

Tenured Faculty at Colleges and Universities in the United States: A De Facto Private Membership Club

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Abstract

There has been a gradual increase at U.S. universities and colleges in the appointment of women to full time faculty positions with women currently comprising approximately 40% of full time faculty. When status, job security, and institutional affiliation are taken into account, the percentage drops significantly: Women occupy only 24% of tenured positions at doctoral-granting institutions, the institutions that employ 47 % of full time faculty nationwide, and a mere 19% of tenured full professor positions at these institutions. Although the reasons for this underrepresentation are numerous and complex, several reasons dominate the issues of continuing gender disparity: (1) The historical and legal culture of the university as an educational institution and as a workplace was akin to a private membership club for men complete with rituals and exclusionary practices; (2) The historical and legal culture of employment generally in the U.S., as reflected in the employment at will doctrine, is that of private club, with anti-discrimination laws and tenure operating as exceptions to this strong presumption; and (3) The application of gender discrimination laws in the university setting are too deferential and are at odds with common cultural assumptions about discrimination.

Introduction

Although women are currently earning doctoral degrees in numbers roughly equal to men and are, therefore, qualified for entry-level tenure track positions on par with men, when status, job security, and institutional affiliation are taken into account, women are vastly underrepresented in tenured faculty positions at U.S. universities and colleges.¹ Women earn 41% of tenure-track positions at doctoral-granting institutions, but six or seven years later, they occupy only 24% of tenured positions and the percentage drops even further in subsequent years when a mere 19% of tenured full professor positions are held by women.² Because doctoral-granting institutions employ 47% of full time faculty at universities and colleges across the U.S., these latter statistics are particularly relevant to an assessment of gender equity.³ The American Association of

¹ U.S. Department of Education, *Digest of Education Statistics 2005*. Table 246, figures for 1971-72 and 2003-04. Available online at http://nces.ed.gov/programs/digest/d05_tf.asp. Women currently earn 48 % of doctoral degrees at U.S. institutions. See also Martha S. West & John W. Curtis, *AAUP Faculty Gender Equity Indicators* 5 (2006). Available online at <http://www.aaup.org>. Without regard to status or tenure, women hold approximately 40% of full time faculty positions in the U.S. *Id.*

² *Id.* at 9, 10, 11.

³ *Id.* at 7.

University Professors (AAUP) has tracked data on tenure by gender for almost thirty years and has concluded that the low percentage of women currently achieving tenure is not attributable solely or primarily to historical underrepresentation and has also found that “[a]s tenure rates have fallen off generally, the gap between men and women has not closed.”⁴ Two recent trends may explain part of the problem. First, for the past twenty years, U.S. colleges and universities have made more long-term contract appointments than tenure track appointments, and second, when these institutions extend tenured or tenure track offers, they tend to hire lateral, tenured professors, of whom 76% are male.⁵

The decline in the percentage of women faculty at the point of tenure is not only more statistically significant than is the decline at the point of promotion to full professor, but it is also more significant because tenure is the point at which a faculty member achieves job security, academic freedom, and membership within a community of peers.⁶ “In general, tenure protects faculty members from retribution for the results of their research, for what they say and teach in class, for their actions in fulfilling their duties in university governance, and for their extramural utterances.”⁷ Universities and colleges in the U.S. are permitted to terminate tenured faculty only in two circumstances. The first and least likely circumstance is that involving economic exigency, such as existed at Tulane University after Hurricane Katrina.⁸ The second and more likely situation in which a tenured faculty member will be terminated involves termination for cause, which grounds generally include a failure to meet standards of professional competence,

⁴ *Id.* at 10. In the last ten years, tenure rates for women have fallen from 52% of all full time female faculty having tenure to 43% at all universities and colleges in the U.S. and for men, the rate has fallen from 70% of all full time male faculty having tenure to 61%. *Id.*

⁵ See Jack H. Schuster & Martin J. Finkelstein, *The American Faculty: The Restructuring of Academic Work and Careers* 195 (2006).

⁶ Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 *Cath. U. L. Rev.* 67, 69 (2006).

⁷ *Id.* at 70.

⁸ *Id.* at 74. In 2005, Tulane announced that it would terminate 233 faculty members along with many doctoral programs and some undergraduate programs. *Id.*

engaging in illegal conduct, actions in violation of civil laws, such as antidiscrimination laws, or violation of university policy.⁹

Available data indicates that this latter basis for termination is, in fact, rarely invoked.¹⁰ Tenured female faculty members, therefore, enjoy substantial job security and even if a tenured female professor is later denied promotion to full professor, that tenured professor retains job security, and she is also in a position to serve as a role model and mentor to untenured female faculty; she also has a voice in formulating and affecting policy regarding tenure requirements. Tenured female professors are in a position to effectively broaden current tenure standards to recognize alternative, non-traditional scholarship and service by speaking out on behalf of and by voting to tenure those “outsider voices” within the academy.¹¹

Although the reasons that women are underrepresented in tenured faculty positions at U.S. universities and colleges are numerous and complex, three reasons dominate the issue of continuing gender disparity in the U.S. and each shares a common underlying perspective—that of the employer as owner of a private membership club and the employee as mere supplier of labor with no entitlements or rights. First, universities and colleges began in the U.S. as institutions for men run by men and thereafter evolved as both educational institutions and as workplaces as a sort of private membership club for men complete with exclusionary practices and rituals.¹² Tenure standards were instituted by the early twentieth century when university and college faculties were overwhelmingly male, they became standardized before the middle of the twentieth century and available data, although incomplete, indicates that at this time, men

⁹ *Id.* at 75.

¹⁰ James J. Fishman, *Tenure and its Discontents: The Worst Form of Employment Relationship Save all of the Others*, 21 Pace L. Rev. 159, 173 (2000). “Of the roughly 300,000 tenured professors in the United States, there are approximately fifty formal dismissals for cause annually, and an unknown number are informally settled.” *Id.*

¹¹ See Susan D. Carle, *Theorizing Agency*, 55 Am. U. L. Rev. 307, 387-388 & n. 375 (2005).

