THE "DEEPLY TOXIC" DAMAGE CAUSED BY THE ABOLITION OF MANDATORY RETIREMENT AND ITS COLLISION WITH TENURE IN HIGHER EDUCATION: A PROPOSAL FOR STATUTORY REPAIR[1]

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I. INTRODUCTION

The abolition of mandatory retirement was a timely idea in 1986. The 1986 Amendments to the Age Discrimination in Employment Act[2] ("ADEA Amendments") ensured that retirement decisions would be based on individual performance instead of stereotypes—an important cornerstone of anti-discrimination legislation. Congress had some inkling that this would cause a tectonic shift in higher education and thus included a clause that created an exception to the abolition of mandatory retirement

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1. Daniel de Vise, *Larry Summers on Some of Higher Education's "Bad Ideas"*, WASH. POST (Nov. 11, 2011, 1:44 PM), http://www.washingtonpost.com/blogs/college-inc/post/larry-summers-on-some-of-higher-educations-bad ideas/2011/11/09/gIQAdFubCN_blog.html. (discussing Larry Summers' condemnation of the abolishment of mandatory retirement in higher education where tenure exists).

2. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986) (amending the Age Discrimination in Employment Act of 1967 to remove the maximum age limitation applicable to employees who are protected under the Act).

for tenured professors until 1994[3], which gave universities additional time to develop plans to address the impact of the elimination of mandatory retirement on the tenure system where individual performance evaluations are minimal. In the face of a study that concluded that higher education could weather the storm of removing mandatory retirement,[4] Congress let the exemption lapse.

In the years since 1994, Congressional concern has proved prophetic. Absent egregious performance, the granting of tenure protects professors from the at-will employment environment[5] that makes the abolition of mandatory retirement manageable in other industries. In positions with some form of tenure, such as public school teachers and civil service personnel, defined benefit plans set a maximum benefit attainable so that there is little incentive for employees to work past the certain number of years of service necessary to achieve their maximum benefit. In contrast, most university professors do not have defined benefit plans and thus continue to accrue additional benefits for every year they have served. This is a significant incentive to stay on the job, in addition to the pleasure that comes from teaching, research, and being engaged with colleagues.[6]

In addition, in the late 1990s, the United States saw a dramatic cultural shift toward a broader acceptance of working later in life.[7] After the abolition of mandatory retirement, many Americans who were able to

3. *Id.* § 6 (stating that through December 31, 1993, "[n]othing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure).at an institution of higher education").

4. RALPH E. GOMORY, NAT'L RESEARCH COUNCIL, ENDING MANDATORY RETIREMENT FOR TENURED FACULTY (P. Brett Hammond & Harriet P. Morgan, eds., 1991).

5. *See* William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 261 (2002) (explaining that most "employers can terminate employees at will for any reason."). *See, e.g.*, REBECCA HANNER WHITE, EMPLOYMENT LAW AND EMPLOYMENT DISCRIMINATION: ESSENTIAL TERMS AND CONCEPTS 8 (1998) (noting that a popular statement of the at-will doctrine is that employers can fire employees "for a good reason, a bad reason, or for no reason at all.").

6. *See generally* Melanie Hicken, *Professors Teach Into Their Golden Years*, CNN MONEY (June 17, 2013, 1:09 PM), http://money.cnn.com/2013/06/17/retirement/professors-retire (discussing professors, both tenured and adjunct, working longer). Kathryn Masterson, *Economy Slows Colleges' Ability to Hire and Delays Retirements*, CHRON. OF HIGHER EDUC. (July 25, 2010), http://chronicle.com/article/economy-Slows -Colleges/123636/ (discussing the "double whammy" of budget cuts and professors choosing not to retire).

7. *Cf.* RICHARD A. POSNER, AGING AND OLD AGE 49 (1995) (highlighting that "[f]orty years ago, most 60-year-olds and all 70-year-olds were thought, by themselves and others, "old." Today a great many people retain a reasonable simulacrum of "youth" (more precisely of middle age) until their late seventies.").

work, and those driven by economic need, continued to work well past sixty-five.[8] Advancements in medical science and technology made it increasingly possible for older Americans to remain healthy and productive well into their seventies and eighties.[9] In particular, although the workplace impact of these changes has been less apparent in blue-collar workers because of the physical demands of their jobs, many white-collar workers could and did continue to work past sixty-five.[10] If other American white-collar workers were starting to stay on the job later in life, why would not professors as well? Indeed, it was easier for professors to do so, since they had lifelong job security once they acquired tenure. American higher education had a problem, and it was about to get worse.

At the time the ADEA amendments were passed, no one could have predicted the economic impact of the 2008 financial crisis on higher education. The effect of the recession on retirement portfolios and rising healthcare costs influenced aging faculty members' decisions not to retire across higher education in the United States.[11] Many faculty plan to 'teach forever,' or as some have colorfully put it, "[t]hey'll have to carry me out of here in a pine box."[12] The absence of defined benefit plans has further

8. BUREAU OF LABOR STATISTICS: OLDER WORKERS (2008), http://www.bls.gov/spotlight/2008/older_workers/data.htm#chart_02 (charting that the labor force participation rate of workers sixty-five and older, from 1948 to 2007, increased from 10.9 percent to 16.0 percent). *See also* JACK LEVIN, BLURRING THE BOUNDARIES: THE DECLINING SIGNIFICANCE OF AGE 63 (2013) (explaining that in a Gallup survey conducted in June 2011, "80 percent of Americans workers surveyed thought they would continue to work full-time or part-time after reaching retirement age."). *Cf.* Bryan D. Glass, *The British Resistance to Age Discrimination Legislation: Is It Time to Follow the U.S. Example?*, 16 COMP. LAB. L.J. 491, 538 n. 110 (1995) (demonstrating through demographic statistics that the abolition of mandatory retirement resulted in an increase in workforce participation rates for individuals over age sixty-five in the United States as compared to the United Kingdom, when considered over a time period in which mandatory retirement was abolished in the United States, but not the United Kingdom).

9. *See* American Hospital Association and First Consulting Group, *When I'm 64: How Boomers Will Change Health Care*, HEALTH DESIGN 1, 4 (May 2007), http://www.healthdesign.org/sites/default/files/news/How%20Boomers%20Will%20Change%20Health%20Care.pdf.

10. *See* g*enerally* Adam Belz, *New Retirement Gap is Blue- and White-collar*, STAR TRIBUNE, May 11, 2013, http://www.startribune.com/business/207071171.html (discussing how white-collar workers are able to toil longer and take lesser jobs that are aligned with their skills and knowledge as they age, while blue-collar workers are forced to retire at sometimes early ages because their bodies can no longer handle the physical demands of their jobs).

11. *See* Paul J. Yakoboski, *Should I Stay or Should I Go? The Faculty Retirement Decision*, TIAA-CREF INSTITUTE: TRENDS AND ISSUES 1, 5 (May 2007), http://www.tiaa-crefinstitute.org/ucm/groups/content/@ap_ucm_p_inst/documents/document/tiaa04024935.pdf.

12. *Cf.* Ross Dellenger, *Ole Miss Won't Forget Old 'Pine Box' Comments*, DECATUR DAILY (Oct. 26, 2007), http://legacy.decaturdaily.com/decaturdaily/sports/columns/071026c.shtml (Tommy Tuberville, football coach at University of Mississippi, reportedly stated, "They'll have to carry me out

aggravated this situation: nine years ago, the last time the National Study of Postsecondary Faculty was completed by the Education Department, the average age for tenured professors was fifty-four.[13] This marks an increase from the same study conducted in 1993, in which the average age was forty-seven.[14]

There are very few positions that offer the level of protection that tenure does. One such position is a federal judgeship,[15] which is distinguishable because of the very public nature of the work. If a judge performs inadequately, community backlash may quickly develop that could usher in a publicly coerced retirement. For example, a state judge, who recently gave a lenient sentence to a convicted rapist of a minor who committed suicide, has announced his retirement following public outrage.[16] Tenured faculty members, unlike judges, labor in the relative isolation of the classroom, where feedback comes at the end of the semester and then only via student evaluations. This creates the first of two problems for higher education in the United States stemming from the abolition of mandatory retirement: the difficulty of removing a tenured professor for poor performance.

In most universities, only egregiously poor performance by a tenured professor is flagged for termination; outdated, boring, or barely adequate, teaching may not sufficiently stand out to warrant a more intense review.[17]

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of here in a pine box."). *See also* Colleen Flaherty, *Working Way Past 65*, INSIDE HIGHER ED. (June 17, 2013), http://www.insidehighered.com/news/2013/06/17/data-suggest-baby-boomer-faculty-are-putting-retirement#sthash.pcl7IqQB.dpbs (stating that "some 74 percent of professors aged 49– 67 plan to delay retirement past 65 or never retire *at all* . . . .") (emphasis added).

13. Faculty and Instructors at Postsecondary Institutions, 2003-04 Faculty Survey, NAT'L CENTER FOR EDUC. STATISTICS, http://nces.ed.gov/dasolv2/tables/#faculty (last visited February 2, 2014). Select "2003-2004 Faculty Survey" hyperlink, select "Variables" hyperlink, select "Age in 2004" hyperlink).

14. Faculty and Instructors at Postsecondary Institutions, 1992-93 Faculty Survey, NAT'L CENTER FOR EDUC. STATISTICS, http://nces.ed.gov/dasolv2/tables/#faculty (last visited February 2, 2014). Select "1992-1993 Faculty Survey" hyperlink, select "Variables" hyperlink, select "Age, single years" hyperlink.

15. 28 U.S.C. §§ 134, 138 (2012).

16. Matthew Brown, *Montana Judge Criticized in Rape Case to Retire*, BOSTON GLOBE (Jan. 8, 2014), http://www.bostonglobe.com/news/nation/2014/01/08/montana-judge-criticized-rape-case-retire/lz5RHAhngCH1f5mrHEqzGP/story.html (noting that however, the judge denied his resignation was in response to the controversial case).

17. *But cf.* Editorial, *Reviews of Tenured College Faculty Won't Diminish Academic Freedom*, BOSTON GLOBE (May 11, 20014), http://www.bostonglobe.com/opinion/editorials/2014/05/11/reviews-tenured-college-faculty-won-diminish-academic-freedom/SKPzhaUlZtZUjA4zpwXekM/story.html (discussing Suffolk University's announcement of post-tenure review of faculty with the possibility of dismissal). Another approach is followed at Bentley University, Waltham, MA where annual reviews

There is also a slow feedback loop due to minimal, if any, post-tenure peer classroom evaluations and skepticism about student evaluations of teaching. Therefore, often many semesters pass before there is sufficient evidence to persuade a professor or her superiors that the tenured professor's employment status should be reevaluated. Inadequacies in scholarship can be even more difficult to discern, given the common time lag between research and publication, as well as the variations between disciplines in frequency, length, and format of publications.

The second distinct challenge faced by higher education caused by the coupling of the abolition of mandatory retirement with the institution of tenure is the prospect of stagnant departments: no new faculty may be hired because there are no vacancies. Having an eighty year old professor teach is not *malum in se*; rather, what is frequently deleterious is that there is no possibility of injecting new full-time faculty into the department cohort. Academic departments and their students benefit from the infusion of new colleagues with different experiences, pedagogical styles, and specialties. When professors hold onto a job for life, they inhibit this type of growth. If this seems insensitive to the fate of professors who are still competent, consider the Iditarod Race in Alaska in 2013. Everyone celebrated when a fifty-three year old won, demonstrating that age is not a firm barrier to success.[18] However, if there were limited spaces in the race and if, once selected, racers had a lifelong right to the space subject only to just-cause termination via a lengthy process, one might feel differently.

These two clear problems created by the coupling of tenure and a ban on mandatory retirement lend credence to a statement made by Larry Summers, President Emeritus of Harvard University, that one of education's bad ideas "was the movement away from mandatory retirement in higher education."[19] Summers stated that the combination of no mandatory retirement age and employment for life "is deeply toxic."[20] We agree, but also acknowledge two competing issues:(1) tenure continues to have value for purposes of protecting free speech, thereby nurturing new

are done for every faculty member, and a tenured faculty member who is not performing may find that he receives no merit increase, a load adjustment, or a plan on how to improve classroom performance. BENTLEY UNIVERSITY, 2014–2015 FACULTY MANUAL 25 § 5.5, *available at* https://www.bentley.edu/files/Faculty_Manual/Faculty_Manual.pdf.

18. Yereth Rosen, *Oldest Iditarod Winner, 53, Follows in Son's Footsteps*, REUTERS (Mar. 13, 2013, 5:23 AM), http://www.reuters.com/article/2013/03/13/us-usa-iditarod-idUSBRE92B11020130313.

19. De Vise, *supra* note 1.

20. *Id.*

ideas and debate in university classrooms; and (2) a return to mandatory retirement in its original form is undesirable, as it is a form of age discrimination that assumes that all older professors are less valuable than younger ones.

Unlike earlier commentators seeking to solve this dilemma, we do not recommend an abolition of tenure or a simple reinstatement of mandatory retirement. We propose to address the "deeply toxic" situation with a more nuanced model that would both preserve the valuable aspects of tenure and allow older professors' readiness for complete retirement to be evaluated on an individual basis. Specifically, we propose that universities should be allowed to reevaluate their needs and their tenured professors when those tenured professors reach the age of seventy. We are not suggesting that professors after seventy should not be allowed to teach, but rather that their tenured position should expire.[21] This would allow a university to switch high-performing professors to an annual or multi-year contract and to terminate those whose performance is not up to par or whose value is outweighed by the need to infuse new hires.

Mandatory retirement in non-tenured industries is not necessary because individual evaluations are used to terminate employment of individuals, including older persons who are no longer qualified or who remain qualified but are unable to compete with better qualified colleagues or applicants. In higher education, the need to regularly compete to retain employment is eliminated to protect academic freedom and free speech.[22]

21. *Cf.* Arthur Levine, *Bright Lights, Big Tenure: Professors, Call Your Agents*, BOSTON GLOBE (May 11, 2014), http://www.bostonglobe.com/opinion/2014/05/09/bright-lights-big-tenure-professors-call-your-agents/A9xzyBIv2hzxXPjWP7sAaL/story.html (discussing how tenure "is losing ground" based on how fewer faculty are tenured because universities are using more adjuncts and because faculty might begin to "forgo tenure in favor of hiring an agent," and calling tenure a "third rail" and suggesting that we should consider new approaches like "extended faculty contracts."). Additionally, the author used the term "third rail" in a February 2014 version that was circulated.

