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PASSING THE BUCK IN TENURE DECISIONS: THE INCREASING RISK OF JUDICIAL INTERVENTION UNDER THE EQUAL PROTECTION CLAUSE

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Professor Mack, a tenure track accounting professor in the college of business at a university, has applied for tenure. Professor Mack is in a department which consists of accounting, finance, and business law. Professor Mack has met the time requirement for eligibility. The professor has also met the minimum requirements of the teaching standards and the service standards. The requirements for research in her department states that, “a minimum of three publications in peer reviewed journals is required in the five years prior to applying for tenure. The journals must have an acceptance rate of 30% or less, according to Cabell’s or some other substantially similar source.”

It turns out that two of the publications meet that criteria, but the third does not. Professor Mack is denied tenure and receives her terminal one year contract from the college.

However, had Professor Mack been a tenure track faculty member in the other department in that college of business, Professor Mack would have received tenure based on her performance in teaching, service and research. The difference in outcome reflects the asymmetry between the different department’s criteria for research. Despite being in the exact same college of business, the other department required three publications in any peer reviewed journal, regardless of acceptance rate. The dissimilarities for Professor Mack’s career are profound. Instead of having the intellectual freedom and professional security afforded by tenure, she is branded with a one year contract and then asked to leave the University, where her career pursuits will be forever marred by her not having received tenure.
I. Introduction:

The above scenario is not an unlikely event. The purpose of this article, therefore, is to explore the legal issue that such differences in tenure requirements between departments within the same college could raise under the Equal Protection Clause.

At many universities there is no requirement that the standards for tenure are the same in all of the colleges, likewise the colleges do not require the same tenure standards within each of their departments. Differing departmental retention, tenure, and promotion standards within a single college are not uncommon. In this article, we will focus only on tenure decisions that are made within colleges of business. Specifically, we will look at the qualitative issues involved in the research component that is part of all tenure decisions. We will not look at retention per se. However, the question of whether or not to retain a tenure track faculty member raises the same issues as whether or not to tenure a tenure track faculty member.

The reason for examining only college of business tenure decisions is that the departments within any college of business are quite homogeneous in regard to the type of publications/research that is required for tenure. Whether a faculty member is hired to teach management, marketing, accounting, or some other area within the college, their publications must be in some type of business journal. One of the contributing factors to this homogeneity is an accrediting body for schools of business – The Association to Advance Collegiate Schools of Business (AACSB). Many colleges of business are accredited by AACSB, and many more aspire to be accredited by this organization. AACSB has created a set of standards that must be met for accreditation; these standards include guidelines for “intellectual contributions.” Therefore, those colleges that are accredited must use AACSB standards to create the guidelines
for judging research/intellectual contributions, and those who aspire to be accredited will use AACSB standards to establish guidelines for tenure, etc., so that they may eventually apply for accreditation.\textsuperscript{4}

Because of these factors and the tradition of journal publication in a college of business, the type of research and writing is very similar for all of the disciplines within a college of business; what differs is primarily the subject matter of the article. This may not be true for departments in a college of liberal arts and science where the department might include art, theatre, and music, for example. That said, the reader should be aware that what is covered here might apply to other colleges within a university\textsuperscript{5} Having outlined the factual backdrop for this paper, we turn our attention to the methodology by which tenure standards are created.

\section*{II. The Methodology and Process of Creating Tenure Standards}

\subsection*{A. The Trickledown of Tenure Requirements}

The process for creating the rules for retention, promotion, and tenure typically follows the same hierarchy in all state university systems. Generally, the rules are established in broad terms by each particular state’s higher education governing body, which regulates the state’s higher education institutions. These broad, system-wide standards will then be modestly refined at the University level.\textsuperscript{6} Then, the University standards will be more refined at the various college levels, and finally, the various departments within the colleges will refine them even more.\textsuperscript{7} For example, the process of creating tenure standards is accurately described by the regulating body of the University of Wisconsin System, which has promulgated a policy that states:
Decisions relating to renewal of appointments or recommending of tenure shall be made in accordance with institutional rules and procedures which shall require an evaluation of teaching, research, and professional and public service and contribution to the institution. The relative importance of these functions in the evaluation process shall be decided by departmental, school, college, and institutional faculties in accordance with the mission and needs of the particular institution and its components parts. Written criteria for these decisions shall be developed by the appropriate institutional faculty bodies; 8