¹² Frederick Rudolph, *The American College and University: A History* 409 (1962).

continued to dominate the ranks of faculty at colleges and universities across the country.¹³ These standards, developed by men for men, have undergone little change since this time, except, of course, that they are now applied to women who had no voice in shaping them and have little voice in applying them, given the dearth of women within the ranks of tenured professors. Tenure standards are applied today by a largely male tenured body who, because of the authority they exercise in the tenure process, are the employer and who, through their decisions, perpetuate the predominantly male private membership club.

The second reason for the underrepresentation of women in faculty positions is due to the historical and legal culture of employment generally in the U.S., which is also rooted in the notion of employment not as a right or as an entitlement, but as a private club. The employment at will doctrine, which applies to all employment relationships without a stated term of duration, permits employers in forty-nine of the fifty states to dismiss employees for any reason or no reason so long as the employer does not violate a statute, constitution, or public policy.¹⁴ Although this law in theory is egalitarian in that it similarly permits employees to terminate the relationship for any reason or no reason, “the harsh reality of unequal bargaining power in the workplace” vests the employer with great leverage to control the employment relationship.¹⁵ Employers exercise that leverage—close to 90% of all employment relationships in the U.S. are at will.¹⁶

¹³ Thelin, *infra* note 28 at 142-145.

¹⁴ Richard A. Bales, *Explaining the Spread of At-Will Employment as an Interjurisdictional Race to the Bottom of Employment Standards*, 75 *Tenn. L. Rev.* 453, 459 & n. 61 (2008) (citing Montana as the only state to abrogate the employment at will rule via statute—Mont. Code Ann. §§ 39-2-901 to 915 (2007)).

¹⁵ Nadjia Limani, *Righting Wrongful Discharge: A Recommendation for the New York Judiciary to Adopt a Public Policy Exception to the Employment-at-Will Doctrine*, 5 *Cardozo Pub. L. Pol’y & Ethics J.* 309, 313 (2006).

¹⁶ One survey indicates that 85% of employees are employed at will. John D. Knopf, *Do Wrongful Discharge Laws Impair Firm Performance?*, 52 *J.L. & Econ.* 197, 198 (2009). Another expert estimates that more than 90% of U.S. private sector employees are employed at will. Robert Sprague, *From Taylorism to the Omnipicon: Expanding Employee Surveillance Beyond the Workplace*, 25 *J. Marshall J. Computer & Info. L.* 1, 20 & n. 171 (2007).

It is true that college and university professors who are on the tenure track and who have not yet achieved tenure, enjoy more job security than individuals who are employed at will because tenure-track faculty members are generally employed for a succession of definite term, usually one-year, contracts.¹⁷ The tenure process, however, operates as an exception to the strong legal presumption of employment at will and, in order to be understood, must be situated within the culture of employment law in the U.S. The employment at will doctrine must also be contextualized as unique, standing in stark contrast to the employment laws in European countries, many of which afford employees “some form of just cause requirement prior to termination.”¹⁸ Viewed within this context, the employment setting in the U.S. has striking similarities to the historical culture of the tenure process, pursuant to which tenured professors as employers have been permitted, and continue to be permitted, to treat the employment setting as one in which decisions may be made in regard to those the tenured faculty choose to associate with as colleagues to perpetuate a history of exclusion.

A third and related reason for the continuing gender disparity on college and university faculties across the U.S. involves one of the primary inroads to the employment at will doctrine, anti-discrimination laws.¹⁹ These laws, and in particular, Title VII’s²⁰ prohibition against sex discrimination, are applied by the courts in a manner that is deferential to the tenure process.²¹ The U.S. Supreme court has sanctioned such a deferential approach: “This Court itself has cautioned that ‘judges ... asked to review the substance of a genuinely academic decision ... should show great respect for the faculty’s professional judgment.’ Faculty tenure decisions are

¹⁷ *Developments in the Law: Academic Freedom of Teachers—Statutory and Contractual Rights*, 81 Harv. L. Rev. 1084, 1090 (1968).

¹⁸ Adams, *supra* note 6, at 71.

¹⁹ Joseph E. Slater, *The American Rule that Swallows the Exceptions*, 11 Employee Rts. & Emp. Pol’y J. 53, 58 (2007) (arguing that the employment at will doctrine renders less effective employment discrimination laws).

²⁰ 42 U.S.C. § 2000e et seq. (2000).

²¹ Guillermo S. Dekat, *John Jay, Discrimination, and Tenure*, 11 Scholar 237, 258 (2009).

the most sacrosanct.”²² Courts frequently cite academic freedom and tradition as reasons for deferring to tenure decisions.²³ A deferential approach to these types of discrimination claims serves to further entrench a male-dominated tenure system women had no voice in creating, and it exacerbates a Title VII claimant’s existing disadvantage.

Contrary to popular belief in the U.S., Title VII discrimination plaintiffs succeed less frequently “than plaintiffs in almost every other type of suit, at every stage of the process.”²⁴ Studies have revealed that claims of discrimination by faculty members against universities and colleges fare even worse, with a success rate after trial or appeal of approximately 20% in comparison to an overall success rate for claims of gender discrimination in employment of approximately 40%.²⁵ Not only does a deferential approach to application of Title VII result in universities and colleges winning 80% of the time, such an approach is also at odds with cultural assumptions and understandings of what it means to discriminate.²⁶ Title VII requires, in most instances, proof of “conscious and demonstrable [gender] bias” and provides no remedy to women who were denied tenure as a result of unconscious stereotyping and bias.²⁷

Moreover, Title VII contains an express statutory exception to coverage for “bona fide private membership clubs,” which exempts social clubs and other organizations as employers from the anti-discrimination laws. A college or university employer would not legally qualify as a bona fide private membership club because it is not currently organized primarily as a social club. The current test devised by courts to assess whether entities qualify as de jure private membership clubs along with judicial deference to Title VII sex discrimination claims made by

²² Martha S. West, *Gender Bias in Academic Robes: The Law’s Failure to Protect Women Faculty*, 67 Temp. L. Rev. 67, 131 (1994) (quoting *University of Pa. v. EEOC*, 493 U.S. 182, 198-199 (1990)).

