

THE DECLINE OF TENURE: THE SIXTH CIRCUIT'S INTERPRETATION OF ACADEMIC TENURE'S SUBSTANTIVE PROTECTIONS

*John M. Badagliacca**

I. INTRODUCTION

Academic tenure has played an instrumental role in shaping higher education in America over the past century. In the most basic sense, academic tenure provides job security to employees in the academic field after a specified probationary period.¹ William Van Alstyne, an American law professor, provides a helpful definition in his defense of tenure: “[t]enure, accurately and unequivocally defined, lays no claim whatever to a guarantee of lifetime employment. Rather, tenure provides only that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed *without adequate cause*.”² Van Alstyne’s definition is important because it emphasizes one of the crucial aspects of academic tenure—employee dismissal *only* for “adequate cause.”³

Tenure provides both substantive and procedural protections to the tenured employee. The substantive protections prevent unlawful dismissal—dismissal without adequate cause—while the procedural protections ensure that employers follow a certain process during the

*J.D. Candidate, 2014, Seton Hall University School of Law; B.A., 2011, College of the Holy Cross. I would like to thank Professor Charles Sullivan, Chris Rojao, and Eric Suggs for their helpful insights and edits on this Comment. I also owe many thanks to Professor Lee Oser for guiding me throughout college, and to Joseph Plukas for being the sounding board for my ideas. Finally, I would like to express my sincere gratitude to my family and friends for their support and encouragement throughout law school and beyond.

¹ CHARLES A. SULLIVAN ET AL., CASES AND MATERIALS ON EMPLOYMENT LAW 403 (1993).

² William Van Alstyne, *Tenure: A Summary, Explanation, and “Defense,”* 57 AAUP BULL 328 (1971) (emphasis in original).

³ Throughout the history of academic tenure scholars, courts, lawyers, and others have used the term “adequate cause” intermittently with “just cause” and “good cause.” For this Comment, all three phrases mean the same thing: the cause needed to properly dismiss a tenured professor.

employment and dismissal of any tenured employees. Academic tenure also includes the concept of “academic freedom,” or the ability of professors to teach material in the way they see fit without worrying about the pressures of censorship or overt administrative restriction. This Comment analyzes the rights provided by academic tenure and discusses the history and the reasoning for the adoption of academic tenure in American colleges and universities.

Specifically, this Comment discusses whether tenure, as an academic and legal concept, affords professors specific rights outside of their employment contracts, or in the alternative, whether tenure is an abstract concept that simply affords professors more freedom in their pedagogical philosophies while providing no legal authority for continuous employment outside of their employment contracts. The United States Court of Appeals for the Sixth Circuit chose the latter in its interpretation of academic tenure in *Branham v. Thomas M. Cooley Law School*.⁴ Lynn Branham was a tenured law professor at the Thomas M. Cooley Law School who was terminated in December 2006.⁵ The court ruled that Branham’s tenure status did not afford her any specific rights beyond those set forth in her employment contract.⁶

This Comment argues that the concept of academic tenure in American higher education today implicitly affords tenured professors procedural and substantive protections from termination. These protections exist as tools to ensure that professors’ academic freedom will remain uninhibited after a probationary period in which the professors earn the right to its protections. In *Branham*, the Sixth Circuit separated the job security aspect of academic tenure from the academic freedom aspect, and treated tenure as a purely pedagogical concept. This interpretation reduces tenure to an almost meaningless legal concept that affords no real employment protections. The concepts of tenure as a grant of job security and tenure as a grant of academic freedom are not mutually exclusive; they are interdependently linked. One cannot exist without the other. This interdependent concept of tenure allows the educational system to progress, and to divide this concept is to endanger the very system it was designed to protect. For these reasons the Sixth Circuit erred in its interpretation of tenure.

This Comment serves as both a discussion of the legal

⁴ 689 F.3d 558 (6th Cir. 2012).

⁵ *Id.* at 561.

⁶ *Id.* at 562.

interpretation of tenure and a defense of tenure in American higher education. Part II of this Comment sets forth the history of tenure in American higher education. It examines the evolution of tenure, the standards set forth by academic and legal organizations, and the industry standards in American higher education. Part III discusses the *Branham* case and its holding. Part IV addresses the nationwide implications of the Sixth Circuit's interpretation of tenure and argues that *Branham*'s tenure provided legal authority for her job security regardless of the one-year duration of her most recent employment contract. It also discusses the effect of the *Branham* ruling on professors' future job security and on their ability to exercise academic freedom. Finally, Part V examines the contemporary opinions on tenure in American higher education in relation to the *Branham* ruling.

II. HISTORY OF TENURE IN AMERICAN HIGHER EDUCATION

The history of specific legal protection for scholars can be traced back to twelfth-century Europe.⁷ In 1158, Emperor Frederick Barbarossa⁸ issued the *Authentica Habita*, an edict that promised scholars safe passage in their travels, protection from attack upon their homes, and compensation for unlawful injury.⁹ This twelfth-century edict shows how, even hundreds of years ago, western civilization understood the need to afford certain protections to those who pursued scholarly work and who would in turn pass on their knowledge to the next generation. Special protection for

⁷ Walter P. Metzger, *Academic Tenure in America: A Historical Essay*, in FACULTY TENURE: A REPORT AND RECOMMENDATIONS BY THE COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION 93, 94 (1973) [hereinafter Metzger, *Academic Tenure in America*].

⁸ Frederick I Barbarossa was a German-born Holy Roman Emperor who ruled from 1152 to 1190, and is widely considered one of the most influential figures of his time. MEDIEVAL GERMANY: AN ENCYCLOPEDIA 380 (John M. Jeep ed., 2001). Barbarossa's reign represented a highpoint of German power, and his influence on the German people remained long after his death:

[The Empire's] territory had been wider under Charles, its strength perhaps greater under Henry III; but it never appeared in such pervading vivid activity, never shone with such lustre of chivalry, as under the prince whom his countrymen have taken to be one of their national heroes, and who is still, as the mythic type of Teutonic character, honoured by picture and statue, in song and in legend, through the breadth of the German lands.

JAMES BRYCE, THE HOLY ROMAN EMPIRE 72 (1864). Barbarossa's edict undoubtedly influenced later German concepts regarding special protections for scholars and academics. See *infra* text accompanying notes 21–27.

⁹ Metzger, *Academic Tenure in America*, *supra* note 7, at 94.

educators, however, did not become a part of the American educational system until relatively recently. Tenure did not reach American schools until the latter half of the nineteenth century, and the modern concept of academic tenure did not exist until the beginning of the twentieth century.¹⁰ The concept of tenure took time to develop in the United States, and did not emerge as a fundamental doctrine of American education until the oldest institutions of higher learning were forced to adapt to the progressive academic movement at the turn of the twentieth century.¹¹

A. *Origins of Tenure in the United States*

In early nineteenth-century America, colleges anchored themselves in tradition. By centering themselves in tradition, American colleges were paternalistic, authoritarian, and extremely skeptical of youth.¹² Institutions of higher education focused on the importance of Christianity, classical studies, and discipline.¹³ This pedagogical mindset left very little room for intellectual creativity.¹⁴ At that time, professorial appointments usually lasted indefinitely and continued as long as the professor exhibited good behavior.¹⁵ Although these indefinite appointments existed, there was no legal precedent to support the presumption that the professor should be allowed to continue his employment absent adequate cause for dismissal.¹⁶ As a result, the professor could be fired at will in many institutions without any substantive or procedural protections.¹⁷ The courts, not wanting to get involved in universities' administrative decisions, allowed university boards to govern themselves regarding

¹⁰ See generally WALTER P. METZGER, *ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY* (1955) (attributing tenure's development in American schools to, among others: the rise of Darwinism and German pedagogical influences in the second half of the nineteenth century; the emergence of the university as a research institution and the unprecedented support from big businesses in the late nineteenth century; and the establishment of the AAUP in the beginning of the twentieth century).

¹¹ *Id.* at 194 ("The establishment of the American Association of University Professors in 1915 . . . was the beginning of an era in which the principles of academic freedom were codified, and in which violations of academic freedom were systematically investigated and penalized.").

¹² *Id.* at 4–5.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ RICHARD HOFSTADTER, *ACADEMIC FREEDOM IN THE AGE OF THE COLLEGE* 230 (1955).

