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Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine

Scott A. Moss†

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I. INTRODUCTION

When the defendant in an employment case is a college or other institution of higher education, the plaintiff usually will face an “academic deference” argument. Citing the importance of “academic freedom,” defendants and sympathetic courts have asserted that “[o]f all fields . . . 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.” Whether or not courts cite the “academic deference” doctrine expressly, they certainly have proven hostile to professors’ claims of discrimination, dismissing as a matter of law claims that seemed quite

1. Faro v. New York Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974) (gender discrimination case under Title VII); see also Jiminez v. Mary Washington Coll., 57 F.3d 369, 377 (4th Cir. 1995) (“[W]hile Title VII is available to aggrieved professors, we review professorial employment decisions with great trepidation . . . . The federal courts have adhered consistently to the principle that they operate with reticence and restraint regarding tenure-type decisions.”); Bina v. Providence Coll., 39 F.3d 21, 26 (1st Cir. 1994) (“[C]ourt review of tenure decisions should be guided by an appropriately deferential standard. A court may not simply substitute its own views concerning the plaintiff’s qualifications for those of the properly instituted authorities; the evidence must be of such strength and quality as to permit a reasonable finding that the denial of tenure was ‘obviously’ or ‘manifestly’ unsupported. The district court appropriately applied this standard to the present case, even though this is a case not of denial of tenure but of denial of appointment to a tenure track position.”) (citation omitted); Dorsett v. Bd. of Trustees for State Colls. & Univs., 940 F.2d 121, 123-24 (5th Cir. 1991) (“In public schools and universities across this nation, interfaculty disputes arise daily over teaching assignments, room assignments, administrative duties, classroom equipment, teacher recognition, and a host of other relatively trivial matters. A federal court is simply not the appropriate forum in which to seek redress for such harms. We have neither the competency nor the resources to undertake to micromanage the administration of thousands of state educational institutions.”) (citations omitted); Carlile v. S. Routt Sch. Dist. RE 3-J, 739 F.2d 1496, 1500-01 (10th Cir. 1984) (“courts are reluctant to review the merits of tenure decisions,” and defendants in such cases “are given wide latitude in discretion concerning whom to award tenure”); Smith v. Univ. of N. Carolina, 632 F.2d 316, 345 & 345 n.26 (4th Cir. 1980) (“University employment cases have always created a decisional dilemma for the courts. Unsure how to evaluate the requirements for appointment, reappointment and tenure, and reluctant to interfere with the subjective and scholarly judgments which are involved, the courts have refused to impose their judgment as to whether the aggrieved academican should have been awarded the desired appointment or promotion . . . . “We, therefore, refuse to embark upon a comparative inquiry . . . into either the quantity or the quality of the published scholarly contributions of the University’s faculty members who have been granted or denied promotion.”) (citations omitted). Cf. Lynn v. Regents of Univ. of Calif., 656 F.2d 1337, 1344 (9th Cir. 1981) (reversing defense judgment in Title VII gender discrimination case but noting “the relative ease with which the courts of appeals have found the employer’s burden to be satisfied in the academic context”).
strong, or at least solid enough to allow a factfinder to rule either way.\textsuperscript{2} Indeed, according to one study, “[f]aculty plaintiffs prevail on the merits in civil rights cases only about one quarter of the time.”\textsuperscript{3} The bulk of the “academic deference” precedents are gender discrimination cases, which illustrates the extent to which the doctrine has been a significant barrier to the use of Title VII to redress the gender segregation that has proven so persistent in academia and various professions.\textsuperscript{4}

This Article argues that courts should reject the entire idea of a special “academic” deference to employment decisions challenged as discriminatory. The legislative history shows that Congress did not intend any special deference for academia, and there is no need for it, because courts can and do look for discrimination in other similar fields of employment. In many ways, there is less justification for deferring to academic than other employers, both for policy reasons (because of the importance of diversity in education) and doctrinal reasons (because of academic employers’ tendency to defend denials of tenure with little evidence other than self-interested testimony as to entirely subjective reasons). Courts’ frequent refusals to scrutinize academic employment decisions for discrimination risks leaving continued gender segregation and

\textsuperscript{2} See, e.g., Farrell v. Butler Univ., 421 F.3d 609, 616 (7th Cir. 2005) (affirming grant of summary judgment to defendant on professor’s sex discrimination claim; “As nonobjective as the selection criteria . . . may have been, this circuit and others have been reluctant to review the merits of tenure decisions and other academic honors in the absence of clear discrimination. We have previously recognized that scholars are in the best position to make the highly subjective judgments related with the review of scholarship and university service.”); Fisher v. Vassar Coll., 114 F.3d 1332 (2d Cir. 1997) (reversing verdict for professor claiming sex and age discrimination). Perhaps illustrating the lengths to which the appellate courts go in dismissing academic discrimination claims, both Farrell and Fisher were split decisions, Farrell a 2-1 panel decision and Fisher a hotly contested 12-judge \textit{en banc} decision that featured five dissenting judges and was abrogated by the Supreme Court shortly thereafter in Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000). See also Courtney T. Nguyen, Employment Discrimination and the Evidentiary Standard for Establishing Pretext: Weinstock v. Columbia University, 35 U.C. DAVIS L. REV. 1305, 1308-09 (2002) (criticizing Weinstock v. Columbia Univ., 224 F.3d 33 (2d Cir. 2000), yet another split (2-1 panel) decision affirming a defense grant of summary judgment on a professor’s sex discrimination claim, as “establish[ing] an evidentiary standard that makes it too difficult for a plaintiff to survive a motion for summary judgment . . . [and] frustrat[ing] the intent of Title VII by insulating universities from judicial scrutiny”).

\textsuperscript{3} Barbara A. Lee, Employment Discrimination in Higher Education, 26 J.C. & U.L. 291, 292 (1999). In contrast, employment discrimination plaintiffs as a whole (i.e., not just academic plaintiffs) prevail between 41 and 57 percent of the time, depending on the type of claim (e.g., retaliation claims are the most successful, whereas race discriminations succeed less often than gender or age discrimination claims). \textit{Id.}

\textsuperscript{4} See supra note 2 (citing gender discrimination cases); see generally Martha S. West, Gender Bias in Academic Robes: The Law’s Failure to Protect Women Faculty, 67 TEMP. L. REV. 67 (1994); Scott A. Moss, Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law, 27 HARV. WOMEN’S L.J. 1 (2004) (discussing the persistence of occupational segregation by gender in a wide range of occupations).
inequality in a large and important sector of both the labor market and our educational system.