²³ *Id.* at 131-132.

²⁴ Slater, *supra* note 19, at 53.

²⁵ West, *supra* note 22, at 124-125.

²⁶ Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

²⁷ West, *supra* note 22, at 70.

women faculty members and judicial interpretations of Title VII's intent requirement, however, combine to render the U.S. university or college a de facto private membership club primarily, although not exclusively, for men.

Historical and Legal Culture of U.S. Universities and Colleges

Beginning in 1636 with the founding of Harvard College, the first colonial college, and continuing for almost 200 years, until Oberlin College opened its doors as a coeducational institution, women were denied admission to universities and colleges by legal mandate.²⁸ These early colleges served a very small percentage of society, estimated at less than 1% of the population: privileged white men.²⁹ These colleges prepared these young men for professional careers as ministers, lawyers, doctors, and teachers; institutions known as academies for men also existed, and many of these institutions offered a course of study indistinguishable from the college curriculum, but some focused on vocational training in subjects such as surveying and navigation.³⁰

Women who sought an advanced education during the colonial period attended primarily single-sex “academies, seminaries, or institutes,” which were distinct from and inferior to the colonial colleges, frequently operating as “temporary, short-lived schools ... that were open for only a few weeks or months at a time.”³¹ Women’s opportunities for higher education began to change with the common school reform movement of the 1820’s and 1830’s, which emphasized educating middle class children, and consequently created a demand for more teachers, a

²⁸ John R. Thelin, *A History of American higher Education* 30, 55 (2004).

²⁹ Margaret A. Nash, *Women’s Education in the United States, 1780-1840*, 6 (2005).

³⁰ *Id.*

³¹ *Id.* at 5.

vocation deemed appropriate for women.³² As a result, by 1840, hundreds of academies, seminaries, and institutes for women had come into existence, many with a well-developed curriculum and a three to four-year course of study. It was at this same time that women were beginning to be admitted to formerly all-male colleges, but the elite colleges continued to restrict admission to men.³³ By late 1870, the majority of women who were enrolling in college were enrolling in one of almost 600 coeducational colleges and universities, a number representing approximately 30% of all colleges and universities in the U.S.³⁴ Another 70% of these institutions, however, steadfastly refused to open their doors to women, and a few elite universities and colleges, such as Harvard, denied women admission to undergraduate programs until approximately the middle of the twentieth century.³⁵

By this time women had come to comprise 40% of the student population in colleges and universities across the nation, but their record of representation on faculties was dismal, with the exception of colleges and universities for women, where female faculty members actually comprised a majority at many such institutions.³⁶ Available records are incomplete as to the representation of women on faculties nationwide, and the data that does exist does not indicate, for example, the nature of their appointments at different institutions, their status, and their job security relative to their male counterparts. Anecdotal evidence, however, demonstrates that the relatively few women who held faculty positions at coeducational colleges and universities in the late nineteenth and early twentieth century, unlike their male counterparts, often assumed duties beyond teaching, including, for example serving as advisors to female students; regardless of

³² *Id.* at 54.

³³ Nash, *supra* note 29, at 5, 6, 12.

³⁴ Barbara Miller Solomon, *In the Company of Educated Women* 44, 58 (1985). Harvard admitted its first female undergraduate students in 1943. *Id.* at 188.

³⁵ *Id.* at 44, 58.

³⁶ Lucille Addison Pollard, *Women on College and University Faculties: A Historical Survey and a Study of Their Present Academic Status* 69-108, 177 (1977).

their training and education, many female faculty members were also relegated to teaching courses in “domestic studies,” designed to prepare young women for their future role as wife and mother.³⁷ “Appointments were often odd combinations of special arrangements usually without tenure and at a substandard salary.”³⁸

Available data also reveals that a large proportion of coeducational universities and colleges did not employ a single woman as a faculty member until after 1900.³⁹ Not surprisingly, some of the elite universities and colleges refused to provide women with the credential necessary to a faculty appointment—a graduate professional or doctoral degree. For example, Harvard began granting women admission to medical school in 1945 and to law school in 1950.⁴⁰ Harvard was also very late to appoint female faculty in its graduate schools—the law school appointed Soia Mentschikoff in 1948 as its first female faculty member, but she was restricted to the status of visiting professor; it was not until 1971 that Harvard granted tenure to a female law professor.⁴¹

These male-dominated institutions also underwent significant change beginning in the late nineteenth century, taking on characteristics distinctive of the modern university and college in the U.S. They became departmentalized and hierarchical, with definite lines of progression within the faculty ranks and definite divisions of authority and roles separating faculty and administrators; they also became research-oriented institutions.⁴² As faculty became more specialized within their fields of expertise, they began to organize by department—economics,

³⁷ Solomon, *supra* note 34, at 90.

³⁸ Thelin, *supra* note 28, at 144-145

³⁹ *Id.* at 84-87, 145.

⁴⁰ *Id.* at 188.

⁴¹ Mary L. Clark, *The Founding of the Washington College of Law: The First Law School Established by Women for Women*, 47 Am. U.L. Rev. 613, 668 (1998) (citing Elizabeth Owens as the first tenured female faculty member).