¹⁶ *Id.*

¹⁷ *Id.*

faculty hiring and firing decisions.¹⁸ All appointments were, in a legal sense, temporary and instantly extinguishable.¹⁹ The norms and standards regarding professorial employment also varied from school to school, and the standards of any given university depended largely on its location and the people in charge.²⁰

While academic tenure as a legal concept was unclear and undefined in America during the nineteenth century, that period marked the beginning of a cultural infusion that would reshape American thoughts on academic freedom. In the nineteenth century over nine thousand Americans studied in German universities.²¹ These returning students, along with German scholars teaching in the United States at the time, assimilated German methods and ideals into American higher education.²² One of the most important ideals that Germans brought to the United States was the concept of *lehrfreiheit*, which roughly translates to “teaching freedom,” and encompasses what we now call “academic freedom.”²³

Particularly, the concept of *lehrfreiheit* meant two things: (1) that a university professor was free to perform his own research and to report his findings through publication or lecture; and (2) that the professor enjoyed the “freedom of teaching and freedom of inquiry.”²⁴ The Germans did not believe that adherence to *lehrfreiheit* was a voluntary choice for universities: “[t]his freedom was not, as the Germans conceived it . . . a superadded attraction of certain universities and not of others; rather, it was the distinctive prerogative of the academic profession, and the essential condition of all universities.”²⁵ *Lehrfreiheit* also promoted the concept of limited administrative rules within the education system.²⁶ Therefore, the German idea of academic freedom entailed the right of professors to teach without fear of dismissal, and promoted an atmosphere of

¹⁸ Metzger, *Academic Tenure in America*, *supra* note 7, at 133.

¹⁹ James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 164 (2000).

²⁰ Metzger, *Academic Tenure in America*, *supra* note 7, at 135.

²¹ METZGER, *supra* note 10, at 93.

²² *Id.* The German concept of giving professors and scholars specific protections traces all the way back to Emperor Barbarossa’s *Authentica Habita*. See *supra* notes 8–9 and accompanying texts.

²³ Gregory M. Dickinson, *Academic Tenure and the Divide Between Legal Academia and Legal Practice*, 6 DARTMOUTH L.J. 318, 329–30 (2008).

²⁴ METZGER, *supra* note 10, at 112–13.

²⁵ *Id.* at 113.

²⁶ *Id.*

administrative leniency surrounding the teaching process.²⁷

By the second half of the nineteenth century, the professoriate began organizing into specialized departments reflecting national specialist organizations.²⁸ This created a more specialized faculty comprised of research scholars who could best be evaluated by their disciplinary peers rather than by administrators or lay trustees.²⁹ After this shift, universities were only a short step away from adopting the belief that faculty should be involved in a quasi-judicial proceeding to determine whether another faculty member should be dismissed.³⁰ This new specialized faculty brought with it a conflict between professors and administrators.³¹ The more the professors explored and critiqued their own specialized field—delving into controversial topics and ideas—the angrier the administrators became.³² The divergence of traditional views in academia had previously been easy grounds for dismissal, but the turn-of-the-century technological advances and the philosophical shifts of the era resulted in a different outlook toward progressive academic thought.³³ It became apparent that to continue the progression of the era, institutions of higher learning needed to promote greater academic freedom.³⁴ While the technological advances of the industrial revolution created a demand for highly trained scientists, universities sought out professors with special skill-sets to provide their students with the education needed to keep with the progressive time period.³⁵ In turn, these highly skilled professors demanded a great level of academic autonomy in order to advance the sciences.³⁶ University leaders began publicly embracing the protection of progressive academic thought at the beginning of the twentieth century.³⁷ In the 1907 commencement address, Harvard president Charles W. Eliot said:

²⁷ *Id.*

²⁸ Fishman, *supra* note 19, at 164. These organizations were tailored to specific disciplines. *Id.* For example, history professors became part of the newly formed American Historical Association. *Id.* The American professor now belonged to a broad professional group (the faculty) and a narrower professional group within a specific discipline. *Id.*

²⁹ Dickinson, *supra* note 23, at 330.

³⁰ Fishman, *supra* note 19, at 165.

³¹ Dickinson, *supra* note 23, at 330.

³² *Id.*

³³ *Id.* at 331.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *See, e.g.,* METZGER, *supra* note 10, at 124.

[S]o long as . . . boards of trustees of colleges and universities claim the right to dismiss at pleasure all the officers of the institutions in their charge, there will be no security for the teachers' proper freedom [I]t is easy for a department to become despotic, particularly if there be one dominant personage in it.³⁸

Eliot's statement was one of the first to link academic freedom with the goal of avoiding administrative interference with faculty positions.³⁹ At the time of Eliot's commencement address, the American university was uprooting itself from its authoritarian past, allowing an opportunity for the modern tenure system to take hold.⁴⁰

B. The AAUP

In 1900, Stanford University dismissed economics professor Edward A. Ross from his position due to his political and social views.⁴¹ Arthur Oncken Lovejoy, an associate professor at Stanford, resigned in protest of Ross's dismissal.⁴² In 1913 Lovejoy, along with eighteen professors from Johns Hopkins University, wrote a letter to colleagues at other leading universities asking them to join in the formation of a national association of professors.⁴³ The purpose of the association was to protect the institutional interests of faculty, specifically through the creation of general principles regarding tenure and the legitimate dismissal of faculty.⁴⁴

Professors around the country responded favorably to the Hopkins Letter, resulting in the establishment of the American Association of University Professors (AAUP) in 1915.⁴⁵ The AAUP modeled itself after the American Bar Association in order to

³⁸ *Id.*

³⁹ Dickinson, *supra* note 23, at 331.

⁴⁰ This tenure movement gained momentum in the early twentieth century, but still took time to develop: in 1913 a Wesleyan professor was dismissed for giving a speech in which he urged less rigid observance of the Sabbath. See Metzger, *Academic Tenure in America*, *supra* note 7, at 146.

⁴¹ Metzger, *Academic Tenure in America*, *supra* note 7, at 138. Jane Lathrop Stanford, the widow of Stanford University's founder Leland Stanford, used her power as the sole trustee of the university to pressure the university into dismissing Ross. *Id.* Although Ross's dismissal was a monumental event in the movement for the protection of academic freedom in America, Ross was no progressive role model. Stanford pushed for Ross's removal after Ross publicly shared his hatred of non-whites, specifically Chinese immigrants. *Id.*

⁴² *Id.* at 137.

⁴³ *Id.* at 135–37.

⁴⁴ Fishman, *supra* note 19, at 166.

⁴⁵ METZGER, *supra* note 10, at 194.

promote its desire to serve as a link between professionalism and academic freedom.⁴⁶ In the same year of its establishment, the AAUP issued the *1915 Declaration of Principles on Academic Freedom and Academic Tenure*.⁴⁷ The report championed three elements of academic freedom: “freedom of inquiry and research, freedom of teaching within the university or college, and freedom of extramural utterance and action.”⁴⁸ In 1940, the AAUP, in coordination with the Association of American Colleges (AAC), released a new statement of principles⁴⁹—the *1940 Statement of Principles on Academic Freedom and Tenure* (“*1940 Statement*”) received widespread endorsement and became one of the most influential of all such formularies.⁵⁰

The *1940 Statement* defined tenure as a means to two specific ends: “(1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability.”⁵¹ With the new goals of tenure set forth, the AAUP then labeled freedom and economic security as “indispensable to the success of an institution in fulfilling its obligations to its students and to society.”⁵² The *1940 Statement* further demanded that, after a probationary period, teachers should have permanent or continuous tenure.⁵³ After achieving tenure, the professor could not be terminated except for adequate cause.⁵⁴ One of the shortcomings of the *1940 Statement* was its failure to clearly define adequate cause, providing only “an oblique reference to moral turpitude and a suggestion as to how incompetence should be judged.”⁵⁵ The *1940 Statement* also sets forth an early framework for the procedural rights afforded to tenured professors: “[t]ermination for cause of a continuous appointment, or

⁴⁶ Fishman, *supra* note 19, at 167.

⁴⁷ See *General Report of the Committee on Academic Freedom and Academic Tenure*, 1 AAUP BULL. 291 (1915), available at <http://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf> [hereinafter *1915 Declaration*].

⁴⁸ *Id.* at 292.

⁴⁹ Metzger, *Academic Tenure in America*, *supra* note 7, at 152; *1940 Statement of Principles on Academic Freedom and Tenure*, in AAUP POLICY TENTH 3 (2d ed.), available at <http://www.aaup.org/sites/default/files/principles-academic-freedom-tenure.pdf> [hereinafter *1940 Statement of Principles*].