Typically, a college of business is made up of several departments. 9 As seen above, each department within a college of business will have some freedom to have different criteria for faculty retention, promotion, and tenure as long as the department’s requirements comport with the broader rules established by the college. Therefore, the departments within each college create the final, most specific, version of the rules which are then used to make tenure decisions. For that reason there can be, and are, variances among the departments within a particular college. 10 This incongruity creates the situation where a college of business faculty member who is in the Accounting Department, for instance, instead of the Management Department, may have different criteria applied to his/her request for tenure. 11

The fact that departments typically have the final say in regard to the applicable standards was clearly stated by two faculty members who were part of a committee whose charge was to write a new promotion and tenure policy for New Mexico State University,

(The two stated) that the (university wide) revision will serve as an umbrella document, but the fundamental promotion and tenure criteria are written by the departments and colleges, which means every department and college should have a promotion and tenure policy that covers their particular discipline. The departmental criteria are fundamental to the whole process and to be developed by the departments with input from the dean. According to the revised P&T Policy: ‘Each principal unit must develop written standards by the end of the Spring Semester of 2008 based on criteria developed by that principal unit subject to the approval of the dean or equivalent administrator. Criteria must be clear and readily available to
all participants and must be followed by all participants at each level of the process. Therefore, it is imperative that clear standards for annual performance evaluation, promotion and tenure be articulated and broadly publicized.\textsuperscript{12}

The first portion of the above quote clearly demonstrates that the standards for faculty retention are generally created by a department within a particular college. The second portion of the quote addresses the transparency of the process. In order to ensure transparency, the review process is generally described in the faculty handbook. Even though it is clear that the rules for receiving tenure involve both procedural rights and substantive issues, historically the emphasis is almost always on the transparency of the process by focusing on the procedural steps required for the review, with clear deadlines at each step of the process.\textsuperscript{13} The reason for the focus on process is that everyone is aware of the risk of litigation under the Due Process Clause if the proper process is not followed. However, the substantive issues involved in the process, the variances among the standards utilized for tenure evaluation, have not been addressed, because, in the past, those legal claims have not been successfully litigated. We will look at these substantive issues later in this paper. First, we dispense with the myth that tenure decisions are not, primarily, an assessment of the quality of research for a particular tenure candidate.

\textbf{B. The Primacy of Research in Tenure Decision Making}

The review process involves both the procedural steps and the substantive issues of whether or not the tenure standards have been met by the respective faculty member. For retention or tenure, the substantive information that is used to make the employment decision includes reviewing an individual faculty member’s teaching, service, and research record. Each of these categories requires highly detailed information to be provided by the faculty member before the review process may proceed. What information and evidence the faculty member must provide is based on that faculty member’s departmental rules, which specify the particular
standards for retention or tenure. Everyone involved in the process clearly understands that if the tenure track faculty member provides the requisite information and meets the specified criteria then he/she is entitled to be retained or tenured.

“P&T (Promotion & Tenure) committees operate under pressures... P&T committees are generally staffed by “busy volunteers” (professors who generally are not given extra pay for the hours they spend reviewing their colleagues’ files), who seek ways to evaluate candidates that appear (to them and to others) objective and fair and which do not consume inordinate amounts of time. Counting the number of publications a candidate has in A-listed journals (as opposed to the much more time-intensive and inherently subjective process of reading and evaluating each candidate’s entire portfolio of work) superficially achieves both requirements.\(^{14}\)

