The Tenure Tax: Social Security Withholdings on Academic Retirement after University of Pittsburgh v. United States

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SOCIAL SECURITY WITHHOLDINGS ON ACADEMIC RETIREMENT AFTER UNIVERSITY OF PITTSBURGH V. UNITED STATES

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INTRODUCTION

The purchase of tenure rights, an increasingly common practice by American colleges and universities, is a mutually beneficial way of extinguishing a professor's perpetual right to employment at a school. In the transaction, the professor receives either a lump-sum payment or an augmentation of her previously allocable retirement package. Meanwhile, the university benefits from freed financial resources and additional flexibility within its academic departments. These transactions, however,

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1 See Everett et al., supra note 1 (noting the frequency with which tenure buyouts occur at major universities and their growing popularity in recent years); Jon J. Jensen, Reducing the Employment Tax Burden on Tenure Buyouts, 80 N. D. L. Rev. 11, 11 (2004) ("Colleges and universities have utilized the purchase of faculty tenure for a variety of reasons ranging from efforts to meet decreased salary budgets to encouraging the turnover of existing faculty.").

2 See Everett et al., supra note 1 (noting that "[o]ne of the tools that has become increasingly popular in recent years to gain such flexibility is the 'early out' incentive package, where faculty members meeting certain age and/or service criteria are offered a supplemental financial package to retire early" and that "[t]his financial incentive is often structured as additional cash or enhanced retirement benefits created by adding service years and/or current age years to the retirement formula"); see also Jensen, supra note 1, at 13 (discussing that as part of the "early retirement agreement the employees agree to give up tenure and/or contract rights, agree not to seek employment with another North Dakota public university or college, and further agree to waivers any claims they may have under the Age Discrimination in Employment Act").

3 Everett et al., supra note 1 (explaining that there are many reasons why a university would offer such a package including that "the incentive program may be designed to free up dollar resources by eliminating faculty lines to restore spending plans lost to budgetary cuts" or "that the offer may be used as a method of opening tenure-track positions when additional faculty lines are otherwise not available"); Jensen, supra note 1, at 13 (noting that the early retirement program is used to make personnel changes, deal with budgetary problems, curriculum needs and to occasionally terminate employment when there was insufficient cause for dismissal).
have a significant shortcoming: Revenue Ruling 2004-110 suggests that these tenure buy-outs be subject to Federal Insurance Contribution Act ("FICA") taxation, which taxes employees and employers on amounts broadly defined as "wages." As a result, professors accepting tenure purchase offers will face FICA withholding on their retirement packages, while their university employers will be forced to match their newly retired employees' contributions to the Social Security system. This will effectively transfer hundreds of millions of dollars in tax liability from the savings accounts of professors at colleges and universities throughout the United States into the grouped insurance plan of the nation – Social Security.

Prior to Revenue Ruling 2004-110, courts had been split with regard to taxation of tenure buy-outs. The Eighth Circuit Court of Appeals was the first court to speak affirmatively on the matter through its decision in North Dakota State University v. United States (hereinafter "NDSU"). In NDSU, the university offered high-ranking, tenured faculty an opportunity to voluntarily enter into an early retirement program, which would pay up to 100 percent of that employee's most recent annual salary in return for his/her tenure rights. This transaction would effectively terminate all elements of his/her employment contract with the university. While the

4 Rev. Rul. 04-110, 2004-2 C.B. 960 ("[A]n amount paid to an employee as consideration for cancellation of an employment contract and relinquishment of contract rights is ordinary income, and wages for purposes of the FICA."); Federal Insurance Contribution Act, I.R.C. § 3121(a) (2000) (defining "wages" broadly as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash").

5 See J. Aaron Ball, The Sea Clammers Doctrine: Reeling in Private Employment Tax Claims in Worker Misclassification Cases, 1 DEPAUL BUS. & COM. L.J. 215, 215–16 (2003) (explaining that "in a traditional employer-employee relationship, the employer withholds a percentage of the employee’s wages from the employee's paycheck and the employer remits the money withheld to the federal government" and at "the same time, the employer also remits a FICA tax (subject to certain credits) in an amount equal to the percentage of wages withheld from the employee, therefore, “the employee and the employer each share approximately one-half of the FICA tax liability”); see also McDonald v. S. Farm Bureau Life Ins., 291 F.3d 718, 721 (11th Cir. 2002) (discussing the traditional employer-employee relationship and how the employee pays half of the total FICA tax owed while the employer pays the other half).

6 See generally Univ. of Pittsburgh v. United States, 507 F.3d 165, 167 (3d Cir. 2007) (noting that the University of Pittsburgh alone had over two million dollars withheld from tenure purchase agreements); N.D. State Univ. v. United States, 255 F.3d 599, 603 (8th Cir. 2001) (explaining how the employer is required to pay an equal amount to the amount withheld from the employee's wages for FICA taxes to further the policies behind the original Social Security Act).

7 See NDSU., 255 F.3d at 607 (holding that tenure purchases are not subject to FICA tax); but see Appoloni v. United States, 450 F.3d 185, 196 (6th Cir. 2006) (holding that tenure purchases are subject to FICA tax).

8 NDSU., 255 F.3d at 599.

9 Id. at 600–01.

10 Id. at 601. Accepting the Early Retirement Agreement would relinquish the employee’s rights to tenure under any contract or employment theory, would bar them from seeking future employment at the school, and would release any potential legal claims for wrongful discharge. Id.
university originally paid FICA withholding on these tenure buy-outs, it filed a refund claim for payments made in previous years after receiving assurance from the Social Security Administration that such retirement payments were not subject to FICA taxation. Nonetheless, the Internal Revenue Service (“IRS”) denied the university’s refund claim, and the university brought suit thereafter. In a pro-taxpayer decision, the District Court found that the tenure buy-outs were factually equivalent to a contractual purchase of a property right, as the university was buying the professor’s greatest asset, perpetual employment, and not remuneration for past services. Thus, the District Court found that the buy-outs were not subject to FICA. The Circuit Court affirmed.

The Sixth Circuit Court of Appeals, however, interpreted the tax implications of these tenure buy-outs differently in Appoloni v. United States. In Appoloni, three Michigan public school teachers participated in an “employee severance plan,” as they had reached ten years of service with the school district and were now classified as “tenured,” also qualifying for a salary raise. This severance plan allowed the school district to maintain low salaries for employees and prevent teacher layoffs or other future staffing problems. After agreeing to the severance, the school district withheld FICA from the teachers’ disbursements, and the three individuals filed a refund claim much the same as the university did in NDSU. Once again, the IRS denied the refund claim, and suit was brought against the government. Here, the Court found that the severance package was not a contractual purchase, but rather payment for prior services accruing over the past ten years of employment. As such, these

11 Id. at 602.
12 Id.
14 Id. at 1052.
15 NDSU, 255 F.3d at 606–07.
16 Appoloni v. United States, 450 F.3d 185, 189–96 (6th Cir. 2006). The court concluded that these transactions constituted payment for prior service. “Relinquishment of tenure rights was simply a necessary and incidental part of accepting the buyout” and “in order to offer the teachers a buyout, the school districts had to ask that they give up their right to future employment—the same as with any severance package.” Id.
17 Id. at 187.
18 Id. at 187–88. “The purpose of this plan was to ‘help prevent teacher layoffs and to lessen the Board’s economic responsibility in the area of staffing’.” Id. at 188.
19 Id.
20 Id. at 188.
21 Id. at 189–96. “[T]he payments at issue were not in exchange solely for the tenure rights; they were in exchange for the teachers’ early retirement, and, as such, were essentially severance payments.” Id. at 193. Therefore, the Sixth Circuit is stating that the school district has no interest in owning intangible tenure rights once possessed by its employees; its intent in agreeing to the buyout was to
severance payments fall within the broad scope of "wages" subject to FICA. The Court, however, did distinguish Appoloni from NDSU based on the requirements for earning tenure rights. While the educators in Appoloni automatically earned tenure for years of service, the professors in NDSU received tenure based upon the quality of their work, thus time served was not an automatic trigger for tenure, but rather a prerequisite.

The circuit split came under scrutiny in 2007, when the Third Circuit was faced with Univ. of Pittsburgh v. United States ("Pittsburgh"). The facts in Pittsburgh are substantially similar to those in NDSU. Between 1982 and 1999, the university offered five separate tenure purchase plans to faculty that qualified based upon quality of service (most notably, tenure), time served and age. During that time, over two million dollars in FICA were withheld from the university and the professors in these tenure purchase agreements. After the NDSU decision came down in 2001, the university filed a refund claim with the IRS totaling $2,196,942.78. This claim was denied, and the university sued for recovery of the withholdings. The District Court relied on NDSU, holding that the nature of academic tenure creates a constitutionally and contractually protected right to employment that can only be extinguished by the professor. Therefore, the District Court held that this was a contractual purchase of the underlying right of employment. Upon appeal, however, the Third Circuit reversed.

