

ACADEMIC TENURE: AN ECONOMIC CRITIQUE

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I. INTRODUCTION

A number of arguments have been put forth in favor of academic tenure, the guarantee of lifetime employment in substantially the same position after some initial probationary period. These arguments have centered around cost effectiveness, academic freedom, and pedagogical quality. They invariably conclude that tenure is good and that horrendous things would happen if tenure were abolished or modified. In fact, it is very difficult to find an academic, especially one with tenure, who is not in favor of tenure.¹ "Tenure is to the academic what the closed shop is to a craft union."²

In this Article, we take the position of the devil's advocate. We show that many of the arguments usually offered in favor of

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1. One journalist scoured North America and could find only one academic who would argue against tenure. See Walker, *Tenure Debate Falls Short*, THE PROVINCE, Sept. 4, 1983, at 269, 269. He should have polled primary and secondary school administrators. A 1972 poll of school administrators found that 86 percent wanted tenure either reformed or abolished. See E. BRIDGES, *MANAGING THE INCOMPETENT TEACHER* 3 (1984) (citing Cramer, *How Would Your Faucets Work If Plumbers Were Shielded by Tenure Laws?*, AM. SCH. BD. J., Oct. 1976, at 22, 22-24). In four Gallup polls of parents' attitudes toward public education, more than 50 percent said they opposed tenure. See *A DECADE OF GALLUP POLLS OF ATTITUDES TOWARD EDUCATION, 1969-1978* (S. Elam ed. 1978).

For a strong defense of tenure, see Machlup, *In Defense of Academic Tenure*, 50 AM. A.U. PROF. BULL. 112 (1964), reprinted in *ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS* 306-38 (L. Joughin ed. 1969). Professor Machlup's argument is based on the rather curious premise that although tenure harms academics more than it helps them, the benefits to "society" accruing from tenure more than compensate for the loss by academics because tenure encourages the free flow of debate. There is no evidence, however, that tenure improves the flow of debate beyond what already exists as a result of freedom of the press. Professor Machlup does not recognize that other groups are also harmed by tenure: Consumers of education, for example, must be content to endure a number of mediocre and incompetent professors who would be fired in the absence of the protection that tenure affords. Machlup apparently believes that "society" consists of something more than the sum of all individuals, but society as a whole cannot benefit from tenure—only individuals can benefit.

2. Walker, *supra* note 1, at 269.

tenure do not hold up under close analysis.³ While tenure can save out-of-pocket expenses, promote independence from outside forces, and increase quality, it also increases overall costs, decreases flexibility, disenfranchises the paying consumer of education, increases dependence on unaccountable insiders, and makes it nearly impossible to remove incompetent and unnecessary professors. While we do not advocate the total abolition of tenure, we would like to see the present tenure practice abolished. We conclude that decisions on the value of tenure should be left to the market. In the absence of the current tenure policy, consumers of education would benefit from lower prices, more choices, and better quality products.

II. A CRITICAL ANALYSIS OF ARGUMENTS FOR TENURE

A. *Is Tenure Cost-Effective?*

The argument that tenure is cost-effective is a plausible one on the surface. Just ask this question: If two teaching positions paid the same salary, had identical duties, and were identical in every other way—student body, prestige, geographic location, fringe benefits—but one position carried a guarantee of lifetime employment and one did not, which position would one choose? The answer appears obvious. Because most people are risk-averse, they would choose the position that included a guaranteed job for life, other things being equal. Therefore, the possession of tenure has some value.⁴ That being the case, professors who have tenure, or who are hired with the possibility of receiving tenure, will work for less money than professors who cannot hope to receive a guarantee of lifetime employ-

3. For detailed discussions of tenure and the issues relating to it, see generally *THE TENURE DEBATE* (B. Smith ed. 1973); and *FACULTY TENURE* (W. Keast & J. Macy eds. 1973).

4. The United States Supreme Court has held that tenure may create a property right that cannot be taken away without due process. *See, e.g., Perry v. Sindermann*, 408 U.S. 593 (1972) (a written contract with an explicit tenure provision may be evidence supporting a claim of a property right to continued employment); *Connell v. Higginbotham*, 403 U.S. 207 (1971) (due-process requirements apply when teacher is hired with clearly implied promise of continued employment); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956) (tenured public college professor has interest in continued employment that is safeguarded by due process); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (college professors have interest in continued employment that is safeguarded by due process). *Cf. Board of Regents v. Roth*, 408 U.S. 564 (1972) (non-tenured faculty member's property interest in employment was created by the terms of his employment and was insufficient to constitute property interest requiring due-process protections before nonrenewal of contract).

ment.⁵ Consequently, universities can save money by granting tenure.⁶ Once tenure exists at an institution, abolishing it would be equivalent to reducing professors' salaries.⁷

Although this argument is true as far as it goes, it is incomplete. There are other factors to consider in evaluating the tenure system besides initial out-of-pocket costs. If guaranteeing workers lifetime employment were cost-effective, wouldn't it make sense for all employers everywhere to grant lifetime employment to all workers? When viewed from this perspective, the cost-effectiveness argument in favor of tenure seems unconvincing. If it were valid, all employers could reduce labor costs by guaranteeing lifetime employment. Yet the education industry is practically the only American industry that grants lifetime employment security.⁸ One might ask why the practice is not more widespread, especially in the private sector where costs are closely scrutinized.

One reason why the idea has not spread throughout the pri-

5. See Machlup, *supra* note 1, at 323-26. This salary effect is a double-edged sword. On the one hand, it attracts individuals to academia, which increases the supply of professors and lowers salaries generally (as supply increases, price decreases). On the other hand, consumers of education benefit because they can purchase more professors for their money because of the lower unit cost. This raises an interesting point. All professors' salaries tend to be reduced because of tenure. Yet only a minority of professors realistically benefit from the academic freedom that tenure affords. For example, political science professors tend to be shielded more by academic-freedom protections than do mathematicians and French grammarians. Would it not be more equitable, then, to allow those professors who do not see the need for protecting their academic freedom to bargain it away for higher salaries? Allowing this possibility would increase freedom of choice without jeopardizing the positions of those professors who would be content with lower salaries plus tenure.