While the "academic deference" doctrine has drawn criticism for quite some time, this Article not only adds an additional voice to the chorus, but also strikes a few additional notes. First, this Article analyzes various unrelated strands of employment discrimination case law, mostly of recent vintage, that severely undercut the doctrine as a basis for granting employers summary judgment or judgment as a matter of law ("JMOL")—

5. See, e.g., West, supra note 4; Susan L. Pacholski, Comment, Title VII in the University: The Difference Academic Freedom Makes, 59 U. CHI. L. REV. 1317, 1318 (1992) (noting that courts "have traditionally exercised restraint in cases involving the academic decisions of colleges and universities. . . . By granting college and university employees the right to sue their employers, however, Title VII seems to mandate a departure from traditional judicial deference"); Mary Gray, Academic Freedom and Nondiscrimination: Enemies or Allies?, 66 TEX. L. REV. 1591 (1988); Elizabeth Bartholet, Application of Title VII to Jobs in High Places, 95 HARV. L. REV. 945, 961 (1982) (noting that in many academic cases, "courts have adopted a 'hands-off' doctrine . . . [that] has been criticized as a form of judicial abdication, inconsistent with the . . . [Title VII amendments] that specifically removed the exemption for academic institutions").

Courts also have drawn criticism for applying too broad an "academic deference" doctrine in the context of reviewing challenges by expelled college students. See, e.g., Curtis J. Berger & Vivian Berger, Academic Discipline: A Guide to Fair Process for the University Student, 99 COLUM. L. REV. 289, 334 (1999) (defending courts' deferential "arbitrary and capricious" standard of review of colleges' dismissals of students for "academic failure," because deference "seems appropriate where the agency's or school's decision calls for an expert judgment . . . . But where a student's career may be at stake because of an academic 'crime,' akin to fraud or copyright infringement, matters courts handle as fact-finders routinely, colleges should not enjoy quite the same degree of deference")

West, for example, argues that courts adjudicating academic discrimination cases require plaintiffs to undertake a difficult search for evidence of discriminatory intent—but then those same courts "discount any evidence found and simply defer to academic expertise. . . . Courts have singled out academic institutions for even greater deference than that accorded to other professional employers." West, supra, 67 TEMP. L. REV. at 130-31. "Because of this deference, the courts avoid examining the merits of tenure decisions. They also ignore or discount any evidence of gender bias in the actual evaluation of the candidate's scholarship, teaching, or service. Furthermore, they are hesitant to accept evidence of discrimination based on comparative evaluations of the files of men who have received tenure, in contrast to the woman who has been denied. They simply refuse to scrutinize critically the 'academic' decision of the university." Id. at 133.

More pointedly, Bartholet and Gray criticize courts as "elitist" for being too reluctant to find that white-collar professionals like themselves are guilty of discrimination.

Judges defer to the employers with whom they identify, and they uphold the kinds of selection systems from which they have benefited. . . . [W]ith prestigious jobs, the courts show an appreciation of the apparent rationality of the employment procedures at issue and a respect for the decisionmakers involved. . . . By contrast, courts can readily strike down a civil service test . . . because, not knowing or caring much about how blue collar workers are chosen or promoted, judges find it easy to focus on the social harm of racial exclusion.

[C]ourts often profess their lack of expertise. . . . But courts are surely more qualified to intervene in academic decisions, with which they have some familiarity, than to decide who is qualified to serve in highly skilled blue collar jobs. . . . It is the courts' expertise, rather than the lack of it, that makes them reluctant to interfere at the upper level.

Bartholet, supra, at 979-80; see also Gray, supra, at 1596-97 (offering similar critique more focused on academia in particular).
the procedural devices that doom most academic plaintiffs’ claims.\(^6\) Specifically, courts have stressed that, under the leading recent Supreme Court precedent on proof of employment discrimination,\(^7\) summary judgment and JMOL are inappropriate where employers’ defenses are vague and subjective\(^8\) or where employers’ defenses rely too heavily on the testimony of interested parties.\(^9\) Thus, even if the notion of academic deference once had merit, it is in increasing tension with other, more firmly grounded employment discrimination principles.

Second, this Article discusses the implications for the academic deference doctrine of recent scholarship on the power of social norms in unregulated markets. While social norms can redress and prevent discrimination in some contexts, academia is the sort of labor market in which social norms are unlikely to be effective at preventing discrimination. Consequently, the risk of continued inequities in academia remains high if discrimination lawsuits are not a viable tool.

Third, this Article notes that even to the extent that courts accept the doctrine of academic deference, the rationale for such deference is limited to the context of promotion to tenure. Accordingly, courts applying the doctrine to failure-to-hire cases are applying precedent sloppily, extending a doctrine beyond its original rationale.

In short, the penchant of many courts to dismiss employment discrimination claims based on “academic deference” is misguided in a host of ways. It threatens to leave academia an island of civil rights lawlessness, essentially exempt from Title VII—a dangerous outcome for a society in which there is such gender inequity in academia and such a consensus that equal educational opportunity is the path to social progress and personal success.