⁵⁰ Metzger, *Academic Tenure in America*, *supra* note 7, at 152.

⁵¹ *1940 Statement of Principles*, *supra* note 49, at 3.

⁵² *Id.*

⁵³ *Id.* at 4.

⁵⁴ *Id.*

⁵⁵ Metzger, *Academic Tenure in America*, *supra* note 7, at 153 n.91.

the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution.”⁵⁶

In 1958, the AAUP and AAC collaborated again to release a more detailed and stringent policy on the procedural standards for dismissals.⁵⁷ This new policy stated that when the first reasons arise to question the fitness of a tenured faculty member, the administrative officer should first seek a personal conference with the faculty member.⁵⁸ The faculty member may then request a hearing in order to determine whether he should be removed from the faculty position on the grounds stated.⁵⁹ The faculty member had the right to counsel, to question all witnesses who testify orally, and to be confronted by all adverse witnesses.⁶⁰ In addition, there must be a record of all of the evidence against the professor.⁶¹

Since 1957, the AAUP has continuously released and revised a policy document titled *Recommended Institutional Regulations on Academic Freedom and Tenure* (“*Recommended Regulations*”).⁶² The document reflects the development of AAUP standards and procedures, and the most recent revision is from 2009.⁶³ The opening lines of the *Recommended Regulations* state its purpose to “protect academic freedom and tenure and to ensure academic due process.”⁶⁴ The *Recommended Regulations* specifically point out that dismissals of all forms of faculty members will not be a means of curbing academic freedom: “[a]dequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers. Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens.”⁶⁵ The language of the

⁵⁶ 1940 *Statement of Principles*, *supra* note 49, at 4.

⁵⁷ 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings*, in AAUP POLICY TENTH 12 (2d ed.), available at <http://www.aaup.org/file/standards-faculty-dismissal.pdf>.

⁵⁸ *Id.* at 13.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 14.

⁶² AM. ASS'N OF UNIV. PROFESSORS, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE (2009), available at <http://www.aaup.org/NR/rdonlyres/E45D7D3B-00F1-4BC0-9D0A-322DF63A1D07/0/RIR.pdf>.

⁶³ *Id.*

⁶⁴ *Id.* at 1.

⁶⁵ *Id.* at 4.

Recommended Regulations shows a conscious effort on the part of the AAUP to defend the idea that tenured professors can maintain job security without fear of arbitrary dismissal. Almost one hundred years after its inception, the AAUP still champions the protection of academic freedom in American institutions, and reinforces that idea in its published works.⁶⁶

C. *The American Bar Association*

Law schools are a particularly prominent subset of American institutions of higher learning. Like some other graduate schools, law schools have the special quality of being linked to both the educational world and to the world of a specific and prominent profession. Therefore, as members of educational institutions, law professors fall under the protection of the standards and regulations of the AAUP.⁶⁷ But law professors, as members of the legal profession, may also find guidance and protection under the standards and regulations of the American Bar Association (ABA).⁶⁸ Every year, the ABA releases its *Standards and Rules of Procedure for Approval of Law Schools* (“ABA Standards”).⁶⁹ The main purpose of the publication is to set forth the requirements law schools must meet in order to obtain and retain ABA approval.⁷⁰ ABA accreditation is important because in most states, one must have attended an ABA accredited school in order to sit for the bar exam.⁷¹ Attending an ABA accredited school also ensures that the student will receive a nationally approved program of legal education.⁷²

The *ABA Standards* also set forth the standards and requirements that govern law school faculty at ABA accredited institutions.⁷³ Standard 405, labeled *Professional Environment*, states that “[a] law

⁶⁶ See generally AM. ASS’N OF UNIV. PROFESSORS, <http://www.aaup.org> (last visited Mar. 12, 2013).

⁶⁷ *Id.*

⁶⁸ See ABA, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS vii (2012), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf [hereinafter ABA STANDARDS].

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ For more information on the ABA’s accreditation and approval of law schools see FREQUENTLY ASKED QUESTIONS, http://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions.html.

⁷² *See id.*

⁷³ ABA STANDARDS, *supra* note 68, at 29.

school shall have an established and announced policy with respect to academic freedom and tenure of which Appendix 1 herein is an example but is not obligatory.”⁷⁴ Standard 405 also includes a set of interpretations to explain the standard.⁷⁵ The explanation of tenure in interpretation 405-6 bears a heavy resemblance to the concept of tenure maintained by the AAUP: “[a]fter tenure is granted, the faculty member may be terminated only for good cause, including termination or material modification of the entire clinical program.”⁷⁶ Interpretation 405-6 also grants specific protections to professors with long-term contract agreements.⁷⁷ The trend and popularity of long-term contracts for faculty members will be discussed in more detail in Part IV *infra*.

As mentioned above, the *ABA Standards* provide an example of a tenure policy for accredited law schools to adopt—since the schools *must* establish an academic tenure policy. The example given by the ABA, labeled *Statement on Academic Freedom and Tenure*, is the exact text from the *1940 Statement* issued by the AAUP.⁷⁸ The ABA’s decision to adopt the AAUP’s policies on academic freedom and tenure as the template for law schools shows that the ABA accepts the AAUP’s regulations in matters regarding academic tenure.⁷⁹ Although the *ABA Standards* state that law schools do not have to adopt the exact example given, the ABA’s choice to use the *1940 Statement* as its tenure policy template is clearly an endorsement of the AAUP’s tenure policies.⁸⁰

D. Current Tenure Statistics

The National Center for Education Statistics reported that in the fall of 2010, 46% of full-time professionals employed at post-secondary schools (including law schools and other professional schools, but excluding medical schools) had faculty status.⁸¹ The

⁷⁴ *Id.* at 32.

⁷⁵ *Id.* at 33.

⁷⁶ Compare *id.* at 33, with *1940 Statement of Principles*, *supra* note 49, at 4.

⁷⁷ ABA STANDARDS, *supra* note 68, at 33.

⁷⁸ Compare *id.* at 161, with *1940 Statement of Principles*, *supra* note 49, at 3.

⁷⁹ The ABA’s *Statement on Academic Freedom* begins with a notation that the text of the statement follows the AAUP’s *1940 Statement of Principles*. ABA STANDARDS, *supra* note 68, at 161.

⁸⁰ *Id.*

⁸¹ LAURA G. KNAPP ET. AL., NAT’L CENT. FOR EDUC. STATISTICS, EMPLOYEES IN POSTSECONDARY INSTITUTIONS, FALL 2010, AND SALARIES OF FULL-TIME INSTRUCTIONAL STAFF, 2010–11, at 3 (2011), available at <http://nces.ed.gov/pubs2012/2012276.pdf>.

report further states that 21% of all full-time professionals had tenure, meaning 45.6% of employees with faculty status had tenure.⁸² Another 17.4% of faculty employees were on a tenure track, while only 15.2% of full-time faculty belonged to post-secondary schools without a tenure system.⁸³ This data shows that a vast majority of colleges and universities across the country utilize some form of tenure system. In those schools, over half of the full time faculty members have tenure status or are on a tenure track. Tenure is a major part of American education, and any change to the substantive tenure doctrine will have serious implications for the institutions and professors participating in some form of tenure system.⁸⁴ Thus, academic tenure's ability to ensure academic freedom must be protected or else true academic freedom in American institutions of higher learning may begin to disappear.

III. THE *BRANHAM* DECISION

In August 2012, the United States Court of Appeals for the Sixth Circuit addressed whether a professor's tenure status afforded her any specific rights outside of her current employment contract in *Branham v. Thomas M. Cooley Law School*.⁸⁵ The court ultimately held that Branham's tenure status did not grant her any rights other than those enumerated in her individual employment contract for the most recent year.⁸⁶ The ruling set a precedent against the legal significance of tenure status and bolstered the importance of employment contracts for graduate professors.

Thomas M. Cooley Law School hired Lynn Branham as a criminal law professor in 1983.⁸⁷ On December 21, 2005, Branham signed an employment contract for a twelve-month employment period beginning on January 1, 2006.⁸⁸ Branham's employment contract contained a section labeled "Rank and Title" which read: "The Professor shall hold the rank and title of TENURED PROFESSOR OF LAW with all the rights and privileges thereof, as defined in the Bylaws of the School or as may from time to time be

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See generally id.* (showing the large number of institutions and professors countrywide that participated in tenure programs as of fall 2010).

⁸⁵ 689 F.3d 558 (6th Cir. 2012). The Sixth Circuit subsequently denied a rehearing and a rehearing en banc. *Id.*

⁸⁶ *Id.* at 563.