6. This argument is a pervasive one, one that is always advanced whenever the institution of tenure is attacked or questioned. Twenty-nine economics department faculty members from the University of British Columbia used this argument when the tenure policy was being challenged in Canada. See Block, *Put an End to Academic Tenure*, *ECON. AFF.*, July-Sept. 1984, at 37, 37-38.

7. See Milne, *Arthritic Academia: The Problems of Government Universities*, in *OCCUPATIONAL REGULATION AND THE PUBLIC INTEREST* 193, 198 (R. Albon & G. Lindsay eds. 1984). Of course, if tenure were abolished, professors would tend to demand higher monetary salaries because, as pointed out above, tenure is a form of compensation.

8. The civil service also guarantees lifetime employment, but people rarely argue that providing guaranteed lifetime employment to civil servants reduces labor costs. In fact, there is a widespread perception that the civil service is laden with inefficient or incompetent workers who are underworked and overpaid. Judges often have lifetime tenure, ostensibly so that they will be insulated from political pressure. A problem with lifetime judicial tenure is that it is nearly impossible for the citizenry to remove from the bench an unwanted judge who does not want to resign. The United States Constitution even prevents Congress from reducing judges' pay, although it does not provide that judges must get cost-of-living raises. See U.S. CONST. art. III, § 1. Therefore, in the absence of a pay raise, inflation will result in a de facto pay reduction. Such a pay cut, however, would apply to all judges, not just those Congress wished to single out for retribution.

vate sector is that lifetime employment guarantees reduce flexibility. If General Motors, Ford, and Chrysler guaranteed their workers lifetime employment, the companies would have gone out of business long ago. To stay solvent, a company must have the flexibility to discard unneeded resources: low-quality or excess machinery, and low-quality or excess employees. The private sector must flexibly comply with the demands of the market in order to survive and prosper.

The education industry need not be so flexible, because it is virtually insulated from competition. Although colleges and universities compete for students, various accreditation agencies and governments dictate much of what they can and cannot do. Colleges and universities cannot compete freely by offering a product that is radically different from what other similar institutions are offering because they must meet the requirements of the accreditation agencies and government regulators, or risk having their accreditation revoked.⁹ The insulation from competition in the education industry, and the resulting ability of many educational institutions to survive without being flexible, allows the tenure system to survive. As one academic economist has observed:

[T]enure is neither necessary nor efficient. Its survival depends upon the absence of private ownership and is also en-

9. Elaboration of this point is beyond the scope of this Article. Accreditation agencies are monopolies. The United States Department of Education places its stamp of approval on only one accreditation agency for each geographic location. For example, all schools in Ohio are accredited by the North Central Association. Any agency other than the North Central Association that accredits schools in Ohio is an unrecognized agency. See J. BEAR, *HOW TO GET THE DEGREE YOU WANT* 32-35 (8th ed. 1982).

The Department of Education also approves accreditation agencies for specific disciplines. For example, business schools are accredited by the American Assembly of Collegiate Schools of Business (AACSB). Much of what the AACSB requires before it will grant accreditation, though, actually decreases the quality of the educational institution. Accreditation pressures force schools to offer courses that are irrelevant and unwanted by educational consumers, and taught by faculty who may not be the best qualified. See R. MCGEE, *A MODEL PROGRAM FOR SCHOOLS OF PROFESSIONAL ACCOUNTANCY* 103-26 (1987) (providing further elaboration).

At least two of the six regional accreditation agencies in the United States are placing pressure on universities to increase ethnic and racial diversity in their faculties and student bodies. This means that schools are being pressured to hire faculty and accept students on the basis of race, ethnic background, and gender, rather than ability. For example, the Middle States Association delayed reaccrediting Baruch College of the City University of New York for three months because of alleged deficiencies in these areas. Critics of this policy say that the accreditation agencies are going too far, but not much can be done because of their monopoly status. See *2 of 6 Regional Accreditation Agencies Take Steps to Prod Colleges on Racial, Ethnic Diversity*, *Chron. Higher Educ.*, Aug. 15, 1990, at A1, col. 3. See also *Accrediting Quotas*, *Wall St. J.*, Dec. 14, 1990, at A18, col. 1.

couraged by subsidization of education by non-customer income sources [(taxpayers and philanthropists)]. Without a private profit-seeking system and without full-cost tuition, the demand for tenure increases and the cost of granting it appears to be cheaper because the full costs are not imposed on those granting it. Competition among schools, teachers, and students provides protection to the search for the truth without tenure.¹⁰

The inflexibility that results from a policy of guaranteeing lifetime employment means that colleges and universities are not able to fire professors who are either incompetent or no longer needed.¹¹ If educational consumers—students—want more business or engineering courses, a university might try to meet this demand by hiring additional professors to teach these subjects. But it cannot fire tenured professors in fields not favored by consumers. As a result, classes in unpopular disciplines have fewer students, while classes in popular disciplines grow unwieldy. The quality of the classroom experience could be enhanced if class size in the popular disciplines were reduced, but university budgets are tight. Without extra funds, additional professors in the popular disciplines cannot be hired unless unneeded professors who teach other subjects can be dismissed. If tenure exists, students who study popular subjects must often do so in large classes because universities do not have the flexibility, at least in the short term, to allocate their resources according to consumer demand. Tenure thus prevents efficient resource allocation, to the detriment of consumers.¹² Universities must wait for the faculty in overstuffed departments to retire or die before resources can be reallocated.¹³

10. A. ALCHIAN, *Private Property and the Relative Cost of Tenure*, in *ECONOMIC FORCES AT WORK* 177, 201 (1977).

11. It is sometimes possible (but expensive) to encourage professors who are no longer needed to leave through early retirement and attractive severance packages. Universities, in effect, buy out the professors' property rights in their tenure agreement. Britain recently used this approach to rid its universities of unwanted faculty. See H. FERNS, *HOW MUCH FREEDOM FOR UNIVERSITIES?* 43 (1982).