II.
“DEFERENCE” TO EMPLOYERS:
THE EXCEPTION THAT SWALLOWS TITLE VII?

The main rationale for an “academic deference” doctrine is that courts are ill-suited to evaluate professors’ job performance, because the evaluation involves such a high level of discretion and depends upon so much specialized knowledge.\(^10\) How can courts evaluate a professor’s

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6. See, e.g., supra notes 1, 2, and 5 (citing cases and articles discussing the dismissals, mostly on summary judgment and JMOL, of academic cases).
8. See infra Part III.B.
9. See infra Part III.A.
10. See supra note 1.
scholarship on *Beowulf* in the original Old English, or on competing theories of cosmology? Even if judges understood the relevant writings, how can they decide whether the plaintiff's theories of the unknowable are "better" than those of rival professors? Courts sometimes go so far as to refuse entirely to examine the plaintiff's qualifications, based on deference to the defendant's "scholarly opinion":

even though plaintiff and certain supporting witnesses contend that his work was of scholarly merit, his output was not so perceived by either the threshold committees or the President himself. The fact alone that there is disagreement as to the scholarly merit of plaintiff's output is sufficient under these circumstances to mandate that the Court not review the merits of [defendant's] academic decision and resolve issues of scholarly opinion.11

The problem with this reasoning is that it would dissolve Title VII if followed to its logical conclusion and extended to other areas of employment. It would have courts defer to employers in a wide swath of labor markets, whenever judges feel insecure about their knowledge of the field. Although some have argued for such deference in interpreting employment contracts requiring "cause" for termination,12 this clearly is not the state of the law of employment discrimination. After all, academia is far from the only field in which evaluation of performance is discretionary and entails highly specialized knowledge; the same is true of various other fields in which federal courts, from the district level to the Supreme Court, have allowed discrimination claims to prevail or survive dispositive motions, such as:

- accounting partnerships;13
- administrative law judgeships;14
- law enforcement;15

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11. *Torres v. City Univ. of New York*, No. 90 Civ. 2278, 1996 WL 554575, at *3 (S.D.N.Y. Sept. 30, 1996). The court in this decision was issuing a decision as the finder of fact, not a summary judgment decision in which it would have been required to construe doubt in favor of the plaintiff; nevertheless, the degree of academic deference—declaring any examination of the merits inappropriate—is striking.

12. See *Richard Carlson*, EMPLOYMENT LAW 680 (2005) (noting that in the context of employment contracts prohibiting terminations without just cause, "deference to an employer's exercise of managerial judgment . . . tends to be especially important in wrongful discharge actions involving upper- or middle-level managers . . ., because an employer's standards for evaluating such personnel are bound to be more subjective than the sort of standards that govern the productivity and performance of factory workers . . .").

AGAINST ACADEMIC DEFERENCE

- engineering, 16
- computer programming, 17 and
- hard sciences such as chemistry. 18

As the Supreme Court noted in affirming a finding that an airline’s mandatory retirement age for pilots and flight engineers was unlawful age discrimination rather than a bona fide occupational qualification, “[e]ven in cases involving public safety, the [Age Discrimination in Employment Act] plainly does not permit the trier of fact to give complete deference to the employer’s decision.” 19 The airline’s arguments were reminiscent of those made by academic institutions—that if experts disagree on the merits, courts must defer to the employer—and the Court’s flat rejection of that argument was striking:

Western argues that . . . “where qualified experts disagree as to whether persons over a certain age can be dealt with on an individual basis, an employer must be allowed to resolve that controversy in a conservative manner.” This argument . . . virtually ignores the function of the trier of fact in evaluating conflicting testimony . . . . [T]he jury may well have attached little weight to the testimony of Western’s expert witness. A rule that would require the jury to defer to the judgment of any expert witness testifying for the employer, no matter how unpersuasive, would allow some employers to give free reign to the stereotyping of older workers . . . .

Indeed, nowhere in the law is a defendant’s denial entitled to such special “deference” as to eliminate the need for judicial scrutiny of the evidence—except, of course, “[i]n Wonderland, evidence is readily excluded on the basis of a general denial:”

[Mad Hatter:] “[T]he March Hare said—”

“I didn’t!” the March Hare interrupted in a great hurry.

“You did!” said the Hatter.

"I deny it!" said the March Hare.

"He denies it," said the King: "leave out that part." See Transcript, R. v. Knave of Hearts (unreported) (King of Hearts, J.), reprinted in L. Carroll, Alice's Adventures in Wonderland (1865), ch. 11.21

Perhaps the best precedent against a strong "academic deference" doctrine is Kunda v. Muhlenberg College.22 In Kunda, the court recited the basic academic deference argument, but it nevertheless upheld an academic plaintiff's resounding victory: the jury found discrimination in the plaintiff's non-promotion and denial of tenure, and the plaintiff won not only back pay, but also an injunction requiring defendant to promote her and grant her tenure.23 At length, Kunda explained that "academic institutions and decisions are not ipso facto entitled to special treatment under federal [discrimination] laws."24 Kunda extensively discussed and quoted relevant Title VII legislative history rejecting a strong "academic deference" doctrine:

Congress did not intend that those institutions which employ persons who work primarily with their mental faculties should enjoy a different status under Title VII than those which employ persons who work primarily with their hands . . . .

Discrimination . . . [in] education is as pervasive as discrimination in any other area . . . . [B]lack scholars have been generally relegated to all-black institutions, or have been restricted to lesser academic positions . . . . Similarly, . . . women have long been invited to participate as students . . . ., but without the prospect of gaining employment as serious scholars.25

Supporting an argument against taking "academic deference" too seriously is the fact that a number of academic plaintiffs have prevailed in recent discrimination decisions.26 Kahn v. Fairfield University27 is an

20. Id.
22. 621 F.2d 532 (3d Cir. 1980).
23. Id. at 535.
24. Id. at 545 (emphasis added).
especially helpful precedent explaining how courts can and should scrutinize the record for discrimination, even in the promotion-to-tenure context:

The job requirements included a doctorate degree as well as “an established reputation as an academician.” . . . [Plaintiff] had published six articles and book chapters. In contrast, the man first offered the position had served as a tenured professor at another institution for ten years, published four books and twenty articles and book chapters . . . . [Plaintiff] dispute[s] the true level of importance placed on the candidates’ academic records by the Search Committee[,] argu[ing] that the retrospective emphasis on the candidates’ academic records serves as pretext for its discriminatory animus[.] . . . [S]ummary judgment is not appropriate [because] . . . [a] jury is free to credit or discredit testimony by University administrators and members of the Search Committee. 28

Thus, courts adjudicating academic employment discrimination claims should engage in the standard inquiry: comparing qualifications with an eye to whether the employer’s asserted motivations are sufficiently implausible, inconsistent, or incoherent that they appear to be a pretext for unlawful discrimination.

III.