22 Id. at 189–91. "[W]e have . . . emphasized that the phrase ‘remuneration for employment’ . . . should be interpreted broadly." Id. at 190.
23 Id. at n.5. "In North Dakota . . . [t]enure . . . was not automatic; the North Dakota Board of Higher Education considered several factors in making tenure determinations, ‘including scholarship in teaching, contribution to a discipline or profession through research, other scholarly or professional activities, and service to the institution and society.’" Id.
24 Id.
25 507 F.3d 165 (3d Cir. 2007).
26 Id. at 166. Both cases involved university professors who had reached tenure and were in a reasonable position to retire from the profession. Id. This was determined by the age of the professor as well as the number of years in service to the university. Id. But, tenure served as the prerequisite condition, and it was earned based upon quality of work demonstrated in their academic careers. Id.
27 Id.
28 Id.
29 Id. at 167. The NDSU decision was issued in July 2001, and the University of Pittsburgh filed its refund claim in November 2001. Id.
30 Id. at 166.
31 Univ. of Pittsburgh v. United States, No. 04-1616, 2005 WL 3619245, at *3 (W.D. Pa. 2005). "Here, under the University’s policy and bylaws, tenure is a lifetime appointment; and absent an agreement to voluntarily relinquish tenure, tenured faculty members may only be terminated for cause or financial exigency after a due process hearing." Id. at n.2. "Thus, as in North Dakota State Univ., tenured faculty members at the University have a contractual and constitutionally protected property interest in continued employment." Id.
32 Id. at *6. "[T]he University’s payments to tenured faculty and administrators holding faculty tenure were not made to compensate those employees for their past service to the University. Rather,
Circuit reversed, holding that the tenure purchases, though factually similar to NDSU, would be treated the same for tax purposes as the buy-outs in Appoloni. 33 Despite a vigorous dissent by Chief Judge Scirica, the Third Circuit adopted the Sixth Circuit’s interpretation and denied the claims by the university and its newly retired faculty. 34 Coupled with Revenue Ruling 2004-110, this decision likely strikes down any future tax-free treatment of these transactions, and arms courts with a decision that second-guesses the ruling in NDSU.

This Comment looks to balance the university taxpayer’s interests in maintaining flexibility within the tenure system and the government’s interest in funding its vast Social Security system. Based upon the underlying nature of a tenure purchase transaction and the purposes served by allowing these transactions to proceed unencumbered, this Comment suggests that Revenue Ruling 2004-110 be redrafted to further limit its application to cases factually similar to Appoloni, but that courts should otherwise follow the Eighth Circuit’s approach.

Part I of this Comment lays out the university’s and the government’s arguments, as stemming from the vagueness of the Internal Revenue Code and the conflicting revenue rulings that attempted to clarify that vagueness. To do this, Part I discusses the revenue rulings that supported the “wages” argument, as adopted by the Third and Sixth Circuits. Part I also discusses the revenue ruling that supported the “contractual purchase” argument, as adopted by the Eighth Circuit.

Part II of this Comment introduces the controversy through the history and policy concerns related to the two interested parties. First, Part II provides the history of Social Security and FICA, the purposes served by Social Security, and the potential problems that face the system in the future. Then, Part II discusses the nature of academic employment in the university, the emphasis placed on tenured employment, the criticism of this system and the long-term status of tenure in American higher education.

Finally, Part III suggests that the IRS revise Revenue Ruling 2004-110 to

the University made payments to those employees under the Plans in exchange for the relinquishment of their protected property rights in continued employment.” Id.

33 Pittsburgh., 507 F.3d 165 at 172. “In this regard, we agree with the Sixth Circuit’s statement in Appoloni that it fail[ed] to see how this is different from other severance packages just because a ‘tenure’ right was exchanged. In almost all severance packages an employee gives up something, and we have a hard time distinguishing this case from similar cases where an employee, pursuant to a severance package, gives up rights in exchange.” Id.

34 Id. at 174–75. “Tenure is the second of ‘two successive relationships with the university,’ and is ‘a significantly different status-effectively a new job.’” Id. at 178 (Scirica, C.J., dissenting).
limit its scope to preclude university tenure purchase agreements based upon substance and policy concerns.

I. THE DISPARATE APPLICATION OF REVENUE RULINGS IN TENURE PURCHASE AGREEMENTS

FICA operates separately from income taxation. The federal income tax exists to fund various aspects and projects of the United States Government. Income taxation accomplishes this by stratifying taxpayers according to their level of earnings in a given year (commonly referred to as “tax brackets”) and applying an applicable tax rate to earnings termed “gross income.” “Gross income” is defined by the Internal Revenue Code (“IRC”) as “all income from whatever source derived.” Meanwhile, FICA exists to fund the Social Security system, which generally acts as a governmental insurance plan for all United States’ citizens who have paid into it. The amounts withheld from a taxpayer are returned, at least in part, upon the occurrence of a triggering event, such as old age, disability or unemployment. FICA funds this program by withholding a fixed percentage from a taxpayer’s “wages,” subject to an earnings ceiling ($106,800 for 2011). The IRC defines “wages” as “all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash.” Thus, gross income is a broader base than wages, as gross income is not pigeonholed to monies

35 See, e.g., Temple Univ. v. United States, 769 F.2d 126, 130 (3d Cir. 1985) (“The purpose and use of FICA funds . . . differ markedly from the objectives underlying the federal income tax system.”); see also Quality Stores, Inc. v. United States, 383 B.R. 67 (W.D. Mich. 2008) (“The income tax withholding system and the FICA-tax withholding system each serves a different interest which may, in turn, dictate differences in the make-up of their respective tax wage bases.”).

36 See, e.g., Leah Witcher Jackson, Won the Legal Battle, but at What Tax Cost to Your Client: Tax Consequences of Contingency Fee Arrangements Leading Up to and After Commissioner v. Banks, 57 BAYLOR L. REV. 47, 56 (2005) (“All citizens should understand that the primary purpose of federal income tax law is to establish a mathematical formula for determining a taxpayer’s ‘fair share’ of the financial burden we as citizens must bear in order to fund the operation of the federal government.”); United States Department of the Treasury, Economics of Taxation: Your Federal Dollar, http://www.treasury.gov/education/fact-sheets/taxes/economics.shtml (explaining the federal taxation system).


39 See, e.g., Temple Univ., 769 F.2d at 130 (“The social security program aims to replace the income of beneficiaries when that income is reduced on account of retirement and disability.”) (quoting S. REP. No. 98-23, at 42 (1983)).


derived from employment.

While the IRC defines wages at the start of the FICA statute, applying that definition can be a very vexatious task, leading a taxpayer through a labyrinth of IRC sections, IRS regulations and revenue rulings. While wages are “all remuneration for employment,” both “remuneration” and “employment” are subject to interpretation. The IRC defines “employment” as “any service, of whatever nature, performed by an employee for the person employing him.”\textsuperscript{43} Meanwhile Treasury Regulation § 31.3121(a)-1(c) clarifies “remuneration”: “Remuneration for employment constitutes wages even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them.”\textsuperscript{44} Thus, wages includes all amounts paid as compensation for services provided by employee for employer, regardless of whether there is still an employer-employee relationship. However, the taxpayer is still left with the task of determining what constitutes “services.” The leading interpretation of “services” comes from \textit{Social Security Board v. Nierotko}, in which the Supreme Court found that “services” encompasses “the entire employer-employee relationship for which compensation is paid to the employee by the employer.”\textsuperscript{45} Therefore, our broadest understanding of wages is any compensation to an employee from an employer for any activity incident to their employer-employee relationship, regardless of whether such relationship still exists.

In a tenure purchase agreement, the employer makes a payment to the employee to terminate the employer-employee relationship.\textsuperscript{46} In these cases, it is contested whether the rights giving rise to the payments were incident to the employer-employee relationship or if those rights preexisted the relationship.\textsuperscript{47} Here, the Code was insufficient in determining the taxable nature of these transactions, and so the parties in these cases turned

\textsuperscript{43} I.R.C. § 3121(b) (2000).
\textsuperscript{44} Treas. Reg. § 31.3121(a)-1(i) (2010).
\textsuperscript{45} 327 U.S. 358, 365 (1946).
\textsuperscript{46} See Univ. of Pittsburgh v. United States, 507 F.3d 165,166 (3d Cir. 2007) (noting that the university offered five successive Early Retirement Plans to tenured employees); see also N.D. State Univ. v. United States, 255 F.3d 599, 600-01 (8th Cir. 2001) (stating that North Dakota State University offered an Early Retirement Program to tenured faculty); see also Appoloni v. United States, 450 F.3d 185, 187-89 (6th Cir. 2006) (noting that employment severance plans were offered to tenured teachers).
\textsuperscript{47} See Pittsburgh, 507 F.3d at 166 (stating the issue as whether early retirement payments made by the university are considered taxable wages); see also NDSU, 255 F.3d at 600-01 (noting that the issue is whether the retirement plan offered to tenured teachers is a taxable wage); see also Appoloni, 450 F.3d at 187-89 (addressing the issue of whether the payments made to the tenured teachers constitute wages under the Federal Insurance Contribution Act).
to a series of revenue rulings promulgated by the IRS. While revenue rulings are given some deference because they represent the Service's interpretation of the law, they are not treated with the same level of authority as the Code or revenue regulations. Thus, their purpose is to suggest the tax treatment that will not trigger litigation with the IRS. Courts are free to disregard the interpretations made in revenue rulings "if they conflict with the statute they purport to interpret or its legislative history, or if they are otherwise unreasonable." In this regard, litigants will buttress their arguments with revenue rulings that support their claim on the grounds that they are comporting with the Service's interpretation, but challenge revenue rulings that undermine their claim based on conflicts in the code, legislative intent and general public policy that makes the interpretation unreasonable.

This Part examines the arguments made by the university and the government, as stemming from the revenue rulings. First, this Part looks at the two revenue rulings presented by the government in support of tenure purchase agreements being subject to FICA. Then, this Part looks at the revenue ruling presented by the university in support of tenure purchase agreements being treated as contractual purchases and thus not subject to FICA. Last, this Part analyzes Revenue Ruling 2004-110, which was issued after the controversy in Pittsburgh and will attempt to subject all further tenure purchase agreements to FICA.

A. The "Wages" Argument Adopted by the Third and Sixth Circuits

In NDSU and Pittsburgh, the government first cited Revenue Ruling 74-252 as a possible interpretation of these tenure purchase agreements.  

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48 See Linda Galler, Emerging Standards for Judicial Review of IRS Revenue Rulings, 72 B.U. L. REV. 841, 844 (1992). "The Treasury Department describes a revenue ruling as "an official interpretation by the [Internal Revenue] Service that has been published in the Internal Revenue Bulletin."" Id. "[R]evenue rulings would enable the public to review interagency communications that the IRS uses as precedents or guides." Id. at 846.