⁸⁷ *Id.* at 561.

⁸⁸ *Id.*

conferred by the Board of Directors.”⁸⁹ In the section labeled “General Provisions,” the employment contract expressly incorporated some of the ABA’s standards: “The current provisions of the American Bar Association standards governing approval of law schools as they relate to maximum teaching loads and other rights, duties, and prerogatives of faculty members shall be and become part of this contract by reference thereto.”⁹⁰ Branham’s employment contract also expressly incorporated Cooley’s Policy 201—the law school’s policy regarding academic rank and tenure.⁹¹

In the Spring Semester 2006, Branham taught Constitutional Law and Torts.⁹² Branham completed the semester without a problem although she expressed displeasure with the school administration for not assigning her any criminal law-related courses.⁹³ In the Fall Semester 2006 she was again assigned to teach Constitutional Law, which she refused to teach.⁹⁴ Instead, she requested an assignment to teach a course related to criminal law.⁹⁵ In December 2006, after Branham refused to teach her assigned course, Cooley dismissed Branham from her position.⁹⁶ Branham’s employment contract required Cooley to put Branham’s dismissal to a faculty vote before the dismissal could be final.⁹⁷ Cooley failed to follow this procedure, and there was no faculty vote concerning Branham’s dismissal.⁹⁸

Upon her dismissal, Branham filed a complaint for wrongful dismissal for breach of contract against Cooley in federal court.⁹⁹ The District Court for the Western District of Michigan concluded that Cooley had breached the employment contract by not following the dismissal process required by the contract.¹⁰⁰ The court then ordered

⁸⁹ Employment Contract at 12, *Branham v. Thomas M. Cooley Law Sch.*, No. 1:07-CV-630, 2010 WL 3505930 (W.D. Mich. Mar. 16, 2009).

⁹⁰ *Id.* at 15.

⁹¹ *Branham*, 689 F.3d at 562; *see infra* text accompanying note 102.

⁹² *Id.* at 561.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Branham*, 689 F.3d at 561.

⁹⁸ *Id.*

⁹⁹ *Id.* Branham got her breach of contract claim into federal court under supplemental jurisdiction arising out of a concurrent ADA claim that Branham brought against Cooley. *Id.*

¹⁰⁰ *Id.*

Cooley to comply with that process.¹⁰¹ Cooley's Policy 201 states:

No tenured faculty member shall be dismissed . . . prior to the expiration of the term of his appointment, except for good cause shown and in accordance with the following procedure:

(a) Notice in writing by the dean of the reasons and grounds for dismissal shall be served on the faculty member at least fourteen days prior to a meeting of the faculty conference at which the removal is to be considered, as provided in subparagraph (b) herein.

(b) The Dean shall thereafter cause a meeting of the faculty conference to be convened for the purpose of considering removal of the faculty member.

(c) If the faculty conference shall concur in removal, the faculty member shall be removed, subject to appeal to the academic committee of the Board of Directors.¹⁰²

In accordance with the court's decision, Cooley held a faculty conference to debate whether adequate cause existed to dismiss Branham.¹⁰³ The faculty concurred with Cooley's decision to dismiss Branham, and the district court then ruled that Cooley had complied with the procedural requirements set forth in Branham's employment contract.¹⁰⁴ Although the district court found that Cooley had originally violated the procedural requirements regarding Branham's dismissal, the court went on to rule that the tenure granted under Branham's contract did not afford her rights beyond those specified in her employment contract.¹⁰⁵ Branham appealed the district court's decision, bringing the issue to the Sixth Circuit.

¹⁰¹ *Id.*

¹⁰² *Id.* at 563.

¹⁰³ *Branham*, 689 F.3d at 561.

¹⁰⁴ *Id.* After the district court ordered Cooley to conduct the faculty conference, the school issued Branham a written notification of the reasons for her dismissal. *Id.* at 563. The faculty members at the conference voted 85–19 in favor of Branham's dismissal. *Id.* The district court ruled that Cooley's actions satisfied the procedural requirements for dismissal even though the faculty conference took place years after Branham's original dismissal. *Id.*

¹⁰⁵ *Id.* at 562.

A. *The Sixth Circuit's Analysis in Branham*

On appeal, Branham argued that her status as a tenured professor granted her a lifetime appointment or a guarantee of continuous employment.¹⁰⁶ She believed that the court should have incorporated the ABA's suggested tenure policies into her employment contract and used those policies to interpret the rights and protections she had regarding her employment status.¹⁰⁷

The Sixth Circuit began its analysis of the issue by examining Michigan contract law and finding that "contracts for permanent employment are for an indefinite period of time and are presumptively construed to provide employment at will."¹⁰⁸ Branham's contract was a twelve-month employment contract.¹⁰⁹ Therefore, under Michigan contract law, Branham's contract was not a contract for permanent employment unless a specific provision of the contract granted her employment for an indefinite period of time outside of the twelve-month agreement.¹¹⁰ Importantly, the court did not find that Branham's tenure status, which was expressly incorporated into the contract, granted her indefinite employment.¹¹¹

The first step the Sixth Circuit took in its analysis was to define the exact rights Branham's tenure status provided her as a professor at Cooley.¹¹² Due to the employment contract's express incorporation of the ABA's standards governing approval of law schools, the court looked to ABA Standard 405 in order to interpret the scope of Branham's tenure rights.¹¹³ Standard 405 states that "[a] law school shall have an established and announced policy with respect to academic freedom and tenure"¹¹⁴ The ABA provides a model tenure standard, which, as mentioned in Part II *supra*, is the same standard as the model standard adopted by the AAUP's *1940 Statement*.¹¹⁵ The Sixth Circuit reviewed the *1940 Statement* but concluded that since the ABA articulated that the statement "is an example but is not obligatory," the tenure standard set forth by the

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 562 (quoting *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268, 271 (Mich. 1991)).

¹⁰⁹ Employment Contract, *supra* note 89, at 12.

¹¹⁰ *Branham*, 689 F.3d at 562.

¹¹¹ *Id.* at 563.

¹¹² *Id.* at 562.

¹¹³ *Id.*

¹¹⁴ ABA STANDARDS, *supra* note 68, at 32.

¹¹⁵ *See id.* at 33.

statement was not necessarily the tenure that Branham held.¹¹⁶ The court then took its analysis a step further and concluded that even if the tenure rights outlined in the *1940 Statement* were the exact rights incorporated into Branham's contract, the tenure held by Branham still did not afford her any special rights beyond those enumerated in her contract.¹¹⁷

The court reached its conclusion due to a narrow reading of the *1940 Statement*. The *1940 Statement* reads "teachers . . . *should* have permanent or continuous tenure," prompting the court to find that it was merely a suggestion, and not a requirement, that law schools grant permanent or continuous tenure.¹¹⁸ Therefore, absent any provision in the contract expressly defining Branham's tenure as permanent or continuous employment, the court found that the language of the contract did not grant any form of permanent employment, and that Branham only had a contract for a twelve-month period of employment.¹¹⁹ The Sixth Circuit posited that the tenure to which Branham's contract referred might have meant that she had academic freedom, and that Cooley generally expected to enter into new employment contracts with her each year, but that Branham was not guaranteed continuous employment through her tenure status or her employment contract.¹²⁰ After the court completed its analysis of Branham's substantive tenure rights it affirmed the district court's ruling that the court-ordered faculty conference complied with the procedural rights afforded to Branham under her employment contract.¹²¹

B. *The Correct Analysis of Professors' Tenure Rights*

The Sixth Circuit erred by ruling that Branham's tenure did not afford her rights beyond those specified in her most recent employment contract. First, the court erroneously concluded that only contracts for an indefinite period of time could establish permanent employment.¹²² The court supported its reasoning by citing *Rowe v. Montgomery Ward & Co.*, which held that contracts for

¹¹⁶ *Branham*, at 562.

¹¹⁷ *Id.*

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ *Id.* at 562–63.

¹²⁰ *Id.* at 563.