CHARACTERISTICS OF ACADEMIA
MAKING “DEFERENCE” INAPPROPRIATE

Courts and defendants arguing for “academic deference” stress characteristics of academic employment that make judicial deference appropriate. Less noted are three characteristics of academia that make judicial deference inappopriate. First, tenure decisions in particular—the main precedents supporting the academic deference doctrine—are closed-door affairs in which the court has to take the defendant at its word for various job qualifications and candidate assessments. 29 Second, the reasons given for tenure denials tend to be largely subjective—exactly the sorts of reasons that either can arise from unconscious discrimination or can mask intentional animus. 30 Third, there is more, not less, need for the legal system to redress discrimination in academia than in many other fields, both


28. Id. at 506-07.
29. See infra Part III.A.
30. See infra Part III.B.
because gender segregation in academia remains so persistent and because educational diversity and equal opportunity are of such great importance to society.31

A. Tenure Decisions: Defendants’ Reliance on Self-Interested Testimony

Tenure decisions by nature are closed-door affairs in which experienced faculty members evaluate the scholarship, teaching, and collegiality (usually in that order) of their junior colleagues. Because few concrete criteria exist for granting or denying tenure, it is difficult to find tangible evidence of the reasons for a tenure denial. Quite often, the evidence consists of the testimony of various decision-makers in the defendant’s employ—other professors, department chairs, and high officials (e.g., a dean or provost).32 Given that these individuals are tenured themselves, they likely are still working at the university when the plaintiff’s case comes to trial (or, more likely, to a summary judgment motion) two or three years after the tenure denial.

One of the oddities of current Title VII doctrine is how few courts have picked up on a passage from Reeves v. Sanderson Plumbing Products, Inc.,33 indicating that courts cannot grant summary judgment or (identically) judgment as a matter of law based on interested parties’ testimony. Reeves, the leading precedent on the parties’ burdens of proof on summary judgment or JMOL motions in employment discrimination cases, elaborated as follows:

the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe . . . . That is, the court should give credence to the evidence favoring the nonmovant as well as that “evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.”34

Especially in the latter part of the above passage, Reeves appears to instruct that an employment discrimination defendant cannot win summary judgment based on the testimony of its own agents and decision-makers,

31. See infra Part III.C.
32. For an informative glimpse of “the Byzantine tenure process” at a major university, see Weinstock v. Columbia Univ., 224 F.3d 33, 38-40 (2d Cir. 2000).
34. Id. at 150 (citations omitted).
because those witnesses are "interested," not disinterested, and therefore a
jury could choose to disbelieve their contradiction of the plaintiff's
allegations.\textsuperscript{35} Only one federal appeals court case has picked up on this
point explicitly, holding that "we must accept all the evidence favoring [the
plaintiff], but only the evidence favoring [the defendant] that is
uncontradicted and unimpeached and that comes from disinterested
witnesses."\textsuperscript{36} Other courts have rejected this plain-text interpretation of
Reeves, fearing that it "would foreclose the possibility of summary
judgment for employers."

Only in one appellate decision in an academic discrimination case has
this rule been recognized and proven decisive—and it was a student’s
discrimination claim, not that of an employee. In Tolbert v. Queens
College,\textsuperscript{38} the Second Circuit held that a defendant could not win its motion
based on the testimony of the defendant’s own agents and decision-makers,
because the district court’s finding, “that defendants had ‘conclusively
disproved’” allegations of discriminatory policies,

\begin{align*}
\text{plainly accepted as true the trial testimony of Liebman \ldots \ [and] Cairns.}
\end{align*}

Acceptance of their versions, however, was not within the province of the
court in ruling on a motion for judgment as a matter of law, for Liebman
and Cairns plainly were not disinterested witnesses; they are defendants.
Nor could Buchsbaum, though not a party, reasonably be considered a
disinterested witness, for he was the coordinator of the \ldots [defendant’s]
program.\textsuperscript{39}

Although Tolbert addressed a grant of judgment as a matter of law in a
Title VI educational discrimination case, it is good law for employment
discrimination cases; it followed Reeves and applied the standards of Title
VII summary judgment precedents.\textsuperscript{40} In non-academic cases, Tolbert has
been followed recently as a cautionary note against granting defendants’

\begin{itemize}
\item \textsuperscript{35} In contrast, an employment discrimination plaintiff opposing summary judgment can rely on
his or her own testimony. See Uy v. Bronx Mun. Hosp. Ctr., 182 F.3d 152, 156 (2d Cir. 1999) (rejecting
as "mistaken" the view "that the case was legally insufficient without corroboration of the plaintiff's
testimony," because such testimony (as to events and facts allegedly evidencing employment
discrimination) "is legally sufficient to create a jury question of the existence of [discriminatory]
animus").
\item \textsuperscript{36} Salitros v. Chrysler Corp., 306 F.3d 562, 569 (8th Cir. 2002).
\item \textsuperscript{37} Sandstad v. CB Richard Ellis, Inc., 309 F.3d 893, 898 (5th Cir. 2002) ("Appellant contends
that Reeves requires us to disregard as interested witness testimony all testimony by managers involved
in the employment decision \ldots . The definition of an interested witness cannot be so broad as to require
us to disregard testimony from a company's agents regarding the company's reasons \ldots . As the Seventh
Circuit noted in Traylor v. Brown, et al., 295 F.3d 783 (7th Cir. 2002), to so hold would foreclose the
possibility of summary judgment for employers, who almost invariably must rely on testimony of their
agents to explain why the disputed action was taken.").
\item \textsuperscript{38} 242 F.3d 58 (2d Cir. 2001).
\item \textsuperscript{39} Id. at 72.
\item \textsuperscript{40} Id. at 70–71; Reeves, 530 U.S. 133.
\end{itemize}
dispositive motions based on evidence, such as interested witnesses' testimony, that a jury might choose to disbelieve.\textsuperscript{41}

Indeed, in one academic discrimination case, among the “interested witness” defense testimony that the court discounted on summary judgment was testimony from “University administrators and members of the Search Committee.”\textsuperscript{42} Yet in many of the academic discrimination cases discussed above, courts have granted summary judgment based on the testimonial assertions of the search committee members and high university officials accused of discrimination.