Of the three criteria utilized by a department to assess the fitness of a candidate’s ability to be granted tenure, scholarly research is the most important. We will, therefore, not look at the other two more subjective criteria of teaching capacity and service. “Research, publications, and scholarship are the most important category of evaluation at many colleges and universities, especially doctoral granting institutions.”\(^{15}\) As described above, the faculty members “scholarship” is generally evidenced by publications in a “top ranked” journal. Even though teaching and service are part of the areas considered in tenure decisions, these two areas generally do not present as large of a problem as judging research because “(T)eaching and service often have well established local benchmarks, both relative and absolute, and a reasonably large set of data to use for comparison.”\(^{16}\) That leaves the issue of research and how it shall be judged. Therefore, “(J)udging research performance is a challenging task, as it must consider the quality and quantity of publications (as well as a host of other factors such as the
Research may include a number of intellectual outcomes, often called “intellectual contributions.” However, the fact is that “(J)ournal publication is a primary consideration in the promotion and tenure decision for faculty in the United States…” What has evolved over the years is a system of ranking journals as to quality. “Some disciplines embraced academic ranking much earlier and more extensively than did others. Within business, rankings first became prominent in accounting, economics, and finance.” “Management, like other disciplines, has identified a set of top journals to serve as proxies for quality.”

“The extensive propagation of journal rankings plays a monumental role in tenure and promotion evaluations in academia. For evaluators, it is exigent to objectively gauge the quality of a candidate's work since it is highly probable that most, if not all, committee members hail from different disciplines; consequently, evaluators look to the ranking of journals in a candidate's discipline to serve as a surrogate measure.”

There appear to be three to four ways to rank journal quality. Each of these methods are used by unbiased third parties to distill a list of journals that are ranked in order of the best journals down to the journals that are not deemed as good. Once the journals are ranked, the ranking becomes a proxy or surrogate for the quality of the research of the authors of the respective articles in the journals. There is, in fact, a vast amount of literature in regard to how to rank journals and what are the best methods to rank journals. Ultimately, the faculty committees and other gatekeepers to acquiring tenure do not have to make decisions as to the quality of the research of a faculty tenure candidate. Rather, they merely look at the research and see where it it’s published to establish its “quality.”
The most common methods that are used to rank journals include “impact factor”, surveying faculty for their perception of quality journals, or simply relying on acceptance rate based on a source such as Cabell’s Directory of Publishing Opportunities (Cabell’s). None of these methods are without some inherent problems; however, that is not part of the discussion for this article. Our purpose is simply to explain the various ranking methods that are used.

When journals are ranked based on impact factor, their rank is based on the number of times they are cited by other papers published by a scientific journal. The table below is an example of how that method works.

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<tr>
<td>3</td>
<td>Marketing Science (3.96)</td>
<td>Acad. Manage. Journal (7.43)</td>
<td>Journal of Marketing (49.41)</td>
</tr>
<tr>
<td>5</td>
<td>Admin. Science Quart. (2.91)</td>
<td>Marketing Science (6.22)</td>
<td>Strategic Manage. J. (40.52)</td>
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<td>6</td>
<td>Strategic Manage. J. (2.83)</td>
<td>Strategic Manage. J. (5.90)</td>
<td>J. Consumer Research (37.97)</td>
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<td>7</td>
<td>J. Int. Business Stud. (2.28)</td>
<td>Journal of Management (5.11)</td>
<td>J. Marketing Research (33.59)</td>
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<tr>
<td>8</td>
<td>Journal of Retailing (2.05)</td>
<td>J. Consumer Research (4.90)</td>
<td>Journal of Management (24.85)</td>
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<tr>
<td>9</td>
<td>Journal of Management (2.00)</td>
<td>J. Business Venturing (4.44)</td>
<td>Marketing Science (19.61)</td>
</tr>
<tr>
<td>10</td>
<td>J. Management Studies (1.93)</td>
<td>J. Marketing Research (4.10)</td>
<td>Sloan Manage. Rev. (18.27)</td>
</tr>
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In the table, “(T)he measurement used to create this ranking…is the number of citations that authors make to articles appearing in various journals.” The use of this method presumes that the more an article is cited the higher the quality of that article.

Ranking journals according to faculty perception of the relative quality of journals involves sending out surveys/questionnaires to the faculty members of prestigious universities and having them rank the journals. The journals that percolate to the top are consistently presumed to be of the highest quality.

The other method frequently used for ranking journals is simply to focus on whether a journal is peer reviewed and to assess the journals’ acceptance rate. The presumption is that those journals that are peer reviewed and have a very low acceptance rate are the highest quality journals. The most commonly used source for the acceptance rate of peer reviewed journals is Cabell’s Directory of Publishing Opportunities (Cabell’s). On their website Cabell’s says, “(o)ur goal has been to help professors, graduate students and researchers publish their manuscripts…At present, the company publishes directories of publishing opportunities in the following areas: Accounting, Economics and Finance, Management, (and) Marketing…(t)he journal emphasizes, the type of review process, acceptance rate and number of external reviewers. The directory helps scholars identify journals for publication and guides users in evaluating journal quality.”