49 Reese Bros. v. United States, 447 F.3d 229, 237–38 (3d Cir. 2006) (acknowledging that although revenue rulings are entitled to great deference they may be disregarded); Geisinger Health Plan v. Commissioner of I.R.S., 985 F.2d 1210, 1216 (3d Cir. 1993) (holding that courts give weight to revenue rulings but may disregard them if they conflict with the statute or its legislative history).

50 Galler, supra note 48. "Revenue rulings represent legal conclusions of the IRS based on stated facts, and frequently set forth the IRS's preferred constructions of statutory phraseology." (emphasis added).

51 Reese Bros., 447 F.3d at 237-38 (quoting Geisinger Health Plan v. Commissioner, 985 F.2d 1210, 1216 (3d Cir. 1993)).

52 See NDSU, 255 F.3d at 604 ("In Revenue Ruling 74-252 the IRS determined that payments made to an employee after his employer terminated his three-year employment contract were FICA wages."); see also Pittsburgh, 507 F.3d at 169 ("First [the government] cites Revenue Ruling 74-252, which involved a three-year contract providing that the employer could terminate the employee during the
According to that ruling:

Payments made to an employee, following his involuntary termination, under the terms of a 3-year contract permitting the employer to terminate the employment relationship provided the employee is paid an amount equal to an additional 6-months salary, are in the nature of dismissal payments and are wages for purposes of... FICA.\textsuperscript{53}

The IRS further explained “all payments made by an employer to an employee on account of dismissal, that is involuntary separation from the service of the employer, constitute ‘wages’ regardless of whether the employer is legally bound by contract.”\textsuperscript{54} Since the employer retained the right to terminate the employee at will, the termination payments made to the employee were actually pursuant to his employment contract, which is significantly different from consideration for the relinquishment of a contractual right.\textsuperscript{55}

While the tenure purchase agreements are termination payments and are therefore similar to the dismissal payments discussed in Revenue Ruling 74-252, neither the \textit{NDSU}, nor the \textit{Pittsburgh} court found Revenue Ruling 74-252 proper to apply to these transactions.\textsuperscript{56} The distinguishing element in tenure purchase agreements is that they are \textit{voluntary} termination provisions.\textsuperscript{57} Because of a professor’s right to tenure, dismissal payments could not realistically be made through involuntary termination. As such, the termination payments would not be made pursuant to the employment contract, as no tenured professor’s employment contract would contain a provision for essentially at will employment. Although this revenue ruling

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\textsuperscript{53} Rev. Rul. 74-252, 1974-1 C.B. 287.
\textsuperscript{54} Id.
\textsuperscript{55} See id. (stating that the dismissal payments were made pursuant to the provisions of the contract rather than as consideration for the relinquishment of interests the employee had in his employment contract in the nature of property); see also Greenwald v. United States, 2000 U.S. Dist. LEXIS 102, at *2 (S.D.N.Y. 2000) (noting that the lump sum payment to Greenwald was also a dismissal payment that constituted “wages” for purposes of FICA and that the tax court defines “dismissal payments” as “payments made to an employee, following his involuntary termination, [and such payments constitute] wages for purposes of FICA”)(quoting Rev. Rul. 74-252).
\textsuperscript{56} See \textit{NDSU}, 255 F.3d at 607 (“[The professors] did not receive what they were entitled to under their contracts, which was continued employment absent fiscal constraints or adequate cause for termination . . . [r]ather they gave up those rights, making this case more analogous to Revenue Ruling 58-301 than to Revenue Ruling 74-252.”); see also \textit{Pittsburgh}, 507 F.3d at 170 (noting that the court preferred Revenue Ruling 58-301 to Revenue Ruling 74-252, but not over Revenue Ruling 75-44).
\textsuperscript{57} See \textit{NDSU}, 255 F.3d at 607. “The terminations involved here were totally voluntary by both parties; it is uncontested that neither NDSU nor a tenured faculty member could enter an Early Retirement Program agreement unless the other party freely consented. This . . . clearly does not involve dismissal payments.” Id.
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argument was unsuccessful, it did provide a situationally valid interpretation where termination of an employment contract would be incident to the employer-employee relationship.

The government found more success in Revenue Ruling 75-44, which is cited in all three cases discussed above. That ruling arose from a dispute involving a railroad worker relinquishing his seniority rights in exchange for a lump-sum payment. In the revenue ruling, the IRS stated “[a] lump-sum payment received by an employee as consideration for relinquishing employment seniority rights is ... wages for purposes of income tax withholding.” The revenue ruling further explains that “employment seniority rights” are rights acquired “through his previous performance of services.” But the IRS also noted that these seniority rights must be acquired over the course of the same employer-employee relationship for which they are being compensated. Thus, rights existing from the outset of the relationship are not termed seniority rights and are thus not governed by Revenue Ruling 75-44.

In applying this revenue ruling to tenure purchase agreements, the courts have wrestled with the factual determination of whether tenure is an employment seniority right arising from previous performance of services. The government successfully argued in Appoloni and Pittsburgh that tenure does not exist from the outset of the employment relationship, rather it is a right arising from a professor’s quality of work and longevity of employment at a particular university. Thus, the transition from adjunct or assistant professor (at will employment) to full professor (secured employment) occurred over the course of the same employer-employee relationship. Therefore, tenure is a seniority right no different than any other seniority right arising in other professions. The courts further justified their rulings by looking at the substance of the transaction,

58 See Pittsburgh, 507 F.3d at 169 (noting that the government cites Revenue Ruling 75-44 for support); see also NDSU, 255 F.3d at 604–05 (stating that the government finds an analogy between tenure rights and seniority, making it similar to Revenue Ruling 75-44); see also Appoloni v. United States, 450 F.3d 185,194 (6th Cir. 2006) (noting that “the government contends this case presents an issue more closely related to Revenue Ruling 75-44”).
60 Id.
61 Id.
62 Id.
63 Pittsburgh, 507 F.3d at 170–71 (acknowledging the factual complications giving rise to the circuit split).
64 Id. at 172–74 (enumerating the payments’ ties to past services as compensation, as well as their underlying purpose – to provide for employees’ early retirement).
65 Id. at 174 (“[A] teacher does not obtain tenure at the outset of employment; it is a right that is earned like any other job benefit.”).
noting that the purpose of purchasing tenure rights is not to acquire an ownership interest in a property right, but rather to extinguish the professor’s employment, making it nearly indistinguishable from severance in any other field.66

B. The “Contractual Purchase” Argument Adopted by the Eighth Circuit

Like the government, the taxpayers analogized tenure purchase agreements with a favorable revenue ruling.67 In all three cases, the taxpayers relied on Revenue Ruling 58-301, which states that “[t]he lump sum payment received by an employee as consideration for the cancellation of his employment contract constitutes gross income to the recipient in the taxable year of receipt. However, such amount does not constitute ‘wages’ for Federal employment and income tax withholding purposes.”68

While Revenue Rulings 75-44 and 58-301 are very similarly constructed, Revenue Ruling 75-44 was promulgated to differentiate the tax treatment of the cancellation of seniority rights from the cancellation of an employment contract.69 As noted above, seniority rights are those acquired through previous services within that employer-employee relationship. Thus, seniority rights do not exist at the outset of an employment relationship, but rather are granted over the course of that relationship. Cancellation of an employment contract, however, extinguishes the rights originally negotiated for at the start of the employment relationship.70 Thus, consideration paid to the employee for such rights constitutes “cancellation of the employee’s original contract rights rather than . . . consideration of the past performance of services through which the relinquished employment rights were acquired.”71 In essence, Revenue Ruling 58-301 interprets contract rights as existing outside of wages because they are granted before any services are provided to the employer,

66 Id. at 171. “We also want to again emphasize the importance of the school district’s principal purpose in offering these severance payments. The school district’s purpose here was not to “buy” tenure rights. It was to induce those at the highest pay scales to voluntarily retire early.” Id.
67 See, id. at 169; N.D. State Univ. v. United States, 255 F.3d 599, 603–04 (8th Cir. 2001); Appoloni v. United States, 450 F.3d 185, 194 (6th Cir. 2006).
69 Rev. Rul. 75-44, 1975-1 C.B. 15. “Unlike [Revenue Ruling 58-301], the present case does not involve the cancellation of an employment contract which, at the outset, bound the parties for a specific period of time.” Id.
70 See id. (“[I]n Rev. Rul. 58-301, 1958-1 C.B. 23, the contractual rights relinquished were acquired in the original negotiation of the contract canceled.”); see also Rothwell v. Vaughn, 49 Cal. App. 2d. 429, 434 (Cal. Ct. App. 1920) (recognizing that “the destruction or cancellation of a written contract . . . with the intent to extinguish the obligation thereof, extinguishes it as to all the parties consenting to the act”).
or otherwise termed, these contract rights preexist the employer-employee relationship and are therefore not incident to it.

Once again, in applying this revenue ruling to tenure purchase agreements, the courts are asked to make a factual determination as to the nature of tenured employment.\(^{72}\) The taxpayers argued that the granting of tenure creates a new employer-employee relationship and terminates the at will relationship that previously existed.\(^{73}\) This argument is premised on the understanding that adjunct and assistant professorship are essentially auditions for tenured professorship.\(^{74}\) As an audition, the requirements necessary for tenure rights are substantially different than those for seniority rights in other professions.\(^{75}\) Most notably, tenure is not granted automatically based upon the number of years spent with a university, but rather is an evaluation of the professor's quality of work conducted at a specified time in the future.\(^{76}\) Thus, the longevity of service is merely incidental to the granting of tenure, as a reasonable period of time must be allowed in order for the professor to adequately showcase her skills. Just as a job interview is not within the scope of the employer-employee relationship, pre-tenured employment exists separately from tenured employment. As a result, the rights of tenure are negotiated at the outset of this new employer-employee relationship, and any consideration paid to extinguish those rights is factually similar to a contractual purchase, not subject to FICA under Revenue Ruling 58-301.