⁴² Rudolph, *supra* note 12, at 394-416.

history, law, philosophy, medicine.⁴³ As they also began to shift from a focus on teaching to a focus on research, faculty peers became most qualified to evaluate existing and potential faculty members for contract renewal or initial appointment.⁴⁴ Faculty thereby began to gain authority over academic decisions within the university setting and the relationship with university administrators and trustees, who had traditionally evaluated faculty performance, began to change and became institutionalized.⁴⁵

As faculty gained a voice in employment, they gradually gained job security. Initially, faculty members were appointed for a term of years, typically three years. With the advent of endowed chairs, some particularly talented and esteemed men were able to secure “life-time or indefinite appointments.”⁴⁶ Other faculty began to lose ground when this status of indefinite appointment with termination permitted only based on cause was applied across the board to all faculty appointments beginning in the nineteenth century, but because the causal basis for termination was not expressly articulated in their written contracts, they were presumed by law to be employed at will, subject to termination at any time with or without cause.⁴⁷

At the turn of the twentieth century, male faculty from elite universities and colleges across the nation began to organize in the aftermath of “the controversial termination of several [male] faculty members at Stanford University and other colleges between 1900 and 1913” allegedly due to their publicly expressed political views and activism.⁴⁸ In response, the American Association of University Professors (AAUP) was formed. This all-male professional organization was founded based upon two express goals: (1) To protect faculty interests through

⁴³ *Id.*

⁴⁴ Fishman, *supra* note 10, at 163-165.

⁴⁵ *Id.*

⁴⁶ *Id.* at 164.

⁴⁷ Adams, *supra* note 6, at 72.

⁴⁸ *Id.*

the creation and adoption of tenure standards with stated grounds for dismissal, and (2) To establish a committee charged with the duty to investigate any instances in which administrators or boards of trustees had unjustly terminated a faculty member.⁴⁹ In 1915, the AAUP disseminated its “Declaration of Principles on Academic freedom and Academic Tenure,” which called for faculty, not administrators or outside trustees, to assess a faculty member’s fitness through a trial-like process.⁵⁰

Just ten years later, the Association of American Colleges (AAC) responded by signing a statement conferring tenure rights upon existing faculty members who had been either permanently appointed or appointed to long-term contracts.⁵¹ In another fifteen years, in 1940, the AAUP and the AAC negotiated new tenure standards designed to provide job security for faculty tied to years of service and performance.⁵² It limited dismissal to instances in which cause existed, conferring due process rights on the faculty member, and to instances of financial exigency.⁵³ These standards for evaluating faculty members have remained fairly consistent over time and are focused on three key areas—teaching scholarship, and institutional service.⁵⁴ These standards have been adopted by universities and colleges across the U.S. and provide faculty with contractual protections as well as protection as a matter of institutional policy.⁵⁵

Not only were tenure standards beginning to take shape in the early part of the twentieth century, but other signifiers of membership in the male-dominated faculty club were emerging, including academic dress and other rituals:

The exhibition of professors displayed in academic robes not only tied the new academicians into an ancient tradition of learning, but

⁴⁹ *Id.*

⁵⁰ Fishman, *supra* note 10, at 167.

⁵¹ *Id.* at 168.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Adams, *supra* note 6, at 81.

⁵⁵ *Id.* at 73-74.

it also paraded them like so many cadets in uniform; it underlined their oneness, their belonging. The commencement ritual which had well served the varied purposes of the American college now assumed a new purpose: the exhibition of the new professionals, drawn up in order of rank and wearing their badges of merit. If the faculty club was a conscious effort to stimulate an institutional cohesiveness that size made impossible, it was also what was required of any self-respecting group of organization men. The American faculty club was merely one more occupational variation of the gentlemen's club—the manufacturer's club, the banker's club, the broker's club.⁵⁶

Women faculty members, however, were simultaneously expected to exist “as a part and apart from the faculty culture. Custom, for example, often dictated that they were not allowed to enter the faculty club or to march in academic processions.”⁵⁷

Before the middle of the twentieth century, the rules of membership in this male faculty club at U.S. universities and colleges had become standardized, with the tenure rules operating as the gateway to entrance into this club. The problem lies not with the tenure standards and their demand of excellence in scholarship, teaching, and service but rather on the high value placed, for instance, on traditional forms of scholarship.⁵⁸ Some contemporary scholars in the legal academy have designated scholarship as either “safe,” that “scholarship that conforms to the ideologies, methodologies and standards shared by the evaluator or the ‘mainstream legal academy,” or “dissent,” that scholarship employing “ideologies, methodologies, perspective, viewpoints and voices or other standards that are competing with the evaluator's or the ‘mainstream’ ideologies”:⁵⁹

Legal scholarship is shaped by the socially dominant member of society. In the United States, this means that, at least until the

⁵⁶ Rudolph, *supra* note 12, at 409.

⁵⁷ Thelin, *supra* note 28, at 144. These women responded by forming faculty clubs of their own and a national organization that eventually became the Association of American University Women, which by 1900, claimed 2,000 members across the U.S. *Id.* at 145.

⁵⁸ Margaret E. Montoya & Francisco Valdes, *Latinas/os and the Politics of Knowledge Production: Latcrit Scholarship and Academic Activism as Social Justice Action*, 83 *Ind. L.J.* 1197, 1210 (2008).

⁵⁹ *Id.* & n. 31.

1970s and 1980s, when women and people of color entered the academy (in significant numbers), legal scholarship was shaped by white men. This means that the ideologies and methodologies of “traditional doctrinal scholarship” are informed by the decades in which the legal academy consisted of white, upper-middle class men. In light of the historical bias, it seems appropriate to question whether safe scholarship is the dominant standard for legal scholarship solely because of fair competition and merit, or due to other factors.⁶⁰

What operated as a system of intentional exclusion for several hundred years, may now operate as a system of unconscious exclusion. One author explained “[t]he insidious nature of gender bias that infects academic decision-making” by recounting the reaction of the former Secretary of Labor, Robert Reich, who had also been a professor, when his wife, Professor Claire Dalton was denied tenure at Harvard Law School:⁶¹

Why? At first I was bewildered. I knew most of the men who had voted against her. A few I knew to be narrow-minded, one or two I might have suspected of misogyny. But most were thoughtful, intelligent men. ... I was sure that they all felt they had been fair and impartial in judging her work. They would be appalled at any suggestion of sexual bias.