22. *See generally* Ernest Van Den Haag, *Academic Freedom and Tenure*, 15 PACE L. REV. 5, 6 (1994) (stating that there is now ongoing discussion about academic freedom and tenure in law schools precipitated by the American Bar Association's consideration of several proposals to change their requirement of tenure policy for accreditation). Paul L. Caron, *ABA Accreditation Committee Recommends Dilution of Faculty Tenure, Punts on Toughening Bar Passage Requirement*, TAXPROF BLOG (July 15, 2013), http://taxprof.typepad.com/taxprof_blog/2013/07/aba-committee.html (discussing law professors' reaction to the ABA proposals to amend accreditation standards that would not require tenure absolutely, but would allow some other form of job security); Mark Hansen, *ABA Legal Ed Section Gets An Earful on Tenure, Other Proposals*, ABA J. (Feb. 6, 2014), http://www.abajournal.com/news/article/aba_legal_ed_section_gets_an_earful_on_tenure_other_proposals (discussing two proposals under consideration: "[o]ne alternative would require law schools to provide some form of security of position short of tenure to all full-time faculty members, including clinical professors and legal writing instructors. The other would not require tenure, but would require

However, when a person reaches a certain age, the need to both evaluate a person's long-unchecked and potentially deteriorated performance and refresh an academic department with different members outweighs the need to continue to use tenure to protect such a person's free speech rights. Therefore, tenure should be allowed until age seventy, and then it should expire. Thereafter, it should be replaced with a more traditional employment contract that is reviewable on an annual basis. This would allow universities to choose not to issue a new annual contract to a professor who fails to meet the current standards of excellence,[23] or to a merely adequate professor who can be replaced by a superior performer.

We propose that Congress reinstitute the exemption that allowed for mandatory retirement in higher education with some limiting language. Such language would clarify multiple issues:

(1) mandatory retirement policies would be lawful but not statutorily required;

(2) a mandatory retirement policy could only be instituted for tenured professors (since non-tenured employees do not pose the same institutional concern and will continually need to

law schools to show they have policies and procedures in place to attract and retain a competent full-time faculty and protect academic freedom."). These proposals have drawn the ire of law school professors. *See generally* Mark Hansen, *500 Law Profs Urge ABA Legal Ed Council to Keep Faculty Tenure as an Accreditation Requirement*, ABA J. (Oct. 22, 2013), http://www.abajournal.com/news/article/public_has_its_say_on_proposed_changes_in_law_school_accreditation_standard (discussing a letter signed by 500 professors stating "[a]lthough we agree that education reform is necessary to meet the evolving needs of the legal profession, elimination of the tenure system will be counterproductive and will not serve these purposes."). For a discussion of other proposed limits on tenure in the law school context, see Jennifer Smith, *Law-School Professors Discover Their Jobs Less Secure*, WALL ST. J. (Aug. 12, 2013), http://online.wsj.com/news/articles/SB10001424127887323446404579006793207527958 (discussing the two proposals put forward at the ABA annual meeting that would modify the ABA's requirement of having a tenure process as a precursor to accreditation, and explaining that the Dean of Boston University Law School stated, "I understand the need for academic freedom… But as an industry we have a need for flexibility that we just don't have right now."). *See also* Rudy Fichtenbaum et al., *AAUP's Response to the American Bar Association's Consideration of a Proposal to Eliminate Tenure from Accreditation Standards*, THE ACADEME BLOG (Jan. 30, 2014), http://academeblog.org/2014/02/01/aaups-response-to-the-american-bar-associations-consideration-of-a-proposal-to-elimina (discussing a copy of a letter from the American Association of University Professors to the Council of the ABA Section of Legal Education that stressed the importance of academic freedom and its connection to tenure).

23. Grounds for non-appointment could include, *inter alia*, failure to provide a challenging classroom environment, missing classes without medical leave, erratic performance, failure to update material, failure to publish, etc.

prove themselves worthy of contract renewal, usually on an annual basis);

(3) a mandatory retirement policy could not preclude a university from rehiring a post-retirement professor (on an annual or multi-year contract basis);

(4) universities who choose to adopt mandatory retirement policies would be required to give tenured professors one academic year's notice as to whether they will be offered a new contract post-retirement; and

(5) any professor employed beyond the age of mandatory retirement (likely seventy) would continue to be protected by the ADEA with regards to all decisions regarding hiring, firing, promotion, training, etc.

In effect, this proposal would create a situation where a professor's tenure would automatically terminate or expire at age seventy but not necessarily her employment, since universities would be free to rehire her into a non-tenured contract. Congress cannot explicitly require the expiration of tenure at seventy since Congress did not create the concept of tenure. Congress could explicitly endorse such a policy, but such an endorsement would likely carry little weight with academics who might greatly resist this intrusion of government into university policies, especially those designed to protect free speech. Instead, by reinstating the mandatory retirement ban exemption, Congress would avoid directly interfering with tenure and would leave the decision to mandate retirement of tenured professors up to universities.

Moreover, by reinstating the mandatory retirement exemption for tenured professors, Congress would clearly be acting within its powers by merely reinstating an exemption that it has previously enacted. Indeed, our proposed statutory approach follows Congress' own precedent of reinstating a mandatory retirement ban exemption when documented experience proves the exemption to be better public policy than the ban. Congress reinstated the ADEA public safety exemption—an exemption from the mandatory retirement ban that had also expired—[24] when studies proved the exemption to be in the public interest.

24. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986) (restoring the public safety exemption, thus once again allowing police and fire departments to use maximum hiring and mandatory retirement ages).

The qualifying language that we are proposing would only apply to tenured professors. Non-tenured lecturers and other university employees would not be subject to mandatory retirement, and universities would be free to convert the contracts of tenured professors to non-tenured contracts governed by the usual employment laws. Under our proposed ADEA amendment, individual year-to-year contracts would still be permissible for all professors over seventy, allowing those educators to continue to contribute as long as they meet the current qualifications and are performing at a level commensurate with the rest of their respective department. For example, if in the forty years since X was hired, the faculty now has doctorates and X does not, or X now routinely gets poor student evaluations and his teaching materials are not updated despite the Chair's entreaties to do so, X might not be offered an annual contract when his tenure expired. Or, in a research university, if X has stopped his research, scholarly presentations and publications, or his productivity or quality of work has declined, he may not be offered a contract post tenure expiration. These are outcomes that would be good for the students and for the university.

Higher education is facing enormous pressures financially and is carrying a variety of professors who do not live up to current standards. Some of these do not teach well. Others are not productive or specialize in an area that is no longer needed. Keeping such professors will only compound a university's ability to navigate these difficult times. The professor whose tenure expires and is not offered a contract has to face the reality that thousands of American workers face every day in business—that it is time to move on to retirement or to find another job.

Under our proposed amendment, employment decisions must still be made on performance criteria, not on age or associated stereotypes. For example, if a professor at a university where current teaching standards require interactive classroom presentations simply sat at her desk and read a lecture without looking up for seventy-five minutes, that would not be considered adequate performance. Such a professor might not be retained after the age of seventy. We do not argue that people over seventy should not work as professors in higher education; instead, we suggest that they should work like so many others do, with the understanding that they do not "own" the job for life. They must seek employment renewal on a multi-year, yearly, or semester basis, contingent on their own performance, contractual terms, and the specific needs of their department or university. No other industry indefinitely retains employees who are performing at a

subpar basis or not as well as others, or those whose particular expertise is no longer in demand.

In effect, all the proposed ADEA amendment would do is to allow a professor's tenure to expire when he or she turns seventy years old without necessarily ending her teaching career. In other words, age could not be used as a proxy for performance evaluation, but performance could be evaluated as it is for non-tenured employees starting at the age of seventy. Importantly, under our proposal universities could not use age alone as a reason to terminate (or refuse to re-hire) a professor. This means that universities who would choose to adopt a mandatory retirement policy for tenured professors would be required either to re-hire a tenured professor under a non-tenured contract or to articulate a non-age-based reason for refusing to do so. In addition, the ADEA would protect professors who continued to be employed under new non-tenured contracts.

Age is being permitted as a criterion at seventy simply to provide a much needed opportunity to convert potentially irrational employment security created by a permanent tenured position into a non-discriminatory system of meritocracy via annual appointments. In fact, when one considers the limiting language that we are adding to the former ban exemption, we are actually creating a system where individual retention decisions are encouraged.

Indeed, our proposal would place professors in a better position than most Americans who work in at-will positions where termination can happen at any time without any notice. Under our plan, sixty-nine-year-old professors would have one of three things that most American workers do not: a one year contract with one year of advance notice of termination; a one-year contract with assurances that that contract will be renewed for at least one further year (at which point the contract could either be renewed or not renewed on a yearly basis); or a multi-year contract. We propose that when a tenured professor turns sixty-nine, the university should be required to give notice of either its intent to impose a mandatory retirement policy without a further employment opportunity, or its willingness to negotiate a non-tenured contract with the professor. If a university chooses not to negotiate a new non-tenured contract, it would need to be prepared to provide a non-age-based reason for this decision, if challenged by the terminated professor. In this way, professors whose employment will be terminated will be given a one-year terminal contract, much like the one tenure-track professors are given when their university determines that they are not making satisfactory progress toward tenure and need to find an

academic home elsewhere. Desirable professors will be given notice of the university's intention to retain them, subject to ongoing annual reviews.

This Article will examine the history of the ADEA, the original mandatory retirement exemptions for high policymaking positions,[25] tenured faculty,[26] and safety personnel,[27] as well as the expiration of the safety personnel exemption[28] and its reintroduction.[29] This paper will then examine the relevant literature on retirement in higher education and discuss mandatory retirement cases in the fields covered by the statutory exemptions. The paper concludes with our recommendations for statutory change.

II. HISTORY OF THE STATUTE AND EXEMPTIONS

At the time of its introduction in 1967, the ADEA protected workers aged forty to sixty-five from age discrimination.[30] The original statute, however, allowed the continuation of what had been accepted practice in the United States: mandatory retirement at or after age sixty-five.[31] In 1978, Congress extended the age of ADEA protection to seventy, thereby banning mandatory retirement before age seventy but permitting it at or after age seventy.[32] Congress simultaneously added two exemptions to its

25. *See* 29 U.S.C. § 631(c)(1) (1988) (noting that the in the version originally adopted in 1978, the high policymaker exemption applied only to individuals between the ages of sixty-five and seventy); *see* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 12(c)(1), 92 Stat. 189, 189 (1978).

26. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 12(c)(1), 92 Stat. 189, 189 (1978) (stating that through December 31, 1993, "[n]othing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education.").

27. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 3(a)(i)(1), 100 Stat. 3342 (1986) (stating that "[i]t shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken… with respect to the employment of an individual as a firefighter or as a law enforcement officer…").

28. *See id.*

29. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

30. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as 29 U.S.C. §§ 621–634 (2006)).

31. *See id.*

32. *See* Age Discrimination in Employment Act Amendments of 1967, Pub. L. No. 95-256, § 12, 92 Stat. 189, 189–190 (1978) (changing the age of compulsory retirement from sixty-five to seventy years of age and added section allowing for compulsory retirement of employee in a "bona fide executive or a high policymaking position" at sixty-five years of age).

ban on mandatory retirement before age seventy: one for employees "who, for the two-year period immediately before retirement, [are] employed in a bona fide executive or high policymaking position" and one for tenured professors.[33] Because mandatory retirement was still allowed at or above the age of seventy, these exemptions merely allowed employers to require retirement five years earlier than the rest of American employers.

In 1986 the statute was again amended, removing the statutory protection cap of seventy so that all employed Americans over forty were now protected by the ADEA. This also had the effect of eliminating mandatory retirement for most American workers but the exemption that permitted mandatory retirement in higher education—now modified to permit mandatory retirement beginning at age seventy instead of sixty-five—was extended, as was the exemption for high policymakers, but with an expiration date of December 31, 1993.[34] Section 6 of the 1986 Amendments states,

> (a) SPECIAL RULE.—Section 12 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631) is amended by adding at the end thereof the following new subsection: "(d) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 70 years of age and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education . . . .
>
> (b) Termination Provision.—The amendment made by subsection (a) of

33. *See id.* § 12(c)(1).

34. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 6(a)–(b), 100 Stat. 3342 (1986). It is strikingly appropriate that President Ronald Reagan, who promised not to make the youth of his opponent an issue in a debate, wrote a "signing statement" when he signed into law the ADEA Amendments of 1986. President Reagan wrote, "I have signed H.R. 4154, the Age Discrimination in Employment Act Amendments of 1986. This legislation ends mandatory retirement solely on the basis of age for most American workers and eliminates the upper age limit of 70 on all of the other protections…." Ronald Reagan, *Statement on Signing the Age Discrimination in Employment Amendments of 1986*, RONALD REAGAN PRESIDENTIAL LIBRARY AND MUSEUM (Nov. 1, 1986), http://www.reagan.utexas.edu/archives/speeches/1986/110186d.htm. At the time even one of the sponsors of the bill never imagined that the exemption for tenured faculty would end. *See generally* Marc L. Kesselman, Comment, *Putting the Professor to Bed: Mandatory Retirement of Tenured Faculty in the United States and Canada*, 17 COMP. LAB. L. 206 (1995) (arguing that there should be mandatory retirement for tenured faculty and that the exemption should have continued). *See also* 132 CONG. REC. H8117 (Sept. 23, 1986) (statements of Rep. Pepper). Responding to the proposed amendment that would exempt tenured faculty from the uncapping of the ADEA, Rep. Pepper stated, "I agree . . . and would certainly encourage my colleagues on a conference committee on this legislation to incorporate an amendment that addresses [this] concern." *Id.*

this section is repealed December 31, 1993.[35]

The amendment called for a study to be undertaken before the exemption's expiration.[36] That study is discussed in section III of this paper.

The 1986 ADEA Amendments also added a new exemption for firefighters and law enforcement officers. Section 3 of the 1986 Amendments states,

> (a) GENERAL RULE.—Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended by adding at the end thereof the following new subsection:
>
> "(i) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—
>
> "(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law March 3, 1983, and
>
> "(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act."
>
> (b) TERMINATION PROVISION. — The amendment made by subsection (a) of this section is repealed December 31, 1993.

Section 5 required that a study be conducted to determine, among other things, "whether physical and mental fitness tests are valid measurements of the ability and competency of police officers and firefighters to perform the requirements of their jobs."[37] A 1992 Pennsylvania State study concluded,

> [A]lthough age is a determinant of an individual's ability to perform the functions of a police officer or firefighter, there is no exact age at which all people can be said to be unqualified. While we agree with this statement it

35. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 6(a)–(b), 100 Stat. 3342 (1986).

36. *See generally* Gomory, *supra* note 4 (detailing a joint study done by the Committee on Mandatory Retirement in Higher Education, the Commission on Behavioral and Social Sciences and the National Research Council, which was conducted as a result of Congress asking the U.S. Equal Employment Opportunity Commission to study [the issue] and report back to Congress).

37. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 5(a)(1)(A), 100 Stat. 3342 (1986).

does not necessarily follow that age based retirements are illegitimate.[38]

This study and its conclusions did not keep the exemption for police and firefighters from being automatically repealed at the end of 1993. However, in 1996, the exemption was reinstated after a three year hiatus.[39] This time, it was made permanent and applicable retroactive to December 31, 1993, when the prior exemption expired. The exemption was reinstated after a hearing about the issue.[40] Many fire and police groups, including the International Brotherhood of Police Officers and Firefighters, were in favor of the reinstatement and a number testified at the hearing. For example Tom Miller of the Indiana Fire Department stated:

> It is important to note who it is that is seeking this public safety exemption. The most vocal advocates for the right to use age limits are the rank and file workers- the very people whom the ADEA is designed to protect. Fire fighters of all ages believe that local governments should have the same option that the federal government has to use age-based employment criteria.[41]

Other group representatives and individuals testified as well.[42]

In contrast to the statutory treatment of police and firefighters, there has been no congressional reinstatement of the exemption for tenured professors. That exemption expired by its own terms at the end of 1993, as did the exemption for police and firefighters. But, unlike the exemption for police and firefighters, no action has yet been taken to reinstate it. Thus, January 1994 ushered in a new era (absent any future statutory modification) of lifetime employment for tenured faculty with removal only for narrowly drawn circumstances constituting cause.[43] This employment arrangement of lifetime appointment (an open-ended employment contract with narrow removal provisions and no mandatory retirement) is itself exceptional in the United States, enjoyed only by relatively few, including federal judges, some state judges and public

38. *See* FRANK J. LANDY ET AL., ALTERNATIVES TO CHRONOLOGICAL AGE IN DETERMINING STANDARDS OF SUITABILITY FOR PUBLIC SAFETY JOBS: EXECUTIVE SUMMARY (1992) (discussed in Martin Schiff, *The Age Discrimination in Employment Act: Whither the Bona Fide Occupational Qualification and Law Enforcement Exemptions?*, 67 ST. JOHN'S L. REV. 13, 16 (1993) (criticizing the phase-out of mandatory retirement for police and firemen).

39. *See* Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

40. *See Age Discrimination in Employment Amendments of 1995: Hearing on S. 553 and H.R. 849 Before the Comm. on Labor and Human Res.* 104th Cong. (1996).

41. *See id.* (statement of Tom Miller, Captain, Indiana Fire Department).

42. *See id.* (statement of the International Brotherhood of Police of Officers).

43. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986).

school teachers. Tenured professors are distinguishable from each of these other groups. For example, public school teachers tend to retire by sixty-five because they have defined benefit plans which pay them a substantial part of their salary as retirement income, whereas faculty in higher education generally have defined contribution plans which do not guarantee any percentage of salary for future payments.[44]

44. *See* Barbara A. Butrica et al., *The Disappearing Defined Benefit Pension and Its Potential Impact on the Retirement Incomes of Baby Boomers*, 69 SOC. SECURITY BULLETIN 1, 3 (2009) ("[T]raditional [defined benefit] plans often create a strong disincentive to continue working for the same employer at older ages."). The researchers also found that "[t]he percentage of workers covered by a traditional defined benefit . . . pension plan that pays a lifetime annuity, often based on years of service and final salary, has been steadily declining over the past 25 years." *Id.* at 1. *Cf.* The Center for the Future of Teaching & Learning, *Teacher Retirement Trends in California*, 1, 1 (2013), http://www.cftl.org/documents/2013/trtc.pdf. (noting that the age of retirement of California teachers is pegged lower between 60.7 and 61.7 from 2006/7 to 2011/12). For discussion of defined benefit plans, see generally Kathryn M. Doherty et al.,, *No One Benefits: How Teacher Pension Systems are Failing Both Teachers and* Taxpayers, NAT'L COUNCIL ON TEACHER QUALITY (2012), http://www.nctq.org/p/publications/docs/nctq_pension_paper.pdf.

A recent challenge to tenure in public K-12 schools is currently working its way through the California courts. The plaintiffs—nine students— argue "that state law regarding tenure, dismissal and layoff procedures serve to 'entrench' bad teachers in public school and prevent districts 'from providing an effective education to all of their students, as guaranteed by the California Constitution.'" Erica E. Phillips, *Students Push to Curb Tenure*, WALL ST. J. (Feb. 15, 2014), http://online.wsj.com/news/articles/SB10001424052702304703804579383122142346030. The California Superior Court in Los Angeles issued its tentative decision on June 10, 2014, finding that the California Permanent Employment statutes, the Dismissal statutes and the LIFO statute (last in, first out) violated the state Constitution under a strict scrutiny standard. Tentative Decision, *Vergara v. California*, No. BC484642 (Super. Ct. Cal. L.A. County 2014), *available at* http://studentsmatter.org/wp-content/uploads/2014/06/Tenative-Decision.pdf. For detailed information on the case, see the Students Matter website at http://studentsmatter.org.

There is currently a stay pending appellate review. This will no doubt encourage many other lawsuits. *See generally* Erica E. Phillips, *Court Strikes Blow to Tenure*, WALL ST. J. (June 11, 2014), http://online.wsj.com/news/articles/SB10001424052702304315504579616363425317346 (discussing the reaction to the decision). Arne Duncan, the U.S. Secretary of Education called the decision "'a mandate' for lawmakers and education leaders to address 'practices and systems that fail to identify and support our best teachers and match them with our neediest students.'" *Id.* The litigation was funded by David Welch, a "Silicon Valley entrepreneur," and led by famed litigator Ted Olson. *Id.* Other prominent individuals have signaled their interest in litigation to reform education, such as David Boies. *See* Alexandra Wolfe, *David Boies and the Fight Against Proposition 8*, WALL ST. J. (June 20, 2014), http://online.wsj.com/articles/david-boies-and-the-fight-against-proposition-8-1403302477 (discussing Boies' career, including working with longtime conservative Ted Olson in overturning California's Proposition 8 prohibiting same-sex marriage and his interest in education reform—signaling areas where conservative and liberals may find agreement).

For further discussion on the new litigation about underperforming teachers in the classroom, see generally Ethan Hutt & Aaron Tang, *The New Education Malpractice Litigation*, 99 VA. L. REV. 419 (2013). For general discussion of how difficult it is to dismiss tenured teachers in the public K-12 arena, see Steven Brill, *The Rubber Room: The Battle Over New York City's Worst Teachers,* THE NEW YORKER, (Aug. 31, 2009), http://www.newyorker.com/magazine/2009/08/31/the-rubber-room (discussing how teachers are assigned to spend time in the "rubber room" under guard while their

Although mandatory retirement is not permitted for federal judges or public school teachers, mandatory retirement is permitted (through explicit statutory ban exemptions) for certain professions: pilots (sixty-five),[45] air traffic controllers (fifty-six with some flexibility up to sixty-one), and federal law enforcement and national park rangers (fifty-seven with some flexibility if less than twenty years' service assuming still in good health).[46] These exemptions have been justified in part by concerns about declining physical fitness and health, but they are also based on concerns about declining mental acuity. Nonetheless, just as there is no mandatory retirement for lower federal judges, the U.S. Constitution sets no age limit

dismissal case goes through the steps in the process, often for years). *But see* Pedro A. Noguera, *In Defense of Teacher Tenure,* WALL ST. J. (June 18, 2014), http://online.wsj.com/articles/pedro-noguera-in-defense-of-teacher-tenure-1403134951 (arguing that the focus on tenure is not the problem but rather our failure to attract top students into teaching along with the funding formulas for schools).

The *Vergara* case has already stimulated discussion in other states. *See, e.g.*, Scott Calvert, *Philadelphia's Teachers Fight for Seniority Amid Layoffs,* WALL ST. J. (July 7, 2014), http://online.wsj.com/articles/philadelphia-teachers-fight-for-seniority-in-layoff-decisions-1404671443 (discussing problems with anticipated teacher layoffs). Because Pennsylvania "is one of 5 states where teacher seniority is the only factor in determining who gets laid off," the California case could be persuasive. *Id.* Last year, Philadelphia laid off teachers according to seniority but hired back "without consideration of longevity." *Id.* There are a number of state bills pending on the subject, but how the collective bargaining agreement affects any bill (the contract expired in August 2013) remains to be seen. *Id.*

The issue has gone farther in New York with a lawsuit filed about the tenure laws which pertain to public K-12 education. *See* Al Baker, *Lawsuit Challenges New York's Teacher Tenure Laws*, N.Y. TIMES (July 3, 2014), http://www.nytimes.com/2014/07/04/nyregion/lawsuit-contests-new-yorks-teacher-tenure-laws.html ("[O]nly 12 teachers in New York City were fired for poor performance from 1997 to 2007 because of a legally guaranteed hearing process that frequently consumes years and hundreds of thousands of dollars in legal fees."). The article includes text of the complaint filed with the Supreme Court of New York in *Davids v. State of New York* and notes that in California a teacher could gain tenure in eighteen months, but in New York it takes a minimum of three years with an option to extend to a fourth year. *Id.*

45. The exemption had allowed mandatory retirement of pilots at age sixty. In December 1959**,** the Age 60 Rule was first promulgated after a decade of dispute. In 1968, after the passage of the ADEA, The Secretary of Labor (administrator of the ADEA) declared that the Age 60 Rule was a Bona Fide Occupational Qualification (BFOQ) under the ADEA. *See Age 60 Rule Chronology*, http://lobby.la.psu.edu/_107th/091_Airline_Age_60/Organizational_Statements/PPF/PPF_Chronology.htm (last visited Feb. 13, 2014). This was changed by The Fair Treatment for Experienced Pilots Act, which became law in 2007 and moved the age to sixty-five. *See* Fair Treatment for Experienced Pilots Act, Pub. L. 110-135, 121 Stat. 1450 (2007). The recent incident involving a sixty-three year old pilot who suffered an in-flight heart attack could reopen this debate. *See* Dave Alsup, *Pilot's Deadly In-Flight Heart Attack Threatens to Renew Age Debate*, CNN (Sept. 27, 2013, 5:07 PM), http://www.cnn.com/2013/09/27/us/boise-airline-pilot-heart-attack/.

46. *Special Retirement Provisions for Law Enforcement Officers, Firefighters, Air Traffic Controllers, and Military Reserve Technicians*, U.S. OFFICE OF PERSONNEL MANAGEMENT, http://www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/c046.pdf (last visited February 2, 2014).

for Supreme Court Justices, though there is removal by impeachment and there is public accountability. A survey in 2011 showed that 12 percent of federal judges were over eighty and, extrapolating from the data, eleven (or less than 1 percent) were over ninety.[47] In light of these data, many states, including Massachusetts, do have mandatory retirement for state judges.[48]

Clearly the public safety exemption makes the strongest argument for a deviation from the abolition of mandatory retirement. Yet there are also compelling arguments for exempting judges as well. It is reported that the Chief Judge Easterbrook of the Seventh Circuit has publicly called on lawyers to contact him if they think a judge is showing signs of mental impairment.[49] According to one study, a portion of all those over age seventy (not just judges) are suspected to have some cognitive impairment, and half of those over age eighty-five have dementia.[50] One commentator stated that "[t]he cognitive functions most affected by age are attention, memory, language processing and decision-making – fundamental skills in any courtroom."[51]

However, just as defined benefit plans control the number of public school teachers who work past seventy, a huge weapon in protecting the public from mentally impaired older judges is the fact that judges are in public court rooms where there is daily review. The internet can provide constant updates on courtroom activities and widely reveals any severe mental impairment. Recall the Wyoming judge who, although not determined to have dementia, exhibited poor decisionmaking in the sentencing of a rapist of an underage girl. The public reaction was swift.[52] Our concern is that, in addition to lacking the retirement incentives of a defined benefit plan, tenured professors (except for some online professors) operate in a much more private realm than judges do. The exemption from mandatory retirement coupled with tenure provides extraordinary job protection to professors without the safeguard of public scrutiny of their

47. *See* Matthew T. Mangino, *GateHouse: Judges Challenge Mandatory Retirement*, MATT MANGINO BLOG (March 22, 2013), http://www.mattmangino.com/2013/03/gatehouse-judges-challenge-mandatory.html (citing a ProPublica investigation).

48. *See generally* Part IV. *See also Mandatory Retirement*, JUDGEPEDIA.ORG, http://judgepedia.org/Mandatory_Retirement (last visited Feb. 2, 2014) (noting that thirty-three states have mandatory retirement for judges generally between ages seventy and seventy-five).

49. *See* Mangino, *supra* note 47.

50. *See id.*

51. *Id.*

52. *See* Brown, *supra* note 16 (reporting that the judge had remarked that the fourteen year old rape victim appeared "older than her chronological age," thus appearing to blame her rather than the teacher who raped her during her first year in high school).

performance to ensure against inept performance. This Article argues that the exemption should be reinstated for professors just as it was for public safety personnel. There is precedent for Congress revisiting legislative decisions when reflection reveals unintended, negative, and unanticipated consequences, of the legislation.

III. LITERATURE REVIEW

As the country was preparing for the end of mandatory retirement for tenured faculty, the National Research Council and the Commission on Behavioral and Social Sciences created the Committee on Mandatory Retirement in Higher Education to study the issue and reported its finding in 1991.[53] The Committee concluded that "the preponderance of the evidence does not justify the continuing exemption of tenured faculty from the overall federal policy of prohibiting mandatory retirement on the basis of age."[54] The Committee presumptively concluded based upon the current economic conditions "that this change is unlikely to affect the vast majority of colleges and universities *because most faculty members retire well before age 70*."[55] They did recognize that the result could be quite different at research universities where many faculty members tend to work until age seventy.[56] One of the solutions proposed to address this potential concern was to encourage retirement incentive programs.[57]

The original reason for the ADEA exemption for college and university tenured professors was twofold: a concern that new faculty would not be hired, thus limiting new ideas, and a concern that "an aging professoriate would grow increasingly ineffective but be irremovable because of tenure."[58] The Committee's recommendations about health care and pension plans reflect an inability to foresee the future economic conditions. They recommended that higher education needed to "develop pension plans that provide inflation protected retirement incomes within the committee's suggested range."[59] They also recognized that medical care costs were beginning to increase dramatically (at about 22 percent annually, and even 56 percent in at least one case); this could be a real problem not only for people retiring but also for incentivizing faculty to

53. *See* Gomory, *supra* note 4, at xi.
54. *Id*. at ii.
55. *Id.* (emphasis added).
56. *See id*.
57. *See id*. at iii.
58. *Id*. at xi.
59. *Id.* at 79.

stay on the college health plan.[60] However, the study of retirement patterns lulled the Committee into believing that past data would predict future patterns.[61] They concluded that "patterns of faculty retirement have remained stable over time, even though the mandatory retirement age has been raised from 65 to 70 and, at some institutions, has been eliminated."[62]

Most striking is the Committee's lack of perspicacity with their recommendation about pensions. They stated, "[w]e recommend that colleges and universities offer pension plans designed to provide retired faculty with a continuing retirement income from all sources equal to between 67 and 100 percent of their preretirement income."[63] This recommendation is fatuous. Furthermore, the Committee stated, "[w]e urge states and colleges and universities to offer defined benefit plans that provide retirees with cost of living adjustments that reflect the inflation rate."[64] While some countries, like France, may believe that one can will a certain living standard for employees, the truth is that a sound fiscal basis must be present to support the payments.[65] Given the financial pressures on higher education in the twenty-first century, defined benefit plans are not uniformly present in higher education and large cost-of-living raises will not occur for current employees, much less retirees.[66]

A problem with prevailing wisdom is that people cannot see beyond the limits of their own times.[67] While the Committee did acknowledge that research universities might see a "high proportion of faculty choosing to

60. *See id*. at 82–83 (citing a 1987 study conducted by Johnson and referring to a case study conducted by [the Committee] which showed a 56 percent increase in health insurance premiums in 1990).

61. *See generally* NASSIM NICHOLAS TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE (2007) (criticizing the use of past stock performance to predict the future because [it] ignores the "black swan" events, i.e., those that are unexpected and significant).