\section*{B. Subjective Reasons:
Reflecting Unconscious, or Masking Conscious, Discrimination}

Decisions to promote or terminate faculty members are notoriously subjective. Evaluations of scholarship, even if honest rather than pretextual, often are know-it-when-you-see-it opinions, such as that a professor’s “research lacked originality” or that, “measured by intellectual strength and scientific ability, [the professor] was not in the same league as other tenured [faculty].”\textsuperscript{43} One court went so far as to hold that conflicting evidence of “scholarly merit” means that the court should “not review the merits” at all.\textsuperscript{44}

Yet the subjectivity of academic employment decisions extends beyond eye-of-the-beholder evaluation of scholarship, extending into entirely personal characteristics. “Collegiality has been increasingly used as a criterion in tenure and termination decisions,” and it has been “consistently upheld” by the courts as a basis for academic employment

\textsuperscript{41} See, e.g., Meacham v. Knolls Atomic Power Lab., 381 F.3d 56, 62 (2d Cir. 2004) (“Because the standard of review . . . requires us to credit the testimony that favors plaintiffs and does not allow us to reverse the jury's verdict based on evidence the jury could have rejected, we do not set out, except in general terms, defendants' refutation of plaintiffs' witnesses' testimony.”) (citing Tolbert, 242 F.3d at 70)), vacated on other grounds, KAPL, Inc. v. Meacham, 125 S. Ct. 1731 (2005) (remanding based on restatement of ADEA disparate impact standards in Smith v. City of Jackson, 125 S. Ct. 1536 (2005)); Scott v. Rosenthal, No. 97 Civ. 2143 (LLS), 2001 WL 968992, at *4 (S.D.N.Y. Aug 24 2001) (in employee compensation suit, “Defendants . . . point to other statements by [plaintiff] Scott and to [defendant] Rosenthal's testimony as contradicting Scott's expectation of compensation. Such evidence raised serious questions of fact and credibility for the jury to resolve, which the court will not reassess . . .” (citing Tolbert, 242 F.3d at 70)); Frink America, Inc. v. Champion Road Mach. Ltd., No. 7:96-CV-486, 2001 WL 34124761, at *2 n.3 (N.D.N.Y. Aug. 9, 2001) (“Where conflicting evidence existed, the Court disregarded evidence favoring Defendant” in evaluating judgment as a matter of law in intellectual property case (citing Tolbert, 242 F.3d at 70)).

\textsuperscript{42} Kahn v. Fairfield Univ., 357 F. Supp. 2d 496, 506 (D. Conn. 2005) (holding, in employment discrimination case, that “summary judgment is not appropriate [because] . . . a jury is free to credit or discredit testimony by University administrators and members of the Search Committee”).

\textsuperscript{43} Weinstock v. Columbia Univ., 224 F.3d 33, 39 (2d Cir. 2000).

\textsuperscript{44} See supra note 6 (discussing Torres v. City Univ. of New York, No. 90 CV 2278 (RO), 1996 WL 554575, at *3 (S.D.N.Y. Sept. 30, 1996)).
against academic deference

decisions, despite criticism of the criterion.\textsuperscript{45} Even if collegiality has come into “increasing” explicit use, it always was present in academic decision-making; one of the earlier “academic deference” cases noted that in academic employment decisions, “the personality of the candidate” is a matter “of great importance.”\textsuperscript{46}

Such subjective rationales may convince a jury, but it is doubtful that they can support an award of summary judgment or judgment as a matter of law—the tools commonly used to dismiss academic plaintiffs’ discrimination claims. Recent Title VII case law outside the academic context clarifies that an award of summary judgment cannot be based on purely subjective assertions. For example, in Mandell v. County of Suffolk, the Second Circuit reversed a grant of summary judgment to a (non-academic) defendant that rejected the plaintiff for “not project[ing] the image . . . [of] a positive grasp’ of some unspecified ‘areas’ of interest to [defendant].”\textsuperscript{47} Mandell noted that a plaintiff can avoid summary judgment without even directly countering such vague evidence:

\begin{quote}
though plaintiff does not present evidence directly contradicting defendants’ . . . stated reasons . . . this failure is not fatal. . . . [A]n employer may not rely solely on wholly subjective and unarticulated standards as a basis for its promotion decisions. An employer’s explanation of its legitimate nondiscriminatory reasons must be “clear and specific.” . . . [Defendant’s] explanation of the negative impact of the 1997 interview is couched in vague and general terms . . . [of a] “positive image” that . . . plaintiff failed to project . . . .
\end{quote}

In Patrick v. Ridge, also a non-academic case, the Fifth Circuit eloquently clarified the point: “This does not mean that an employer may not rely on subjective reasons for its personnel decisions. It does mean, though, that to rebut an employee’s prima facie case, a defendant employer must articulate in some detail a more specific reason than its own vague and conclusional feeling about the employee.”\textsuperscript{48}

The problem is not only that vague, entirely subjective reasons fail some burden of proof. Rather, the problem is that such reasons are not rebuttals of discrimination allegations because they are entirely consistent with discriminatory motivations, as Patrick explained:

\begin{quote}
47. 316 F.3d 368, 380 (2d Cir. 2003).
48. Id. at 381 (emphases added) (citations omitted).
49. 394 F.3d 311, 317 (5th Cir. 2004) (reversing defense grant of summary judgment where defendant justified its failure to promote plaintiff by asserting that she was “not sufficiently suited” and that the successful candidate was the “best qualified”).
a hiring official’s subjective belief that an individual ‘would not “fit in” or was “not sufficiently suited” for a job is at least as consistent with discriminatory intent as it is with nondiscriminatory intent: The employer just might have found the candidate “not sufficiently suited” because of . . . race, or engaging in a protected activity.\textsuperscript{50}

More broadly, courts have rejected summary judgment where a jury could find discriminatory bias in criticism that only indirectly, not explicitly, related to the plaintiff’s group membership. For example, “purely indirect references to an employee’s age, such as comments that an employee needed to look ‘sharp’ . . . and that he was unwilling and unable to ‘adapt’ to change, can support an inference of age discrimination.”\textsuperscript{51}

In \textit{Kahn v. Fairfield University},\textsuperscript{52} the court applied this line of case law in an academic discrimination case, denying the defendant’s summary judgment motion on the rationale that while a search committee’s disparagement of the plaintiff as “arrogant” about “her own agenda” might be fair criticism, “[s]uch characteristics might be considered positive, leadership traits . . . [and] may also be considered improper gender stereotypes.”\textsuperscript{53} This recent decision should be a blueprint for courts adjudicating professors’ discrimination claims; yet given the current state of the law, it is more of an aberration in a landscape of “academic deference” decisions.