Gradually, I came to understand. They were applying their standard of scholarship as impartially as they knew how. Yet their standard assumed that the person to whom they applied it had gone through the same training and had had the same formative intellectual experiences as they. It assumed further that the person had gained along the way the same understandings of academic discipline, and the same approaches to core problems, as they had gained. In short, their standard was premised on the belief that the people they had judged had come to view the modes and purposes of scholarship—of the life of the mind—in the same way they had come to view it.

... The values and perspectives she brings to bear on the world—and in particular, the world of ideas—are different from theirs, because she has experienced the world differently. ... They had applied their standard as impartially as they knew how, but it was a male standard.

⁶⁰ *Id.*

⁶¹ West, *supra* note 22, at 144.

Not that they were incapable of appreciating her scholarship simply because they were men. ... The majority of the men on her faculty had voted to grant her tenure; she had failed only to get the necessary two thirds. Presumably, the men who supported her had been...able and willing to expand their standard—not to compromise it or to reduce it, but to broaden it to include a woman’s way of knowing. I suspect that those who did not, did not care to try.

And why would they not have cared to try? ... Apart from a few diehards, they were kindly men, tolerant men. But perhaps they did not feel that she had invited them to try. ... She had not played at being a good daughter to the older and more traditional men on the faculty, giggling at their jokes and massaging their egos. Nor had she pretended to be one of them, speaking loudly and talking tough. They had no category for her, and to that extent, she had threatened them, made them uncomfortable. So that when it came time for them to try to see the world from her perspective, they chose not to.⁶²

A predominantly male tenured faculty whose members who have been educated as students and mentored as junior faculty within this system, which favors traditional forms of scholarship and teaching, may have unknowingly internalized these male faculty club values and beliefs, or at the very least, have had little reason to self-critically assess their views on these matters. As the next section demonstrates, given the fact that the tenure system is situated within a larger employment setting that vests great discretion and latitude with the decision-maker, the employer, and vests little right or entitlement to work with the employee, the larger legal system reinforces and acts to perpetuate this view of tenured faculty as a male faculty club.

Historical and Legal Culture of Employment in the U.S.

The employment setting in the U.S. also fosters a view of employment as a private club. Authorities in the U.S. do not agree about the state of employment law prior to 1877 in the U.S.

⁶² *Id.* at 144-145 & n. 311 (quoting Robert B. Reich, *The Resurgent Liberal* 204-205 (1989)).

Some scholars believe that the English rule, articulated by William Blackstone in 1765, reflected colonial views. Blackstone's rule presumed that employment relationships of indefinite duration would continue for one year.⁶³ "Blackstone's rule, predicated on the presumption of a largely agricultural workforce, was designed to avoid opportunism. Because farmworkers worked long hours during the growing season but little during winter, they were at risk of being discharged in late fall after the harvest."⁶⁴ Other scholars argue that the American colonies did not follow English common law from the beginning, with some scholars asserting that the employment at will doctrine was commonly followed and others arguing that employment law in the colonies consisted of "a confusion of principles and rules."⁶⁵

Scholars do, however, agree that whatever the state of employment law existing in the American colonies, the employment at will rule came to be embraced in all states after Horace Gay Wood, an author of a treatise, declared it to be the law of the land in 1877:

[T]he rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. ... It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party.⁶⁶

Unfortunately, the cases Wood cited as authority for his statement did not support his assertions about the status of employment at will in the U.S.⁶⁷ Nevertheless, "Wood's rule spread across the nation until it was generally adopted" and "by 1930, the doctrine had become

⁶³ Bales, *supra*, note 14, at 456

⁶⁴ *Id.*

⁶⁵ *Id.* at 457. (quoting Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 Am. J. Legal Hist. 118, 122 (1976)).

⁶⁶ *Id.* at 457 (quoting H. G. Wood, *A Treatise on the Law of Master and Servant* 272 (1877)).

⁶⁷ *Id.* at 458.

embedded in American law. The doctrine was accepted without question or discussion.”⁶⁸ The rule developed differently in one respect from Wood’s statement—rather than being a default rule, the employment at will doctrine operated as a strong presumption, particularly in cases of indefinite appointment, such as lifetime or permanent employment relationships.⁶⁹ Different theories have been advanced to explain the prevalence of the doctrine in U.S. employment law. Some experts assert that the employment at will “rule was an adjunct to the development of advanced capitalism in America.”⁷⁰ As the U.S. economy shifted to become a national economy, and as the means of production became centralized in large factories, middle level workers “became more important, prevalent, and potentially powerful. Thus, they ‘might have been expected to seek a greater share in the profits’ and degree of control over the companies for which they worked.”⁷¹

Beginning in 1959 and continuing to the present, the law began a gradual but steady shift away from operating as a presumption and toward operating more in line with Horace Wood’s description as a default rule. At this time a California appellate court was the first to recognize a public policy exception to an employer’s right to terminate an employee at will when an employee alleged that he had been terminated after he refused to commit perjury.⁷² This approach developed to permit employees “to circumvent the doctrine entirely by allowing at will employees who were discharged to sue in tort rather than in contract”⁷³ for situations involving

⁶⁸ Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. Pa. J. Lab. & Emp. L. 65, 68 (2000).

⁶⁹ Bales, *supra* note 14, at 458.

⁷⁰ *Id.* (quoting Feinman, *supra* note 65, at 131).