12. For a discussion of flexibility and tenure, see Morris, *Flexibility and the Tenured Academic*, *HIGHER EDUC. REV.*, Spring 1974, at 3.

13. See *id.* at 3. Universities have a number of other options in addition to waiting for unneeded faculty to retire or die. They can be given increased courseloads or unwanted administrative duties, which might induce some faculty members to leave. They could deny salary increases, which would decrease their purchasing power as inflation reduces the value of the dollar. Implementing such policies, however, increases animosity and could lead to a strike, which most university officials would rather avoid. Furthermore, such policies often take years to address the problem.

Although tenure may allow universities to hire faculty at lower salaries, total salary costs may be higher under a tenure system because universities will be forced to hire more faculty to teach popular disciplines and will not be able to fire unneeded faculty who teach unpopular subjects. If professors in disciplines with small consumer demand were given classes of thirty students instead of ten, two-thirds of them could be fired, and the funds saved could be used to hire professors in disciplines that students want to study, such as business.¹⁴ When this inflexibility factor is considered, one can conclude that tenure actually increases salary costs.¹⁵

B. *Does Tenure Promote Academic Freedom?*

Another popular argument in favor of tenure is that without it, professors would hesitate to speak out on controversial subjects for fear of being fired.¹⁶ This argument seems plausible on the surface. Certainly, if one need not worry about being

14. Some might argue that the students do not know what is best for them and that college administrators and accreditation agencies are better able to determine what students should study than the students themselves. This assumes that administrators and accreditors have the right to force their views and values on students, who may have far different values and views. Some schools thus require students to take Western civilization courses that consist of works written exclusively by white males. Other schools force students to take "watered down" Western civilization courses that include authors of questionable value just because they happen to be black, hispanic, or female. Some colleges force students to take sensitivity courses or courses that assert a particular political agenda. Many colleges force students to take mathematics, literature, foreign languages, or other courses that many students consider nonessential or a waste of time and money. For example, schools that are accredited by the American Assembly of Collegiate Schools of Business require students to take background "common body of knowledge" courses for the M.B.A. degree that often have little or nothing to do with what the student wants to learn. These courses often comprise up to 50 percent or more of the total coursework required for the M.B.A., thus doubling the cost and the time needed to complete the degree. The requirements for the M.S. degree in taxation are especially outrageous in this regard. In order to take the 10 or so courses needed for the degree, tax students are forced to take many courses totally outside the field of taxation. See R. MCGEE, *supra* note 9, at 18-24. Why would an education bureaucrat or committee necessarily know the needs of students better than the students themselves? In what other industry would the providers of a product be able to tell the buyers what they must buy? If the education monopoly were crushed, students could study the subjects that they value and save years of study and thousands of dollars.

15. This does not take into account the possible detrimental effects of the tenure system on the quality of the professoriate. See *infra* pp. 554-57.

16. Some would describe tenure as "the best guarantee of academic freedom." Lovain, *Grounds for Dismissing Tenured Postsecondary Faculty for Cause*, 10 J.C. & U.L. 419, 419 (quoting COMM'N ON ACADEMIC TENURE IN HIGHER EDUC., FACULTY TENURE 21 (1973)). The United States Supreme Court has recognized that academic freedom is a special concern of the First Amendment. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (teachers cannot be dismissed for refusing to sign a certificate that indicates whether or not they had ever been Communists).

fired for speaking out on controversial issues, one will be more likely to speak out than if one fears for his livelihood. We know that many theories that we now recognize as truth were once considered heretical: The world is round, not flat; the earth revolves around the sun, not the other way around; slavery is evil, even though it was thought of as normal and even necessary in the past. Members of the academic profession have been the proponents of these new ideas that have changed our ideas about truth. The argument runs that, in the absence of tenure, professors who speak out on controversial subjects or espouse unpopular views may jeopardize their careers. The free flow of information will be slowed or stopped.

But academics are not the only ones who challenge authority or existing orthodoxy. Novelists, playwrights, editors, news commentators, journalists, song writers, clergy, film producers, actors, cartoonists, and whistleblowers from various walks of life also espouse unpopular views and challenge orthodoxy. Should each of these groups also be given guaranteed jobs for life so that they can feel free to challenge the establishment? In the case of news journalists, tenure is not needed because journalists are motivated by the market. They seek out the truth and try to present it better and faster than the competition, so that their employer can capture a larger audience. Might not the same argument be made for academics? If universities were entrepreneurial, academics who sought the truth would be valued commodities; they would not need to worry about tenure, because their careers would be secure so long as they sought the discovery and dissemination of truth.¹⁷ On the other hand, if teaching the truth offends or harms some individuals or groups, should not these individuals or groups have the right to combat the dissemination of truth by refusing to pay someone to disseminate it? To argue otherwise would be to conclude that professors deserve some special claim to the pocketbooks of the students or taxpayers who pay their salaries.¹⁸

The academic-freedom argument also suffers from its weak premise—that academics must be completely “free” and “independent.” From whom should academics be independent? Academics are always worried about threats from outsiders.

17. See H. FERNS, *supra* note 11, at 44.

18. See A. ALCHIAN, *supra* note 10, at 199.

But what about the individuals who pay their salaries—education consumers and taxpayers? If a journalist writes something that is unpopular, consumers can exercise their view of the piece by not buying the newspaper that prints the article. Television viewers can turn to another channel if they dislike a commentator's views. Yet taxpayers and consumers of education must often support the careers of academics of whom they disapprove. In effect, those who advocate tenure on the grounds of academic freedom claim that academics have a right to the hard-earned dollars of others even if those who earn the dollars do not support the academics' views. In the view of tenure advocates, academic freedom justifies forcing others to support an academic's views with their cash.