\textbf{C. The Special Nature of Academia: More, Not Less, Judicial Scrutiny?}

\textit{1. The Persistence of Gender Segregation and Inequality in Academia}

If education is the future, then the future looks a lot like the past—at least in terms of gender segregation and inequity. For example, women comprise almost a third of all lawyers and law school faculties, but only 5.9\% of tenured faculty members and 21.9\% of full-time professors;\textsuperscript{54} in contrast, more than two-thirds of all legal writing instructors are women.\textsuperscript{55} More specifically, “[r]ecent empirical evidence suggests there is occupational segregation in the legal profession”:

\textsuperscript{50} 394 F.3d at 317.

\textsuperscript{51} Machinchick v. PB Power, 398 F.3d 345, 353 (5th Cir. 2005).

\textsuperscript{52} 357 F. Supp. 2d 496 (D. Conn. 2005).

\textsuperscript{53} Id. at 506.


Women tend to be over-represented in certain areas [..] more likely to work in government and public interest jobs [..] more likely to specialize in fields that are comparatively less lucrative, such as family law[, and] .. unlikely to work in bankruptcy, securities, and criminal cases involving narcotics and organized crime.\textsuperscript{56}

Given that this level of segregation exists in academia and the professional world, there would seem to be a compelling case for rooting out gender discrimination in academia, not only because it is a significant realm of professional employment, but also because universities and professional schools are the gateways through which virtually all professionals pass. The Supreme Court recognized a "compelling interest" in academic diversity, sufficient to justify affirmative action even under judicial "strict scrutiny," in \textit{Gratz v. Bollinger}\textsuperscript{57} and \textit{Grutter v. Bollinger}.\textsuperscript{58}

While those cases addressed student diversity, the argument for faculty diversity, and at the very least equal opportunity for faculty, is no less compelling.

Thus, there is a strong argument that the special place education holds in society makes it more critical, not less appropriate, for courts to scrutinize academia for discrimination. Yet whenever courts discuss the special nature of academia in employment discrimination cases, they invariably focus only on the less persuasive half of the story—the "academic deference" rationale for scrutinizing academic employment decisions less closely.

2. The Inability of Social Norms to Police Academic Labor Markets for Discrimination

As discussed above, thanks to the "academic deference" doctrine, academic institutions face little prospect of successful employment discrimination suits.\textsuperscript{59} Thus, to a substantial extent, the "academic deference" doctrine has rendered academia an island of immunity from the employment discrimination laws. This is a significant fact, because it indicates that the scholarly attention lavished on academia is not just professors self-indulgently analyzing themselves and their colleagues. Rather, academia is a particularly interesting sector of the labor market to study, because it provides a glimpse of the world we might see if we

\textsuperscript{56} Maryann Jones, \textit{And Miles To Go Before I Sleep: The Road to Gender Equity in the California Legal Profession}, 34 U.S.F. L. REV. 1, 15-17 (1999).
\textsuperscript{57} 539 U.S. 244 (2003).
\textsuperscript{58} 539 U.S. 306 (2003).
\textsuperscript{59} Certainly, even losing suits impose costs on employers. But when the only likely costs are litigation expenses and settlements of longshot cases, employment discrimination law's beneficial incentive effects on employers are likely to be minimal.
followed the prescriptions of those who would eliminate, or substantially weaken, the employment discrimination laws.

But even if academia is a field essentially free from enforcement of the employment discrimination laws, a critical question remains: is that necessarily a bad thing? Some have argued, Richard Epstein most famously, that unregulated free markets would eliminate inefficient discrimination, because "[o]ne tendency of competitive markets is to drive out inefficient forms of behavior, with discrimination as with anything else." A rejection of good female or minority labor is an inefficient sacrifice of productivity that places a firm at a competitive disadvantage, Epstein notes; such a state of affairs cannot prevail widely, or for long, in competitive markets. Scattered discrimination may remain in especially non-competitive sectors of the economy (e.g., government employment), but by and large, if any discrimination persists for long, Epstein and Richard Posner argue, it must be efficient discrimination based on actual differences between, for example, male and female workers.

Even if one does not entirely accept the free-market logic that discrimination cannot be a pervasive problem, one might accept a milder form of the argument: discrimination cannot be as pervasive as commonly believed, so there is no need for particularly aggressive enforcement of employment discrimination laws. If so, then various narrow interpretations of Title VII, including the "academic deference" doctrine, may be appropriate. If discrimination cannot be as pervasive as a cursory review of the gender inequity statistics would lead us to believe, then we should not be so quick to infer discrimination based on circumstantial evidence.

Many persuasive arguments have been levied against the free-market theory that inefficient discrimination cannot be particularly prevalent, but scholarship on the power of social norms provides further support for the

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61. Id.
62. See, e.g., id. ("[C]ertain forms of race, sex, age, and disability discrimination will continue to survive in various quarters, but . . . invidious forms of discrimination will not."); Richard Posner, ECONOMIC ANALYSIS OF LAW § 11.7 at 366-67 (5th ed. 1998) ("First, not all discrimination is inefficient. An example of efficient discrimination is the refusal (which is now unlawful) of employers to pay pregnancy disability benefits. . . . Second, antidiscrimination laws can boomerang against the protected class. . . . If for whatever reason women workers have a lower marginal product (maybe because they have invested less in their human capital), employers will have an incentive to substitute capital for labor inputs in those job classifications in which they employ many women").
63. See, e.g., Moss, supra note 4, at 77-78 (discussing and citing arguments that inefficient discrimination may persist because of "various information problems endemic in real-world labor markets[,] . . . opportunistic, anti-competitive 'cartel-like' behavior by dominant groups to exclude other groups[, . . . [and] [o]ther ways that discriminatory exclusion can be self-perpetuating" due to harmful incentives and psychological effects that discrimination imposes on discriminated-against groups).
notion that employment discrimination laws may be less necessary than commonly assumed. Most prominently, Robert Ellickson documents how lawsuits and enforceable legal rules may be surprisingly unnecessary, because informal social norms can be quite powerful enforcers of fairness and shared values. Employers face exactly such social pressures not to treat employees unfairly, scholars of social norms have argued. Jesse Rudy cites statistics showing a “low number of arbitrary discharges” as evidence that “no discharge without cause” is a ‘norm’ and, accordingly, that “legal protection is unnecessary because the norm provides adequate protection for employees, even in the absence of the law”.