Indeed, it is not unusual for a college to provide and maintain a list of top rated journals that the faculty members may use when evaluating those who applied for tenure. For example, the University of Texas at Dallas website states:

The UT Dallas' School of Management has created a database to track publications in 24 leading business journals (Click here for the list). The database contains titles and author affiliations of papers published in these journals since 1990. The information in the database is used to
provide the top 100 business school rankings since 1990 based on the total contributions of faculty…. The School of Management maintains and keeps this web site current to provide timely data on research productivity in leading research journals across major disciplines in business schools. The school has worked hard to ensure data integrity, but as with any project of this type where the affiliation data is not always clear, some errors may exist. If you spot an error, please send us the corrections at Top 100 Admin.  

When any of the above described methods are used the presumption is that the “quality” of the journal is based on some objective measurement. Therefore, when the faculty review committees rate a faculty members publication record there is virtually no subjectivity to the question of quality, because the committee is using an outside source as a surrogate for quality. In other words, the faculty committee is not making a subjective decision, rather it is simply an objective standard based on a third party’s reporting. Using these third party rankings as a surrogate for quality takes out the subjectivity that was the issue in Clark v Whiting, the keystone decision dealing with the intersection of Equal Protection and tenure-track employment in a public University environment. It is Whiting and the burgeoning potential legal issues surrounding this case that we now turn our attention to.


A. The Landscape of Equal Protection

One of the keystone differences between public and private employment is that Constitutional safeguards exist for public employees, whereas they are rarely available to private employees. Those safeguards could fall under the Fourteenth Amendment’s Equal Protection Clause. In the relevant part, the Fourteenth Amendment’s Equal Protection Clause states, “nor shall any State … deny to any person within its jurisdiction the equal protection of the laws.”
Accordingly, as a threshold requirement, there must be some kind of state action. Employment by a state university provides sufficient state action, such that the Fourteenth Amendment would be applicable.29

When individuals in substantially the same circumstances are treated differently by the government, due to variation of the criterion that happens to apply to them, it raises an equal protection issue under the Constitution. The Supreme Court, however, has a multifaceted approach to its evaluation of differing treatment by the government of individuals in substantially similar conditions. Thus, merely because individuals in substantially similar situations are treated differently by the government, does not, within itself, make such treatment unconstitutional. “(The) Supreme Court has applied a bifurcated analysis in the context of equal-protection arguments, applying different levels of scrutiny to different sorts of classifications. First, the Court asks whether a suspect class or classification is involved. If a suspect class or classification is at issue the Court applies a more searching standard. How searching that standard is depends on the sort of class or classification presented: racial classifications or classifications burdening fundamental rights receive strict scrutiny.”30 “Over the past thirty years, the Supreme Court’s constitutional jurisprudence where individual rights are concerned—with the exception of criminal procedure—has come to be dominated by a three-tiered system under which governmental action is categorized according to some predetermined criteria, and then subjected to an appropriate level of scrutiny. Actions that look particularly suspicious are subject to “strict scrutiny,” those that are somewhat suspicious are subject to “intermediate scrutiny,” and the most innocuous receive “rational basis” review.”31

As the Supreme Court has said, “We have departed from traditional equal protection principles only when the challenged statute places burdens upon ‘suspect classes’ of persons or
on a constitutional right that is deemed to be ‘fundamental’.\textsuperscript{32} The concept of “strict scrutiny” was first appropriated in Skinner v. Oklahoma ex rel. Williamson\textsuperscript{33}, which is “the leading case in the fundamental rights strain of equal protection law.”\textsuperscript{34} Therefore, in order to fall under the purview of “strict scrutiny,” a business school faculty member’s interest in their continued retention, tenure, and/or promotion must be considered a fundamental right. We shall see that faculty members have a fundamental interest in retention, promotion, and tenure evaluations.