Ironically, a major threat to outspoken professors can be found within the academy itself. Tenured academics decide whether an untenured professor is awarded tenure. Untenured faculty can easily be weeded out if they offend the members of the faculty tenure committee.¹⁹ Unless he can show that racial, ethnic, or gender bias influenced the tenure decision, a professor who is denied tenure has little recourse.²⁰ Many scholars have had their careers short-circuited by their fellow professors because of their political leanings.²¹ If a group of liberals, conservatives, or Marxists wants to exclude those who disagree with their views, all they have to do is deny them tenure. Yale

19. The tenure process works in different ways at different schools. At Seton Hall University, for example, there are three tenure committees, one each at the departmental, school, and university level. At other schools, there is only one committee.

20. Finding proof of discrimination is often difficult. See generally Note, *Title VII and the Tenure Decision: The Need for a Qualified Academic Freedom Privilege Protecting Confidential Peer Review Materials in University Employment Discrimination Cases*, 21 SUFFOLK U.L. REV. 691 (1987); Palombi, *The Ineffectiveness of Title VII in Tenure Denial Decisions*, 36 DEPAUL L. REV. 259 (1987); Mahoney, *Title VII and Academic Freedom: The Authority of the EEOC to Investigate College Faculty Tenure Decisions*, 28 B.C.L. REV. 559 (1987).

21. See, e.g., *A Teacher Disillusioned With Utopia*, Boston Globe, Dec. 20, 1990, at 97, col. 3 (professor of comparative literature dismissed from Hampshire College for "his refusal, despite his leftist sympathies, to reduce the European literature he teaches to a one dimensional story of imperialism, colonialism and Third World oppression"); Dershowitz, *Quota System Wrong for Harvard Law*, Boston Herald, May 8, 1990, at 29, col. 1 (female assistant professor denied tenure at Harvard Law School because the "women [faculty members] argued that she, though a woman, was not a feminist"). See generally ACADEMIC LICENSE: THE WAR ON ACADEMIC FREEDOM (L. Csorba ed. 1988) [hereinafter ACADEMIC LICENSE]; R. KIMBALL, TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION (1990).

A professor's political opinions often enter into the hiring, firing, and tenure decisions. See, e.g., P. LAZARFELD & W. THIELENS, THE ACADEMIC MIND 392 (1958); W. BUCKLEY, GOD AND MAN AT YALE 136-90 (1951); E. ROOT, COLLECTIVISM ON THE CAMPUS 289-335 (1955); Menn, *The Tenure Process and Its Invisible Kingmaker*, in HOW HARVARD RULES 271, 271-78 (J. Trumpdour ed. 1989).

University's president acknowledged this problem in 1972: "In strong universities, assuring freedom from intellectual conformity coerced within the institution is even more of a concern than is the protection of freedom from external interference."²² As another academic observed:

[It is a] tattered secret that faculty members may devise a pattern of departmental appointments that shuts out significant schools of thought, may enter into a Faustian bargain with the grant-givers that trades off mental independence for a larger bank roll, and may make political judgments when reviewing the professional merits of their peers.²³

Some academics go even further and prevent individuals from speaking at the university if they espouse views with which they disagree.²⁴ Officials of the South African government, officials from the Reagan administration, Nicaraguan contras, and other non-liberal types often are the victims of such anti-free speech activists these days.²⁵ During the 1950s, academics who espoused Communist, Marxist, or collectivist views experienced similar difficulties.²⁶ Even when an unpopular or "politically incorrect" individual is permitted to speak, he will often pay a price in the form of harassment, heckling, and picketing. Academics who promote cultural diversity often use these disruptions as an excuse to exclude certain individuals from the university and foreclose debate on issues of the day.²⁷ Academic freedom can be threatened from within the university as

22. Brewster, *On Tenure*, 58 AM. A.U. PROF. BULL. 381, 382 (1972).

23. Metzger, *Academic Freedom: A Symposium*, 13 N.Y.U. EDUC. Q. 4, 5 (1982).

24. The American Association of University Professors (AAUP) takes the position that college and university students have the right to listen to anyone whom they wish to hear, "and affirms its own belief that it is educationally desirable that students be confronted with diverse opinions of all kinds . . . [A]ny person who is presented by a recognized student or faculty organization should be allowed to speak on a college or university campus." *Summary of Forty-Third Annual Meeting*, 43 AM. A.U. PROF. BULL. 359, 363 (1957), reprinted in *ACADEMIC FREEDOM AND TENURE: A HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS* 112-13 (L. Joughin ed. 1969). This position has sometimes been ignored when the person invited to speak has espoused a conservative position. See, e.g., Silber, *Free Speech and the Academy*, INTERCOLLEGIATE REV., Fall 1990, at 33, 34 (Marxist English professor attacked former contra leader Adolfo Calero at Northwestern University).

25. For a listing of campus free speech abuses, see *ACADEMIC LICENSE*, *supra* note 21, at 305-12.

26. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (refusal to sign a certificate indicating membership in the Communist Party); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (refusal to answer questions about political beliefs and associations).

27. See Chavez, *The Real Aim of the Promoters of Cultural Diversity Is to Exclude Certain People and to Foreclose Debate*, Chron. Higher Educ., July 18, 1990, at B1, col. 2. See also Timmons, *Fraudulent Diversity*, NEWSWEEK, Nov. 9, 1990, at 8.

well as from without, and the tenure process does not guarantee that untenured professors will be protected from internal assaults on the right to say or write what is on their minds.

C. *Does Tenure Insure a High-Quality Professoriate?*

According to the tenure theory, only those professors who prove themselves through excellent teaching, research, and service are awarded tenure;²⁸ their weaker brethren fall by the wayside. At some of the "better" universities, however, receiving an award for good teaching is considered the kiss of death for an untenured professor.²⁹ Anyone who spends so much time preparing for class must somehow be deficient in research, or so the rationale goes.³⁰ In one recent period, three out of four recipients of Harvard's teaching award were denied tenure.³¹ Stephen Ferruolo, a widely known medieval history scholar, won the Dinkelspiel award for outstanding teaching at Stanford in 1982, and was denied tenure shortly thereafter.³² Bruce Tiffney won Yale's teaching award two weeks after being denied tenure.³³ Faye Crosby won the Yale teaching award in 1982 and was denied tenure three years later.³⁴ "It's extremely unlikely," says Douglas Kankel, a tenured associate professor in Yale's Biology Department, "that if you are a professor with an exceptional teaching background, you will survive the

28. A fourth criterion—collegiality—is sometimes added to this list. One court defined collegiality as "the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests." *Mayberry v. Dees*, 663 F.2d 502, 514 (4th Cir. 1981), *cert. denied*, 459 U.S. 830 (1982). While person-ality is not usually an official criterion for tenure, it often plays an indirect role in determining whether a faculty member is awarded tenure. For a discussion of this point, see Zirkel, *Personality as a Criterion for Faculty Tenure: The Enemy It Is Us*, 33 CLEV. ST. L. REV. 223 (1984-85).