**C. The 2004 Revenue Ruling's Application and Purpose**

In 2004, the IRS released another revenue ruling interpreting the taxable

\(^{72}\) *Pittsburgh*, 507 F.3d at 166 (noting that the "issue in this case is whether early retirement payments made by the University of Pittsburgh to its tenured faculty are taxable as "wages" under the Federal Insurance Contribution Act (FICA)"); *NDSU*, 255 F.3d at 600 (8th Cir. 2001) (stating that the "district court determined that payments to tenured faculty under the program were not wages within the FICA definition of wages by that payments to high-level administrators under the program were wages subject to FICA taxation").

\(^{73}\) *Pittsburgh*, 507 F.3d at 177–78 (Scirica, C.J., dissenting) ("[T]he rights of tenure . . . show that it marks a new relationship between professor and university.").

\(^{74}\) *See id.* at 177 ("[T]his 'probationary' period is a prerequisite to tenure and is not analogous to the time period during which employees accrue different types of seniority rights."); *see also* Michigan State Univ. Faculty Ass'n v. Mich. State Univ., 93 F.R.D. 54, 56 (W.D. Mich. 1981) (explaining that "[t]enure-stream faculty serve a probationary period of three to six years, at the end of which, if reappointed, they receive tenure and become insulated from dismissal except for cause").

\(^{75}\) *Pittsburgh*, 507 F.3d at 177 (listing the several factors aside from longevity weighed in determining whether or not to grant tenure).

\(^{76}\) *See id.; see also* Tori v. Marist College, 344 Fed. App'x. 697, 700 (2d Cir. 2009) (noting "that the college judged the quality, not just the quantity, of its professors' scholarly work for tenure-review purposes").
nature of contractual purchases made to cancel employment rights.\textsuperscript{77} In Revenue Ruling 2004-110, the IRS stated:

\begin{quote}
[\text{A}]n amount paid to an employee as consideration for cancellation of an employment contract and relinquishment of contract rights is ordinary income and wages for purposes of the Federal Insurance Contribution Act (FICA), the Federal Unemployment Tax Act (FUTA), and the Collection of Income Tax at Source (federal income tax withholding).\textsuperscript{78}
\end{quote}

The IRS further explains this ruling, noting, 
\textquoteright{}[t]he employee receives the payment as consideration for canceling the remaining period of his employment contract and relinquishing his contract rights.\textsuperscript{79} According to the IRS, this payment is compensation paid as remuneration for employment, because the employee cannot provide clear and convincing evidence that it does not depend upon the employment relationship.\textsuperscript{80} Aside from this explanation, the revenue ruling does little more than insinuate that FICA is supposed to be interpreted broadly.\textsuperscript{81} In effect, Revenue Ruling 2004-110 modified and superseded Revenue Ruling 58-301, even though the reasoning is not clearly spelled out in the ruling.\textsuperscript{82}

Since Revenue Ruling 2004-110 was issued prior to the decisions in \textit{Appoloni} and \textit{Pittsburgh}, the courts recognized that the revenue ruling could not legally be applied retroactively to payments made before January 12, 2005.\textsuperscript{83} Nonetheless, the presence of Revenue Ruling 2004-110 loomed large in these decisions, as the majority in \textit{Pittsburgh} admitted that they \textquoteleft{}are free to consider and afford some deference to the reasoning in Ruling 2004-110.\textsuperscript{84}

The taxpayers in \textit{Appoloni} postulated that Revenue Ruling 2004-110 was

\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.} (\textquoteleft{}The employee does not provide clear, separate, and adequate consideration for the employer\textquoteright{}s payment that is not dependent upon the employer-employee relationship and its component terms and conditions.\textquoteright{}).
\textsuperscript{81} \textit{Id.} (\textquoteleft{}The Code and regulations provide that amounts an employer pays an employee as remuneration for employment are wages, unless a specific exception applies. \ldots{} The Code and the regulations also provide that any service of whatever nature performed by an employee for the person employing him is employment, unless a specific exemption applies.\textquoteright{})(emphasis added).
\textsuperscript{82} \textit{Id.} (\textquoteleft{}Accordingly, \ldots{} Rev. Rul. 58-301 [is] modified and superseded \ldots{} In addition, Rev. Rul. 74-252 and Rev. Rul. 75-44 are modified to the extent their holdings regarding FICA, FUTA, RRTA, and Federal income tax withholding rely on distinguishing Rev. Rul. 58-301.\textquoteright{}).
\textsuperscript{83} Univ. of Pittsburgh v. United States, 507 F.3d 165, 170 (3d Cir. 2007) (\textquoteleft{}Ruling 2004-110 limited Ruling 58-301 to its facts and to payments made before January 12, 2005.\textquoteright{}).
\textsuperscript{84} \textit{Id.} at 173, n.11.
“promulgated in anticipation of litigation.” Reading between the lines, the taxpayers are essentially claiming that the revenue ruling served an administrative purpose, but failed to match the substance of the transaction with its appropriate tax treatment. In this regard, the taxpayers are hinting that the revenue ruling can be challenged based upon conflicts in the code, legislative intent, and general public policy that make the interpretation unreasonable. While the Code is fairly vague and the legislative intent mixed, the public policy concerns of the Social Security system and tenured employment are both very strong and well documented. Thus, a showing of unreasonableness in light of public policy could thwart Revenue Ruling 2004-110, allowing courts to reexamine the previous revenue rulings in similar cases. As a result, the IRS would likely be asked to revise the revenue ruling based solely upon interpretations of the underlying nature of the transaction.

II. THE HISTORY AND POLICY CONCERNS OF THE TWO INTERESTS REPRESENTED IN PITTSBURGH

The very purpose of our judicial system is to strike a balance between the competing interests of two parties. Fairly often, this debate turns, not on what is termed “right” or “wrong” but, on which party can better accommodate having its interest infringed. In Pittsburgh, the court was asked to weigh the interests of a wealth-distribution program serving the retirement community and an employment scheme that promotes higher education and research of innovative theories affecting every realm of

85 Appoloni v. United States, 450 F.3d 185, 204 (Griffin, J., dissenting).
86 See President George W. Bush, Remarks on Future of Social Security System (December 11, 2004) (“In the year 2018, for the first time ever, Social Security will pay out more in benefits than the government collects in payroll taxes. And once that line into the red has been crossed, the shortfalls will grow larger with each passing year. By the time today’s workers in their mid-20s begin to retire, the system will be bankrupt, unless we act to save it.”); Marc L. Kesselman, Comment, Putting the Professor to Bed: Mandatory Retirement of Tenured University Faculty in the United States and Canada, 17 COMP. LAB. L.J. 206, 211 n.16 (1995) (“Tenure preserves academic freedom by removing the professor’s fear of having his ideas judged by university administrators. Tenure succeeds because “a system that makes it difficult to penalize a speaker does indeed underwrite the speaker’s freedom.” (quoting Kingman Brewster, Jr., On Tenure, 58 AAUP BULL. 381 (1972) (coming, in part, from his 1971-72 Report as President of Yale University))).
87 Paul W. Kahn, The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell, 97 YALE L.J. 1, 1 (1987) (“For Powell, the goal of constitutional adjudication was to find the center, to strike the balance between competing interests.”) Id. at 2; Neomi Rao, On the Use and Abuse of Dignity in Constitutional Law, 14 COLUM. J. EUR. L. 201, 205 (2008) (“When considering proportionality, courts balance competing interests, allowing rights to be infringed where there is sufficient state ‘justification’ for doing so.”).
88 See Christopher T. Wonnell, Contract Law and the Austrian School of Economics, 54 FORDHAM L. REV. 507, 525 (1986) (“Professors Posner and Rosenfield have argued that the court should allocate the risk to the superior ex ante risk-bearer.”); see also Kahn, supra note 87.
academic thought. The costs in the balance were steep—two million dollars directly, potentially hundreds of millions in precedent and a necessary call for reform for the disadvantaged party.

This Part discusses these competing interests. First, this Part introduces the history of the Social Security system, the purpose of Social Security and troubles that face the system going forward. Then, this Part looks at the peculiarity of academic employment from other professional fields, the emphasis that this peculiarity places on tenure, the criticisms of tenure and what lies ahead for tenure in American higher education.

A. The History and Purpose of the Social Security System

a. The History of Social Security and the Creation of FICA

At the outset of Franklin Roosevelt's presidency, the nation was facing tremendous adversity. As Nancy J. Altman wrote:

By the beginning of 1933, about 15 million Americans were unemployed—almost 40 percent of the workforce. Of these, between 1 and 2 million people were traipsing the country in vain, looking for any kind of work. Hundreds of thousands of others who had lost homes and savings were camped just outside of Washington, in New York's Central Park, and in and around other cities, in shacks, tents, and cardboard boxes—shantytowns angrily nicknamed "Hoovervilles." Millions more were underemployed, working just two or three days a week, one or two weeks a month. Even those still employed full time saw their earnings cut by a third. People were hungry for any kind of work, no matter how little it paid. When New York advertised for 100 men to shovel snow for 50 cents an hour, 1,000 men lined up at the employment office at dawn, some dressed in expensive overcoats and homburg hats. A mother of six picketed in protest at being excluded, on account of her sex, from the temporary snow-shoveling job.

Social Security emerged out of this economic hardship. As part of his

89 British Broadcasting Corporation, Wall Street Crash and the Great Depression, available at http://www.bbc.co.uk/schools/gcsebitesize/history/mwh/usa/walldepressionrev1.shtml (noting the deplorable economic and social conditions in the United States at the end of President Herbert Hoover's term).