\textbf{B. Understanding Tenure-Track Employment as a Property Interest}

As we saw above, for the “strict scrutiny” standard to apply under the Equal Protection Clause, it must be established that certain university faculty members have a fundamental right in regard to his/her employment.

In January 1972 the U.S. Supreme Court heard two cases that involved university faculty members’ rights in regard to continued employment.\textsuperscript{35} In \textit{Roth}, the faculty member had a contract for a fixed term of one academic year, and the contract was not renewed. He was simply informed that he would not be hired for the following academic year. Roth challenged the University’s conduct as a violation of his rights under the Due Process Clause. The court applied Wisconsin law and regulations, and held that Roth had no legal right to an “expectation” of renewal of his employment contract. By extension, the court opined, there was no violation of Roth’s rights under the Due Process Clause. Even though \textit{Roth} deals with a claim of a violation of the Due Process Clause, the importance of the case to our argument is that the court recognized that “‘liberty’ and ‘property’ are broad and majestic terms”\textsuperscript{36}, and that they include much more than just the normal understanding of property.

In \textit{Sindermann}, however, the facts were different, and, therefore, the outcome was different. The “Appeals (Court) held that, despite the respondent’s lack of tenure, the failure to
allow him an opportunity for a hearing would violate the constitutional guarantee of procedural due process if the respondent could show that he had an ‘expectancy’ of re-employment.” The Court agreed that in this situation there was a factual issue as to whether or not he had a legitimate “expectancy” of continued employment. The college had certain rules and practices that could be construed as giving one the expectancy of continued employment. As such, if Sindermann could prove that he had this expectancy then due process would attach to that right. The Court went on to say, “We have made clear in Roth … that ‘property’ interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, ‘property’ denotes a broad range of interests that are severed by ‘existing rules or understandings.’ … A person’s interest in a benefit is a ‘property’ interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.” Therefore, faculty members who, in their employment circumstances have an expectation of continued employment will have a “property interest, and such a property interest is included as one of the fundamental rights that receive higher standards of protection.” Accordingly, certain faculty members have a property interest in their employment that is considered as part of the Court’s concept of fundamental rights.

However, not all faculty members will have a property interest in their employment because at most universities there are likely a combination of tenured faculty, probationary faculty, academic teaching staff, adjunct faculty, and/or other teaching professionals. Generally, all faculty members are reviewed annually to determine whether or not each will receive an employment contract for the coming year.
Some of those faculty members will be in categories such that they do not “have an expectation of continued employment” and, therefore, the Equal Protection Clause of the Fourteenth Amended would not apply to them. In contrast, those faculty members who are on tenure track employment will have an “expectation of continued employment” and constitutional rights will attach. As stated at the beginning of this article, we are focusing only on those faculty members who would have an expectation of continued employment under the Supreme Court standard discussed above. It follows that if the employment practice involves a fundamental right the practice is subject to “strict scrutiny” and is justifiable only if it furthers a compelling governmental purpose, and only if no less restrictive alternative is available.41


The United States Supreme Court has held that when a government practice restricts “fundamental rights” the practice is subject to “strict scrutiny.”42 “Unquestionably we have held that a government practice or statute which restricts ‘fundamental rights’ or which contains ‘suspect classifications’ is to be subjected to ‘strict scrutiny’ and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.”43 “The strict scrutiny standard requires a compelling state interest, that the means for meeting that compelling interest be strictly necessary to meet the end, and that there is no less restrictive alternative.”44 We have previously shown that some faculty members have a fundamental right in being retained (tenured). Therefore, we must address what the “compelling state interest” is that is being protected in the decision of whether or not to tenure a faculty member? “The logic behind tenure at U.S. universities was that society values the generation and dissemination of knowledge, an activity that faculty members perform through their teaching and research.”45 “Given its importance, tenure should not be awarded lightly but rather after a
serious and rigorous process. Part of that consists of the years of research and scholarship to get the highest degree in the field (usually a doctorate), followed by a record of scholarly work and teaching in the probationary period of 5 or 6 years, both of which are evaluated by peers locally and in the wider profession. These are the equivalent of the training and apprenticeships required for union cards in professional guilds.  