⁷¹ *Id.* at 462 (quoting Feinman, *supra* note 65, at 133).

⁷² *Id.* at 459 (citing *Peterman v. Int’l Brotherhood of Teamsters*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959)).

⁷³ Summers, *supra* note 68, at 70.

terminations “for exercising a statutory right, such as filing a workers’ compensation claim, or for performing a required public duty, such as jury service.”⁷⁴

Since this time, courts have recognized various additional contract and tort-based exceptions to employment at will, stemming from, for instance, oral promises of job security and similar written promises contained in employee handbooks and manuals distributed to employees; various other legal theories developed, including intentional infliction of emotional distress and breach of the implied duty good faith and fair dealing when, for example, an employee has been terminated for refusing to date a supervisor.⁷⁵ State and federal labor and anti-discrimination legislation have also been enacted as exceptions to the employment at will rule, and although these theories and exceptions could have rendered the employment at will doctrine “an anachronistic shell,” because the exceptions have been narrowly construed by the courts, the doctrine remains alive and well in forty-nine of the fifty states.⁷⁶

In fact, legislative efforts in Congress and in many states to abrogate the employment at will doctrine have been overwhelmingly defeated, including the Model Employment Termination Act of 1991, which has neither been “seriously considered,” nor adopted by a single state.⁷⁷ This entrenched doctrine renders the U.S. fairly singular in comparison to other industrialized and developing countries in its legal assumptions about the employment relationship, the nature of labor, and the rights and duties of employers and employees.⁷⁸ The employment at will rule reflects a judicial perspective that affords employers “unfettered

⁷⁴ Deborah A. Ballam, *Employment at Will: The Impending Death of a Doctrine*, 37 Am. Bus. L.J. 653, 662 (2000).

⁷⁵ *Id.* at 661. In *Agis v. Howard Johnson Co.*, 355 N.E.2d 315, 317-318 (Mass. 1976), a claim of intentional infliction of emotional distress was recognized in an employment at will setting when an employer who believed one or more employees were stealing from him, began dismissing employees in alphabetical order because he did not know the identity of the thief. *Id.*

⁷⁶ Bales, *supra* note 14, at 459.

⁷⁷ Summers, *supra* note 68, at 78.

⁷⁸ *Id.* at 65.

freedom to determine who should be employed” and decrees “that workers are subordinate to the employer’s decisions—however arbitrary they may be.”⁷⁹

This doctrine

draws its strength from the deeply rooted conception of the employment relationship as a dominant-servient relation rather than one of mutual rights and obligations. The employer, as owner of the enterprise, is viewed as owning the job with a property right to control the job and the worker who fills it. That property right gives the employer the right to impose any requirement on the employee, give any order and insist on obedience, change any term of employment, and discard the employee at any time. The employer is sovereign over his or her employee subjects.⁸⁰

Not surprisingly, as the next section demonstrates, this strong legal preference for the rights of employers as owners of the employment enterprise is reflected in the sex discrimination laws female faculty members invoke when they believe they have been denied tenure based upon their gender rather than based upon the merits of their candidacy.

Historical and Legal Culture of Employment Discrimination Law in the U.S.

Title VII, the primary federal law applicable to sex discrimination in employment, protects female faculty from discrimination “because of...sex.”⁸¹ Even before Title VII was passed in 1964, its sponsors in Congress strategized about how best to deal with the arguments opponents of the legislation would make—that private employers across the nation had the right to choose

⁷⁹ *Id.* at 77.

⁸⁰ *Id.* at 78.

⁸¹ 42 U.S.C. §§ 2000e et seq. (2000).; 29 C.F.R. §§ 1601 et seq. (2009). Each state also has parallel anti-discrimination laws and other relevant federal laws include: the Equal Pay Act (EPA), 29 U.S.C. section 206(d) (2000) (prohibits discriminatory payment of wages based on sex); Title IX, 42 U.S.C. section 1681 et seq.(2000) (prohibits sex discrimination in programs receiving federal financial assistance and applies to employment); and the Fourteenth Amendment Equal Protection Clause to the U.S. Constitution (does not apply to private universities and colleges).

who they would associate with as employees.⁸² Although this legislation had been sent to Congress on June 19, 1963, as a part of a group of civil rights bills, two days before the final congressional vote on Title VII, on February 8, 1964, Howard Smith, a southern member of the House of Representatives and very longstanding opponent of race discrimination legislation,

introduced an amendment on the House floor, ... calling for the insertion of the word “sex” into the proposed Title VII, [legislation] Many thought he was joking or more seriously, trying to throw a monkey wrench into the provision. No, assured Smith, the insertion of the word “sex” “will help an important minority.” “This bill is so imperfect,” Smith said, “what harm will this little amendment do?”⁸³

Many believed the proposed amendment was designed to ensure that Title VII would be defeated,⁸⁴ and when it was not, the congressional prohibition of sex discrimination by private employers became law with little discussion and debate and no legislative history to guide courts.⁸⁵ The irony, of course, is that outside the context of the discrimination claims of female faculty members, “Title VII enforcement has been most effective in cases dealing with sex discrimination.... [and] during the first two years of enforcement 4,000, sex discrimination complaints were filed, roughly one-quarter of the commission’s case load.”⁸⁶

Because sex was a last-minute addition to Title VII as it was being debated and argued and because the bill was primarily designed to counteract the nation’s long and devastating

⁸² Ann C. McGinley, *Functionality or Formalism? Partners and Shareholders as “Employees” Under the Anti-Discrimination Laws*, 57 S.M.U.L. Rev. 3, 41 (2004).

⁸³ Dennis W. Johnson, *The Laws that Shaped America* 319 (2009). See also Dekat, *supra* note 21, at 245-246.