New Deal legislation, Roosevelt created the Committee on Economic Security ("CES") in 1934 to analyze the financial crisis facing the nation. The CES was given the task of making "recommendations concerning proposals which in its judgment will promote greater economic security." On January 17, 1935, the CES reported back to Roosevelt, suggesting a system of Social Security that would protect the interests of the underserved in America. On August 14, 1935, Congress signed the Committee's suggestions into law, creating the Social Security Act.

The Social Security Act was a daring endeavor. It looked to create a system of quasi-subsidizing for the unemployed and elderly. In 1937, its first assignment was the registration of all employers and workers in the United States. Thereafter, Social Security started paying benefits to retirees, first in lump-sum payments and then in monthly payments. Over the decades since its inauguration, Social Security has grown to cover disability rights and Medicare, with nearly every president making some alteration to the Act.

As for its first assignment, it might have been its most important. Registration was absolutely necessary for establishing the government's means of funding the Social Security system - FICA taxation. Originally

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92 Social Security Administration, Reports & Studies: The Committee on Economic Security (CES), available at http://www.ssa.gov/history/reports/ces/cesbasic.html (discussing the creation of the CES by then President Roosevelt).

93 Id. (noting that the promotion of economic security was the main goal of the CES).


95 SOCIAL SECURITY BOARD, SOCIAL SECURITY IN AMERICA, Preface (1937).

96 See generally SOCIAL SECURITY BOARD, SOCIAL SECURITY IN AMERICA supra note 94.

97 SOCIAL SECURITY: A BRIEF HISTORY, supra note 94, at 4. "The monumental first job was the need to register employers and workers by January 1, 1937." Id.

98 Id. at 5–6 (discussing the evolution of the payment methods of social security benefits); see also Teresa T. King and H. Wayne Cecil. The History of Major Changes to the Social Security System, available at http://www.nysscpa.org/cpajournal/2006/506/infocus/p15.htm (explaining how social security benefits were distributed).

99 SOCIAL SECURITY: A BRIEF HISTORY, supra note 94, at 6–18 (discussing Presidents Eisenhower and Johnson's inclusions of disability and Medicare benefits and also the term-to-term adjustments made by subsequent presidents); King & Cecil, supra note 98 at 15–19 (noting numerous changes made to Social Security over the years and steps the federal government took to make sure the success of the program).

a power of the Social Security Act, FICA taxing power was transferred over to the IRS and written into the Internal Revenue Code in 1939.101 In its first decade, FICA taxed employees' wages at a one percent rate per annum, while taxing employers' for a matching one percent.102 As amendments were made to the Act over its eighty-year history, that percentage skyrocketed, reaching 7.65 percent (6.2 percent to Old-Age, Survivors and Disability Insurance and 1.45 percent to Hospital Insurance); this amount is applied to both the employee and the employer.103

The operations of FICA are an enigma to many.104 As a basic matter, Social Security benefits are paid out of FICA contributions to those who paid FICA taxes in previous years.105 Logically, the benefits received are apportioned according to the contributions an individual made into Social Security.106 These contributions come from the taxing authority of the IRS.107 The IRS requires employers withhold an applicable percentage of wages from an employee's paycheck and pay that amount to the

101 See Your Social Security Statement, supra note 100 (noting that taxing provisions were placed in the Internal Revenue Code in 1939); see also Cohen, supra note 100, at 398 (describing FICA as a short title for the Internal Revenue Code's old age and survivors' revenue provisions).

102 See Social Security Administration, FICA & SECA Tax Rates, http://www.ssa.gov/OACT/ProgData/taxRates.html (last visited Feb. 23, 2010) (stating that FICA tax rates were set at one percent for employers and employees from 1937 to 1949); see also Cohen, supra note 100, at 389 (discussing how taxes imposed on employers and employees were initially set at one percent of the employee's wage for each).

103 See FICA & SECA Tax Rates, supra note 102 (noting current FICA tax rates, which have been in place since 1990); see also Joy Sabino Mullane, Incidence and Accidents: Regulations of Executive Compensation Through the Tax Code, 13 LEWIS & CLARK L. REV. 485, 497 (2009) (analyzing how the current 7.65 percent tax rate may affect employer behavior).


105 See Your Social Security Statement, supra note 100 (explaining that FICA taxes can also be described as contributions to the social insurance system that is Social Security); Jeffrey C. Honaker, Note, United States v. Cleveland Indians: FICA Taxes v. The Social Security Act – Why Have Different Definitions For Identical Language?, 17 AKRON TAX J. 99, 102–06 (2002) (describing the tax burden imposed by FICA).


107 See Your Social Security Statement, supra note 100 (explaining the authority under which social security taxes are collected); see also FICA Tax, available at http://www.money-zine.com/Financial-Planning/Tax-Shelter/FICA-Tax/ (describing FICA as a "tax collecting mechanism").
government, along with a matching contribution by the employer. That percentage, however, is only applied up to a certain wage ceiling (such as up to $106,800 for 2011, as discussed in Part I). The total amount collected by the government in any given year will be used to pay the Social Security benefits due for that year. In this sense, Social Security operates on a "pay-as-you-go" system. The amount collected above disbursement is invested in government securities, namely Treasury bonds. Since this amount is invested back into the U.S. Treasury, it is readily available for spending by other agencies. In return, the Social Security Administration receives the equivalent of an IOU. But while Social Security maintains a quasi-trust fund with these IOUs, in reality, it amounts to little more than notes receivable on which it will never collect. In conclusion, Social Security's eighty-year status quo hangs in

108 See Social Security & Medicare Tax Rates, supra note 102 (charting applicable tax rates); see also Social Security and Medicare Contributions, available at http://www.moneychimp.com/features/fica.htm (stating that the contribution of social security tax is based on a percentage of salary).
109 Social Security Administration, Automatic Increases: Contribution and Benefit Base, available at http://www.ssa.gov/OACT/COLA/cbb.html#Series (noting that the amount of earnings subject to FICA taxation are limited for a given year); see also Social Security Wage Ceiling Announced for 2009, available at http://www.ssa.gov/OACT/COLA/wage.html#Series (noting that the amount of earnings subject to FICA taxation are limited for a given year).
111 O'Brien, supra note 110.
112 Id. "[M]oney not needed to pay today's benefits is invested in special-issue Treasury bonds."
113 Jeannie Sahadi, Social Security Reform: A Guide (Jan. 8, 2005), available at http://money.cnn.com/2004/12/06/retirement/social_security/ ("[T]he surplus . . . is loaned to the U.S. Treasury, which puts it in the general revenue pool. As such, it is spent on anything the government deems fit."); see also Christian E. Weller, The Commission's Straw Man: Social Security Well Prepared for Retirement of Baby Boomers in 2016 (Jan. 14, 2004), available at http://www.epi.org/publications/entry/issuebriefs/ib159. ("[D]uring the years that excess payroll taxes were accumulating as a surplus in the Social Security trust fund, these funds were loaned to the U.S. Treasury. As a result, the trust fund holds U.S. Treasury securities as its assets.").
the balance of any given year's FICA returns.116

b. The Purpose of Social Security

As noted above, Social Security arose out of economic hardship.117 Since Wall Street can be volatile enough to wipe clean an individual’s retirement account in a matter of weeks (whether it be October 1929 or October 2008), the government has realized that “leaving retirement security to the marketplace is far too risky for the elderly.”118 The initial purpose served by Social Security was to create a self-sustained retirement plan that would allow individuals to receive benefits even in the toughest of financial times.119 This was accomplished by withdrawing a portion of an individual’s salary from his wages before those wages had a chance to enter into the volatility of the marketplace.120 The independent forces of the U.S. government and secured investment in Treasury bonds then protect these contributions for disbursement.121 While marketplace volatility will affect an individual’s contributions (or disbursements) in any given year, the pooling of contributions from the geographically and economically diverse American workforce serves as the best available risk-diversification mechanism.122

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116 See Furman, supra note 115. If the Social Security system is collecting less than it is paying at a future date, then the system is in jeopardy regardless of whether it has repaid the value of the bonds; this only amounts to a prolonging of the inevitable insolvency of the system. Id. However, if the Social Security system is collecting more than it is paying at a future date, then any bond repayments made to Social Security will be returned into the U.S. Treasury as excess contribution. Id

117 See McArthur, supra note 91, at 6 (noting that President Roosevelt’s “Committee on Economic Security,” formed to draft the Social Security bill, found that less than 3% of Americans over the age of 65 had a pension in the early 1930s); see also Wall Street Crash and the Great Depression, supra note 89 (detailing the correlation between the stock market crash and the great depression).

118 McArthur, supra note 91, at 6.

119 Id. at 8 (“The understanding that retirement savings must be protected by the federal government, and that individual market investments are too risky, was part of a larger understanding developed during the Depression that markets are fundamentally unstable in ways that government often has to correct.”); Frances Perkins, Social Security: The Foundation, N.Y. TIMES, August 18, 1935, at SMI.


122 See generally McArthur, supra note 91. McArthur discusses how market forces are not completely efficient and that the market is closely looped within itself. Unfortunately, this makes
The aggregate contributions from the American workforce are then available for disbursement. Payments out of Social Security were made to those that could not fend for themselves at that time. This originally included the elderly and the unemployed, but was expanded to include children, the sick and the disabled. The Act’s time-proven success is a product of its balance – the employed support the unemployed, the healthy support the sick and younger generations support their elders. While this system has been criticized as being “unfair” to “productive” members of the public, the theory of balance still makes Social Security a celebrated cornerstone of American society. Although many will continue to criticize Social Security, the critic can very quickly and tragically become the beneficiary of the system or, with any luck, advance to an age to redeem her benefits paid into the system. Thus, the Social Security system still continues to serve a purpose to the American people.

c. The Future for Social Security

The Social Security Administration acknowledges that, without reform, the current Social Security system will collapse in the future. They predict that 2041 will be the first time the system will falter. Many economists believe the Social Security Administration is being optimistic, agreeing that 2018 is a much more plausible “doomsday.” It is certain, however, that, without change, the contributions to the system will eventually fall short of the disbursements out of it.