¹²¹ *Id.*

¹²² *Branham*, 689 F.3d at 562.

permanent employment are for an indefinite period of time.¹²³ Thus, since Branham's contract was not for an indefinite period of time, Branham did not enjoy any right to permanent employment.¹²⁴

The problem with the court's reliance on *Rowe* is that *Rowe* does not address the concept of tenure.¹²⁵ The plaintiff in *Rowe* was a saleswoman, not a graduate professor with tenure status.¹²⁶ The *Rowe* court did not need to address the issue of any additional employment rights such as tenure.¹²⁷ Therefore, while the decision that contracts for permanent employment are for an indefinite period of time remains good law, it fails to fully cover the issue of Branham's substantive tenure rights. The concept of tenure that scholars have promoted throughout history is that the tenured professor does not need to rely on contracts in order to maintain permanent employment.¹²⁸ Tenure is the grant of a permanent employment status. If the only way to ensure a prolonged promise of employment is to enter into an employment contract for a permanent or lengthy period, then the entire purpose of academic tenure becomes moot.¹²⁹

Multiple courts have found that a professor's tenure status grants him employment rights on top of his current employment contract, and that the rights expressly outlined in employment contracts do not automatically limit or restrict substantive tenure rights.¹³⁰ For example, in *Collins v. Parsons College*, the Supreme Court of Iowa ruled that a professor who was granted tenure in a one-year employment contract could be terminated only for just cause and on

¹²³ 473 N.W.2d. 268 (Mich. 1991).

¹²⁴ *Branham*, 689 F.3d at 562.

¹²⁵ *See Rowe*, 473 N.W.2d 268 at 272 (deciding whether an employer's oral statements and written policy statements created an indefinite employment contract).

¹²⁶ *Id.* at 270.

¹²⁷ *See id.* at 272.

¹²⁸ Permanent employment may better be described as indefinite employment with job security. The permanent employment that tenured professors maintain is an employment that continues unless there is adequate cause for dismissal or the professor decides to leave. Permanent employment granted by tenure status is not a permanent contract for employment to which both the school and the professor are bound. It is a contractual option; the school is bound to employ the tenured professor year to year (as long as the professor decides to sign the contract), while the professor has the option of leaving at his own will at the end of every year.

¹²⁹ *See generally* Ralph S. Brown Jr. & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325 (1990); Metzger, *Academic Tenure in America*, *supra* note 7; Van Alstyne, *supra* note 2.

¹³⁰ *See, e.g.,* Keiser v. State Bd. of Regents of Higher Educ., 630 P.2d 194 (Mont. 1981); *Collins v. Parsons Coll.*, 203 N.W.2d. 594 (Iowa 1973); *State ex rel. Richardson v. Bd. of Regents of Univ. of Nev.*, 261 P.2d 515 (Nev. 1953).

written charges before the faculty.¹³¹ Collins had signed a one-year contract, which labeled him as a tenured professor even though the contract did not expressly define tenure.¹³² Upon expiration of the contract term, the college informed Collins that he would not be employed the following year.¹³³ The college did not allege any adequate cause for its dismissal of Collins or make any suggestion that Collins's dismissal was due to his performance.¹³⁴ The court ruled that Collins "did not waive his right of tenure by executing written contracts carrying out the original agreement in individual years."¹³⁵ Therefore, although Collins entered into an employment contract for a period of only one year, he was still entitled to indefinite employment due to his tenure status.¹³⁶ Additionally, the *Collins* court was willing to look to the general plain meaning of tenure in order to define what Collins's tenure status entitled him, but did not need to resort to that analysis because the school's tenure policies were clearly outlined in its bylaws.¹³⁷

The Supreme Court of Nevada encountered a similar tenure issue in *State ex rel. Richardson v. Board of Regents of University of Nevada*.¹³⁸ There, the court found that the university's bylaws regarding tenure were binding even if they were not enumerated in the professor's individual employment contract.¹³⁹ Frank Richardson had been an associate professor at the University of Nevada for four years when he was dismissed because of alleged insubordination.¹⁴⁰ The university's tenure policy was outlined in a faculty bulletin promulgated by the Board of Regents, which stated that upon an associate professor's completion of one year of service he could be re-appointed, after which re-appointment "his employment *shall continue* under tenure."¹⁴¹ The bulletin went on to state that a tenured

¹³¹ *Collins*, 203 N.W.2d at 598.

¹³² *Id.* at 596.

¹³³ *Id.*

¹³⁴ *Id.* at 597.

¹³⁵ *Id.* at 598.

¹³⁶ *Id.* at 599.

¹³⁷ *Collins*, 203 N.W.2d at 597–98. The court looked at the definition of tenure in Webster's Third New International Dictionary: "a status granted usu. after a probationary period to one holding a position esp. as a teacher and protecting him from dismissal except for serious misconduct or incompetence determined by formal hearings or trial; permanent tenure." *Id.* at 597.

¹³⁸ 261 P.2d 515 (Nev. 1953).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 515.

¹⁴¹ *Id.* at 516 (emphasis added).

professor may only be dismissed for cause.¹⁴² The court makes no mention as to whether the university expressly incorporated the tenure policy or Richardson's tenure status in any of the employment contracts Richardson signed with the university.¹⁴³ Regardless, when the Board of Regents was challenged on its jurisdiction regarding Richardson's dismissal, the Board argued that its tenure policy was not binding and could be ignored whenever the Board saw fit.¹⁴⁴

The Supreme Court of Nevada ruled that the policy was binding, and stated that the rule, "having been duly established, has the force and effect of statute," and that it affected all "persons holding their positions under contract."¹⁴⁵ The University of Nevada had a clear statement of its tenure policies, which its Board of Regents endorsed.¹⁴⁶ Therefore, regardless of the rights set forth in its employees' contracts, the university had a binding obligation to obey its tenure policy, which provided continuous employment to tenured professors.¹⁴⁷

The rights tenure status enshrines for professors is not limited to termination cases. The Supreme Court of Montana ruled on a tenure issue that did not involve termination in *Keiser v. State Board of Regents of Higher Education*.¹⁴⁸ Marjorie Keiser was the Director of the School of Home Economics at Montana State University.¹⁴⁹ In 1975, Keiser signed a full academic term (twelve-month) employment contract, which stated that she had "continuous" tenure status.¹⁵⁰ Then, in 1978, the president of the University only offered Keiser a partial academic term (ten-month) employment contract.¹⁵¹ All of Keiser's employment contracts had termination clauses stating that the school could only terminate a faculty member with continuous tenure if there was "adequate cause."¹⁵² But "continuous tenure" was

¹⁴² *Id.*

¹⁴³ *Id.* at 515.

¹⁴⁴ *Richardson*, 261 P.2d at 517.

¹⁴⁵ *Id.* at 518.

¹⁴⁶ *Id.* at 516.

¹⁴⁷ *Id.* at 518.

¹⁴⁸ 630 P.2d 194 (Mont. 1981).

¹⁴⁹ *Id.* at 195.

¹⁵⁰ *Id.* at 196.

¹⁵¹ *Id.* After the 1975 contract, Keiser signed a new contract year after year with the identical twelve-month academic term until 1978 when the university refused to offer her a full term contract. *Id.*

¹⁵² *Id.* at 198. The contract also allowed for termination if the university found itself in financial exigency. *Id.* This Comment does not discuss financial exigency terminations of tenured professors, but certain terminations of tenured professors

not defined in any of Keiser's contracts.¹⁵³

The court looked to the 1940 Statement issued by the AAUP in order to define tenure and determined that the goals of tenure were academic freedom and economic security, or the promise of indefinite employment.¹⁵⁴ Since economic security was a goal of tenure, the court ruled that Keiser and Montana State University had that goal in mind when executing Keiser's 1975 employment contract, and it ruled that a main ingredient of Keiser's continuous tenure was appointment of a full academic term.¹⁵⁵ Therefore, the court found that the reduction in Keiser's academic term was a violation of her continuous tenure.¹⁵⁶ Keiser's right to continuous full-term employment was not expressly enumerated in any of her employment contracts, but the court in *Keiser* looked outside the contracts to define the scope of Keiser's tenure rights and ultimately ruled that her tenure status—undefined in all of her contracts—afforded her a specific set of protections.¹⁵⁷

C. *The Correct Interpretation of Branham's Tenure Rights*

The Sixth Circuit's ruling in *Branham* stands in direct contradiction with the ruling in *Collins*. Like Collins, Branham was a tenured professor, which was expressly stated in her employment contract.¹⁵⁸ Branham also signed a contract that covered a one-year term of employment.¹⁵⁹ The Sixth Circuit should have followed the reasoning of the Supreme Court of Iowa in *Collins*—ruling that while the employment contract only covered a one-year term, the professor's tenure status afforded him continuous employment unless adequate cause existed for dismissal.¹⁶⁰

The main difference between *Collins* and *Branham* is that in *Branham* the law school most likely had adequate cause to dismiss Branham—her refusal to teach her assigned classes.¹⁶¹ But the fact that Cooley had adequate cause to dismiss Branham does not mitigate the error in the court's analysis. The court ruled that

are valid under the financial exigency doctrine.