62. Gomory, *supra* note 4, at 103.

63. *Id*. at 107.

64. *Id.* at 109.

65. *See* Michael Stothard, *French Managers Released After 18-Hour Boss-Napping*, FIN. TIMES (Jan. 29, 2014), http://www.ft.com/cms/s/0/9f1ecb62-88e7-11e3-9f48-00144feab7de.html#axzz2ruoMSqe3 (discussing the action French workers took in holding their bosses "hostage" as part of an escalating dispute over severance pay). Such action would be criminal in the United States.

66. Kevin Kiley, *Nowhere to Turn*, INSIDE HIGHER EDUC. (Jan. 17, 2013), https://www.insidehighered.com/news/2013/01/17/moodys-report-calls-question-all-traditional-university-revenue-sources.

67. *See generally* TALEB, *supra* note 61, at xix ("Black Swan logic makes *what you don't know* far more relevant that what you do know").

work past 70 if mandatory retirement is eliminated,"[68] it could not predict the tremendous change in economic conditions. Economic uncertainty, coupled with the prevalence of defined contribution plans that by their structure reward working longer, has created a problem that extends well beyond research universities. In 1991 many saw a simple fix in instituting retirement incentives—a solution that hindsight now tells us is woefully insufficient. For example, Matthew Finkin (who served as Chairman of the Committee on Academic Freedom and Tenure for AAUP) argued in 1988,

> If uncapping (referring to ending mandatory retirement) does present significant institutional problems, a matter as yet by no means certain, the academic community would be better advised to explore voluntary early retirement programs and pension policies. One might ask, for example, whether money purchase annuity systems, whereby both employer contributions and fund assets accumulate and which serve accordingly to encourage longer service, continue to make sense in the absence of a firm retirement date. Alternatively, one should consider whether guaranteed benefit plans geared to a level pay-out under which a faculty member does not fare noticeably better retiring at seventy-five than at seventy ought to be explored.[69]

Finkin argued that without "any experience under an uncapped ADEA, the abandonment of tenure would be, to put it mildly, a dangerous over reaction."[70] Finkin acknowledged in his footnotes that distinguished individuals could foresee the possibility of such drastic measures. John Dunlop, a then Harvard Law Professor, testified in 1983 before a Senate Subcommittee on the impact of uncapping the ADEA in academia:

> [C]olleges and universities would be faced with two very undesirable options: (1) They could elect to keep the tenure system as it now functions essentially intact, with the result that individuals would have the assurance of continued employment, in effect for life-with harmful effects on education, on the advancement of new faculty members and on the

68. Gomory, *supra* note 4, at 103–04 (noting that at some research universities, more than 40 percent of faculty retire at the mandatory age of seventy, suggesting that if [that] were lifted, more might stay on).

69. Matthew W. Finkin, *Tenure After an Uncapped ADEA: A Different View*, 15 J. C. & U. L. 43, 60 (1988) (responding the analysis in Oscar M. Ruebhausen, *The Age Discrimination in Employment Act Amendments of 1986: Implications for Tenure and Retirement*, 14 J.C. & U.L. 561, 570–71 (1988), which argues that post-1993 universities and faculty could limit the tenure contract and then have continued employment via term contracts). Finkin suggested a ridiculously simplistic solution that does not comport with twenty-first century reality: "[A]lternatively one should explore whether guaranteed benefit plans geared to a level payout under which a faculty member does not fare noticeably better by retiring at seventy-five than at seventy ought to be explored." *Id*. at 60.

70. *Id*.

> academic enterprise as a whole. (2) They could seek to eliminate tenure altogether, or to alter the tenure system in some substantive way, with chilling effects on academic freedom as we have understood it . . . .[71]

Interestingly, there was no discussion of a more moderate approach, such as the one put forth in this paper, which retains tenure but only until age seventy. Other professionals have alluded to the "unease occasioned by the coming demise of mandatory retirement."[72] However, in 1990, these same professionals, Robert S. Brown and Jordan E. Kurland, go on to dismiss the concerns about an uncapped ADEA and argue that looking at data between capped and uncapped universities "found no significant differences in mean retirement ages."[73] Since any other conclusion seemed to be choosing between permitting mandatory retirement to continue and abolishing tenure, such a finding was somewhat self-serving.

To be fair, 1990 preceded the uncapping and the conclusions were based only on projections. Certainly the impact of the future recession from both a practical and psychological perspective could not possibly have been calculated at the time. However, since the 1990 assumptions about voluntary retirement age and the impact of retirement incentive programs have now proven to be incorrect, it is certainly appropriate to reconsider now the policy that these erroneous assumptions were set out to support.

Since the recession that started in December 2007,[74] there has been more research and concern about the delay in faculty retirement in higher education.[75] A TIAA-CREF study published in December 2011 noted that

71. *Id*. at 60 (quoting from *Prohibition of Mandatory Retirement and Employment Rights Act of 1982: Hearing on S. 2617 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 97th Cong. 146 (1983) (statement of John Dunlop, Professor, Harvard Law School)).

72. Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325, 328 (1990) (quoting from ALBERT REES & SHARON P. SMITH, FACULTY RETIREMENT IN THE ARTS AND SCIENCES 91 (1991)). *See generally* Richard A. Epstein & Saunders MacLane, *Keep Mandatory Retirement for Tenured Faculty*, CATO REV. OF BUS. & GOV'T REG. 85 (1991). *See also* Kesselman, *supra* note 34 (discussing Canada's approach). *See also* Ruebhausen, *supra* note 69 ("there should also be a clear understanding of what happens upon expiration of the tenure contract.").

73. Brown & Kurland, supra note 72, at 348. *See id*. at 331–32 (discussing history of tenure and academic freedom and the problem of "deadwood" (unproductive faculty) at a university; *see id*. at 348 (exploring the costs of tenure in terms of the difficulty in removing faculty). *See also* ALBERT REES & SHARON P. SMITH, FACULTY RETIREMENT IN THE ARTS AND SCIENCES 91 (1991).

74. Chris Isidore, *It's Official: Recession Since Dec. '07,* CNN MONEY (Dec. 1, 2008 5:40 PM), http://money.cnn.com/2008/12/01/news/economy/recession/.

75. *See generally* Nicole M. Arangio, *First Circuit Strikes Down Age-Based Mandatory Retirement Policy for State Police Officers—Gately v. Massachusetts, 2 F.3d 1221 (1st Cir. 1993)*, 28 SUFFOLK U. L. REV. 929, 929 (1994) (describing the result of *Gately v. Massachusetts*, in which "the court declared that age was not a [bona fide occupational qualification] and enjoined the state from

only 25 percent of senior faculty "expect to retire by a normal retirement age."[76] The study concludes that "financial necessity is a major reason for most of those reluctantly expecting to work past normal retirement age."[77] The study also acknowledges without a footnote, "[C]olleges and

enforcing the statutorily mandated retirement policy). Anthony R. Baldwin, David S. Day & Judith A. McMorrow, *Will There Be Life After Law School? The Impact of Uncapping the Mandatory Retirement Age*, 41 J. LEGAL EDUC. 395, 396 (1991) (analyzing the results of "surveys of law school faculty members who were about to retire and of retired professors" to see how the elimination of mandatory retirement impacted them); John H. Burton, Jr., *Tenured Faculty and the "Uncapped" Age Discrimination in Employment Act*, 5 YALE L. & POL'Y REV. 450 (1987) (examining the likely effects of the Age Discrimination in Employment Act and exploring various responses that colleges and universities should consider); Charles B. Craver, *Implications of the Elimination of Mandatory Retirement for Professors*, 16 J.C. & U.L. 343, 345 (1990) (evaluating "the legal issues that universities will face if Congress eliminates the upper age limit for professors in the ADEA."); Marianne C. DelPo, *Too Old to Die Young, Too Young to Die Now: Are Early Retirement Incentives in Higher Education Necessary, Legal, and Ethical?*, 30 SETON HALL L. REV. 827 (2000) (addressing the ethical issues that deans face regarding retirement incentives for professors who have not yet reached the normal retirement age); Michael D. Jacobsen, *Old School? O.K.: No Need to Return to Mandatory Retirement in Higher Education*, 18 ELDER L.J. 71, 71 (2010) (asserting that it would be "a mistake to allow for mandatory retirement in higher education institutions because older professors offer talent and experience that is disappearing at institutions of higher education that heavily rely on adjunct professors); James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 161 (2000) (defending "academic tenure and offering some recommendations to make it more effective."); Eric Andrew Fox, Note, *An Examination of Mandatory Retirement Provisions for Police Officers*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 101, 102 (2000) (examining "the practice of state and local police departments mandatorily retiring their officers at a certain age" and focusing on the "bona fide occupational qualification defenses that police departments often assert to justify their mandatory retirement ages."); Ruebhausen, *supra* note 69, at 569–71 (examining the ADEA Amendments and their implications for tenured faculty); Note, *Questioning Age-Old Wisdom: The Legality of Mandatory Retirement of Tenured Facility Under the ADEA*, 105 HARV. L. REV. 889, 891 (1992) (arguing that the elimination of mandatory retirement by the ADEA Amendments "by no means doom[s] academic tenure"); Don R. Sampen, *Age Discrimination and Reasonable Non-Age Factors*, 24 J.C. & U.L. 1, 1 (1997) (focusing on an exception to the ADEA that "allows employers to take actions based on reasonable factors other than age."); Aloysius Slow, *Tenure and Other Unusual Personnel Practices in Academia*, 14 J.L., ECON. & ORG. 152, 152 (1998) (exploring how "distinctive features of academia alleviate constraints such as specialization as knowledge expands, research obsolescence, and the informational asymmetries between a university and its faculty."); Gary Becker, *The Graying of College Faculties*, THE BECKER-POSNER BLOG (July 6, 2008, 9:48 PM), http://www.becker-posner-blog.com/2008/07/the-graying-of-college-faculties-becker.html (analyzing the recent trend of increased faculty age and how the trend has impacted academia); Richard Posner, *Aging Professors*, THE BECKER-POSNER BLOG (July 6, 2008, 9:33 PM), http://www.becker-posner-blog.com/2008/07/aging-professors-posners-comment.html (arguing that the elimination of a mandatory retirement age should not impact the age trend of professors because of other changes that would happen simultaneously, such as the implementation of early retirement incentives).

76. Yakoboski, *supra* note 11, at 1 (discussing the 75 percent who are reluctant to retire either by choice or because they would prefer to retire but feel they cannot (known as the "reluctantly reluctant")).

77. *Id.* (noting that the recession was a major driver for deciding to continue to work).

universities are institutionally challenged by senior faculty who remain 'too long.'"[78] Newspaper headlines such as "Americans Rip up Retirement Plans" underscore this new trend.[79]

Contrary to predictions that there would be minimal change at the time of the elimination of mandatory retirement in higher education,[80] several studies have supported the conclusion that the abolition of mandatory retirement has led to faculty postponing retirement past age seventy.[81] One turn-of-the-century researcher noted that after 1994 "the retirement rate for faculty members age 70 and older fell to 33 percent from 100 percent."[82] More recent research shows similar statistics. For example, at University of Arkansas it was reported that 14 percent of faculty are over sixty-five, with 5 percent over seventy.[83] The most recent 2014 *Chronicle* Survey queried

78. *Id.* at 7.

79. Lauren Weber, *Americans Rip Up Retirement Plans*, WALL ST. J. (Jan. 31, 2013), http://online.wsj.com/news/articles/SB10001424127887323926104578276241741448064.

80. *See* REES & SMITH, *supra* note 73. *But cf.* Alan L. Gustman & Thomas L. Steinmeier, *The Effects of Pensions and Retirement Policies on Retirement in Higher Education*, 81 AM. ECON. REV. 111 (1991). Also, these trends in higher education are more pronounced than those in K–12, which have continued to see timely retirements mostly because of defined benefit plans discussed earlier. *See generally Faculty Experts: The Changing Face of the Teaching Force*, PENN GRADUATE SCHOOL OF EDUCATION PRESS ROOM, http://www.gse.upenn.edu/pressroom/faculty/teaching_force (last visited February 6, 2014) (discussing how the teaching force at the elementary and secondary levels is getting larger in size and forming a bi-modal age distribution and projecting that the average retirement age of teachers will begin to decline in the future due to the large number of older teachers currently in classrooms); Sherry Posnick-Goodwin, *Teacher Retirement on the Rise*, CAL. TEACHERS ASS'N, http://www.cta.org/en/Professional-Development/Publications/2009/06/Educator-June-09/0609-Action-05.aspx (last visited Feb. 4, 2014) (acknowledging that the retirement of public school teachers is on the rise in California due to incentive packages that are being offered by school districts to entice teachers to retire earlier than they would otherwise choose to, thereby freeing up budget space for the districts).

81. *See generally* Robert L. Clark & Linda S. Ghent, *Mandatory Retirement and Faculty Retirement Decisions, 47* INDUS. REL. 153 (2008) (discussing factors affecting faculty decisions). Yakoboski, *supra* note 11 (discussing the reluctance to retire).

82. *See* Edward Wyatt, *Tenure Gridlock: When Professors Choose Not to Retire*, N.Y. TIMES (Feb. 16, 2000), http://www.nytimes.com/2000/02/16/jobs/tenure-gridlock-when-professors-choose-not-to-retire.html (quoting research at Muhlenberg College).

83. *See* Masterson, *supra* note 6 (mentioning that the number of faculty "retiring or leaving Duke for another institution has dropped by about a half"). Contrast concern about a possible shortage in business school faculty. *See* Alison Damast, *Bridging the Business Faculty Gap*, BUSINESSWEEK (Oct. 1, 2007), http://www.businessweek.com/stories/2007-10-01/bridging-the-business-faculty-gapbusinessweek-business-news-stock-market-and-financial-advice ("The situation is so dire that some business schools could eventually be in danger of losing their AACSB accreditation because of the faculty shortage," says Richard Sorenson, the Chair of AACSB (Association to Advance Collegiate Schools of Business) faculty shortage workgroup. 'Some schools don't have the financial resources or reputation and are having difficulty recruiting new faculty,' says Sorenson…."). *But see* Robert S. Owen, *Managing a U.S. Business School Professor Shortage*, 2 RES. IN HIGHER ED. J. 1 (2008) (noting that AACSB has been predicting this faculty shortage, but disputing the data noting that faculty are not

2000 faculty and 400 administrators and demonstrated the acceleration of the trend of later retirement and the attendant problems.[84] The survey found that "overall, nearly one-quarter of faculty members expect to retire after the age of 70" while "[n]early 80 percent of administrators and 90 percent of faculty members agree that young professors are crucial for advancing innovations within academic departments."[85]

While some universities do not see this as a problem,[86] others do. For example, 5 percent of Cornell's faculty members are seventy or older, which is more than twice the number from ten years before, and 11 percent are between sixty-five and sixty-nine.[87] The figures at other universities reveal a higher proportion of faculty over seventy. "The American academy has gone grey in patches with the effect being most visible at the more prestigious universities. At Johns Hopkins around 10% of tenured faculty are older than 70. At Harvard and Columbia, 7% are; and at Yale close to 9%."[88] Some argue that because of light teaching loads in research universities, faculty post-seventy are able to remain engaged and productive, while others acknowledge that this may be a problem but suggest that less productive faculty are often "nudged" out.[89]

We must reiterate that we do not posit that older faculty are per se a problem or detrimental to a university. Again, we are simply concerned with the coupling of tenure with no mandatory retirement: the lack of review and the attendant difficulties of terminating a tenured professor make mandatory retirement desirable as the only reasonable tool for

retiring as expected and suggests that the earlier surplus of faculty who were underemployed "could be used to fill gaps," and explaining that the decline in faculty based on a reference to "a period of peak oversupply" (in the 1990s) as a standard is misleading).