Professor Howell E. Jackson argues that Social Security’s position is not as cheery as the financial figures released by the Administration make it seem. Applying accrual accounting to Social Security’s finances,
Jackson demonstrates how dire the situation really is, writing:

According to the most recent annual report prepared by the system's Board of Trustees, the Social Security trust funds showed a $165.4 billion net increase in assets in 2002 and reported accumulated reserves of nearly $1.4 trillion by year end.... Were the finances of the Social Security system restated under principles of accrual accounting, the Social Security trust funds would have had to report a loss of several hundred billion dollars in 2002. Moreover, as of December 31, 2002, an accrual-based balance sheet of the Social Security system would have revealed more than $14.0 trillion of accrued liabilities to Social Security participants and beneficiaries. Even allowing for the system's $1.4 trillion of accumulated reserves as well as the value of excess future taxes to be paid by current participants over the rest of their working lives, the Social Security trust funds had unfunded obligations on the order of $10.5 trillion as of year-end 2002.¹³³

There are several reasons why Social Security is facing such a crisis of this magnitude in the future. First, Americans are living longer.¹³⁴ It is not uncommon for individuals to reach 90 or 100 years of age in today's society.¹³⁵ It is also not uncommon for them to withdraw Social Security benefits for upward of 25 or 30 of those years.¹³⁶ While our contributions system calculates the needed withholding to meet the year's disbursements as is adjusted for inflation and cost of living, the system does not readily account for the longevity that Americans have enjoyed as a result of innovations in medicine.¹³⁷ Second, Medicare costs have continued to rise.

¹³³ Id.
¹³⁴ Salynn Boyles, Americans Living Longer Than Ever, WebMD Health News (Oct. 17, 2006), available at http://www.webmd.com/news/20061017/americans-living-longer-than-ever. "When the U.S. population reached 100 million in 1915, the average lifespan was 54 years. When we hit 200 million in 1967, it was around 70. Today, the average lifespan of someone living in the U.S. is just months shy of 78, and there is little reason to think that we won't continue to push the life expectancy envelope." Id.
¹³⁷ See John B. Shoven and Gopi Shah Goda, Adjusting Government Policies for Age Inflation, National Bureau of Economic Research (March 27, 2008). "Despite these large changes in what it means to be age 65, there has been almost no adjustment in the Social Security program to account for
As a means of shielding against malpractice lawsuits, it is common practice for doctors to practice "defensive medicine," running many series of tests in diagnosing a patient that would have been labeled "frivolous" decades ago. But aside from the malpractice aspect, the cost of good medical care has significantly risen since President Lyndon Johnson made Medicare part of the Social Security Act. Last, Social Security is just starting to feel the effects of the retirement of the "Baby Boomers" generation. The 1940s through 1960s saw an astoundingly high birth rate in the United States, and it is finally taking its toll on the Social Security system. In 1950, the worker-to-beneficiary ratio was 17-to-1; it is now 3-to-1 and rapidly approaching 2-to-1. The convergence of rising disbursement costs over longer periods of time to more individuals, especially with a decreasing worker base to bear the burden, spells either imminent doom or imminent reform. This reform would take shape by either decreasing Social Security benefits or increasing contributions through a higher rate or broader base. As in Pittsburg and Appoloni, the inclusion of tenure purchase agreements within FICA suggests the latter.

B. The History and Purpose of Tenure in American Higher Education

a. The Nature of Academic Employment

Academia is not like corporate America. The purpose of a university is not to maximize profits or generate the largest market share. Likewise, the goals of a professor are not the same as a CEO or an office employee. Dr. Mark L. Meyer described the academic employment scene, writing, "Every day in universities around the country, researchers toil away in laboratories, unraveling the mysteries of science to gain a greater understanding of the

these differences. If we think of individuals with a higher life expectancy and lower mortality rate as effectively 'younger,' absent adjustments to Social Security rules, participants are allowed to commence a Social Security life annuity at younger and younger real ages." Id. 138 U.S. CONGRESS, DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE (July 1994). "[T]otal direct costs of the medical malpractice system represent less than 1 percent of overall health care costs in the United States. The medical malpractice system may also increase costs indirectly by encouraging physicians to practice defensive medicine." Id. at iii. "Defensive medicine occurs when doctors order tests, procedures, or visits, or avoid certain high-risk patients or procedures, primarily (but not necessarily solely) because of concern about malpractice liability." Id. at 1.

139 See Devon Herrick, Why are Health Costs Rising?, National Center for Policy Analysis (May 7, 2003). "Prices for medical services have been rising faster than prices of other goods and services . . ." Id.


world in which we live. Many are motivated by the pursuit of knowledge as an end in itself. . . ."142 As such, the professor's job description differs from that of her corporate contemporaries: educate, research and publish.143 In order to contribute to the general "pursuit of knowledge," professors select specialties and subspecialties within an academic discipline to study.144 Because of the highly specialized nature of academic employment, supervision is often extremely difficult, outside of classroom performance. As Richard B. McKenzie writes:

Supervisors . . . may be highly trained in a discipline and one or two subdisciplines, but they are often called upon to employ workers/professors who know far more than the supervisors about the faculty members' assigned areas of research and teaching. . . . [T]hey must rely ultimately and extensively . . . on their workers/professors to define their own specific research and classroom curriculums and to change the content of degrees and majors as knowledge in each field evolves. Academic administrators and officials employ people to conduct research and explore uncharted avenues of knowledge that the officials themselves cannot conduct or explore because they lack knowledge of assigned fields . . . .145

From the professor's perspective, her research will often delve into areas of no interest to her supervisor and without any immediately recognizable benefit to the university.146 Even more daunting is the time and resources necessary for successful completion of many research projects.147 This makes patience more than just a virtue for an academic employer; it is a way of life. In order to successfully maintain a university, the administration must be willing to grant a wide degree of latitude to its employees without being so overly patient as to lead to financial ruin.148 As

143 See Lawrence R. Jauch, Relationships of Research and Teaching: Implications for Faculty Evaluation, 5 RES. HIGHER EDUC. 1, 1 (1976). "The job description for professors normally includes two major components, teaching and research, and a third catch-all category of service." Id.
145 Id.
146 Id.
147 See generally F. M. Scherer, Time-Cost Tradeoffs in Uncertain Empirical Research Projects, 13 NAVAL RES. LOGISTICS Q. 71, 71 (1966). "In this paper, the relationship between time and cost in what may be called uncertain empirical research and development projects is explored." Id.
such, universities have maintained the tenure track as a unique employment scheme that grants nascent professors a degree of independence to prove their value before they are evaluated for long-term employment by the administration.\footnote{See generally Stacy E. Smith, Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities, 59 WASH. & LEE L. REV. 299 (2002).}

b. The Emphasis on Tenured Employment

Tenure in American higher education has its roots in the turn of the 20th century, when gentlemen’s agreements generally gave rise to presumptive rights of permanence in employment.\footnote{Allen A. Glatthorn, Publish or Perish – The Educator’s Imperative 3 (Corwin Press 2002).} Over time, organizations like the American Association of University Professors (“AAUP”) shaped the course of tenured employment, creating a probationary period during which a professor would prove her merit through teaching, research and publication.\footnote{See Peterson, supra note 148 (noting the administration’s ability to terminate the employment relationship without cause during the probationary period).} This pressure has been colloquially coined “publish or perish.”\footnote{Id.} During this probationary period, the professor is employed on an at will basis with the university.\footnote{Id.} Upon a positive evaluation at the end of the probationary period, the professor is granted tenure and is no longer terminable at will by the administration.\footnote{Id.} However, a negative evaluation usually does not result in the granting of another probationary period, but rather the exercise of the university’s right to terminate the relationship.\footnote{Id.}

By the 1960s, tenure had become the standard in American higher education, as both research grants and matriculation rates increased.\footnote{Id.} Market demands aside, several policy reasons contributed to tenure’s rise. The most widely contended benefit of tenure is “academic freedom.”\footnote{Id.} “Academic freedom,” as it applies to higher education, is the extension of First Amendment rights to a professor’s teaching methods and research, as to create a “marketplace of ideas” for students and to permit study into innovative and even controversial realms of thought.\footnote{Id. at 310} The existence of tenure, and thereby the extinguished right of termination by the university, insulates the professor’s academic freedom. As Mark L. Kesselman
remarked, "Tenure preserves academic freedom by removing the professor’s fear of having his ideas judged by university administrators. Tenure succeeds because 'a system that makes it difficult to penalize a speaker does indeed underwrite the speaker’s freedom.'" This level of protection permits a professor to publish on matters that may be counter to a university’s mission or even research an issue that university administrators personally find irrelevant (as opposed to a topic de jure), thereby broadening the base of academic discussion at any given university.

Another purported benefit of tenure is the continuity it creates in the university. Continuity is a multifaceted benefit, as it allows professors to research long-term projects, develop the reputation of the university and establish relationships with students and other professors. If all professors were caught in perpetual “publish or perish,” then no substantiated research would occur on topics that require observation over months or years. Likewise, the reputation of a university would not be attributable to the quality of teaching transpiring within its classrooms, but rather be determined by the quality of brick that upholds them.