¹⁵³ *Id.*

¹⁵⁴ *Keiser*, 630 P.2d at 199.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Branham v. Thomas M. Cooley Law Sch.*, 689 F.3d 558, 561 (6th Cir. 2012).

¹⁵⁹ *Id.*

¹⁶⁰ *Collins v. Parsons Coll.*, 203 N.W.2d 594, 597–99 (Iowa 1973).

¹⁶¹ *Branham*, 689 F.3d at 561.

Branham's tenure status was meaningless beyond the agreements set forth in her employment contract, meaning that, even if Cooley lacked adequate cause, it had the ability to dismiss Branham free of legal consequence at the expiration of her one-year employment contract.¹⁶² That is the exact situation that academic tenure is supposed to prevent.

In *Richardson*, the university most likely had adequate cause to dismiss the professor because of insubordination, but the university tried to skirt its own tenure policies, and the court ruled that the policies were binding regardless of the professor's contract.¹⁶³ In *Keiser*, the professor's tenure status prevented the university from reducing her academic term at the expiration of her employment contract.¹⁶⁴ The *scope* of the protection that tenure affords professors is the core issue at stake in *Branham*, not the outcome of the professor's employment. Ultimately, the Sixth Circuit reached the correct outcome: Branham's dismissal was proper.¹⁶⁵ But the court used a flawed rationale in order to reach that outcome, and the ruling that emerged as a result of the court's flawed reasoning struck a harsh blow to the doctrine of academic tenure.

The *Branham* case is a prime example of a situation where administrative inefficiency forced the court to enter into an analysis that resulted in an errant legal ruling. Branham's employment contract granted her tenure status but did not define tenure.¹⁶⁶ The contract then incorporated the *ABA Standards*, which provides that "a law school shall have an established and announced policy with respect to academic freedom and tenure."¹⁶⁷ At that point, the contract still did not give any definition or explanation as to what Cooley's tenure status actually meant.¹⁶⁸ The courts in *Collins* and

¹⁶² *Id.* at 563.

¹⁶³ *State ex rel. Richardson v. Bd. of Regents of Univ. of Nev.*, 261 P.2d 515, 518 (Nev. 1953). Similar to the facts in *Branham*, the university in *Richardson* had adequate cause to dismiss the professor, and the school rightfully dismissed the professor. *Id.* at 515 (explaining that Richardson was uncooperative and insubordinate). But the *Richardson* court made sure that the correct procedures were taken during the dismissal in order to ensure that the university's tenure rights protected professors in future situations where the university may not have adequate cause for dismissal. *Id.* at 518.

¹⁶⁴ *Keiser v. State Bd. of Regents of Higher Educ.*, 630 P.2d 194, 199 (Mont. 1981).

¹⁶⁵ *Branham*, 689 F.3d at 566.

¹⁶⁶ *Id.* at 562.

¹⁶⁷ ABA STANDARDS, *supra* note 68, at 32.

¹⁶⁸ *See* Employment Contract, *supra* note 89, at 15.

Richardson did not have to face this issue.¹⁶⁹ In *Collins*, the court noted that it was unnecessary to delve into a discussion on the meaning of tenure because the faculty bylaws at Parsons College specifically stated that a tenured faculty member “could be terminated only for just cause, on written charges before the tenured faculty.”¹⁷⁰ In *Richardson*, the court went as far as to rule that the university’s tenure policy had the force of a statute because there was a faculty bulletin, which expressly stated that upon reappointment after one year, an associate professor’s employment “shall continue under tenure.”¹⁷¹ The tenure policies of both institutions clearly provided that tenured professors have the right to continuous employment because of their tenure status.¹⁷² *Collins* and *Richardson* are examples of administrative efficiency.

The Michigan Court of Appeals illustrated the best example of how administrative efficiency can help solve problems by defining tenure in *Bruno v. Detroit Institute of Technology*.¹⁷³ In that case, the school dismissed a professor without adequate cause, prompting the professor to argue that his dismissal was improper due to his tenure status.¹⁷⁴ The court stated, “the answer to this question depends entirely upon the construction given to the language of . . . defendant’s tenure policy.”¹⁷⁵ After looking to the school’s policy, the court found that the professor had achieved tenure status, and then sought to determine what that status meant.¹⁷⁶ The school’s tenure policy defined tenure as “expectation of continuous appointment until retirement, with stipulations that it may be terminated for causes specifically identified in the present statement of tenure policy.”¹⁷⁷ Here, the court looked to the school’s policies, found the policy on tenure, and made a ruling based on that policy.¹⁷⁸ The Sixth Circuit was unable to perform an easy and straightforward analysis like the one in *Bruno* because Cooley’s tenure policy was not

¹⁶⁹ See generally *Branham*, 689 F.3d 558; *Collins v. Parsons Coll.*, 203 N.W.2d 594 (Iowa 1973).

¹⁷⁰ *Collins*, 203 N.W.2d at 597–98.

¹⁷¹ *State ex rel. Richardson v. Bd. of Regents of Univ. of Nev.*, 261 P.2d 515, 516 (Nev. 1953).

¹⁷² See *Collins*, 203 N.W.2d at 597–98; *Richardson*, 261 P.2d at 516.

¹⁷³ 512 N.W.2d 745 (Mich. Ct. App. 1974).

¹⁷⁴ *Id.* at 747.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 749.

¹⁷⁸ *Id.* at 747–49.

clearly defined.¹⁷⁹

The administrative inefficiency found in the *Branham* case—specifically, the lack of a clear definition of tenure in Branham’s employment contract or Cooley’s school policies—forced the Sixth Circuit to devise its own interpretation of the scope of Branham’s tenure rights. Since Branham’s contract expressly incorporated the standards of the ABA, the court looked at the ABA’s model set of tenure policies—a direct copy of the AAUP’s *1940 Statement*.¹⁸⁰ The *1940 Statement* defines tenure as a means for economic security and states that professors “should have permanent or continuous tenure, and their service should be terminated only for adequate cause.”¹⁸¹ Despite the *1940 Statement*, the court rejected the argument that Cooley adopted the ABA’s model tenure policy because it found that the policy was merely an example for schools and not an obligation that they must follow.¹⁸²

The court then admitted that Cooley’s Policy 201 referred to the concept of tenure, but did not define it.¹⁸³ The lack of a clear definition of tenure in the employment contract or in Cooley’s policies forced the court to analyze multiple tenure policies set forth by different organizations, and the court failed to choose the correct standard that applied to Branham. Instead, the Sixth Circuit decided that the ABA/AAUP policy did not apply—reasoning that the policy was merely a model of a tenure policy, and did not necessarily represent the tenure Branham held.¹⁸⁴ Thus, no right to continuous employment existed because there was no right to continuous employment in the employment contract.¹⁸⁵ The Sixth Circuit further erred by claiming that, even if it incorporated the *1940 Statement* into the employment contract, Branham would still not have been afforded any rights other than those explicitly laid out in her contract.¹⁸⁶ The court reached this conclusion by claiming that the statement suggests but does not require that law schools grant permanent or continuous tenure.¹⁸⁷ In *Collins, Richardson, and Keiser*,

¹⁷⁹ See *Branham v. Thomas M. Cooley Law Sch.* 689 F.3d 558, 562 (6th Cir. 2012).

¹⁸⁰ ABA STANDARDS, *supra* note 68, at 161; see also *1940 Statement of Principles*, *supra* note 49.

¹⁸¹ *1940 Statement of Principles*, *supra* note 49, at 4.

¹⁸² *Branham*, 689 N.W.2d at 562.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 562–63.

¹⁸⁶ *Id.* at 562.

¹⁸⁷ *Id.*

the courts treated “tenure” and “continuous tenure” as synonymous terms.¹⁸⁸ Tenure *is* continuous; there is no such thing as non-continuous tenure. Therefore, the problem with the Sixth Circuit’s reasoning is that Cooley had already granted Branham tenure. Thus, by granting her “tenure,” Cooley granted Branham “continuous tenure,” and the issue as to whether the school was obligated to grant continuous tenure or not disappears.