A sore spot among those who regard teaching as paramount and everything else as secondary is the rather low esteem in which teaching is held by those in control of promotion and tenure. These persons argue that students are paying tuition to be taught by professors, not graduate assistants, and they are not paying tuition to subsidize faculty research. Yet research is rewarded, and teaching is not. In some universities, it is possible to go through an entire undergraduate program without being taught by a single member of the faculty. The student may be exposed only to a series of graduate assistants. See C. SYKES, *PROFSCAM: PROFESSORS AND THE DEMISE OF HIGHER EDUCATION* 35 (1988) (citing R. DUGGER, *OUR INVADDED UNIVERSITIES* 170 (1974)).

29. See C. SYKES, *supra* note 28, at 58 (citing Barol, *The Threat to College Teaching*, NEWSWEEK ON CAMPUS, Oct. 1983).

30. See *id.* at 53.

31. See *id.*

32. See *id.* at 53-54.

33. See *id.* at 54.

34. See *id.*

tenure process.’”³⁵ One critic has characterized the trend as systemic: “The pattern extends throughout higher education. Virtually every university in the country has a similar story. These cases are dramatic, irrefutable evidence that the academic culture is not merely indifferent to teaching, it is actively hostile to it. In the modern university, no act of good teaching goes unpunished.”³⁶

Even if the tenure process serves as a gauntlet that only the excellent survive,³⁷ that does not mean that the excellent untenured professor will continue to be excellent after receiving tenure. A professor may become out-of-date, lazy, incompetent, or senile after receiving tenure, yet need not fear being fired. Furthermore, the tenure process is marred by favoritism, politicking, and the “good old boy” network. Professors who receive strong tenure recommendations from the department chair and dean have a better chance of receiving tenure than do other, perhaps better-qualified nominees who receive lukewarm recommendations.³⁸ A majority of the professors who sit on university tenure committees are from fields other than that of the tenure nominee, know little about what the nominee has accomplished in his area of research, and depend heavily on the recommendations of others. When examining a nominee’s list of publications, some committee members have even been known to ask which journals are refereed and which are not, because they are totally unfamiliar with the literature in the nominee’s field.

Another argument against the present tenure rule of “up-or-out”³⁹ is that the probationary period is too short to evaluate properly a faculty member’s potential.⁴⁰ This is especially true

35. *Id.* (quoting Professor Douglas Kankel).

36. *Id.*

37. Professor Machlup suggests that at least part of the “deadwood” problem is caused not by tenure, but by the inability of university administrations and tenure committees to weed out inefficient and incompetent professors, who also happen to be their friends, before they receive tenure. See Machlup, *supra* note 1, at 313-14, 317.

38. One prominent educator has pointed out that this politicking takes valuable time and energy away from teaching. Such politicking, however, is encouraged by the tenure process. See G. ROCHE, *EDUCATION IN AMERICA* 106-07 (1977).

39. In most institutions, professors who do not receive tenure within approximately six years are dismissed.

40. The probationary period varies with the institution. It is generally about six years but may be longer or shorter. Professors who have taught at another institution may have a reduced probationary period at their new institution. The AAUP has recommended a seven-year probationary period. The arbitrariness of this rule has been criticized by a number of commentators, including John R. Silber, now President of

whenever the probationary period is short and the faculty member is engaged in a type of research that takes years to complete. The probationary period might end before the professor has published anything, and thus, a professor with excellent potential may be dismissed.⁴¹ The university and the professor lose in such cases. If the professor can find another academic position, one university's loss is another's gain. But professors who lose their positions must endure the hassle and trauma of finding another position and relocating to another city, often disrupting their family life in the process.

The "up-or-out" policy of tenure also increases turnover rates among untenured faculty. As a result, costs rise as universities engage in constant searches for replacement candidates. The quality of the faculty also generally drops whenever universities fire untenured professors who have a few years experience and replace them with untenured professors who have little or none.⁴²

Junior professors who teach such "drill" courses as elementary accounting, beginning French, and freshman English do not need the protection of academic freedom provided by the tenure system as much as professors who teach more theoretical courses.⁴³ At the same time, many of these young professors face such heavy teaching loads that the burden of a tenure-level research program is at best impracticable. If tenure cannot be completely abolished, at least it should be ended for these junior professors, who stand to lose more from tenure than they can gain. In this way, they can have the opportunity to be employed at the same institution for more than six years and will not have to look for a new job every few years.⁴⁴

As Charles Sykes has noted:

Tenure corrupts, enervates, and dulls higher education. It is, moreover, the academic culture's ultimate control mechanism to weed out the idiosyncratic, the creative, the nonconformist. The replacement of lifetime tenure with fixed-term

Boston University. See Silber, *Tenure in Context*, in *THE TENURE DEBATE* 34, 48-50 (B. Smith ed. 1973).

41. See Machlup, *supra* note 1, at 315.

42. See *id.* at 318-19.

43. We do not concede that anyone needs tenure to protect the right to speak and write. We merely assume it here for the sake of argument.

44. Some academic fields are extremely overcrowded. Professors in these fields who are fortunate enough to find one job may not be so lucky if they must find another job after a few years. Some individuals who are good classroom teachers may be forced to leave teaching altogether.

renewable contracts would, at one stroke, restore accountability, while potentially freeing the vast untapped energies of the academy that have been locked in the petrified grip of a tenured professoriate.⁴⁵

The argument that tenure insures a high-quality professoriate cannot withstand scrutiny. If tenure cannot provide special benefits in the form of enhanced academic freedom or lower costs—and it appears likely that this is the case—the arguments for its continuation are correspondingly weakened.