84. Jeffrey J. Selingo, *The Retirement Wave: Attitudes on College Retirement and Succession Planning*, CHRON. OF HIGHER EDUC., 1, 4 (2014), *available at* http://red-academica.net/observatorio-academico/wp-content/uploads/2014/05/TCOHE-2014-Retirement-Wave.pdf ("[M]any professors plan to stay in their jobs well past the traditional retirement age, even though they agree with administrators that the aging academic departments are less than ideal for the future of higher education.").

85. *Id.* at 5.

86. *See* Masterson, *supra* note 6. Tufts University Provost Jamshed Bharucha also said that he "believes universities will see a substantial increase in the rate of retirements in the next 10 years . . . ." *Id.*

87. *See id.*

88. Joel Budd, *Working Late in the US*, THE GUARDIAN (Sept. 30, 2002), http://www.theguardian.com/education/2002/oct/01/highereducation.careers (noting that [this] is different in Britain where there still is mandatory retirement).

89. *Id.* (One professor states that "[w]hen asked why so many of his colleagues stopped working at a younger age than him he explains that university administrators waged an occasionally unpleasant war of attrition against unproductive faculty").

removing ineffective or outdated faculty. While these faculty members may be removed, valuable senior faculty may be offered yearly or multi-year contracts. Before mandatory retirement was abolished, faculty retired from their tenured position but often continued on in a non-tenured year-to-year capacity. The proposal we are exploring would allow the same.

It is clear that people do not really know whether the number of faculty over seventy will continue to grow at the pace of the past decade, but the recent Chronicle survey found that forty percent of professors surveyed believe that they will stay "five or more years longer than they had planned" because of both money reasons and the cost of healthcare.[90] And one thing *is* clear: higher education will be changed dramatically if there is not an entry point to the tenure track for younger faculty, according to Professor Joel Trachtenberg, President Emeritus at George Washington University:

> With lifetime contracts, universities become top-heavy with senior faculty. In many academic fields . . . a professor's best research is usually completed by the time she reaches 60; the final 15, 20 or 25 years of one's service in the classroom or lab is often marked with fewer contributions to the advancement of knowledge. *Delaying retirement also provides less opportunity for younger more robust teachers to come up the academic ranks. And not inconsequentially, the salaries and benefits of most senior faculty are higher than most junior professors.* These issues matter more in times of economic challenge than otherwise.[91]

Trachtenberg notes that if after seventy, faculty were moved to year-to-year contracts this would bring benefits to the university and students.[92] He states that this modification would "(1) restore flexibility in academic planning for necessary changes in curriculum and other needs; (2) provide room for younger scholars and teachers; [and] (3) allow for humanely addressing problems that advanced age inevitably brings."[93]

90. Selingo, *supra* note 84, at 5. "[O]nly twenty eight percent [of faculty] are confident in their ability to manage medical bills in their retirement. However, "two-thirds of older professors and a majority of younger faculty members" do report that they are staying because the "love of the job." *Id.* It is interesting that while forty-two percent of campus leaders" claim that faculty say this because "professors just don't know how to spend their time in retirement," only sixteen percent of faculty agree that is the reason why. *Id.*

91. Stephen Joel Trachtenberg, *How to Phase Out Lifetime Tenure*, N.Y. TIMES (Mar. 10, 2011), http://www.nytimes.com/roomfordebate/2010/8/15/aging-professors-who-wont-retire/how-to-phase-out-lifetime-college-tenure (arguing for contracts of twenty, thirty, or forty years followed by year-to-year contracts) (emphasis added).

92. *See id.*

93. *Id.*

Trachtenberg does not argue his proposal benefits professors in the post-seventy cohort. Certainly going from a job for life for which you can only be removed for "just cause" to even a multi-year contract or year-to-year contract is a diminution of security.[94] The focus instead is on the larger good of the university. At junior faculty levels, this larger good is arguably best served by the protections to free debate that tenure provides. At senior faculty levels, these benefits to the advancement of knowledge must be balanced against the detriment to that advancement caused by faculty who can only be removed for "just cause." The "just cause" standard is a high hurdle for the university. Faculty can be removed from a tenured position for such causes as plagiarism or murder.[95] These are obviously extreme cases, however, and therein lies the problem. Mediocrity and adequate performance when the university would be better served by better performance from a new professor would simply not satisfy the "just cause" standard. Routine low quality performance necessary to satisfy the "just cause" standard is not caught easily. To avoid these situations, some universities currently have experimented with multi-year contracts as an alternative to the traditional tenure and lecturer arrangements.[96] Non-renewal of contracts still must be done in compliance with law and thus cannot be based on age alone or other reasons that violate the law.[97] Still, this trend may indicate that the tenure system is more threatened by the lack of mandatory retirement, than it would be by a proposal such as ours which preserves tenure but caps it at seventy to address legitimate concerns about updating faculty staffing when appropriate.

Although Trachtenberg does not elaborate on issue number three in his short article ("humanely addressing problems that advanced age

94. *See id.* ("Let's keep job security until about age 70.").

95. *See* Verna Gates, *Alabama Professor Gets Life in Prison for Killing Co-Workers*, REUTERS (Sept. 24, 2012, 7:35 PM), http://www.reuters.com/article/2012/09/24/us-usa-crime-professor-idUSBRE88N11C20120924. *See generally* Scott Jaschik, *Supreme Court Rejects Appeal from Ward Churchill*, INSIDE HIGHER EDUC. (Apr. 2, 2013), http://www.insidehighered.com/news/2013/04/02/supreme-court-rejects-appeal-ward-churchill (explaining that the Supreme Court declined to hear the appeal of a University of Colorado professor who was fired for plagiarism).

96. *See* Jennifer Epstein, *In Lieu of Tenure*, INSIDE HIGHER EDUC. (Mar. 10, 2010), http://www.insidehighered.com/news/2010/03/10/webster (describing the benefits and drawbacks to a system of multi-year contracts offered as an option at Webster University in St. Louis, MO where ninety-two of 133 senior faculty opted for the arrangement).

97. We are arguing that the law protects those untenured from discrimination in non-renewal. Failure to offer another multi-year contract should not be based upon discriminatory reasons. Faculty—whether forty, fifty, sixty or seventy—should still be protected against discrimination.

inevitably brings"[98]), this is the sleeper issue. When retirements were continuing at a normal pace, one need not be concerned with the theoretical and abstract concerns about the collision of tenure and the abolition of mandatory retirement in higher education. Yet the numbers suggest an accelerating pace of faculty staying on longer and the number of professors over seventy doubling in ten years. What if this accelerates in the next decade? If many universities have a faculty with an average age of seventy-five, universities will likely face additional pressures of administering the Family Medical Leave Act for a geriatric population in a semester environment—something that was not anticipated as being necessary.[99] Universities could well find themselves having to answer such questions as what are essential functions of a professor? How important is physical energy? Graduate students might line up to have the chance to sit at the feet of a brilliant Stephen Hawking, but what about the more likely case of an average to below average eighty year old English professor, who needs the money but who, because of debilitating chronic diseases, can barely speak above a whisper and puts the class to sleep in the first five minutes? This could easily become a more common occurrence and a university dean's new headache.[100]

Some recent research seems to conclude that advanced age does not always predict decline in productivity.[101] However even this research includes a recognition of the importance of individualized assessments of merit:

98. Trachtenberg, *supra* note 91.

99. *See generally* Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6. (1993).

100. *Cf.* L.V. Anderson, *Death of a Professor*, SLATE (Nov. 17, 2013, 11:45 PM), http://www.slate.com/articles/news_and_politics/education/2013/11/death_of_duquesne_adjunct_margaret_mary_vojtko_what_really_happened_to_her.html (discussing the story of an adjunct professor who was let go and died amid suggestions that the university did something wrong). However the author tells a story of a woman who had lost touch with her students and who had mental problems, and supports the university. *Id*. Although this is distinguishable from the case of dismissing a tenured faculty member, the media reports obscure this fact. The story raises the question— does a professor have the right to teach forever?

101. *See* Timothy J. Fogarty, *Sustained Research Productivity in Accounting: A Study of the Senior Cohort*, 1 GLOBAL PERSP. ON ACCT. EDUC. 31, 51–52 (2004) (finding productive faculty continued being productive and examining the correlation with high ranked doctoral programs in the accounting field and productivity). Colleen Flaherty, *Researcher Reflects on Studies of Faculty Issues*, INSIDE HIGHER EDUC. (Dec. 2, 2013), http://www.insidehighered.com/news/2013/12/02/researcher-reflects-studies-faculty-issues (including interview with Dr. Cathy Trower of COACHE (Collaborative on Academic Careers in Higher Education) who finds in her research that some scholarly productivity actually improves over time).

> Whereas the practice of compulsory retirement in Europe prevents even the most productive researchers from continuing their work, the abolition of compulsory retirement allows even the least productive researchers to continue. Since, due to their seniority, even unproductive researchers draw substantial salaries, having to continue employing them is a financial burden to the university system. However, because the employment of staff members of any age who fail to contribute as researchers or teachers constitutes a burden, *the most desirable system would be one in which decisions on continued employment at any stage are based on individual merit*.[102]

Although the sky did not fall immediately when the exemption for higher education expired in 1994,[103] it is falling now. The passivity with which many approached the change in 1994 should be re-examined in 2014 in light of the extraordinary and unanticipated pressures on education these twenty years later.[104] Professors Epstein and MacClane concur, recognizing that mandatory retirement may be a necessary tradeoff for retention of the tenure system and stating that, "[i]t is sheer hyperbole to equate mandatory retirement with a criminal punishment."[105] They were part of the handful that sounded warnings in 1991 about the expiration of the tenure exemption.

Although there have been many articles written about the ADEA and higher education,[106] few authors have touched upon the abolition of tenure, even in the limited way this Article has discussed it as the expiration of tenure at seventy. Tenure could be called the "third rail" of education—much like social security has been dubbed the "third rail" of politics.[107]

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102. Wolfgang Stroebe, *The Graying of Academia: Will it Reduce Scientific Productivity?*, 65 AM. PSYCHOL. 660, 672 (2010) (discussing differences between the United States and Europe where there is mandatory retirement) (emphasis added).

103. It is interesting that so little fanfare occurred when the exemption for faculty from the abolition of mandatory retirement expired at the end of 1993. Unlike "Chicken Little" who ran around proclaiming the sky was falling, no one shouted an alarm about the expiration of the exemption. It took a number of years to realize the impact this could have on higher education if retirement trends changed. For information on the Chicken Little story, see *Henny Penny*, WIKIPEDIA.COM, http://en.wikipedia.org/wiki/Henny_Penny (last visited February 4, 2014).

104. *See* Epstein & MacLane, *supra* note 72, at 96 (arguing that this expiration will favor "the past over the future, and the old over the young, but reduces the effectiveness and vitality of universities as well. There is still time to prevent this needless self-inflicted wound upon the intellectual capital of this nation.").

105. *Id.* at 88.

106. *See supra* note 73 and accompanying text.

107. William Safire, *Third Rail*, N.Y. TIMES (Feb. 18, 2007), http://www.nytimes.com/2007/02/18/magazine/18wwlnsafire.t.html?_r=0 (discussing the attribution of the famous saying that "Social Security is the *third rail* of American politics" to Kirk O'Donnell,

Twenty years after the expiration of the exemption, fear of touching that third rail has precluded most from taking a hard look at what was glossed over—the combination of tenure with the removal of mandatory retirement. The "third rail" of education—tenure—needs to be bravely examined in light of the ban on mandatory retirement. Does either continue to make sense in the face of the other? Although it remains unpopular to acknowledge, an honest assessment of the situation indicates that, both tenure and mandatory retirement need to be tweaked. The former should be capped at seventy and, to achieve that cap, the latter needs to be reinstated in a modified way. As a statutory matter, just as with the public safety exemption to the ban, Congress had it right the first time and should return to the original exemption.

IV. CASE LAW

Mandatory age-based retirement was accepted as inevitable prior to 1986. The 1986 ADEA amendments removed the upper age cap for ADEA protection against age discrimination in hiring, promotions, wages, *termination* of employment and layoffs; this all but eliminated the prior reality of age-based mandatory retirement policies.[108] Nonetheless, statutory exemptions have allowed the practice to continue in certain industries and have generated case law. The recent case law most relevant to this Article's consideration of reinstating the exemption for tenured faculty from the abolition of mandatory retirement concerns litigation brought by judges. But this Article will also examine developments in the case law pertaining to law and accounting firms, executives, and public safety personnel.[109] First, though, we consider the case law that has set the

Counsel to Speaker of the House). *See also* Levine, *supra* note 21 (calling tenure a "third rail" and suggesting considering "extended faculty contracts").

108. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986) (emphasis added).

109. For a discussion on judges, see Bernstein v. Maryland, No. L-09-2915, 20014 U.S. Dist. LEXIS 122594 (D. Md. 2009) (announcing the court's decision to uphold the mandatory retirement age for judges in the state of Maryland). Capitol News Bureau, *Mandatory Retirement Relief Fails*, THE ADVOCATE (June 5, 2013), http://theadvocate.com/home/6173558-125/mandatory-retirement-relief-fails (reporting that the bill eliminating the mandatory retirement age for judges in Louisiana was not passed); Lauren McGaughy, *Mandatory Retirement for Louisiana Judges Would Cease Under Constitutional Amendment Approved by Panel*, THE TIMES-PICAYUNE (May 15, 2013, 11:03 AM), http://www.nola.com/politics/index.ssf/2013/05/louisiana_judge_retirement_bil.html (describing a state senate bill which would eliminate the existing mandatory retirement age of seventy for judges in Louisiana); Bill Raftery, *Update on Mandatory Judicial Retirement Legislation: Bills in 16 States, But So Far No Enactments; Hawaii Appears to Be Closest But Has Choppy History on the Subject*, GAVEL TO GAVEL (Mar. 19, 2013), http://gaveltogavel.us/2013/03/19/update-on-mandatory-judicial-retirement-

proof standards for ADEA claims and the impact of that standard on higher education cases.