It is true that there may be various reasons for granting tenure. From a faculty member’s point of view, it may be to protect academic freedom. This concept is clearly stated and promoted by the American Association of University Professors (AAUP). However, in our opinion, the reasons for granting tenure are much broader than that. From the university’s point of view, the basis for granting tenure is an established, and clearly stated, level of performance of one’s job duties, which includes teaching, research and service to the institution. All of those reasons were clearly seen above when we looked at the various standards for granting tenure. What the university desires is a competent professor. The fact is that what the university wants and what the public wants are the same - competency. Those who are paying for an education want to be certain that they are receiving the best education for their money. This includes both the tuition and the tax dollars that are spent for education. Therefore, the compelling state interest for reviewing faculty in the tenure process is to make sure those faculty members who are teaching are at least qualified and competent in both their current knowledge and ability to impart that to students. For that reason, what is reviewed is the faculty member’s teaching performance, research performance and service.

The first performance issue to be reviewed, teaching ability, demonstrates the faculty member’s ability to teach students by being able to communicate with students in a manner that is understandable and helps them to learn the material. The ability to teach is generally assessed
through an examination the syllabi, student teaching evaluations, peer evaluations and other indications of teaching performance.

The second, research, demonstrates that the faculty member possesses current knowledge in the field that he/she is teaching. The presumption is that by being able to publish in peer reviewed journals, the faculty member has demonstrated that he/she is current and that what is being covered in class is material that is current, and, therefore, relevant. The research component is shown by such things as the number and quality of presentations at professional association meetings, publication in professional journals, books, contributions to books, and other such items intended to show that the faculty member is current and knowledgeable in his/her teaching field.

The service component is mainly used to show that the faculty member is also participating in the college and university – as a “good organizational citizen.” In addition, there could be outside service to the public or to the profession. (e.g., the reviewing of other faculty members’ research as a peer reviewer for journals).

Therefore, all of these factors are important in demonstrating a “compelling state interest,” namely that the faculty member has the ability and competency to teach students. If, as we argue, the reason for making such judgments constitutes a compelling state interest, then the corresponding methods of providing evidence of good teaching, evidence of currency through publications, and presentations must be constitutionally proper. Publication requirements in peer reviewed journals could clearly be the proper evidence of a faculty member’s ability and knowledge within a field. The problem, however, presents itself when the research requirements vary between departments within the same college. Any variance between departments within the same college could properly be understood as a constitutionally “improper method.” The
method used to judge whether a faculty member has the current knowledge in their field, so that his/her teaching is current and relevant should be the same for each department in the college of business, because the last requirement in a strict scrutiny analysis – that there is no less restrictive alternative – would require that the objective standards for making those decisions are virtually identical among all of the departments in a college of business.

D. The Substantive Issue of the Assessment of a Tenure Candidate’s Research Quality:

The substantive issue of equal protection relates specifically to the standards that apply to the review of the faculty member’s performance. Due to the variances in tenure requirements between departments, there is a systemic risk of litigation under the Equal Protection Clause. One of the major reasons for this risk of litigation is that not receiving tenure has a major impact on the faculty member’s future career, not just that he/she loses their present position. “In most institutions, tenure track faculty members who do not achieve tenure within a specified period of time are then given terminal contracts for only one more year of service. Those who are thus ‘tossed from the ivory tower’ are denied not only the prestige, security, and financial benefits associated with tenure, but are also stigmatized as being ‘unworthy’ faculty members. As ‘tainted goods,’ their prospects of employment at other institutions of higher learning may be very limited.” Therefore, the stigma of not being granted tenure could have a significant effect upon a faculty member’s future career. If the basis for not receiving tenure is based on standards that are equal and are objectively measured, then that should not create a legal problem, but if the standards, even if objectively measured, vary among departments within a college, that could create a legal issue under the Equal Protection Clause.