III. ADDITIONAL REASONS FOR ABOLISHING TENURE

The tenure system came under increased attack after World War II,⁴⁶ and two national commissions cited it as a possible cause of student unrest during the 1960s.⁴⁷ The Linowitz Commission called tenure “a shield for indifference and neglect of scholarly duties.”⁴⁸ The Scranton Commission said that tenure protects “practices that detract from the institution’s primary functions, that are unjust to students, and that grant faculty members a freedom from accountability that would be unacceptable for any other profession.”⁴⁹ The American Association of University Professors (AAUP) and Association of American Colleges (AAC) were understandably upset at these criticisms, but their own commission concluded that the fault was not with the tenure system itself but with its application and administration.⁵⁰ The AAUP’s commission recommended that

“adequate cause” in faculty dismissal proceedings should be restricted to (a) demonstrated incompetence or dishonesty in teaching or research, (b) substantial and manifest neglect of duty, and (c) personal conduct which substantially impairs the individual’s fulfillment of his institutional responsibilities. The burden of proof in establishing cause for dismissal rests upon the administration.⁵¹

45. C. SYKES, *supra* note 28, at 258.

46. See Lovain, *supra* note 16, at 420 (citing COMM’N ON ACADEMIC TENURE IN HIGHER EDUC., FACULTY TENURE 8-10 (1973)).

47. See *id.*

48. *Id.* (quoting SPECIAL COMM. ON CAMPUS TENSIONS, AM. COUNCIL ON EDUC., CAMPUS TENSIONS: ANALYSIS AND RECOMMENDATIONS 42 (1970)).

49. *Id.* (quoting PRESIDENT’S COMM’N ON CAMPUS UNREST, REPORT OF THE PRESIDENT’S COMMISSION ON CAMPUS UNREST 201 (1970)).

50. See *id.* at 421 (citing COMM’N ON ACADEMIC TENURE IN HIGHER EDUC., FACULTY TENURE 20 (1973)).

51. *Id.* (quoting COMM’N ON ACADEMIC TENURE IN HIGHER EDUC., FACULTY TENURE 75 (1973)).

Other commentators have attacked the tenure system for other reasons. Attorney John Gierak cites Michigan's Teacher Tenure Act⁵² as the "single biggest obstacle to correcting the problem of poor teachers in [Michigan] public schools."⁵³ He gives three compelling reasons for this conclusion:

[1] The teacher tenure system is wholly unnecessary to protect teachers from arbitrary and capricious actions of school boards, because teachers have more than adequate protection under collective bargaining agreements administered by powerful teachers unions.

[2] Teacher tenure procedures are exorbitantly expensive in terms of both time and money, due in part to the fact that board of education members are required under the system to spend endless hours sitting as a "jury" on charges of teacher incompetency and misconduct.

[3] The enormous amounts of time and money that must be invested in a teacher tenure case are powerful forces built into the tenure system that strongly discourage action against poor teachers. The impact of these cost considerations upon how districts deal with incompetent teachers cannot be overestimated, especially in small districts and those districts experiencing financial difficulties, which include the vast majority of all public school districts in the state.⁵⁴

Times have changed drastically since Michigan passed its teacher tenure law in 1937. Labor law in Michigan and the rest of the nation has evolved to the point where tenure is no longer needed.⁵⁵ Teachers are now well-protected against arbitrary dismissal by various teachers' unions, to which the vast majority of teachers belong.⁵⁶ Union grievance procedures are much like those afforded by the Teacher Tenure Act. Special legisla-

52. MICH. COMP. LAWS § 38.91 (1990) (MICH. STAT. ANN. § 15.1971 (Callaghan 1990)).

53. Gierak, *Abolish the Teacher Tenure Act to Improve the Quality of Public Education*, 68 MICH. B.J. 1098, 1098 (1989). Although Gierak focuses primarily upon primary and secondary schools, his arguments and our subsequent discussion are also applicable to higher education.

Professor Steven Amberg takes a contrary view of the need to abolish the Teacher Tenure Act. See Amberg, *Abolish the Teacher Tenure Act? Not While the Need Still Exists*, 68 MICH. B.J. 1104 (1989). However, Amberg ignores Gierak's arguments, does not make any valid arguments of his own, and blames incompetent teachers on administrators who fail to supervise or train them properly.

54. Gierak, *supra* note 53, at 1098.

55. See *id.* at 1099.

56. For a discussion of unions and tenure, see Olswang, *Union Security Provisions, Academic Freedom and Tenure: The Implications of Chicago Teachers Union v. Hudson*, 14 J.C. & U.L. 539 (1988).

tion is thus no longer needed to protect teachers' rights.⁵⁷

Part of the problem with tenure acts like Michigan's is that they make dismissal of an incompetent teacher exorbitantly expensive. In Michigan, for example, legal fees for an action to discharge an incompetent teacher are typically between \$50,000 and \$70,000 and in some cases exceed \$100,000.⁵⁸ Dismissing a teacher is time-consuming—a board of education may have to sit through ten or more hearings before it can take action.⁵⁹ In Michigan, if a board of education determines that a teacher should be dismissed, the teacher can request another hearing before the state's Teacher Tenure Commission. If the tenure commission upholds the board's dismissal, the teacher may appeal to the circuit court, then to the appellate court, and finally to the Michigan Supreme Court. In order to pay the legal costs of defending its action, the school board may need to lay off an additional teacher for three or four years.⁶⁰ In view of the time required to serve as a board member throughout this process, some school districts may find it difficult to obtain volunteers to sit on their boards of education, especially in large school districts, where several teachers may be attempting to have their dismissals overturned.⁶¹

With such expensive and drawn-out procedures required to dismiss an incompetent teacher, it is always possible that the school administration will decide that retaining an incompetent teacher is the lesser of two evils.⁶² If that happens, the incompetent teacher is left free to damage hundreds or even thousands of students over the course of his career.⁶³ Allowing incompetent teachers to continue teaching also harms the morale of good teachers and administrators. This problem can be solved by abolishing the Teacher Tenure Act and instead rely-

57. Almost every state legislature has passed some type of statewide tenure legislation. See L. STELZER & J. BANTHIN, *TEACHERS HAVE RIGHTS TOO* 1 (1980).