If the employer violates the norm often, she may be subject to feelings of guilt and, more importantly, to non-legal sanctions from her employees. Current employees may begin to look for alternative employment and gossip that the employer is a bad actor may spread among current employees as well as to prospective job applicants, putting the employer at a disadvantage when competing to hire and retain top employees. On the other hand, if the employer follows the “no discharge without cause” norm consistently, her employees will be encouraged to make greater investments in the employment relationship than they would with less job security.

Thus, where a practice, such as discrimination, is not only inefficient but also contrary to social norms, informal enforcement of those social norms will complement free-market economic pressures. The stronger the free-market pressures and social norms against discrimination, the less necessary are employment discrimination laws—and the more appropriate are narrow interpretations of those laws.

A full debate on the efficacy and limitations of social norms in labor markets is beyond the scope of this Article, but for this Article’s purposes, the relevant question is a narrower one. Can academia’s privileged status—virtual exemption from the employment discrimination laws—be justified by the notion that social norm pressures will prevent most inefficient discrimination in academia? Is academia the type of labor market in which social norms are likely powerful enough to obviate the need for enforcement of discrimination laws?

66. Id. at 348.
If so—if, due to economic or social norm pressures or both, discrimination cannot be prevalent in academia—then the substantial degree of gender segregation and inequality in contemporary academia must be efficient. This would lend support to the notion that male-female labor market disparities result not from discrimination but from real male-female differences; as former Harvard University President Lawrence Summers opined, "innate differences between men and women might be one reason fewer women succeed in science and math careers."

But there is a problem with the idea that social norm theory provides support for the "academic deference" doctrine. The premise of the academic deference doctrine is that information on a professor's qualifications is difficult for outsiders to assess. Even courts reviewing reams of documents on a professor's performance cannot easily discern whether she truly merited the denied position. If it is prohibitively hard for a court to figure out whether the professor was discriminated against or simply was insufficiently qualified, then how could those who would punish violations of social norms figure it out better?

A violation of social norms is punished not by some centralized authority, but by masses of community members offended by the violation. In the academic context, those masses would include other employees, job applicants, students, and other community members. Of those, the best informed would be the other employees, who may have hunches that the professor did or did not suffer discrimination. But how many other employees truly have all of the relevant information? How many have read all (or even most) of the professor's scholarship, seen the professor's teaching, or worked together with the professor? Certainly, most do not have anywhere near as much information as a court reviewing a stack of evidence that includes the relevant publications, teaching evaluations, and various other employment records.

Various characteristics of academia serve to inhibit informal enforcement of social norms. The highly specialized nature of academia means that even within an academic department, one professor may know almost nothing about another professor's field of scholarship. Academic teaching and research, moreover, usually are highly individualized; scientific collaboration aside, professors at the same school typically do not engage in teaching and scholarship together. Moreover, academic employment is characterized by longer tenure, and less turnover, than in many other industries; consequently, the risk that irate employees enforce the social norm by departing is lower than in many other labor markets.

Beyond co-workers, the flow of information to other potential enforcers of social norms—job applicants, students, community members, and other institutions' academics—is even more limited. Job applicants and academics at other institutions are likely to know nothing of the professor's teaching, collegiality, or service to the institution. Students and community members likely know little about the professor's scholarship, collegiality, or service. In short, when a professor alleges discrimination, his or her coworkers are likely to have imperfect and divergent guesses as to whether there was discrimination, and non-coworkers are likely to have even less basis for an opinion.

This lack of widespread information poses a major problem for those who argue that social norms obviate the need for aggressive employment discrimination law enforcement. What Ellickson showed is that informal enforcement of social norms is a feasible substitute for law enforcement when “members transact visibly (and so cannot cheat . . . easily) and are interdependent (and therefore subject to punishment for cheating).” But as discussed above, academic employment decisions do not occur “visibly” enough to allow others to know when employers break the anti-discrimination social norm. The flow of information on academic employment decisions is too sparse for social norms to hold much power.

In short, the premise of the “academic deference” doctrine (low information flow) runs counter to a key assumption of social norm theory (high information flow). Thus, social norm theory cannot provide support for academic deference. If the “academic deference” doctrine is warranted, it is because there is little transparency to academic employment decisions; and if there is little transparency to academic employment decisions, then social norms are unlikely to be particularly effective.

IV.
LIMITING THE “DEFERENCE” TO TENURE DECISIONS, NOT HIRING DECISIONS

Finally, one less frequently noted criticism of the “academic deference” doctrine is that even if it is appropriate, is should be limited to the proper context: promotion-to-tenure decisions, not entry-level hiring decisions. Indeed, most of academic deference precedents are not hiring cases, but promotion cases involving evaluation of incumbent employees.70


Nevertheless, courts adjudicating hiring cases have been known to grant defendants summary judgment based on "academic deference" but cite only promotion precedents. More broadly, courts can be quite sloppy in their rationales for "academic deference." One prominent precedent even justified deference to an employer's allegedly discriminatory denial of tenure by citing the deferential standard applicable to an expelled student's longshot substantive due process claim. Supporting these ill-conceived citations across disparate doctrines are the tenure precedents that paint with too broad a brush—for example, declaring academic deference for any "faculty appointments at a University level," not just tenure decisions.

1229 (2d Cir. 1974) (transfer/demotion of research scientist to new position "without tenure possibilities").

