusion into constitutionally protected personal liberties. According to the Court the government purpose (1) must be legitimate and substantial and (2) cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.\textsuperscript{77}

In 1967, in Keyishian v. Board of Regents,\textsuperscript{78} the Court declared that academic freedom is a "special concern of the First Amendment" and that laws which cast a shadow over the robust exchange of ideas in the classroom would not be tolerated.\textsuperscript{79} The following year, in Pickering v. Board of Education,\textsuperscript{80} the Supreme Court upheld a teacher's first amendment guarantee of freedom of speech. Although such protection could have been included specifically within the concept of academic freedom, the Court stated that the state had no greater interest in monitoring the speech of the teacher-citizen than it did in monitoring the speech of the citizenry in general.\textsuperscript{81} In short, the Supreme Court has generally been quick to vindicate the constitutional rights of academicians. It has stricken loyalty-oath requirements as violative of the first amendment\textsuperscript{82} and promoted autonomy by prohibiting restrictions on curriculum and activities.\textsuperscript{83} Academicians have been further protected by the Court's

\textsuperscript{73} 360 U.S. 109 (1959). During interrogation before a congressional committee, Barenblatt refused to answer questions concerning his political or religious beliefs, as well as other personal and private affairs. His refusal was based on the first amendment specifically and on academic freedom in general.

\textsuperscript{74} Id. at 112.

\textsuperscript{75} Id. at 124-34.

\textsuperscript{76} 364 U.S. 479 (1960). A state statute required teachers to file an affidavit annually listing the organizations to which they belonged or regularly contributed during the preceding five years; the Supreme Court held that such forced disclosures impaired a person's right of free association.

\textsuperscript{77} Id. at 488.

\textsuperscript{78} 385 U.S. 589 (1967).

\textsuperscript{79} Id. at 603.

\textsuperscript{80} 391 U.S. 563 (1968). The Court held that speaking on issues of public importance may not be used as the basis for dismissing a teacher from his teaching position.

\textsuperscript{81} Id. at 568.

\textsuperscript{82} In Whitehall v. Elkins, 389 U.S. 54 (1967), plaintiff who was offered a teaching position at the University of Maryland, challenged the constitutionality of a state loyalty-oath requirement. The Supreme Court stated, "We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom." Id. at 59-60. But see Connell v. Higgenbotham, 403 U.S. 207 (1971), in which a primary school teacher was dismissed from her job for refusing to sign a loyalty oath. The Court ruled that requiring all teachers to pledge to support the Constitution of the United States and of the State of Florida is acceptable. Id. at 208.

\textsuperscript{83} In Meyer v. Nebraska, 262 U.S. 390 (1923), the Court struck down a state law that forbade teaching any modern language other than English to children below the eighth grade. The Supreme Court did not mention academic freedom per se but stated that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance
recognition of their freedom of association rights, and due process rights in dismissal proceedings and freedom of speech rights in political activity.

Since federal antidiscrimination legislation was made applicable to colleges and universities in 1972, both academicians and nonacademicians have become increasingly alarmed by what they allege is an infringement of academic freedom by the federal government. The presidents of four leading universities in Washington, D.C., have asserted that "government interference is disrupting higher education to a point where institutional autonomy is seriously threatened." The president of the National Academy of Science has told members of the academy that there is a conflict between academic excellence and equal opportunity. A faculty member of the University of Geor-
Georgia alleged academic freedom as the reason for his refusal to obey a court order requiring him to reveal the bases for his vote on the promotion and tenure of a female assistant professor. The University of California at Berkeley refused to provide confidential letters of recommendation to civil rights investigators in the Department of Labor.

Academicians have resisted review of their employment practices by arguing that such review violates their academic freedom. Historically, academicians have enjoyed independence from regulation far greater than their counterparts in industry. This independence is based on the premise that educators must be afforded autonomy in teaching, research, and publishing in order to preserve freedom and integrity of thought. External supervision of employment decisions, however, in no way interferes with a faculty member's privilege of teaching, conducting research or publishing, the areas traditionally protected by academic freedom. In contradistinction, an institution's refusal to hire, promote or grant tenure to a female because of her sex directly interferes with that female's privilege of teaching, conducting research and publishing and is a definite violation of her academic freedom. Furthermore, even

The government has sought and obtained university records concerning the details of individual faculty appointments—explicit affirmation by government that it considers other criteria to be as significant as academic competence, if not more so, in appointments to the faculty. Yet nothing can so damage the future of a university as an appointment to the faculty of anyone less than the best whom the university might otherwise have attracted to its company. Id. at 1122.