58. See Gierak, *supra* note 53, at 1100.

59. See *id.* Gierak points out that some hearings take much longer. In *Cooper v. Oak Park Public Schools*, 624 F. Supp. 515 (E.D. Mich. 1986), board hearings took almost 10 months. See *id.* at 516.

60. See Gierak, *supra* note 53, at 1100.

61. See *id.* at 1101.

62. Gierak cites this fact as a major contributing cause to the mediocrity of the public schools. See *id.*

63. Several studies by the American Association of School Administrators found teacher incompetence to be a major problem in public schools. In a 1977 study, school administrators estimated that between 5 and 15 percent of their teachers were unsatisfactory performers. See E. BRIDGES, *MANAGING THE INCOMPETENT TEACHER* 1 (1984) (citing S. NEILL & J. CUSTIS, *STAFF DISMISSAL: PROBLEMS AND SOLUTIONS* 5 (1978)).

ing upon binding arbitration,⁶⁴ which, according to Gierak, offers a number of advantages over the present system:

1. Arbitration is much quicker, which results in less disruption to educational programs, less potential back-pay liability, and increased fairness. . . .
2. Arbitration is much less expensive, for it reduces attorneys fees and costs. . . .
3. Arbitration does not necessarily involve board members. . . .
4. Because arbitrators are mutually selected by the parties, their decisions are generally better received and perceived to be more fair. . . .
5. Arbitration decisions are seldom appealed, which lends greater finality to the process. . . .⁶⁵

Gierak goes on to observe that eliminating the Teacher Tenure Commission and its accompanying overhead would save taxpayers millions of dollars.⁶⁶

While Gierak's arguments do not necessarily apply directly to situations in other states, many states have processes similar to that of Michigan.⁶⁷ And, although Gierak aims his attacks at the public primary and secondary school systems, his analysis largely applies to the collegiate level. Unionism is not as rampant at the college level as it is in the primary and secondary public schools, and university trustees do not necessarily become as involved in tenure disputes as do board of education members, but abolishing tenure at the college level can improve the quality of education by ridding the school of incompetent teachers.

IV. CONCLUSIONS AND RECOMMENDATIONS

Academic tenure has advantages and drawbacks. It may save out-of-pocket expenses, but it also decreases flexibility, and the

64. See Gierak, *supra* note 53, at 1101-03.

65. *Id.* at 1102. Gierak uses as a case-in-point *Beebee v. Haslett Public Schools*, 406 Mich. 224, 278 N.W.2d 37 (1979), in which "the tenure charges filed with and upheld by the board against a teacher in 1968 were not finally resolved until 1979, a period of litigation spanning 11 years." Gierak, *supra* note 53, at 1103 n.13. Gierak does not mention how much money was wasted in the course of this litigation or how many students were permanently damaged during the 11 years that this incompetent teacher was in the classroom.

66. See Gierak, *supra* note 53, at 1103.

67. As noted above, most other states also have teacher tenure acts. For discussions of Louisiana's Teacher Tenure Act, see Comment, *Louisiana's Teacher Tenure Act*, 34 Loy. L. REV. 517 (1988); and Resetar, *The Louisiana Teachers' Tenure Act—Protection from Dismissal for Striking Teachers?*, 47 LA. L. REV. 1333 (1987).

resulting inflexibility may cost more than the out-of-pocket expenses saved. Tenure enhances independence from outside forces but reduces the influence of those who pay and consume—taxpayers and students—while increasing the influence that tenured professors have on their untenured colleagues. The tenure process might increase the quality of the professoriate if it can truly separate high-quality teachers from those of low quality, but once a professor is tenured, it is difficult for the university to fire him unless he becomes incompetent or unneeded. Indeed, courts have ruled that universities may not fire a tenured professor even for ethical lapses.⁶⁸ Moreover, dismissing a tenured professor or teacher who does not want to go can be time-consuming and expensive.

So what is the solution? Is tenure good or bad? Nothing in the discipline of economics allows an unambiguous answer. The question is similar to “What is the optimal allocation of labor and capital in a given plant or industry?” Economics, however, can provide a methodology for answering this question. Let the market determine the worth of tenure. Give buyers and sellers of educational services freedom of choice. Allow colleges and universities the freedom to determine whether they want to offer tenure and how they want their tenure policy to be structured, without fear of losing accreditation.⁶⁹ Then, educational consumers would have the option of going to a school that has a tenure policy or one that does not. If tenure is a good management policy, it will tend to show in the consumer’s perception of the university’s reputation,⁷⁰ and that will have an effect on the university’s enrollment and the amount of tuition it can charge.

Education consumers’ dollar votes will be most effective, however, in rewarding good universities and punishing poor universities only if government is completely removed from the picture.⁷¹ Government tends to reward universities with fund-

68. See *Burton v. Cascade School Dist. Union High School No. 5*, 353 F. Supp. 254, 255 (1973), *aff’d*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975); *Texton v. Hancock*, 359 So. 2d 895 (Fla. Dist. Ct. App. 1978). See also Magner, *Can't Fire Professor for Ethical Lapses, Rutgers Told*, Chron. Higher Educ., Aug. 15, 1990, at A2, col. 2.

69. For a discussion of how tenure policies may be changed or abolished, and how schools that do not have tenure policies have fared, see R. CHAIT & A. FORD, *BEYOND TRADITIONAL TENURE: A GUIDE TO SOUND POLICIES AND PRACTICES* (1982).

70. We do not mean to limit our recommendations to universities. The economics of tenure also apply to primary and secondary schools, although the problems and opportunities are somewhat different.