In order for the Sixth Circuit to correctly interpret the scope of the protections afforded to Branham by her tenure status, the court needed to accept the definition of tenure in the *1940 Statement*. No other clear definition of tenure existed in the employment contract or in Cooley’s bylaws.¹⁸⁹ Thereafter, the court would have read the *1940 Statement* as a policy that granted any tenured professor permanent or continuous employment because the *1940 Statement* defined tenure as a means for economic security and outlined the substantive and procedural rights of tenured professors.¹⁹⁰

The court should have held that, while the employment contract was a method for the school to set up a contract for payment to the professor, the professor’s tenure ultimately controlled her employment status. In a contractual sense, tenure is a type of option—where the school is bound to employ the tenured professor if she decides to come back year after year unless there is adequate cause for termination, but where the professor is free to leave after any year without any binding obligation to the school. As long as the professor has achieved tenure status, defined in the school’s bylaws, the designated length of the professor’s most recent employment contract should not govern the length of time that the school remains obligated to employ the professor. In this case, Branham’s tenure status *did* afford her certain rights and protections not specified in her most recent employment contract, such as the right to continuous employment.¹⁹¹

¹⁸⁸ See *Keiser v. State Bd. of Regents of Higher Educ.*, 630 P.2d 194 (Mont. 1981); *Collins v. Parsons Coll.*, 203 N.W.2d 594 (Iowa 1973); *State ex rel. Richardson v. Bd. of Regents of Univ. of Nev.*, 261 P.2d 515 (Nev. 1953).

¹⁸⁹ *Branham*, 689 F.3d at 562.

¹⁹⁰ *1940 Statement of Principles*, *supra* note 49.

¹⁹¹ As mentioned *supra*, Cooley most likely had adequate cause to dismiss Branham, but the court’s ruling will allow schools to dismiss tenured professors *without cause* at the expiration of their employment contracts. See text accompanying note 161.

IV. THE IMPLICATIONS OF THE *BRANHAM* DECISION

The Sixth Circuit's ruling in *Branham* will have adverse effects on the American professoriate and American education. The first problem for American professors is the interpretation of academic tenure. By ruling that a professor's tenure status does not afford that professor any rights or protections other than those specified in the professor's individual employment contract, the Sixth Circuit diminished the role of academic tenure.¹⁹² As much as American higher education has changed in the past one hundred years, the main goal of tenure has remained the same: to protect academic freedom. This goal is still important and necessary. Any diminishment in the substantive rights afforded to professors with tenure status will result in a diminishment of the protection of academic freedom in American institutions of higher learning.

Branham allows colleges and universities discretion to grant professors "tenure" without also granting them the rights and protections that traditionally accompany tenure.¹⁹³ Following the *Branham* decision, institutions will be able to appease professors by granting them "tenure" while circumventing the protections that should accompany the professors' tenure status by: (1) not defining any specific tenure rights in professors' employment contracts and (2) having a vague tenure policy that allows for a broad interpretation of whether tenure actually means continuous employment or not. Cooley managed to achieve just this in *Branham*. If this ruling stands, the protections of academic tenure will wane, as employment security for professors will only exist in their current employment contracts. Essentially, "tenure" will become a hollow title, rendering it a meaningless badge of seniority.

The diminishment of academic freedom that will result from the destruction of the traditional academic tenure doctrine will have the most adverse effect on American education because professors will no longer have the continuous job security that allows them to introduce innovative thought into the classroom without fear of dismissal. An educational system that makes it difficult to penalize a speaker reinforces the speaker's academic freedom.¹⁹⁴ Meanwhile, a restraint on academic freedom leads to a restraint on progressive thought.¹⁹⁵

¹⁹² *Branham*, 689 F.3d at 563.

¹⁹³ *Id.*

¹⁹⁴ Brown & Kurland, *supra* note 129, at 329.

¹⁹⁵ See Van Alstyne, *supra* note 2, at 330. Van Alstyne argues that one of the main functions of tenure is "to maximize the freedom of the professional scholar and

Tenure as job security and tenure as academic freedom are linked such that the latter cannot truly exist without the former. Tenure provides extra job security to professors because it provides a means to academic freedom.¹⁹⁶ The concept of *lehrfreiheit* will no longer exist in American education if school administrations are not required to adhere to certain tenure standards and can control all employment protection through the professor's employment contract. Professors might revert to the antiquated, anti-progressive teaching styles for fear of losing their jobs if they promote too much non-traditional thinking.¹⁹⁷ The suppression of creative thought that spurred the creation of the AAUP will increase as the protections afforded by academic tenure decrease.¹⁹⁸

The ruling in *Branham* will also incentivize professors to seek more contractual protections instead of the previously guaranteed protections of tenure. This will mean that seasoned professors will constantly have their next contract agreement in mind when planning on what materials to teach and how to teach them, especially if schools choose to hire them using one-year contracts. Instead of teaching and researching in a comfortable and protected environment, professors will be pressured to prove their short-term worth. Tenure is a long-term commitment that promotes long-term intellectual growth. The temporal restraints that come with employment contracts will impede that intellectual growth.

One potential solution to the problem in *Branham* is for institutions to clearly define their tenure policies in both their bylaws and employment contracts. The bylaws should expressly state that the school has a tenure system (as required by the ABA),¹⁹⁹ and then elaborate on what substantive and procedural protections tenure status gives tenured professors.²⁰⁰ Professors' employment contracts should also state that the professor is a tenured professor and

teacher to benefit society through the innovation and dissemination of perspectives and discoveries aided by investigations, without fear that he must accommodate his honest perspectives to the conventional wisdom." *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See METZGER, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY, *supra* note 10, at 4–5.

¹⁹⁸ See *id.* at 194.

¹⁹⁹ ABA STANDARDS, *supra* note 68, at 32.

²⁰⁰ See, e.g., 1940 *Statement of Principles*, *supra* note 49, at 4 (“After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.”).

expressly incorporate the tenure policies of the school (which should be clear and unambiguous) in order to eliminate any confusion as to what tenure means or the rights of the tenured professor. Cooley's unclear policies and employment contracts allowed the Sixth Circuit to enter into an errant analysis on tenure.²⁰¹ The result of that analysis now threatens to alter and restrict American tenure doctrine.

Cooley's administrators have already recognized the law school's victory as a gateway to impose more restrictions on tenured faculty members.²⁰² In a statement released after the Sixth Circuit's decision, James Robb, Cooley's Associate Dean for Development and Alumni Relations, stated that "[t]he Sixth Circuit's decision is very important to institutions of higher learning because it confirms that 'tenure' is a contractual concept which takes its meaning only from the language of the particular employment contract and from nothing else. The word 'tenure' itself adds no gloss"²⁰³ But nowhere in the AAUP regulations, the ABA regulations, or the in the historical evolution of tenure in the United States has tenure been treated as primarily a contractual concept.²⁰⁴ It has been treated as exactly the opposite—a concept that lies outside the restrictions of normal employment standards and security.²⁰⁵ The judiciary needs to protect this concept of tenure in order to ensure that academic freedom continues to thrive in American colleges and universities.²⁰⁶ Conversely, the Sixth Circuit's ruling weakens the economic security provided by academic tenure and, in turn, endangers academic freedom.

V. CONTEMPORARY THOUGHTS ON ACADEMIC TENURE

The use of the tenure-track system in American colleges and universities has its critics and its supporters. The anti-tenure community fears that tenure provides too much job security to professors and allows professors to slip into a pattern of mediocrity without fear of dismissal.²⁰⁷ The pro-tenure base shares the views of

²⁰¹ *Branham*, 689 F.3d 558.

²⁰² See *U.S. Court of Appeals Finds in Favor of Cooley Law School*, THOMAS M. COOLEY LAW SCH. (Aug. 6 2012), http://www.cooley.edu/news/2012/us_court_of_appeals_finds_in_favor_of_cooley_law_school.html.

²⁰³ *Id.*

²⁰⁴ See PART II *supra*.

²⁰⁵ *Id.*

²⁰⁶ See Van Alstyne, *supra* note 2, at 330.

²⁰⁷ For articles that highlight or explain the negative effects of tenure systems in higher education see Fishman, *supra* note 19; Dickinson, *supra* note 23, at 341–43; Brown & Kurland, *supra* note 129, at 331–33.

this Comment—that academic tenure protects academic freedom, which promotes progressive and creative thought in the classroom.²⁰⁸ In recent years, the anti-tenure camp has gained some traction, and the *Branham* decision will undoubtedly add to that momentum.