71. See, e.g., Bina v. Providence Coll., 39 F.3d 21, 26 (1st Cir. 1994) ("court review of tenure decisions should be guided by an appropriately deferential standard. A court may not simply substitute its own views concerning the plaintiff's qualifications for those of the properly instituted authorities; the evidence must be of such strength and quality as to permit a reasonable finding that the denial of tenure was 'obviously' or 'manifestly' unsupported. The district court appropriately applied this standard to the present case, even though this is a case not of denial of tenure but of denial of appointment to a tenure track position.") (citation omitted); Sarmiento v. Queens Coll. CUNY, 386 F. Supp. 2d 93, 98-99 (E.D.N.Y. 2005) (citing Lieberman, Faro, and Bickersstaff (see supra note 70) as employment precedents for the Court's conclusion, in a claim of race discrimination and retaliation in a failure to hire an assistant professor, that "Defendant's decisions regarding the professional experience and characteristics sought in a candidate, as well as the search committee's evaluation of Plaintiff's qualifications, are entitled to deference"), affd on other grounds, No. 05-1236, 153 Fed. App'x 21, (2d Cir. Oct. 28, 2005) (not discussing "academic deference"); Kokes v. Angelina Coll., 220 F. Supp. 2d 661 (E.D. Tex. 2002). (In the interest of full disclosure, the author wishes to mention that he represented the plaintiff-appellant at the Second Circuit in Sarmiento.)

In Kokes, the court granted the employer, a community college, summary judgment in a failure-to-hire case brought by an unsuccessful applicant for a college instructor position. 220 F. Supp. 2d 661. Yet Kokes cited only two precedents, one a failure-to-promote case and one a termination case (neither of them academic cases) for the key principle: that courts should defer to decision-makers' evaluations of the candidates' qualifications. Id. at 666 ("'The judicial system is not as well suited by training and experience to evaluate qualifications . . . in other disciplines as are those persons who have trained and worked for years in that field of endeavor for which the applications under consideration are being evaluated.' Discrimination laws were not meant to be 'vehicles for judicial second-guessing of business decisions.'") (quoting, respectively, EEOC v. La. Office of Cmty. Servs., 47 F.3d 1438, 1444 (5th Cir. 1995), and Walton v. Bisco Indus., Inc., 119 F.3d 368 (5th Cir. 1997)). As discussed above, the argument for deference to decision-makers' evaluations is stronger when those decision-makers are undertaking promotion (or termination) decisions based on their own personal, first-hand evaluations of subordinates rather than hiring decisions based on the limited information contained in an application plus (perhaps) an interview.

72. Okruhlik v. Univ. of Ark., 395 F.3d 872, 879 (8th Cir. 2005) (affirming grant of judgment as a matter of law to university defendant, following a jury verdict for the plaintiff on her failure-to-promote claim; "We are mindful of the singular nature of academic decision-making, and we lack the expertise to evaluate tenure decisions or to pass on the merits of a candidate's scholarship. . . . The Supreme Court has made it clear that 'when judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment.'") (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985), an expelled student's failed "substantive due process" challenge).

73. Faro v. New York Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974)
Yet other of the leading "academic deference" cases do carefully note that tenure cases are quite different from hiring cases. In Lieberman v. Gant,¹⁴ the Second Circuit distinguished its tenure context from another case "concern[ing] renewal of a teaching contract rather than appointment to tenure":

In contrast to an ordinary teaching position, terminable at the end of any academic year, . . . tenure entails what is close to a life-long commitment by a university, and therefore requires much more than the showing of performance "of sufficient quality to merit continued employment" . . . . Under such appropriately rigorous standards, a candidate for tenure does not make out . . . a prima facie case merely by showing qualifications for continuation as an untenured faculty . . . .⁷⁵

Similarly (and more recently), the Seventh Circuit, explaining the rationale for academic deference, has stressed the nature of both the tenure decision-making process and the long-term commitment tenure entails:

[T]enure decisions are often based on "the distinction between competent and superior achievement." Such decisions necessarily rely on subjective judgments about academic potential. Experienced faculty members may well come to different conclusions when confronted with voluminous and nuanced information about a colleague's overall capacity to make a long-term institutional contribution.⁷⁶

Thus, if tenure cases warrant special "academic deference," it is based on considerations particular to tenure—i.e., "life-long commitment" and subjective evaluation based on close personal scrutiny of colleagues' teaching and research in the decision-makers' own workplace. Those considerations are absent in a failure-to-hire lawsuit. In the hiring context, there is no justification for any thumb on the scale for the defendant; the basic burdens of proof should apply, as in any discrimination case.

V.

CONCLUSION

It is odd that the "academic deference" doctrine has drawn such broad judicial adherence yet so little judicial questioning. Courts treat it as generally accepted, even though there are powerful arguments against it. Worse, courts apply it in failure-to-hire cases, where it has even less justification than it does in denial-of-tenure cases, which constitute the bulk of the "academic deference" precedents.

⁷⁴. 630 F.2d 60 (2d Cir. 1980).
⁷⁵. Id. at 64.
⁷⁶. Vanasco v. Nat'l Lewis Univ., 137 F.3d 962, 968 (7th Cir. 1998) (quoting Kuhn v. Ball State Univ., 78 F.3d 330, 331 (7th Cir.1996)) (emphases added) (affirming grant of summary judgment to university in professor's denial-of-tenure claim).
Yet the problem is not just that the "academic deference" doctrine, as currently constituted, is unsound doctrine; it is also unsound policy. Education is a field calling for special scrutiny, not special deference, by courts endeavoring to assure that opportunities are equal and that the current level of gender inequality is not the product of discrimination. It might go too far to say that the courts' hands-off approach to academic claims of discrimination is effectively a judicial repeal of Title VII for a favored sector. But to the extent that Title VII has been weakened in that sector, widespread judicial reluctance to scrutinize academic employment decisions weakens the ability of Title VII to help us move forward in a critical area of society. Fortunately, with various strands of case law undercutting the premises of the "academic deference" doctrine, there is hope for a better-late-than-never entry by the courts into a critical and heavily segregated sector of the labor market.