71. Readers may be shocked by the suggestion that education be completely priva-

ing regardless of quality, whereas consumers reward universities (by paying tuition) based on their perceptions of quality. Consumers will have little influence if a university's budget is provided entirely or mostly by government and accredited by a government-approved accreditation agency. Universities can best serve consumers only if they are free to offer the best product they can without artificially-imposed government obstacles and prohibitions. If universities were allowed to become entrepreneurial, they would be forced to serve consumers or suffer a loss of enrollment.⁷² Under the present system, universities can thrive while ignoring consumers so long as they continue to receive generous government funding and, at the same time, can prevent other universities from competing effectively

tized. We have been taught to believe that free public education is desirable and even a right. Discussing this issue in depth is beyond this Article's scope. Fortunately, several books and articles have been written on the benefits of totally private education, which can be much cheaper and qualitatively better than tax-supported education. For discussions of this point, see S. BLUMENFELD, *IS PUBLIC EDUCATION NECESSARY?* (1985); J. COLEMAN & T. HOFFER, *PUBLIC AND PRIVATE HIGH SCHOOLS* (1987); J. COONS & S. SUGARMAN, *EDUCATION BY CHOICE* (1978); S. DENNISON, *CHOICE IN EDUCATION* (1984); R. FITZGERALD, *WHEN GOVERNMENT GOES PRIVATE: SUCCESSFUL ALTERNATIVES TO PUBLIC SERVICES* 139-48 (1988); F. FORTKAMP, *THE CASE AGAINST GOVERNMENT SCHOOLS* (1979); M. PIRIE, *PRIVATIZATION: THEORY, PRACTICE AND CHOICE* 194-97, 231-35, 283-87 (1988); R. POOLE, *CUTTING BACK CITY HALL* 172-88 (1980); *THE PUBLIC SCHOOL MONOPOLY: A CRITICAL ANALYSIS OF EDUCATION AND THE STATE IN AMERICAN SOCIETY* (R. Everhart ed. 1982); E. SAVAS, *PRIVATIZING THE PUBLIC SECTOR: HOW TO SHRINK THE GOVERNMENT* 102-03 (1982); Spring, *The Public School Movement vs. the Libertarian Tradition*, *J. LIBERTARIAN STUD.*, Spring 1983, at 61; E. WEST, *EDUCATION AND THE STATE: A STUDY IN POLITICAL ECONOMY* (2d ed. 1970).

72. Professor Armen Alchian suggests that the incidence of tenure is directly correlated to the percentage of university income that comes from endowments and taxpayers. That is, the higher percentage of funding that comes from sources other than consumers (students), the more likely there is to be a high incidence of tenure, because the system is insulated from consumer demand. Such universities can continue to grant tenure, despite its inefficient features, because consumers do not have much clout if the vast majority of university funding comes from other sources. If consumers paid 100 percent of the cost of their education, tenure would be far less likely to exist as a management policy, as evidenced by the fact that at proprietary schools (which are run like businesses), tenure is practically nonexistent. Thus, tenure can best be eliminated by getting government out of education. See A. ALCHIAN, *supra* note 10, at 194.

Alchian also points out that teaching will grow in importance as the percentage of total university funding that comes from tuition increases. See A. ALCHIAN, *The Economic and Social Impact of Free Tuition*, in *ECONOMIC FORCES AT WORK* 203, 220 (1977). Students pay tuition to be taught rather than to subsidize faculty research and service, and if they are paying the full cost, they will be able to exercise tremendous influence by threatening to withhold their tuition or take their money to a competing institution. As it stands, tuition covers a small part of total funding, especially at tax-supported institutions. The inescapable conclusion is that teaching will improve if government is removed from the business of funding education. Even if this does not occur, emphasis on teaching could improve if government provided support in the form of vouchers instead of direct funding. A voucher policy still raises a moral question, because under such a policy, the government is still using the force of taxation to make some persons (taxpayers) pay for a benefit that goes to others (students).

by blocking such competitors' innovative courses and delivery systems.⁷³

If a consumer-oriented educational system were available, a number of tenure options would likely result. Some universities would probably retain the traditional tenure system. Others would abolish it entirely, thus becoming like every other industry that refuses to guarantee its workers lifetime employment. A number of combinations and permutations would also likely develop. Perhaps five-year renewable contracts would replace tenure in some cases. Through hybrid instruments of this type, professors could be somewhat insulated from external and internal influences but could still be dismissed if their services became unneeded or unwanted. Other universities might decide to grant tenure to some professors and give term contracts to everyone else.⁷⁴ The market would discover other options as well, if allowed to operate. Tenure is a management policy. As is the case with all management policies, companies with good policies tend to thrive and companies with poor ones tend to lag behind the competition. The market determines what a good management policy is, and what is not, far better than theoreticians gathered around the fireplace in the faculty lounge.

73. The accreditation system prevents competition. A university cannot just offer an innovative course whenever and wherever it wants. It must first look over its shoulder to see whether the relevant accreditation agency will permit the new course. The American Assembly of Collegiate Schools of Business (AACSB), for example, routinely prohibits business schools from starting or expanding a new program without its approval—and approval is often denied in advance by telling the business school at the time of its accreditation visit that it may not expand a certain program or start any new programs unless it first complies with specified conditions and receives AACSB approval. Thus, a business school may be prevented from offering M.B.A. courses at a company's facilities and may be forced by the accreditation agency to phase out such programs already in existence in order to maintain accreditation—even if consumers want the programs to be expanded.

74. Present university policy is either to grant tenure after some period of time, generally about six years, or to give a one-year notice of termination. Thus, professors who do not receive tenure are fired with one year's advance warning. If a termination letter is not received after a certain cut-off date, the professor is often considered tenured. The tenure or term contract option, by contrast, would allow untenured professors to continue teaching without forcing the university to terminate after some arbitrary period of time. Until a few years ago, academics in British schools were generally granted tenure automatically after a one- to five-year probationary period. See H. FERNS, *supra* note 11, at 42 n.2.