Last, tenure serves as enticement for pursuit of an academic career. As professorship involves the rigorous testing and evaluation of ideas in “uncharted avenues” (including the requisite “publish or perish” period), academia seeks candidates with the highest educational credentials. Professors’ salaries, however, do not match up favorably with those of other postdoctoral candidates – most notably, physicians and lawyers. The average salary of a full professor at an American university was...
approximately $85,500 for the 2007-2008 academic year. By comparison, many law firms set starting salaries at nearly twice that level, while the average annual salary of a physician is well over $100,000 and can range as high as a quarter million for specialties such as anesthesiology. Thus, the security of lifetime employment might partially offset the wages foregone had the professor applied her education otherwise and thereby allows universities to compete with the legal and medical professions for quality candidates.

c. The Criticism of a Tenure System

While many in academia have zealously advocated for tenure, it has also met sharp criticism. Betty Joyce Nash notes that academia might not be free from corporate comparison, writing, “With rising college costs and shrinking state budgets, lawmakers wanted universities to act more like businesses.” These business decisions include maintaining greater flexibility in academic departments and also retaining a stronghold on project expenses. Just like corporations, universities embrace flexibility in hiring and in replacement of academic staff, as seen by the popularity of tenure purchase agreements. While there are means of maintaining flexibility within the tenure system, some universities have entertained the possibility of term-of-years contracts, thereby allowing for multiple evaluations. Nonetheless, reductions in tenured employment would give the university broader cost-cutting methods, as it could replace senior faculty with first-year faculty at a fraction of the cost. Meanwhile, slight restrictions on academic freedom through at will employment would effectively give the university greater budgetary controls, since it would have more leverage in persuading professors how or on what to conduct

170 See Betty Joyce Nash, Academic Labor Market’s Tenure Track Recedes, REGION FOCUS 20 (Summer 2007).
171 Id. at 20 (referencing legislators attempts to force periodic post-tenure review on state universities).
172 Id.
173 See Everett, supra note 1.
174 See Nash, supra note 170.
175 See AAUP Faculty Salary Survey, supra note 167 (demonstrating the salary gap between tenured professors and instructors).
There are, however, non-financial criticisms of tenure, such as the incompetence or obsolescence of human capital due to longevity or general sloth arising from security. A general concern for universities is that their tenured faculty may reach an age where they can no longer effectively communicate the material to their students. While an American court has not decided the issue, the Canadian Supreme Court has found that mandatory retirement of a professor to maintain his or her professional dignity does not violate any age discrimination statute. Likewise, universities are concerned that their faculty may "exploit tenure by shirking their duties in the classroom, in their research, and in their service to their universities" as a result of being insulated from dismissal. Without a tenure system, neither of these would be a major concern to a university.

d. The Future of Tenure in American Education

The future of tenure, like the future of Social Security, is uncertain. After reaching new heights in the 1960s and 1970s, "tenure has been declining steadily over the last three decades." Today, more than half of those pursuing academic careers are off the tenure track. In fact, part-time positions account for more than half of all faculty positions in higher education. A number of institutions have already set term-of-years contracts parallel to tenure tracks, using added perks such as family leave and sabbatical as incentive. Others are using higher pay to compensate for lost job security. Many others are just changing their "hook," now using "versatility" and "lifestyle flexibility" as means of attracting new candidates. Due to market pressures, thus far, all of the shifts have been toward something that resembles at will professorship. These shifts, however, do not have all of the protections of tenure and will likely damage

176 Kesselman, supra note 86. If increased costs are incurred by the university because academic freedom gives professors carte blanche, then removal of that freedom should decrease costs.
177 See generally McKenzie, supra note 144.
178 Id.
179 See Kesselman, supra note 86.
180 See McKenzie, supra note 144.
182 See Zemsky, supra note 181; see also Nash, supra note 170 at 20 ("Today, 63 percent of faculty jobs are off the tenure track.").
183 See Nash, supra note 170 at 20.
184 Id. at 23.
185 Id.
186 Id.
academic freedom, the continuity of research and teaching at American universities and academia's ability to recruit "the best and brightest" to teach the next generation. Pessimistically, Robert Zemsky predicts:

The opening shot in this battle will likely be in a small, politically conservative state. . . . The rhetoric will be angry, with each side claiming truth, justice, and virtue for itself. The losers in such confrontations will be the state's public colleges and universities regardless of who wins the political contest. Ultimately, all of higher education will lose as faculty everywhere else, fearing that they are next to be challenged, resist all proposals that seemingly change the nature and privileges of the academy.187

III. LIMITING REVENUE RULING 2004-110 TO PROMOTE EFFICIENCY IN UNIVERSITY EMPLOYMENT AND TO ALIGN GOALS OF THE TWO CONFLICTING INTERESTS

As discussed in Part I, Revenue Ruling 2004-110 modifies and supersedes Revenue Ruling 58-301 in applying FICA to tenure purchase agreements.188 While this revenue ruling will be afforded some deference, courts are free to disregard the interpretations made in Revenue Ruling 2004-110 "if they conflict with the statute they purport to interpret or its legislative history, or if they are otherwise unreasonable."189 In determining any conflicts or unreasonableness, courts must acknowledge the prescriptive nature of taxation and how policy concerns factor into which party's rights will be infringed by the Code.190

This Part argues that the courts should disregard this revenue ruling on three grounds, and likewise, that the IRS should revise Revenue Ruling 2004-110 to limit its application to fact patterns similar to Appoloni. First, Revenue Ruling 2004-110 conflicts with the Code based upon the substance of the transaction. Second, applying FICA to tenure purchase agreements runs counter to the legislative intent of the Social Security Act. Last, Revenue Ruling 2004-110 is "otherwise unreasonable," based on the policy concerns of tenured employment in higher education.

187 Zemsky, supra note 181.
190 See Fernandez v. Wiener, 326 U.S. 340, 362 (1945). "Undoubtedly every tax which lays its burden on some and not others may have an incidental regulatory effect. But since that is an inseparable concomitant of the power to tax, the incidental regulatory effect of the tax is embraced within the power to lay it." Id.
A. Conflicts with the Code Based upon the Substance of Tenure Purchase Agreements

a. Tenure Purchase Agreements are not Incident to the Employer-Employee Relationship

Our broadest understanding of wages is any compensation to an employee from an employer for any activity incident to their employer-employee relationship, regardless of whether such relationship still exists. Prior to Revenue Ruling 2004-110, Revenue Rulings 58-301, 74-252 and 75-44 each attempted to apply this definition of wages to various transactions that terminate the employer-employee relationship.191 The disparate results of each of these revenue rulings were a product of the inherent differences in the nature of each transaction. First, Revenue Ruling 74-252 dealt with involuntary termination payments, which were a provision of the employment contract.192 FICA applied to these payments because they were made pursuant to the employment contract and were thus incident to the employer-employee relationship.193 Next, Revenue Ruling 75-44 dealt with compensation payments in return for voluntary relinquishment of seniority rights.194 FICA applied to these payments because the seniority rights accrued over the course of the employer-employee relationship and were thus incident to it.195 Last, Revenue Ruling 58-301 dealt with compensation payments in return for voluntary relinquishment of the employment contract.196 FICA did not apply to these payments because the rights in the employment contract preexisted the employer-employee relationship and were thus not incident to it.197

The application of FICA to tenure purchase agreements ultimately turns on whether or not the right of tenure accrues over the course of the employer-employee relationship or whether it is a negotiated right at the outset of a new employer-employee relationship.198 The government successfully argued that tenure arises over the course of the employer-employee relationship, based on the simple notion that the employee

191 See Univ. of Pittsburgh v. United States, 507 F.3d 165, 167 (3d Cir. 2007) (noting the application of all three revenue rulings).
192 See Rev. Rul. 74-252, supra note 53.
193 Id.
194 See Rev. Rul. 75-44, supra note 59.
195 Id.
196 See Rev. Rul. 58-301, supra note 68.
197 Id.
198 Univ. of Pittsburgh v. United States, 507 F.3d 165, 170-71 (3d Cir. 2007) (acknowledging the factual complications giving rise to the circuit split).
continues to work for the same employer after tenure is granted. In *Appoloni*, this interpretation is more appropriate, as the rights of tenure are automatically bestowed upon employees upon reaching a preset longevity threshold. While high school administrators have the ability to terminate their employee’s services just before this longevity threshold, the failure to do so does not equate with the evaluations conducted in university employment, nor does it change the employment relationship in any fundamental way, as the tasks of the high educator remain very much the same as prior to the granting of tenure. In summary, the *Appoloni* scenario requires neither evaluation nor an extension of a new employment contract; the grant of tenure comes without any ceremony and without any change in the employer-employee relationship aside from greater job security.

For university employees, however, this interpretation grossly oversimplifies the nature of tenure. The right of tenure is granted at the end of the probationary period, in which the professor is an at will employee. This probationary period is most analogous to a term-of-years contract, which upon expiration stirs evaluation for tenured employment. This analogy is valid because the end of the probationary period inevitably marks a fundamental change in the employer-employee relationship. If the professor receives a negative evaluation, then the employment relationship simply ends. If the professor receives a positive evaluation, then the university offers the professor a tenured position, which the professor is free to either accept or reject. In this sense, the end of the probationary period marks the beginning of negotiations between the university and the professor for further employment. The agreement struck between the university and the professor is more than just a promotion; it is the beginning of a new employer-employee relationship with newly negotiated rights. As a result, any consideration paid to the professor for voluntary termination of those rights is not subject to FICA because the rights preexisted the tenured employment relationship.

b. Tenure Rights are More Analogous to “Property” than “Services”

Subjecting tenure buyouts to FICA withholding is incongruent with the Service’s treatment of other similar buyouts. For instance, the IRC states,
“Amounts received by a lessee for the cancellation of a lease, or by a distributor of goods for the cancellation of a distributor’s agreement (if the distributor has a substantial capital investment in the distributorship), shall be considered as amounts received in exchange for such lease or agreement.”\textsuperscript{204} Here, the IRS treats the forfeiture of a property right in rental property as an exchange for that property right and not as just another payment pursuant to the lease. But the IRS refuses to afford such favorable purchase treatment to tenure buyouts.