A. PROVING AGE DISCRIMINATION

When the ADEA outlawed age discrimination in the workplace in 1967, the courts were left with the task of determining how a plaintiff could or should prove the presence of illegal age discrimination. After a long series of lower court cases, in 2009 the Supreme Court made it more difficult to prove age discrimination. In *Gross v. FBL Financial Services*,[110] the Court established a new burden of proof. The Court declined to utilize the complex burden-shifting standard used in the *Price*

legislation-bills-in-17-states-but-so-far-no-enactments/ (offering a table that contains the status of mandatory retirement bills in 16 states); Paul Reed Ward, *Pa. High Court Rejects Changing Mandatory Retirement for Judges*, PITTSBURGH POST-GAZETTE (June 18, 2013, 12:00 AM), http://www.post-gazette.com/state/2013/06/18/Pa-high-court-rejects-changing-mandatory-retirement-for-judges/stories/201306180216 (announcing the Pennsylvania state Supreme Court's ruling upholding the mandatory retirement age for state court judges); Stephanie Francis Ward, *70 is Not So Old, Say State Court Judges Challenging Mandatory Retirement Rule*, ABA JOURNAL (May 22, 2013, 6:45 PM), http://www.abajournal.com/news/article/70_is_not_so_old_say_state_court_judges_challenging_retirement_rule/ (detailing the appeal of a 1968 Pennsylvania law that established a mandatory retirement age of seventy for state court judges). For a discussion on accountants, see *Discriminating Against Partnerships: The Fed Try to Re-write PwC's Retirement Policy*, WALL ST. J. (June 3, 2013), http://online.wsj.com/news/articles/SB10001424127887323855804578511693604180764 (explaining that the Equal Employment Opportunity Commission is deciding whether to sue PricewaterhouseCoopers to change its retirement policy while also considering legal action against Deloitte and KPMG). For a discussion on lawyers, see David Glovin, *Kelley Drye Settles EEOC Suit Over Attorney Age Bias Claim*, BLOOMBERG (Apr. 10, 2012, 7:12 PM), http://www.bloomberg.com/news/2012-04-10/kelley-drye-settles-eeoc-suit-over-attorney-age-bias-claim-1-.html (announcing that a New York law firm agreed not to fire lawyers because of their age as part of a settlement of a lawsuit brought by the Equal Employment Opportunity Commission). For a discussion on police officers and firefighters, see Badgley v. Walton, 10 A.3d 469 (Vt. 2010) (ruling that the mandatory retirement age for law enforcement officials in the state of Vermont did not violate the common benefits clause); Sadie v. City of Cleveland, 718 F.3d 596 (6th Cir. 2013) (affirming the judgment that the police department in Cleveland, Ohio did not violate the ADEA or commit age-based discrimination); Jan Hefler, *N.J. Troopers Fight Retirement Rule*, THE PHILADELPHIA INQUIRER (Mar. 4, 2009), http://whbuckman.com/n-j-troopers-fight-retirement-rule (disclosing that New Jersey State Troopers are fighting against the mandatory retirement age of fifty-five on the grounds that they are fit and want to stay in law enforcement). For a discussion on pilots, see Emory v. United Air Lines, Inc., 720 F.3d 915 (D.C. Cir. 2013) (discussing how the court ruled against the pilots' allegations of age discrimination in regard to the airline's mandatory retirement); Greg Mersol, *Court Rejects EEOC Class-Wide BFOQ Challenge to Mandatory Retirement of Pilots*, JD SUPRA BUSINESS ADVISOR (Dec. 31, 2012), http://www.jdsupra.com/legalnews/court-rejects-eeoc-class-wide-bfoq-chall-53816 (expressing that the EEOC was suing on behalf of those who were forced to retire as pilots at age 60 in *EEOC v. Exxon Mobil Corp*).

110. Gross v. FBL Fin. Servs., 557 U.S. 167, 174–75 (2009).

Waterhouse v. Hopkins[111] gender discrimination case. Instead, a five person majority (Thomas, Roberts, Scalia, Kennedy and Alito) held that

> a plaintiff bringing a disparate treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that *age was the "but for" cause of the challenged adverse employment action*. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.[112]

The Court vacated the lower court decision and remanded for action consistent with the articulated standard.

The same year, the federal bill *Protecting Older Workers Against Discrimination Act* ("POWADA") was introduced. This bill would have changed the burden of proof, making it easier for plaintiffs to prove age discrimination by requiring only a showing that age "was a motivating factor." The presence of other factors would not invalidate the claim, as the Court had held in *Gross*.[113] The bill did not progress despite the fact that the *Lilly Ledbetter Fair Pay Act* was signed into law that year, making it easier for victims of gender wage discrimination to sue.[114] There does not seem to be a similar appetite for easing age discrimination claims. POWADA was re-filed in 2012, but it has not been passed.[115] Thus the *Gross* case remains binding law and deters future litigation under ADEA absent clear proof of cause and effect.

The *Gross* standard favors employers who seek to ease out older employees because such practices are not illegal if the employer can point to any additional reason besides age to explain a termination. In contrast, universities have a much harder time pointing to another non-age reason for a termination without meeting the high tenure-busting standard of "just cause." The ban on mandatory retirement therefore has a disproportionate impact on higher education, especially in light of the *Gross* proof standards.

111. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

112. *See Gross*, 557 U.S. at 180 (emphasis added).

113. *See* S. 1756, 111th Cong. (2009). H.R. 3721, 111th Congress (1st Sess. 2009). *See generally* Mike Delikat, *Age Discrimination, Employment Law Yearbook 2013*, *in* EMPLOYMENT DISCRIMINATION LAW & LITIGATION 157 (Theodore O. Rogers & Anne C. Vladeck eds., 2013).

114. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 622 (2007) (requiring the questionable result of having to file a claim within 300 days of a discriminatory pay act even though a plaintiff very likely would not have known about the pay discrimination at the time it first occurred in a culture of private pay information).

115. S. 2189, 112th Congress (2012). *See also* Delikat, *supra* note 113.

B. JUDGES

Federal judges are appointed by the President and confirmed by the Senate with no mandatory retirement age, although judges who retire may elect to assume senior status and continue working in retirement.[116] State law fixes when a state judge must retire, if at all. Thirty-three states and the District of Columbia have set a maximum age for retirement.[117] The most common age set is seventy, followed by seventy-five, and closely by seventy-two.[118] Vermont is the outlier, setting retirement age at ninety, and the remaining states have set no mandatory retirement age.[119]

The Supreme Court addressed the issue of mandatory retirement for judges in *Gregory v. Ashcroft*,[120] in which two Missouri judges challenged the state statute requiring mandatory retirement for judges as violating both the ADEA and the Equal Protection Clause of the Fourteenth Amendment. In analyzing the ADEA claim, the Court parsed the statutory language governing the definitions of employer and employee. In 1974, Congress broadened the ADEA definition of "employer" to include states[121] but narrowed the ADEA definition of "employee" to exclude all elected and most high-ranking government officials, including "appointee[s] on the policy-making level."[122] In Missouri, judges are initially appointed by the governor and then reelected through a retention election. The Court concluded that elected judges were certainly excluded and Congress' intention as to appointed judges was "at least ambiguous" and therefore, under the Court's statutory construction rules, appointed judges were presumed to be included in the exclusion.[123] Because the Missouri judges were therefore excluded from ADEA protections, the Court held that the ADEA did not prohibit their mandatory retirement.[124] The Court then proceeded to analyze the equal protection claim and concluded that the mandatory retirement policy did not violate the Constitution because there was a rational reason behind it.[125] The Court was unequivocal:

116. *How the Federal Courts Are Organized*, FED. JUD. CENTER, http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/183 (last visited Nov. 12, 2014).

117. *Id.*

118. *Id.*

119. *Id.*

120. Gregory v. Ashcroft, 501 U.S. 452 (1991).

121. *See* 29 U.S.C. § 630(b)(2) (2012).

122. *See id.* § 630(f).

123. *Ashcroft*, 501 U.S. at 470.

124. *Id*. at 456, 473.

125. *Id.* at 470–73.

> The people of Missouri have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age. The people may therefore wish to replace some older judges. Voluntary retirement will not always be sufficient. Nor may impeachment—with its public humiliation and elaborate procedural machinery—serve acceptably the goal of a fully functioning judiciary.
>
> The election process may also be inadequate. Whereas the electorate would be expected to discover if their governor or state legislator were not performing adequately and vote the official out of office, the same may not be true of judges. *Most voters never observe state judges in action, nor read judicial opinions*. The people of Missouri rationally could conclude that retention elections—in which state judges run unopposed at relatively long intervals—*do not serve as an adequate check on judges whose performance is deficient. Mandatory retirement is a reasonable response to this dilemma*.
>
> This is also a rational explanation for the fact that state judges are subject to a mandatory retirement provision, while other state officials—whose performance is subject to greater public scrutiny, and who are subject to more standard elections—are not. *Judges' general lack of accountability explains also the distinction between judges and other state employees, in whom a deterioration in performance is more readily discernible and who are more easily removed*.
>
> The Missouri mandatory retirement provision, like all legal classifications, is founded on a generalization. It is far from true that all judges suffer significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all . . . . The people of Missouri rationally could conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal sufficiently inadequate, that they will require all judges to step aside at age 70.[126]

The *Ashcroft* opinion reflects an understanding that mandatory retirement makes sense under certain circumstances:

1. the job at stake involves "demanding tasks" requiring undiminished "mental capacity;"
2. the job at stake has a long duration without checks for "deficient" performance;
3. the job at stake involves a situation where inadequate performance is not "readily discernible;" and

126. *Id.* at 472–73 (emphasis added) (internal citations omitted).

4. the job at stake involves a "general lack of accountability" . . . even when "significant deterioration at age 70" may not exist.

These criteria apply to tenured professors. If the people of Missouri can "conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal sufficiently inadequate" that they may legally require mandatory retirement of their judges,[127] then it stands to reason that universities with similar concerns be permitted to implement mandatory retirement for tenured professors. If anything, the argument for the difficulty of ferreting out non-performing judges is less compelling than the problem in academia because the classroom is not a public venue and thus there is no public scrutiny. Furthermore, it is more draconian to force the permanent retirement from the bench of all seventy-year old judges, regardless of individual aptitude, than it is to end professors' tenure but allow for the rehiring of worthy professors on an annual contract basis.

In the wake of the *Ashcroft* ruling, disgruntled judges in several states have been unsuccessful in their attempts to challenge the constitutionality of state-imposed retirement.[128] For example, in Pennsylvania, the Supreme Court of Pennsylvania ruled against several judges who challenged mandatory retirement imposed by the state constitution.[129] The challenge centered on a claim that mandatory retirement abridged the right to equal protection of the law.[130] The plaintiffs argued that it was a "sensitive classification" and required "intermediate scrutiny."[131] They acknowledged that under a federal equal protection review age only requires a rational basis review but under the Pennsylvania Constitution there may be a higher level of scrutiny.[132] The Court disagreed:

> [W]e do not believe that the charter's framers regarded an immutable ability to continue in public service as a commissioned judge beyond seventy years of age as being within the scope of inherent rights of mankind. Rather, in view of the people's indefensible right to alter their government as they think proper through amending its basic charter, the mandatory retirement provision for judicial officers is subject to deferential, rational basis review

127. *Id.* at 473.

128. *See supra* note 109 and accompanying text.

129. *See* Driscoll v. Corbett, 69 A.3d 197, 200 (Pa. 2013) (noting that the section of the Constitution had been added by amendment and ratified by the electorate in 1968, which required retirement of judges at seventy, was challenged and affirmed in 1989 in Gondelman v. Commonwealth, 554 A.2d 896 (Pa. 1989)).

130. 69 A.3d at 202.

131. *Id.* at 202–03.

132. *See id*. at 203–02.

under equal protection and due process, and it satisfies that standard. [133]

Acknowledging that "certain societal circumstances may have changed since 1968 when the challenged provisions were added to the Constitution—and, indeed, some of the original justifications for mandatory retirement may not have reflected the most fair or even the most beneficial public policy,"[134] the Pennsylvania Court concluded that because the current policy still made rational sense, any change to the mandatory retirement policy would require a state constitutional amendment. This matter was dismissed in a Pennsylvania federal court as well.[135]

In the aftermath of these cases, states are free to amend their constitutions to change or to eliminate the requirement that judges retire at seventy. Interestingly, a number of bills are being considered in various states to extend the mandatory retirement age for state judges, but not to eliminate mandatory retirement entirely.[136] Indeed, the fact that at present the majority of states have some form of mandatory retirement for judges[137] suggests that there is an understanding that not all jobs should continue in perpetuity.

It is interesting to note that while the federal system does not have an age limit, it has been held to be a state's prerogative to manage its judiciary differently. This is similar to our approach to permitting but not requiring mandatory retirement in higher education. Many state systems do allow judges to return to hear cases on senior status after retirement, which is also

133. *Id.* at 214–15.

134. *Id* at 215.

135. *See* Jon Campisi, *Federal Judge Dismisses Suit by Pa. Judges Challenging Mandatory Judicial Retirement Age*, PENN. REC. (Sept. 25, 2013, 9:41 AM), http://pennrecord.com/news/11468-federal-judge-dismisses-suit-by-pa-judges-challenging-mandatory-judicial-retirement-age.

136. *See* Jesse McKinley, *Too Old to Judge? Albany Reconsiders*, N.Y. TIMES (June 4, 2013), http://www.nytimes.com/2013/06/05/nyregion/vote-in-albany-on-changing-retirement-ages-for-judges.html?pagewanted=all&_r=1& (discussing a proposed bill that would amend the New York Constitution to extend the retirement age to eighty for judges on the state supreme court and court of appeals). *See also* Tom Keane, *Could the New Retirement Age be Never?*, BOSTON GLOBE (Mar. 9, 2014), http://www.bostonglobe.com/opinion/editorials/2014/03/07/rod-ireland-forced-retirement-from-sjc-waste-wisdom/XvCVkre492fFkZLS8yE4MI/story.html (discussing mandatory retirement of judges in Massachusetts and arguing it does not make sense particularly when you can run for President of the United States when you are seventy or older). However Keane does not address that the entire country's votes for president after a grueling campaign cycle will clearly illuminate many defects of the candidates, whereas judges have job protection that makes removal difficult, which is why the Supreme Court, to date, has allowed states to continue to have mandatory retirement ages. *See supra*.

137. *See* Ashby Jones, *A New Lease for Old Judges*, WALL ST. J. (Mar. 5, 2013, 3:12 PM), http://online.wsj.com/news/articles/SB10001424127887323699704578328214137916682 ("Thirty-two states and Washington, D.C., currently have mandatory retirement ages for at least some judges.").

similar to our suggestion that tenure should expire at seventy, but some faculty should be allowed to continue on in year-to-year or multi-year contracts.

C. LAWYERS, DOCTORS, AND ACCOUNTANTS

In addition to the mandatory retirement ban exemption for public safety personnel, the ADEA contains a mandatory retirement ban exemption for executives that are sixty-five years old and employed in high policymaking positions.[138] The applicability of this provision has been commonly litigated in cases where an executive is a partner in a law, medical, or accounting firm. The distinction between a high policymaker and other employees is arguably analogous to the distinction between a partner and other employees.

The Supreme Court ruled in a 2003 decision, *Clackamas Gastroenterology v. Wells*, on the issue of what the proper standard should be for determining if a worker is an "employee" for discrimination law purposes.[139] This ruling was a necessary threshold matter:

> The Americans with Disabilities Act of 1990 (ADA or Act), like other federal antidiscrimination legislation, is inapplicable to very small businesses. Under the ADA an "employer" is not covered unless its workforce includes "*15 or more employees* for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." The question in this case is whether four physicians actively engaged in medical practice as shareholders and directors of a professional corporation should be counted as "employees."[140]

If the physician shareholders were employees, the business would employ a sufficiently large workforce for the ADA to apply to it. If, conversely, the physician shareholders were not employees, then the ADA would not apply.