⁸⁴ Elizabeth Malcom, “*Looking and Feeling Your Best*”: *A Comprehensive Approach to Groom and Dress Policies Under Title VII*, 46 San Diego L. Rev. 505, 513 & n. 42(2009); Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, Duq. L. Rev. 453, 453 (1981) (citing the likely motivation for the last-minute addition of sex as a protected class under Title VII--making “it unacceptable to some of its supporters or by laughing it to death.”).

⁸⁵ *Id.* Some experts disagree arguing that there were Representatives who spoke in favor of the sex discrimination amendment to Title VII and there was at least some serious debate on the day sex was added. Malcom, *supra* note 84, at 513 & n. 42.

⁸⁶ Johnson, *supra* note 83, at 328.

history of race discrimination, opponents couched their arguments against enforceability in reference to race and not sex.⁸⁷ Their arguments are, however, applicable to the gender protections of Title VII because the arguments derive from the perspective of employment as a dominant-servient relationship in which the employer has an absolute freedom to hire and fire workers for any reason, including immutable characteristics unrelated to ability or performance. Opponents “made the libertarian argument that Title VII would deprive employers of the constitutional right of association rooted in the First Amendment to hire, work with, and discharge whomever they pleased.”⁸⁸

Southern senators who opposed the legislation adopted an additional strategy, characterizing Title VII as extremely harmful “to the American economic and governmental system”⁸⁹:

The bill is the answer to a bureaucrat’s dream. It is the realization of a bureaucrat’s prayers. ... I honestly believe that no bill has ever been submitted to the American Congress that poses a greater threat to our forms of government, that threatens to substitute a government of men—men clothed with an official title but operating without the restraint of law—that is posed by the pending measure.⁹⁰

Title VII must, therefore, be understood against this backdrop of a very strong and prevalent belief in the employment at will doctrine and a resulting view of employers as empowered by virtue of their ownership of a business enterprise, a view of employees as having no rights or

⁸⁷*Id.* at 317.

⁸⁸ McGinley, *supra* note 82, at 41. They also made other arguments, including that Title VII would require quotas and race-based hiring, discrimination against Caucasians, and would prohibit merit-based decisions. Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 *Ariz. L. Rev.* 1003, 1012 (1997).

⁸⁹ John G. Stewart, *The Civil Rights Act of 1964: Strategy*, in *The Civil Rights Act of 1964: The Passage of the Law That Ended Racial Segregation* 200 (Robert D. Loevy ed. 1997)

⁹⁰ *Id.* (Senator Richard Russell from Georgia).

entitlements to employment, a view of the employment relationship as essentially private, and a fear of governmental intervention.

As initially enacted in 1964, Title VII provided an exemption to employment in higher education.⁹¹ In 1972, when Title VII was amended to apply to public employers, it was also amended to apply to colleges and universities as employers.⁹² Thus, Title VII should serve as an important vehicle for redress of discrimination claims in academia because it applies to claims of tenure-based discrimination made against all universities and colleges in the U.S., the majority of which are pursued as individual disparate treatment or intentional discrimination claims.⁹³ The application of Title VII in this area has, however, been problematic due to the deference a majority of courts give to tenure decisions.⁹⁴

These federal courts cite numerous reasons for applying a less rigorous standard to universities and colleges and thereby rendering a female faculty member's burden of proof more onerous: (1) the stakes are so high for the institution because a favorable tenure decision results in a lifetime or permanent contractual commitment to a faculty member; (2) tenure decisions do not involve typical hiring or promotion decisions in which one employee is competing against another; (3) tenure decisions are decentralized with several levels of recommendation and

⁹¹ Dekat, *supra* note 21, at 246.

⁹² *Id.* The amendment as to university and college employers can be found at 42 U.S.C. § 2000e-1(a) (2000). *See* West, *supra* note 22, at 94 & n. 95.

⁹³ *Id.* at 146. Title VII also includes two systemic or class-based theories of discrimination. Disparate impact discrimination requires no showing of intent to discriminate; instead, a female faculty member must point to a facially neutral policy with a discriminatory impact on women, a difficult burden for women who are seeking tenure. Dekat, *supra* note 21, at 247. A female faculty member can also pursue a systemic disparate treatment claim by putting on statistical evidence of a "pattern and practice" of discrimination against female faculty. West, *supra* note 22, at 147-148.

⁹⁴ Dekat, *supra* note 21, at 240-241.

decision; (4) the factors involved in a tenure decision are complex; and (5) tenure decisions are subjective in nature.⁹⁵

None of these reasons are convincing arguments that a Title VII discrimination claimant employed as a faculty member at a university or college should be treated differently than other Title VII claimants. The stakes are high for the employer, but the employee has gone through a rigorous and lengthy probationary period of approximately six years, which means that the employee has devoted a significant portion of her career to her employer, and, consequently, the stakes are also very high for her. Even if the competition argument were accurate, this fact should not result in a different standard being applied absent congressional mandate. Federal courts routinely make decisions involving long-term contractual commitments and highly compensated professionals. Other employment settings also involve complex, decentralized decision making processes with multiple levels of review, particularly in the promotion process.⁹⁶ Courts have always dealt with specialized employment settings, recognizing that the burden is on the claimant to prove her case.⁹⁷ Assuming that the tenure decision involves greater subjectivity than do decisions in other employment settings, it is not the subjectivity that should be dispositive on the issue of discrimination. If the different constituents involved in the tenure review process provide clear and cogent reasons for tenure decisions, whether they are based on subjective, objective, or some combination of factors, judicial review is possible.⁹⁸

In jurisdictions in which courts do not invoke the academic deference doctrine, Title VII's requirements for proving individual disparate treatment or intentional discrimination pose

⁹⁵ *Id.* at 260-265 (citing *Zahorik v. Cornell Univ.*, 729 F.2d 85 (2d Cir. 1984)).

⁹⁶ *Id.* at 262-263.

⁹⁷ *Id.* at 263-264 (citing “accounting partnerships; administrative law judgeships; law enforcement; engineering; computer programming; and hard sciences such as chemistry” as examples).