The ABA has also started showing some signs of moving away from its tenure policy. In 2010 a special committee of the ABA proposed a revision to its guidelines on academic freedom.²⁰⁹ In the revision, the committee proposed to remove Standard 405, which requires all schools to establish a tenure policy.²¹⁰ The committee characterized the change in the standards as a way to minimize “intrusive mandates” on schools seeking accreditation, and urged that schools should still protect academic freedom.²¹¹ Many law school professors around the country vehemently oppose this proposal.²¹² The professors specifically oppose the proposal because it came only a few weeks after multiple groups issued lengthy statements in favor of preserving the existing protections.²¹³ As of the 2012–2013 *ABA Standards*, there has been no change to the ABA’s tenure policy.²¹⁴

Apart from the ABA, a growing belief exists among American colleges and universities that that the education system would be better without tenure.²¹⁵ Many institutions are moving towards hiring faculty members with long-term contracts instead of implementing a tenure-track system.²¹⁶ In a survey by *The Chronicle of Higher Education*, less than a quarter of college presidents preferred full-time tenured professors to faculty working under long-term or annual contracts.²¹⁷

²⁰⁸ See generally Brown & Kurland, *supra* note 129; Van Alstyne, *supra* note 2.

²⁰⁹ Scott Jaschik, *Law School Professors’ Tenure in Danger?*, USA TODAY (July 26, 2010, 4:50 PM), http://www.usatoday.com/news/education/2010-07-26-ihe-law-tenure_N.htm.

²¹⁰ *Id.* (stating that some members of the special committee did not believe that Standard 405 ever imposed a tenure requirement); but see ABA STANDARDS, *supra* note 68, at 32 (“A law school shall have an established and announced policy with respect to academic freedom and tenure of which Appendix I herein is an example but is not obligatory.”). Thus, while the ABA’s tenure policy example is not obligatory, a plain reading of the text shows that each accredited law school must have *some* established tenure policy.

²¹¹ Jaschik, *supra* note 209.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See ABA STANDARDS, *supra* note 68.

²¹⁵ Jack Stripling, *Most Presidents Prefer No Tenure for Majority of Faculty*, CHRONICLE OF HIGHER EDUC. (May 15, 2011), <http://chronicle.com/article/Most-Presidents-Favor-No/127526/>.

²¹⁶ *Id.*

²¹⁷ *Id.*

Proponents of long-term contracts for professors argue that tenure's protections make it too difficult to get rid of incompetent faculty and can promote a culture of complacency among tenured professors.²¹⁸ One critic of tenure even posited that academic tenure has led to a dearth of practical legal training in law schools.²¹⁹

Although there has been a movement to remove tenure from higher education, there are still many defenders of the traditional concept of tenure. Law Professor William Van Alstyne believes that tenure's function as a protection for academic freedom provides more benefit than harm.²²⁰ Van Alstyne states, "[a]n individual who is subject to termination without showing of professional irresponsibility, irrespective of the long term of his service within his discipline, will to that extent hesitate publicly to expose his own perspectives and take from all of us that which we might more usefully confront and consider."²²¹ Therefore, at the risk of giving tenure to professors who may become complacent, an institution may force its professors to withhold progressive thought in the classroom.²²² The occasional "deadwood" scholar, who becomes complacent but does not function so poorly as to warrant removal may exist, but this is the exception not the rule.²²³ Surveys show that tenured professors publish more, teach more, and serve on more committees than untenured professors.²²⁴ Tenured professors also tend to do a large amount of research in their field, allowing them to educate their students on the latest academic works and breakthroughs.²²⁵ Additionally, when institutions enforce their tenure policies properly, they will dismiss poor professors when adequate cause exists.²²⁶

Contrary to what many tenure opponents believe, tenure is essential to prevent decline in quality amongst the professoriate. Tenure promotes efficiency by diminishing uncertainty regarding job

²¹⁸ *Id.*

²¹⁹ See Gregory M. Dickinson, *Academic Tenure and the Divide Between Legal Academia and Legal Practice*, 6 DARTMOUTH L.J. 329 (2008).

²²⁰ See Van Alstyne, *supra* note 2.

²²¹ *Id.* at 330.

²²² *Id.*

²²³ Brown & Kurland, *supra* note 129, at 332.

²²⁴ *The Truth About Higher Education*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/33067.htm> (last visited Sept. 17, 2012).

²²⁵ *Id.*

²²⁶ See *King v. Univ. of Minn.*, 774 F.2d 224 (8th Cir. 1985) (dismissing professor for charges of incompetent performance).

security.²²⁷ Tenure also promotes what Henry Rosovsky labeled the “social contract” of tenure.²²⁸ The “social contract” of tenure includes the assurance that one can work without interference, that one belongs to a select company of educated men and women, and that one can grow old without the fear of being pushed out of one’s job.²²⁹ This concept creates a favorable climate for academic freedom.²³⁰ Tenure also creates a business pattern called “hands-tying.”²³¹ A university ties its hands so that it cannot renege just because the appointment of a particular faculty member was not as fruitful as the administration expected.²³² This promotes better selection methods and hiring efficiency by institutions of higher learning.²³³ In the long run, institutions should benefit from this method because smart, able scholars will join those institutions due to the opportunity to teach at a high level with good job security.²³⁴ Tenure provides its own protection from poor professors because as difficult as it is to remove a tenured professor, it is just as difficult to become a tenured professor. Nationally about 2% of tenured faculty members are dismissed each year.²³⁵ Meanwhile, the average probationary period for a professor at a four-year school is seven years.²³⁶ This is long period of evaluation, during which schools may choose not to renew the professor’s appointment or to dismiss the professor without cause.²³⁷

The Sixth Circuit’s ruling in *Branham* promotes the movement toward long-term contract agreements for professors in place of tenure status. It offers legal support for the power of the employment contract over the power of the generally accepted concept of academic tenure. The problem with long-term contracts is that the protections professors would normally have under tenure will only exist during the term of the contract and will disappear at the end of the term. This is exactly how the probationary period for

²²⁷ See Van Alstyne, *supra* note 2, at 331.

²²⁸ Brown & Kurland, *supra* note 129, at 333 (citing HENRY ROSOVSKY, *THE UNIVERSITY: AN OWNER’S MANUAL* 183 (1990)).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 334.

²³² *Id.*

²³³ *Id.*

²³⁴ Brown & Kurland, *supra* note 129, at 334.

²³⁵ *The Truth About Higher Education*, *supra* note 224.

²³⁶ *Id.*

²³⁷ *Id.*

tenure works now. The only difference is that probationary professors receive short-term contracts instead of long-term contracts.²³⁸ At the end of a contract the professor loses the substantive and procedural rights that would have been afforded to him for life if he was a tenured professor. Tenure's critics may perceive the *Branham* ruling as a victory for American colleges and universities, and a loss for the professoriate, but this is a loss for both sides because the positive aspects of academic tenure far outweigh the negative.

VI. CONCLUSION

The founders of academic tenure in American higher education created tenure in order to ensure academic freedom. They felt the oppression of an antiquated, authoritarian educational tradition that stifled progressive thought, and instilled fear in those who chanced to speak out against it. The first step to protect academic freedom was to offer job security to the professoriate. The first step to the destruction of academic freedom will be to eliminate that job security. The *Branham* court erred in its ruling because it ruled that Branham's tenure did not afford her rights beyond those specified in her most recent employment contract. That ruling resulted in a huge blow to the job security that tenure status afforded tenured professors. According to the Sixth Circuit, the substantive protections of tenure no longer exist unless they are specifically enumerated in each professor's current employment contract. The proper interpretation should have been that once Branham accepted her position as a tenured professor, she was entitled to continuous employment notwithstanding her annual employment contracts. Cooley may have been justified in dismissing Branham for adequate cause, but that does not change the validity of her tenure status regarding the specific rights enumerated in her most recent employment contract. This interpretation is important because it protects professors' tenure status and protects the vital rights that tenured professors receive: continuous employment and academic freedom.

If left unchanged, the *Branham* decision will lead to the deterioration of tenure and the deterioration of academic freedom. The Sixth Circuit's weakening of academic tenure rights will result in the dissipation of tenure track systems in American institutions due to

²³⁸ A contract of five years or more can be considered a long-term contract.

the inability of tenure to serve its main purpose to the professors. Professors will seek long-term contracts in order to ensure job stability, and true academic freedom—the ability to teach without fear of dismissal for teaching style or innovative classroom material—will no longer exist. This is a step in the wrong direction for American higher education. The *Branham* decision is the gateway to the erosion of academic freedom, and the preservation of the academic integrity of the professoriate requires that the legislature or the judiciary fix the problem *Branham* created.