89. Middleton, supra note 39, at 1, col. 2. Professor James Dinnon, under the pretext of academic freedom, disobeyed a court order to reveal how he voted and the bases for his vote on the promotion and tenure of Dr. Maija S. Blaubergs. On July 3, 1980, when Mr. Dinnon surrendered himself to initiate his three-month jail term, he wore full academic regalia to demonstrate that "in effect, the federal government will be locking up the University of Georgia." Id. Dr. Blaubergs had filed suit for violation of Title VII of the Civil Rights Act of 1964.

90. Fields, supra note 39, at 4, col. 1. The University of California at Berkeley continued its refusal to reveal confidential letters of recommendation to the Office of Civil Rights investigators, and the Department of Labor threatened to deny the university $25 million in federal contracts.

91. But see McGill, Is Federal Regulation a Threat to Academic Freedom?, Columbia Today, March 1977, at 2, 34-36. President McGill of Columbia University acknowledged that the principle of federal regulation is not a threat to academic freedom—he claims the threat is the regulators.


93. Brown, supra note 68, at 300. See also Searle, Two Concepts of Academic Freedom, in The Concept of Academic Freedom 86 (E. Pincoffs ed. 1975). However, faculties must accept specific teaching responsibilities and must conform classroom teaching to the subject matter promulgated in the course description. Libelous or obscene writing is not protected even when presented as a work of scholarship. See Hamling v. United States, 418 U.S. 87 (1974).

The traditional definition of academic freedom has recently been expanded to encompass institutional autonomy and faculty self-rule. J. Fleming, G. Gill & D. Swinton, The Case for Affirmative Action for Blacks in Higher Education 84 (1978).

[T]his expanded meaning of academic freedom translates largely into a direct attack on only one government regulation: affirmative action. No other type of government regulation or legislation is applicable to higher education—pension rights and retirement benefits, health and safety regulations, equal student aid and veterans benefits, and student rights legislation—has been or is subjected to the wrath of members of academia as is affirmative action.

Id.
assuming that the institution’s academic freedom is invaded and that such freedom is a constitutionally protected liberty, the government’s intrusion is permissible under the \textit{Shelton} test.\textsuperscript{94} The goal of ensuring that jobs in academia are assigned on the basis of merit is legitimate. Moreover, the government’s means of accomplishing this goal does not broadly stifle personal liberties, and the goal cannot be achieved by a more narrow means, such as requesting voluntary nondiscrimination.

Although the status of women in academic institutions has improved since antidiscrimination legislation was enacted,\textsuperscript{95} an unjustified disparity continues to exist between female and male faculty members. For example, seventy-two percent of men, but only forty-six percent of women, hold tenured appointments,\textsuperscript{96} and female scientists are paid approximately seventeen percent less than their male colleagues at all faculty levels.\textsuperscript{97} Despite the continued inequalities, the judiciary has been conservative in its response to allegations of sex discrimination in academia. During the past three years, however, the courts have developed standards, analogous to those applicable in industry, for evaluating alleged discriminatory acts. The courts delve behind the college’s or university’s final decision, inquire into the reasons for the decision, and scrutinize the bases on which the decision was made. But the judiciary refrains from acting as a “super-tenure” committee imposing its own evaluations of a female’s qualifications for academic appointment, promotion or tenure. The court’s aim is not to impose its own judgment concerning who will hold academic appointments but rather to ensure that academic employment decisions are not based on illegal sexually-discriminatory reasons. Such action by our courts is both necessary and appropriate.

\textbf{R. Joyce Burriss Garrett}

\footnotesize{
\textsuperscript{94} See notes 76-77 and accompanying text supra.
\textsuperscript{96} Status Improves for Women Scientists in Academe, Chemical and Engineering News, May 7, 1979, at 6.
\textsuperscript{97} Comm. on the Educ. and Employment of Women in Science and Eng’r, Comm’n on Human Resources, U.S. Nat’l Research Council, Climbing the Academic Ladder: Doctoral Women Scientists in Academe (1979).}