⁹⁸ *Id.* at 264.

other hurdles to female faculty members who have been denied tenure. The requirement of proof of actual discriminatory animus based on gender proves difficult in the academic setting in terms of exactly who must be shown to have harbored discriminatory animus and to what extent individuals within the committee review process must be proven to have shared this intent in order to hold the university or college responsible.⁹⁹ “Under current case law, prejudicial remarks from several faculty or committee members have not been enough to prove illegal intent on the part of the university.”¹⁰⁰

The proof requirement is also problematic for the faculty member because it does not incorporate or recognize subconscious or unintentional discrimination that continues to exclude women from the ranks of tenured professors:

The intent requirement in discrimination law is one way of maintaining and justifying the present myth of meritocracy. By pretending that discrimination results only from decisions made by people with prejudicial motives, we can continue to believe that those of us who have succeeded in this system have done so by our own meritorious performance. . . . Just as the intent requirement has been used in constitutional litigation to avoid confronting the problem of unconscious racial prejudice, so it serves to prevent the exposure of subconscious gender or racial bias under employment discrimination law.¹⁰¹

The academic deference doctrine together with the intent requirement under Title VII, reflect the entrenched employment at will doctrine to which Title VII operates as a limited exception.¹⁰² In addition to these judicial interpretations of Title VII that create real hurdles for women who have been denied tenure to pursue discrimination claims, the express statutory

⁹⁹ West, *supra* note 22, at 125-126

¹⁰⁰ *Id.* 127 (citing *Lam v. University of Hawaii*, 59 Fair Empl. Prac. Case (BNA) 113 (D. Haw. Aug. 13, 1991); *Brousard-Norcross v. Augustana College Ass’n*, 935 F.2d 974 (8th Cir. 1991); *Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir. 1990)).

¹⁰¹ West, *supra* note 22, at 145. See *Lawrence*, *supra* note 26, at 326-327.

¹⁰² See *Slater*, *supra* note 19, (arguing that the employment at will doctrine “swallows the exception Title VII was designed to create”).

language of Title VII ratifies, in narrow circumstances, a view of employment as a private club. Title VII expressly incorporates a narrow exception for “bona fide private membership clubs” as a part of its definition of “employer.”¹⁰³ Although this exemption runs directly counter to Title VII’s stated purpose, its basis, not surprisingly, “rests on the constitutional right to freedom of association” embodied in the First Amendment.¹⁰⁴ The few cases that have arisen under this section of Title VII require that the employer bear the burden of proving entitlement to the exemption.¹⁰⁵

Although courts are not entirely consistent in their approach to this issue, they have developed tests that focus on the social nature of the organization in question and emphasize the following factors: (1) selectivity in membership and admissions; (2) institutionalized membership procedures, (3) the level of membership control of club governance, (4) organizational history and whether it was changed to avoid application of anti-discrimination law, (5) the restrictions on use of the club by non-members, (6) the level of membership dues, (7) the use of advertising, and (8) the dominance of a profit motive.¹⁰⁶ At one end of the spectrum, courts have concluded that credit unions do not qualify as private membership clubs because they are only minimally selective and have a large membership base;¹⁰⁷ at the other end, courts have found that longstanding private, social clubs, whose membership includes members of the business and academic community, such as the Chicago Club, do qualify.¹⁰⁸

¹⁰³ 42 U.S.C. § 2000e (b) (2) (2000).

¹⁰⁴ David A. Jensen, Note, *Private Clubs and the Burden of Discrimination: EEOC v. Chicago Club*, 1999 Wis. L. Rev. 825, 826 (1999).

¹⁰⁵ *Id.* at 826, 839.

¹⁰⁶ *Id.* at 834 & n. 59 (quoting *Mills v. Fox*, 421 F. Supp. 519, 523 (E.D.N.Y. 1976) (quoting *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203 (D. Conn. 1974)). The Equal Employment Opportunity Commission has also adopted interpretive guidelines to analyze the private club exemption, which although entitled to deference, are not binding on courts. *Id.* at 835.

¹⁰⁷ Jensen, *supra* note 104, at 837 (citing *Quijano v. University Fed. Credit Union*, 617 F.2d 129, 130 (5th Cir. 1980)).

¹⁰⁸ *Id.* at 841 (citing *EEOC v. Chicago Club*, 86 F.3d 1423, 1437 (7th Cir. 1996)).

Of course academic institutions would not qualify as bona fide private membership clubs within the meaning of Title VII, because they are not currently organized primarily as social clubs. They are, first and foremost, institutions of higher learning—education is a business in the U.S. It is quite interesting to note, however, that a majority of the eight factors listed above (factors 1 through 5) come close to describing the current body of tenured faculty at college and university campuses across the country. The tenure process is certainly a selective, institutionalized procedure by which individuals earn membership in a group, and, as a result of which, they are entitled to rights of faculty governance. In this very real sense, U.S. employment laws together with anti-discrimination laws operate to permit what was once de jure exclusion of women and has since transformed into their de facto exclusion from the ranks of the tenured faculty private membership club.

Conclusion

U.S. women were excluded by statute from colleges and universities for several hundred years. Today, they continue to be excluded from secure, tenured positions within the faculty ranks. As long as the larger employment setting in the U.S. ratifies a view of the employment relationship as being akin to a private social club, women will continue to be excluded. Employment law and anti-discrimination law must be interpreted in such a way as to recognize the rights of employees to a livelihood and to quality of life. The laws that have been in place for almost half a century to protect women from sex discrimination must be interpreted in a manner that recognizes that the vast majority of discrimination is the result of unconscious stereotypes and bias and not due to personal animus or attitudes toward women as inferior or incompetent by virtue of their gender. Such a change is long overdue and will enrich higher education for students and faculty alike.

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