In articulating a standard for determining whether a worker is an employee, the Court relied heavily on "the EEOC's focus on the common-law touchstone of control . . . and specifically by its submission that each of . . . six factors is relevant to the inquiry whether a shareholder-director is an employee."[141] Although the Court remanded for the lower court to apply

138. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256 § 12, 92. Stat. 189 (1978).

139. *See* Clackamas Gastroenterology Assocs. P.C. v. Wells, 538 U.S. 440 (2003).

140. *Id*. at 441–42 (internal citations omitted) (emphasis added).

141. *Id.* at 449. The six factors focus on the employer's control over the employee:

the standard, it also preliminarily applied the six-pronged test and held that the physician shareholders were probably not employees. This was because, among other reasons, "they apparently control the operation of their clinic, they share the profits, and they are personally liable for malpractice claims."[142] Thus the Plaintiff, bookkeeper Deborah Wells, and her claim against Clackamas under the ADA would probably not advance because the shareholder physicians were not employees and therefore the entity did not pass the threshold test of fifteen or more employees for twenty weeks.

This case has implications for the applicability of the ADEA to professional corporations and partnerships because the ADEA shares the ADA definitions of employee. Labeling someone a "partner" does not preclude that person from being an employee, especially in a large organization. After *Clackamas*, this question appears not to be entirely controlled by the form of the business. More important than the business's organizational form is the application of the six factors articulated by the EEOC and adopted by the Court.[143] Law firms have recently found their practices regarding partners' retirements scrutinized. In a famous case,[144] the law firm Sidley Austin Brown & Wood agreed to settle and entered into a consent decree and paid out $27.5 million to lawyers who were involuntarily moved from partner to counsel.[145] The attorneys in question were apparently more like employees than employers.[146] However, in a state court case dealing with a former partner suing Holland and Knight LLP, the judge ruled that the plaintiff was not covered by federal or state

> Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
> Whether and, if so, to what extent the organization supervises the individual's work
> Whether the individual reports to someone higher in the organization
> Whether and, if so, to what extent the individual is able to influence the organization
> Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts
> Whether the individual shares in the profits, losses, and liabilities of the organization.

Id. at 449–50 (quoting EEOC COMPLIANCE MANUAL, http://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1-d) (internal citations omitted).

142. 538 U.S. at 451.

143. *Id.* at 449-450.

144. EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002).

145. *See* Press Release, U.S. Equal Emp't Opportunity Comm'n, *$27.5 Million Consent Decree Resolves EEOC Age Bias Suit Against Sidley Austin* (Oct. 5, 2007), http://www.eeoc.gov/eeoc/newsroom/release/10-5-07.cfm.

146. *See id.*

law because he was a partner, and thus more like an employer than an employee.[147]

In 2012, the New York law firm of Kelley Drye & Warren settled with an eighty-one year old ex-partner whom they had "de-equitized".[148] They reportedly agreed to pay him $450,000 for work from 2001 to 2010 and $124,000 for 2011. He will continue to receive 12 percent of fees from a specific client. The firm had changed the blanket policy but decided to settle because of the costs associated with litigation. While there is no additional comment, it can be inferred that the firm chose to make the continuation of partner status at any age contingent on performance rather than age. Billable hours and client fees are easily measurable and it would make more sense to structure a firm that way rather than assume that a fifty-five and sixty-three year old partner are presumptively more productive than a seventy year old. However, in a survey by Altman and Weil Inc., half the law firms with fifty or more lawyers had retirement policies in 2007.[149]

Accounting firms have been dealing with challenges to their well-established mandatory retirement policies, partnership agreements, and the terms of succession.[150] In 2013, the EEOC continued to investigate the mandatory retirement policies of PricewaterhouseCoopers, which has a policy requiring partners and principals to retire at sixty.[151] As of this writing, the EEOC has not filed suit. The Wall Street Journal editorial reminds readers that "business owners are exempt on the logical grounds that they cannot discriminate against themselves."[152] They note that if, "the Commission goes forward, it will mean that any partnership with a fixed retirement age could be cited next. It would also open the door to lawsuits

147. *See* Weir v. Holland & Knight, LLP, No. 603204/07, 2011 WL 6973240 (N.Y. Sup. Ct. Dec. 9, 2011) (finding under state law that after applying the *Clackamas* factors, the partner was not an employee).

148. Joe Palazzolo, *Kelley Drye Settles with EEOC Over Age Bias Claims*, WALL ST. J. (Apr. 10, 2012, 7:19 PM), http://blogs.wsj.com/law/2012/04/10/kelley-drye-settles-with-eeoc-over-age-bias-claims/ (explaining the factual basis for the settlement).

149. *See* Joe Palazzolo, *Law Firm Nears Deal in Age Suit*, WALL ST. J. (Mar. 7, 2012, 6:35 PM), http://online.wsj.com/news/articles/SB10001424052970203961204577267800109649884 (including figures about retirement).

150. *See* Caleb Newquist*, AICPA Asks EEOC to, Respectfully, BTFO of Big 4's Mandatory Retirement Policies*, GOING CONCERN (July 1, 2013), http://goingconcern.com/post/aicpa-asks-eeoc-respectfully-btfo-big-4s-mandatory-retirement-policies.

151. *See id.*

152. Editorial, *Discriminating Against Partnerships*, WALL ST. J. (June 3, 2013, 7:02 PM), http://online.wsj.com/news/articles/SB10001424127887323855804578511693604180764 (discussing the logic of not allowing owners to be considered employees for discrimination purposes).

from retired partners for back pay or re-employment."[153] The Wall Street Journal castigates the Obama administration for allegedly reviewing Deloitte and KPMG and states, "the agency is in the midst of a campaign to protect millionaires."[154] There may not be great sympathy for partners who signed agreements and have been handsomely paid in seven figures for twenty years. Should a group of partners be able to control the terms of their partnership? And yet, the *Price Waterhouse v. Hopkins* case did establish that in selecting a partner, firms could not ignore federal anti-discrimination laws.[155]

The utilization of mandatory retirement has been limited and restricted to public safety personnel, judges, high policymaking executives and those who are not deemed to be employees, like accountant partners and lawyer owners. The large firms raise questions whether one of 2000 is an owner or an employee. However, that has not been decided at this time except on a fact specific, case-by-case basis. Nonetheless, the previous exemption for tenured faculty should be reinstated allowing for the expiration of tenure at seventy. For reasons more compelling than those used by law and accounting firms in choosing to continue with mandatory retirement, higher education should be allowed this flexibility.

D. PUBLIC SAFETY CASES

Public safety cases are not as persuasive because of the distinction between the physically challenging duties of police or fire personnel and the lack of physical demands of professors' duties. [156] Nonetheless the following cases show the court's support for an ADEA mandatory retirement ban exemption that was reinstated after proof that it was good public policy. The exemption for tenured professors similarly has been proven to be good public policy.

The Seventh Circuit issued a significant opinion in 2004 in *Minch v. City of Chicago*.[157] The Court recounted the history of the ADEA and the

153. *Id.*

154. *Id.*

155. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (stating that Title VII applies to partner selection).

156. However, one could argue that managing a well-researched, prepared, organized, lively, and interactive, class for two or three hours requires great physical energy and stamina.

157. Minch v. City of Chicago, 363 F.3d 615 (7th Cir. 2004) (holding that mandatory retirement of firefighters was not contrary to the ADEA). In 2007, the Seventh Circuit decided a related issue involving the same parties. Minch v. City of Chicago, 486 F.3d 294 (7th Cir. 2007) (holding that mandatory retirement did not deprive the plaintiffs of their due process rights).

restoration of the exemption in 1996 for police officers and firefighters, which permitted states and local governments to reinsert age limits.[158] In 2000, the Chicago City Council reinstated a mandatory retirement age of sixty-three for certain fire and police personnel for the articulated reasons of "public safety."[159] The ADEA exemption required that any discharge be "pursuant to a bona fide retirement plan that is not a subterfuge to evade the purposes of [the statute]."[160] The four police and firefighter plaintiffs argued that one city councilor's language of "old-timers" and "deadbeats" showed the true reason for reinstatement of mandatory retirement.[161] The Seventh Circuit, however, did not accept that argument:

> . . . [T]he statutory exemption expressly permits the City to reinstate its mandatory retirement program, and the inevitable result of any such program will be to force older employees from the workforce and create openings for younger workers. That some City officials affirmatively wished for that result, is immaterial insofar as section 623(j)(2) is concerned. *Betts and Bell* require proof that the City was using mandatory retirement as a vehicle to commit some other type of age discrimination forbidden by the ADEA. And here *the plaintiffs can postulate no type of discrimination other than the very type of age-based discrimination (mandatory retirement) that the statute permits*.[162]

The Court then remanded back to the district court to dismiss the ADEA claims.[163]

In a subsequent First Circuit case *Correa-Ruiz v. Fortuno,*[164] police officers challenged Puerto Rico's Law 181, which in 2003 lowered the mandatory retirement age from sixty-five to fifty-five for police and firefighters.[165] The motivation was "'to give a higher security to the people and to protect the security' of police and firefighters."[166] In 2005, this was changed again, wherein "police and firefighters with thirty years of service

158. 363 F.3d at 618–20.

159. The City of Chicago moved to dismiss the complaints, but the district court denied the motion, holding that the plaintiffs might be able to prove that the ordinance amounted to a subterfuge to evade the purposes of the ADEA. Drnek v. City of Chicago, 192 F. Supp. 2d 835 (N.D. Ill. 2002). On reconsideration, the district court certified the following question for interlocutory appeal: "[W]hether a plaintiff can demonstrate subterfuge under § 623(j)(2) with *any* kind of evidence if there is no violation of § 623(j)(1)." Drnek v. City of Chicago, 205 F. Supp. 2d 894, 9000 (N.D. Ill. 2002).

160. 29 U.S.C. § 623(j)(2) (2012).

161. 363 F.3d at 621.

162. *Id.* at 630 (emphasis added).

163. *Id.* at 631.

164. Correa-Ruiz v.Fortuno, 573 F.3d 1 (2009).

165. *Id.* at 7.

166. *Id.* (quoting the Preamble of Puerto Rico's Law 181).

could take voluntarily retirement at fifty-five but the mandatory age was shifted to fifty-eight.[167] The plaintiffs filed suit and the District Court dismissed all claims with prejudice.[168] They appealed and the Court focused on three possible rationales for recovery:

> (1) plaintiffs' terminations in accordance with Law 181 were unlawful because the ADEA bars a state or local government from lowering a retirement age that was in effect as of March, 3, 1983, (2) plaintiffs' mandatory retirement violated the ADEA because they were not provided with fitness testing to determine their capacity to continue working, and (3) plaintiffs' terminations did not comply with § 623(j)(2) of the ADEA because their discharges were "not pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.[169]

The Court rejected the Plaintiffs' analysis and found that the 1996 amendment to the ADEA allowed the state to lower the retirement age.[170] The Court then addressed the issue of whether fitness testing was a condition precedent to retirement. They noted that "[the statute] unambiguously requires testing as a pre-condition to mandatory retirement only for those employees who would be discharged after the Secretary of HHS promulgates appropriate tests."[171] However since no tests had been issued, there was no duty to administer them. The Court cited the aforementioned *Minch* decision for support.[172] Lastly the Court examined the subterfuge argument. As in *Minch*, the Court reaffirmed the right of ". . . government employers who are concerned about the effectiveness of older public safety officers to impose mandatory retirement at age fifty-five."[173] Additional arguments about a Fourteenth Amendment violation of due process or "arbitrariness" were also rejected and no individualized hearings were required.[174] The Court affirmed the lower court's decision. A number of other cases in other jurisdictions have had similar results and this outcome is well settled law.[175]

167. *Id.*

168. *Id.* at 3–4. For the lower court decision, see Correa-Ruiz v. Calderon-Serra, 411 F. Supp. 2d 41 (D.P.R. 2005).

169. *Correa-Ruiz*, 573 F.3d at 8.

170. *Id.* at 9–10.

171. *Id.* at 11.

172. *Id.* at 11–14.

173. *Id.* at 14.

174. *Id.* at 15–16.

175. Sadie v. City of Cleveland, 718 F.3d (6th Cir. 2013) (upholding mandatory retirement at age sixty-five for police and firefighters); Badgley v. Walton, 10 A.3d 469 (Vt. 2010) (upholding mandatory retirement at age fifty-five for public safety officers); Police Benevolent Ass'n of the N.Y.

V. STATUTORY PROPOSAL

While not quite as dramatic as the public safety implications behind the rationale for mandatory retirement of public safety personnel, the stagnation of higher education faculty caused by the coupling of tenure and the abolition of mandatory retirement is nonetheless a more compelling case for mandatory retirement than the case for mandatory retirement of judges, and calls for a statutory course correction. The value of tenure in encouraging free speech and allowing for scholarly experimentation is significant but becomes outweighed at some point by the rigidity of tenure. Rather than abandon the tenure system, we propose an age cap on tenure to preclude the challenges it can cause with the removal of senior faculty with diminished performance. Since seventy was the age at which Congress last capped ADEA protection and permitted mandatory retirement in higher education, it seems a logical age at which to cap tenure. This cap would allow for the retention—on a year-to-year or multi-year contractual basis—of those at or over seventy who continue to be productive. We are proposing an age cap on tenure, not an age cap on employment.

Since, conceptually, we are proposing that tenure, rather than employment, terminate at age seventy, the simplest approach would be to have tenure expire at age seventy and to have everyone's contract automatically convert to a lecturer contract, renewable annually at the option of the university. In this way the tenured faculty member would retain their position but would now be subject to the same performance requirements that lecturers already are. Since Congress removed the ADEA's upper age cap of seventy in 1986,[176] these professors would still be protected against age discrimination by ADEA. This means that if the

State Troopers v. Bennett, 477 F. Supp. 2d 534, 540–42 (N.D.N.Y. 2007) (upholding mandatory retirement at age fifty-seven for state troopers); MacDonald v. Bd. of Comm'rs of Pilots of New York, 523 F. Supp. 949 (S.D.N.Y. 1981) (upholding mandatory retirement at age sixty-five for the issuance of pilot licenses for watercraft); Johnson v. Lefkowitz, 566 F.2d 866 (2d Cir. 1977) (upholding mandatory retirement at age seventy for civil service employees); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (upholding mandatory retirement at age fifty for Massachusetts state police officers). This case predated the ADEA Amendment, and the case's result has been altered by statute to sixty-five with some exceptions. 1987 Mass. Acts 790-92 (codified at MASS. GEN. LAWS ANN. ch. 32 §§ 1, 3, 26(3)(a) (West 2013). For a discussion on implementation, see Susan Spencer, *Some Towns Seek to Sidestep Police, Fire Retirement Age*, WORCESTER TELEGRAM & GAZETTE (May 20, 2014), http://www.telegram.com/article/20140520/NEWS/305209805/1116http://www.telegram.com/article/20140520/NEWS/305209805/1116).

176. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986) (amending the Age Discrimination in Employment Act of 1967 to remove the maximum age limitation applicable to employees who are protected under the Act).

university wished to discharge the professor or refuse to renew their lecturer contract, it would need some reason other than simply their age to do so.[177] However, to achieve this construct without unduly impacting other aspects of the ADEA and its amendments, we need to work within the statute and with the authority that Congress has.

Congress has no authority to require or even permit an age-based termination of tenure since tenure is not a statutory creation but, rather, a creation of higher education. Conversely, Congress can indeed permit mandatory termination of an employment contract at a specific age since it is the entity that outlawed this practice in the first place.[178] To avoid lengthy congressional debates, months of wordsmithing, and the need to rewrite other sections of ADEA, we propose an explicit re-adoption of the relevant 1986 ADEA language:[179]

SPECIAL RULE FOR TENURED FACULTY

SPECIAL RULE. Section 12 of the Age Discrimination in Employment Act

177. In general, there would have to be a performance related reason.

178. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3, 12, 92 Stat. 189, 189–90 (1978) (outlawing compulsory retirement for those under age seventy unless they are tenured professors at institutions of higher education or a "bona fide executive(s) or (hold) a high policymaking position").

179. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986). To be clear, in the original ADEA (1967), Section 12 of the statute consisted of one sentence that limited the prohibition of the ADEA to workers between 40 and 65. Age Discrimination in Employment Act of 1967, Pub L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–634 (2012)). The 1978 ADEA Amendments expanded Section 12 to four subsections, labeled "a" through "d". The new subsection "a" was the original one sentence provision limiting coverage, but it now stated that the prohibitions were limited to workers between 40 and 70. Subsections "b" and "c" are not relevant here. Subsection "d" added the mandatory retirement ban exemption for tenured professors, allowing for mandatory retirement of tenured professors to begin at 65 instead of 70 (as the amended statute now required of other industries). Age Discrimination in Employment Act Amendments of 1978, Pub L. No. 95-256, sec. 3, § 12, 92 Stat. 189, 189–90.

The 1986 ADEA Amendments—specifically Section 6 of those Amendments, the "Special Rule for Tenured Faculty"—did not add any further subsections to Section 12 of the original ADEA. Rather, Section 6 contained 3 major provisions: section 6(a) merely moved the age at which mandatory retirement for tenured professors would be allowed from 65 to 70; section 6(b) set a termination date of December 31, 1993 for the exemption absent further congressional action; and section 6(c) set out the requirement that a study be commissioned "to analyze the consequences of the elimination of mandatory retirement on institutions of higher education" with results to be reported to Congress and the President by January 1, 1992. Age Discrimination in Employment Amendments of 1986, Pub L. No. 99-592, sec. 6, § 12, 100 Stat. 3342, 3344.

The portion of the 1986 ADEA Amendments that we propose to re-adopt is only Section 6(a) (the subsection of the "Special Rule for Tenured Faculty" which retained the exemption from the ban on compulsory retirement for tenured professors 70 and older). We do NOT propose re-adoption of Section 6(b) (the subsection which set the termination provision) or Section 6(c) (the subsection which required the study).

> of 1967 [as amended] (29 U.S.C. 631) is [further] amended by adding at the end thereof the following [new] subsection:
>
> "(d) Nothing in this Act shall be construed to prohibit compulsory retirement for any employee who has attained seventy years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965)."

To make explicit that adoption of a compulsory retirement policy is *entirely optional* and that the age at which such a policy applies may be *higher* than seventy, we would add the following language:

> COMPULSORY RETIREMENT POLICY OPTIONAL. Nothing in Section 12(d), as amended, shall require an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965) to adopt a policy of compulsory retirement. Absent such a policy, employees described by Section 12(d), as amended, retain all their contractual rights and also remain protected by the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631), as amended.
>
> AGE FOR COMPULSORY RETIREMENT. Nothing in Section 12(d), as amended, shall require an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965) that chooses to lawfully adopt a compulsory retirement policy to impose this policy at age seventy. Section 12(d), as amended, merely permits such policies beginning at age seventy. Compulsory retirement at an age younger than age seventy would violate Section 12(d), as amended, but compulsory retirement at any age above age seventy would not violate Section 12(d), as amended.

To make explicit the concept that compulsory retirement of a tenured professor does not preclude a university from immediately, or later, rehiring that professor with a non-tenured Lecturer or Researcher contract, we would add the following language:

> OPTION TO CONTINUE EMPLOYMENT. Nothing in Section 12(d), as amended, shall preclude an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965) from hiring or rehiring a person who has attained seventy or more years of age under a contract without unlimited tenure.
>
> ADEA PROTECTION CONTINUES. A person hired or rehired after compulsory retirement, as permitted in Section 12(d), as amended, shall retain all the protections afforded by the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631), as amended.

To ensure consistency and fairness in the implementation of compulsory retirement policies, we would add the following language:

COMPULSORY RETIREMENT PROCEDURES. If an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965) chooses to adopt a policy of compulsory retirement, as permitted by Section 12(d), as amended, that policy must provide as follows:

> All persons who have attained seventy years of age (or whatever higher age the employer has set in its policy) who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at said institution must be retired at the age specified by the institution's policy or at an equivalent period of time after attaining the specified age, such as the end of the academic year or current contract year.
>
> A person subject to compulsory retirement under the provisions of Section 12(d) shall be notified at least one year before the imposition of compulsory retirement as to whether the university plans to issue a new, non-tenured contract to replace the tenured contract at the time of compulsory retirement. Such new contracts need not be uniform across all retired employees and need not be contracts for full-time work but they must be issued and administered in full compliance with the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631), as amended.

To address the issue of fair treatment of those tenured professors who would already be seventy or older at the date of the implementation of our proposed amendment, we would add the following language:

ADEQUATE NOTICE TO THOSE ALREADY SEVENTY OR OLDER.

a. If an institution of higher education (as defined by section 1201(a) of the Higher Education Act of 1965) chooses to adopt a policy of compulsory retirement, as permitted by Section 12(d), as amended, then any employee who has attained seventy or more years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at said institution at the time of the effective date of this amendment shall be guaranteed at least one additional academic year of continued employment under the terms of said contract. Such an employee may immediately, upon the effective date of this amendment, be notified of said institution's intentions to impose compulsory retirement upon said employee but this compulsory retirement may be imposed no sooner than one full academic year after the effective date of this amendment.

b. A person subject to compulsory retirement under the provisions of Section 12(d) shall be notified at least one year

> before the imposition of compulsory retirement as to whether the university plans to issue a new, non-tenured contract to replace the tenured contract at the time of compulsory retirement. Such new contracts need not be uniform across all retired employees and need not be contracts for full-time work but they must be issued and administered in full compliance with the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631), as amended.

We believe that these amendments, reinstating the 1986 provisions allowing for mandatory age-based retirement of tenured faculty in higher education but retaining the removal of the age cap on ADEA protection, would effectively protect the interests of both universities and professors. Universities would be free to remove unproductive scholars and ineffective teachers, while able to retain those that still add sufficient value to warrant their relatively high salaries and their negative impact on hiring opportunities. At the same time, tenured professors would retain the job security and free speech rights afforded them by tenure for the bulk of their academic careers. They would not be forced to retire entirely at seventy unless their performance warranted such an outcome. If their employment did continue, it would continue to be protected against age discrimination.

In addition, and not insignificantly, this proposal would normalize conversations about retirement. By making it a statutory requirement that universities notify tenured faculty of their post-retirement employment intentions a year before tenure expiration, the now forbidden and potentially offensive conversation between the older professor and his or her Chair or Dean becomes something that instead is required by law. This should remove the stigma and the presumed implications of ageism or incompetence from such conversations. Instead, the conversations can hopefully evolve to useful dialogues about performance and the professor's own wishes for retirement. This will allow Chairs to better plan staffing and hiring for upcoming years and will allow older professors an opportunity to prove themselves worthy of retention while also providing a forum for possibly emotional conversations about transitioning. In all, it would be a win-win situation.

VI. CONCLUSION

While many thought that college professors would continue to retire as they always had,[180] a recent analysis found that the number of professors

180. *See* discussion *supra* Part III, notes 53–106 and accompanying text.

that are sixty-five or older more than doubled between 2000 and 2011.[181] In addition, a study from 1991 found that the group of more than one quarter senior law faculty that had "no plans or do not know when they will retire" would exacerbate the situation impeding the entry of new law professors.[182] One can only conclude that the 2011 numbers spell a worsening of this situation.

No one could anticipate that after the economic recession began in 2008 that many people would believe that they might work forever. In a 2014 world, defined benefit plans are no longer routinely offered to employees as a plan of choice in the United States.[183] Understanding why more professors continue to work past seventy is simple math. The economics are hard to argue with—if a professor works five additional years after seventy and earns $150,000 a year, that adds $750,000 to his or her gross income, which will significantly augment the ongoing Social Security payout or rebuild a nest egg depleted by college tuitions, medical bills, divorce expenses, or spousal job loss.[184]

The demographics of the reality of retirement in 2014 continue to be different than what anyone could have projected:

> Nearly two thirds of Americans between the ages of forty-five and sixty say they plan to delay retirement. That was a steep jump from just two years earlier, when the group found that 42% of respondents expected to put off

181. Audrey Williams June, *Aging Professors Create a Faculty Bottleneck: At Some Universities, 1 in 3 Academics Are Now 60 or Older*, CHRON. OF HIGHER EDUC. (Mar. 18, 2012), http://chronicle.com/article/Professors-Are-Graying-and/131226/ (highlighting the problem of older faculty). Also, at Cornell, the number of professors in their seventies has more than doubled since 200, and they now make up 6 percent of the entire school's faculty, whereas other comparably sized institutions have 7 percent of faculty in that age group. *Id.*

182. David S. Day, Thomas C. Langham & Suzan F. Pearson, *Senior Law Faculty Attitudes Toward Retirement*, 41 J. LEGAL EDUC. 397, 403 (1991). For additional discussion and lack of awareness that this could actually happen, see Finkin, *supra* note 67, at 60 ("If uncapping does present significant institutional problems, a matter as yet by no means certain, the academic community would be better advised to explore voluntary early retirement programs and pension policies.").

183. Butrica et al., *supra* note 44 (discussing defined benefit plans). But consider that President George W. Bush tried to privatize Social Security, which is similar to a benefit plan but invested by the government, to be more like a private defined contribution plan where individuals could control the investment of funds and that they and their heirs would "own" the asset but Bush met with no success. *See* Jon Perr, *Romney and Ryan Both Supported Privatization of Social Security*, DAILY KOS (Aug. 11, 2012, 8:51 PM), http://www.dailykos.com/story/2012/08/11/1119157/-Romney-and-Ryan-both-supported-privatization-of-Social-Security. Presidential candidate Mitt Romney also supported it. *Id.*

184. *See generally* Elizabeth Warren, *The Over-Consumption Myth and Other Tales of Economics, Law, and Morality*, 82 WASH. U. L.Q. 1485, 1502–06 (2004) (discussing that American families do not have financial difficulty because of "over-consumption" but rather because of increasingly expensive basic expenses like housing, health insurance, transportation, and child care).

> retirement. The increase was driven by the financial losses, layoffs and income stagnation sustained during the last few years of recession and recovery . . . .[185]

These are new economic times. Tenure was instituted when both the economy and the average life expectancy were significantly different than today.[186] We still believe in the viability of tenure but we believe in it as originally contemplated at the time of the 1986 Amendments when a professor's tenure would end at seventy because the exemption for higher education permitted mandatory retirement at seventy.[187]

Just as the exemption for safety personnel was reinstated when it became clear that this was good public policy,[188] we believe that the exemption from the abolition of mandatory retirement should be reinstated for tenured professors. Changing the retirement process for tenured professors is critical for the viability and future of higher education. Doing so would allow new faculty who are less expensive to the institution and who have current research to enter the tenure track, thereby bringing essential renewal to the faculty. This does not mean that older faculty will be shut out of higher education; rather, their tenure will simply expire and faculty over seventy will be treated like other non-tenured faculty members who have multi-year, yearly, or semester contracts. Nothing would preclude a university from offering a multi-year contract to a person it is anxious to retain, despite being older than seventy, as long as that person continued to contribute and also to satisfy the particular needs of that department.

This will return the legal landscape to a pre-1994 place where tenure protection exists up to seventy years of age. After that, universities would be free to deal with professors as they deal with all other employees—in a non-discriminatory way. Universities may choose not to offer a year-to-year contract to some post-seventy professors, particularly those who

- Are not as qualified or as good a current fit with the department's current needs as other candidates;
- Do not meet the current standard of qualifications;

185. *See* Weber, *supra* note 79 (quoting Gad Levanon, co-author of a Conference Board Report 2012 containing a survey of 15,000 people).

186. *See id.*

187. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986).

188. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

- Have not published anything or very little of quality for some time;
- Are not research active in an institution where this is or has become a faculty requirement;
- Demonstrate relatively poor teaching by lack of enrollments in classes, inadequate syllabi and materials by current standards, failure to use requisite technologies, or student and peer teaching evaluations that are significantly below the average, indicating a gross disconnect with the students.

Of course, just because one has white hair, a cane, or hearing aid, does not mean that one cannot teach or produce valuable scholarship. Faculty would have to be assessed individually and not based upon stereotypes of age or disability. And, even though they would have to compete for their jobs on an annual basis just as lecturers and other educators do, post-tenured faculty would still be in a better position than most at-will workers in the United States because these faculty would have a yearly contract.

The crisis in higher education, including its cost and accessibility, dictates that as a society we must address this issue.[189] If the reinstatement of the exemption would position higher education to better address the challenges of the future and to remain flexible enough to adjust and to respond to new demands, society should be willing, a second time, to adjust the law. Twenty years after the expiration of the exemption, it is time to take a second look. Reinstating the exemption, with the limiting language that this Article proposes, would rectify the mistake of coupling the

189. For a discussion of the possible changes anticipated in higher education, see *Creative Destruction*, ECONOMIST (June 28, 2014), http://www.economist.com/news/leaders/21605906-cost-crisis-changing-labour-markets-and-new-technology-will-turn-old-institution-its (discussing the revolution in higher education brought about by "three forces: rising costs, changing demand and disruptive technology.") The article goes on to say that "[t]he result will be the reinvention of the university. . . . Politicians will inevitably come under pressure to halt this revolution. They should remember that state spending should benefit society as a whole, not protect tenured professors from completion." *Id.*; *The Digital Degree*, ECONOMIST (June 28, 2014), http://www.economist.com/news/briefing/21605899-staid-higher-education-business-about-experience-welcome-earthquake-digital (discussing the "three disruptive waves [that] are threatening to upend established ways of teaching and learning," including a funding crisis, technological revolution, and the expanded pool of learners—not just the elite few); Clayton Christenson, *Still Disruptive*, ECONOMIST (June 13, 2013), http://www.economist.com/whichmba/clayton-christensen-still-disruptive (noting "[s]o I'd be very surprised if in the next few years we don't see hundreds of universities in bankruptcy).

abolition of mandatory retirement with tenure—a "bad idea" now ripe for change.[190]

190. *See* de Vise, *supra* note 1 (discussing Professor Larry Summers' ideas and critique of tenure without limits).