Perhaps the courts deny purchase treatment of tenure rights because they are not as concrete a property right as a lease to real property. This distinction, however, is dubious, as our tax code very readily acknowledges numerous intangible property rights and favorably treats them as capital assets.\textsuperscript{205}

Another distinction is that the purchase of tenure rights does not really give any property right back to the university.\textsuperscript{206} This so-called “disappearing asset” theory arose in a series of cases from the 1950s, generally stating that no property interest is vested in the purchaser, but for the extinguishing of the right held by the seller.\textsuperscript{207} This distinction is also doubtful, as the sale of such tenure rights endows the university with the right to permanently terminate the employment relationship, which is something that it did not possess prior to the transaction. Therefore, as the right shifts from employee to employer, it does not disappear, but merely changes in format.

The last distinction drawn harkens back to a familiar point: the purchase of tenure rights seems to be more analogous to compensation for services than the purchase of a property right.\textsuperscript{208} While this comment has expounded at great length the differences in seniority rights that are incident to the employer-employee relationship and those that preexist such a relationship, analysis from a property v. service perspective illuminates an inconsistency in labeling such payments as compensation for services.

\textsuperscript{204} I.R.C. § 1241 (2000).
\textsuperscript{205} 26 U.S.C. § 1249(a) (2000) (recognizing patents, trademarks, copyrights and other intangible assets as property).
\textsuperscript{206} Univ. of Pittsburgh v. United States, 507 F.3d 165, 171 (3d Cir. 2007). “We also want to again emphasize the importance of the school district’s principal purpose in offering these severance payments. The school district’s purpose here was not to “buy” tenure rights. It was to induce those at the highest pay scales to voluntarily retire early.” \textit{Id.}
\textsuperscript{207} See Everett, supra note 1 at 5-6; see also General Artists Corporation v. Commissioner, 205 F.2d. 360 (CA-2, 1953), \textit{cert. denied}, 346 U.S. 866 (1953); Commissioner v. Starr Brothers., 204 F.2d. 673 (CA-2, 1953); Commissioner v. Pittson Co., 252 F.2d. 344 (CA-2, 1958), \textit{cert. denied}, 357 U.S. 919 (1958).
\textsuperscript{208} See Everett, supra note 1 at 22-23.
Since a tenured professor is paid an annual salary for instructing courses and conducting research, the compensation for that professor’s services is fairly immediate. Therefore, payments in tenure purchase agreements do not really compensate for prior services, as the professors have already been compensated for those efforts pursuant to their employment contract. The only other rationale is that the payment compensates the professor for foregone future services. This rationale, however, defies common logic, as you really cannot be compensated for services you have not, nor ever will, perform. While the tenure right being transferred in these buyouts essentially guarantees future compensation to the professor if she performs her services, the transfer effectively terminates the further performance of those services and thus any further compensation tied to them. In fact, the only instances where “front pay” has been uniformly awarded by U.S. courts have been wrongful termination and employment discrimination claims, wherein the plaintiff was wrongfully precluded from providing future services.\textsuperscript{209} This is distinct from tenure purchases, wherein the professor is voluntarily no longer providing services. In this regard, “tenure should be viewed as a separate property right ‘on top’ of the right to annual compensation for services rendered,”\textsuperscript{210} the sale of which should be treated as of any other property right.

This view of tenure as a “separate property right” further illustrates how tenure of professors preexists the employment relationship as a distinct and independent right. As such, the sale of tenure rights is not compensation for services nor is it incident to the employer-employee relationship. Thus, the sale of tenure rights is not includable in the definition of “wages” and therefore should not be subject to FICA.

\textbf{B. Taxing Retirement Benefits through FICA Frustrates the Purpose of the Social Security Act}

The purpose of the Social Security Act is to “promote greater economic security.”\textsuperscript{211} The Act promoted economic security by creating a system that provided for those who could no longer provide for themselves.\textsuperscript{212} Specifically, it supplied some economic means to those in retirement by making monthly payments to them based upon their previous contributions

\textsuperscript{209} See Newhouse v. McCormick & Co., 157 F.3d 582 (8th Cir. 1998).
\textsuperscript{210} Id.
\textsuperscript{212} Id.
to the system.\textsuperscript{213} In effect, the Social Security Act looked to ensure that the elderly community had at least a base level of funding for its retirement.

Tenure purchase agreements seek to move employed university faculty into retirement.\textsuperscript{214} This event may very well occur before the professor reaches the requisite age to draw Social Security benefits.\textsuperscript{215} As a result, the newly retired professor will be dependent solely upon personal funding of her retirement (such as savings or pensions) up until that requisite age. As a result, a policy that reduces her personal funding hardly promotes "greater economic security" in retirement.

Even further, subjecting tenure purchase agreements to FICA could cause the professor to suffer a burdensome "double taxation" on her retirement benefits, as she would be taxed for FICA and federal income purposes when the tenure purchase payment is made and possibly again for federal income purposes when the Social Security benefits are paid in the future.\textsuperscript{216} This second layer of tax does not exist for retirement packages in most other professions, which are structured as pensions.\textsuperscript{217} Thus, the Service's position on these transactions creates inequality between tenured retirement plans and those of other professions.

Additionally, encumbering tenure purchase agreements further jeopardizes tenure as a future employment practice (as will be discussed in Section C). In and of itself, tenure promotes tremendous economic security by guaranteeing employment at a comfortable salary for professors.\textsuperscript{218} For this reason, it would also frustrate the legislative intent of the Social Security Act to encumber tenure at American colleges and universities, as it would create instability in a once-stable job market.

\textsuperscript{213} See What Does FICA Mean?, supra note 100.
\textsuperscript{214} See Everett, supra note 1.
\textsuperscript{216} See Cynthia Blum, Should the Government that Pays Social Security Benefits across Borders also Tax such Benefits?, 18 VA. TAX REV. 621, 631 (1999). "U.S. citizens or residents were required to include up to 50% of [Social Security] benefits in gross income under a complex formula provided in section 86 of the Code." Id.
\textsuperscript{217} David R. Stras & Ryan W. Scott, Are Senior Judges Constitutional?, 92 CORNELL L. REV. 453, 460 ("[A] significant advantage of resignation is that pension annuities are not subject to FICA taxes . . . .").
\textsuperscript{218} See Peterson, supra note 148 (noting the permanence of tenured employment and thus its job security).
C. Hindering Tenure Will Promote Disadvantageous Hiring Practices in Higher Education

While the merits of tenure have been both lauded and contested in recent years, the nature of academic employment has remained the same regardless of the nature of the professor’s employment. In order to effectively operate as a university, professorship must possess academic freedom in order to investigate innovative and even controversial realms of thought, must be secure enough to engage in long-term studies without fear of termination halting research and must be enticing enough to attract bright new minds to continue the academic exploration into the world in which we live. Tenure is an employment scheme that enables all three.

While there are inequities in the tenure system, no substitute has been proposed that meets all of the aims of academic employment. This, however, has not impeded the shift to at will employment in higher education, as growing percentages of academic positions are off the tenure track. This shift is a product of universities’ growing concerns about flexibility and availability of financial resources. This is precisely the reason that tenure purchase agreements were contrived in the first place. They allow universities to retain all of the benefits of the tenure system, while maintaining flexibility to adjust to financial exigencies and changing academic needs. Thus, allowing these transactions to proceed unencumbered is a tremendously strong policy concern in American higher education. By taxing the transaction, the IRS is discouraging its practice, moving professorship closer and closer to at will employment.

CONCLUSION

The application of tax principles seeks to match the tax treatment with

219 See Part II, Section B, Subsection 3.
220 See Kesselman, supra note 86; see also Smith, supra note 158; see also Weissman, supra note 165.
221 See Kesselman, supra note 86; see also Smith, supra note 158; see also Weissman, supra note 165.
222 See Zemsky, supra note 181.
223 See Nash, supra note 170.
224 Id.
225 See Everett, supra note 1.
226 Id.
227 Id.
the underlying nature of the transaction, while respecting the many policy concerns inescapably tied to it. Revenue Ruling 2004-110 fails to do either. The ruling skirted the substance of tenure purchase agreements, which extinguish a right that is negotiated for at the outset of a new employment relationship. In so doing, the ruling overlooked the many peculiarities unique to academic employment and grouped it among the majority of severance agreements. Also, the ruling disregarded policy concerns by encumbering the party with fewer available options. While Social Security can be reformed through various adjustments in disbursement and contribution policies, the goals of academic employment are served by tenured employment alone. By taxing tenure purchase agreements, the IRS is discouraging a practice that maintains the benefits of tenure while curtailing the inflexibility inherent in the system.

Considering the substantial role the university plays in our American society, it would be in the best interest of the country for the Service to rethink this tax policy which burdens the employment scheme that makes professorship possible. The failure to do so only provides further incentive for academia to shift away from tenure and toward employment schemes that undercut academic freedom and the many benefits derived from it.

230 See Fernandez, 326 U.S. at 362.
231 Univ. of Pittsburgh v. United States, 507 F.3d 165, 165 (3d Cir. 2007). “Tenure is the second of ‘two successive relationships with the university,’ and is ‘a significantly different status—effectively a new job.’” Id. at 178 (Scirica, C.J., dissenting).
232 See Appoloni v. United States, 450 F.3d 185,198-96 (6th Cir. 2006). The Court concluded that these transactions constituted payment for prior service as “[r]elinquishment of tenure rights was simply a necessary and incidental part of accepting the buyout” and “in order to offer the teachers a buyout, the school districts had to ask that they give up their right to future employment—the same as with any severance package.” Id.
233 See Kesselman, supra note 86; see also Smith, supra note 158; see also Weissman, supra note 165.
234 See Everett, supra note 1.