Therefore, “Given the widespread use of performance evaluations in education and their impact upon careers, it should come as no surprise that the entire evaluation process is filled with
legal implications. In particular, the legality of the criteria and procedures used in evaluating faculty performance have (sic) been subjected to repeated legal challenges.” However, the challenge to winning a case based on the “quality” of the research by a faculty member appears to have hit a roadblock in a Supreme Court decision. The leading case in this area, Clark v. Whiting, is fairly old but relevant to our argument. In Whiting, Professor Clark claimed that North Carolina Central University violated his equal protection rights by treating his request for promotion to professor differently from others “in the past.” One of the criteria, in his department, for promotion was that his scholarly contributions evidenced “continued growth”. The specific evidence of his scholarly contributions consisted of a “self-published laboratory manual for use in his classes, his Ph.D. thesis, and an accepted, but unpublished, article. The plaintiff based his equal protection claim “on the alleged failure of the defendants to apply the same standards in evaluating his qualifications for promotion and his ‘scholarly achievement’s as were used in ‘in the past’ in passing on promotions of other faculty members.” In response to the plaintiff’s argument, the court said:

If plaintiff’s equal protection argument is applied to the facts of this particular case, the issue for the court would be whether the defendants, in reviewing the “concrete evidence” of plaintiff’s “continued growth by scholarly contributions in his field,” had given the same consideration, made the same analysis and reached a like judgment on his “scholarly” publications as it had on similar publications by other faculty members “in the past” in deciding on faculty promotions. The problem thus presented to the court would not be an easy one…But what the plaintiff would overlook is that the question is not whether similar publications, or at least some of them, may have been considered in the promotion context in connection with other situations where a faculty promotion was approved; the question is how those publications may have been evaluated by proper academic authorities as a basis for determining whether the faculty member had demonstrated “continued growth by scholarly contributions in his field.” It is a quality, not quantity, which is to be evaluated and it is that evaluation with respect to
which courts are not qualified to “second guess” the professional experts.\textsuperscript{54}

The \textit{Whiting} opinion underscores reluctance on the part of the courts to inject their own subjective, qualitative assessments, and thereby supplant better qualified “professional experts”. As we shall see below, the current backdrop of tenure decisions evades this judicial pitfall, because in most colleges of business, the relative “quality” of a publication is gauged by an objective third party standard.\textsuperscript{55} Today, the quality standard is generally judged by using journal ranking as a proxy for establishing the quality of a journal by the local tenure and promotion committee. As one commentator has stated, “Journal publication is a primary consideration in the promotion and tenure decision for faculty in the United States…”\textsuperscript{56} It is not, therefore, solely a subjective local faculty issue. It becomes simply a factual issue that does not require local qualified expertise to judge, because the “quality standard” that is applied is an objective standard set by a third party. As Peter Lawrence has stated, we have become an "audit society, in which each indicator is invested with a specious accuracy and becomes an end in itself."\textsuperscript{57}

Therefore, today the quality standard of a tenure candidate’s research is determined by a third party, making the issue raised by the court in \textit{Whiting} moot, because the faculty committee isn’t deciding the quality on an \textit{ad hoc} basis for each tenure request. Rather, the quality standard is established by some objective outside standard. The faculty members on the tenure committee simply look at the vita of the faculty member requesting tenure, look at the number of publications and where they were published, and then the committee looks at some outside ranking source to determine the “quality” of the publication.

As discussed earlier, that outside source could be the rank of the journals established by citation count, by faculty survey of what they consider top journals or simply looking at Cabell’s
to determine the journal’s acceptance rate. At most colleges of business, these outside sources have become the surrogate for quality. Thus, other than counting articles, and looking at some outside source, nothing else is required of a committee member evaluating publication requirements for tenure. Therefore, since the committee members are not making quality decisions on an ad hoc basis, it would not involve the court having to “second guess” whether the faculty standard that is applied to any one request is “correct,” because the court would only have to look at the standard determined by the third party and determine whether that same “objective” standard is applied to all faculty members requesting tenure; if this presumably objective quality standard differs from one faculty member to another within the respective college of business, such differentiation may violate the Equal Protection Clause.

At the beginning of this article we gave a brief example of what could happen to a faculty member during the tenure process. Now we want to re-visit this with a more detailed example in order to provide the more comprehensive understanding of the issue.

Professor Mack is in the Accounting Department of the College of Business at Large State University. Professor Sharma is in the Management Department of the College of Business at Large State University. Both have been there the requisite number of years to be eligible for tenure. The criteria in the Accounting Department is evidence of good teaching, based on self evaluation, peer evaluation and student evaluations, evidence of service to the University based on committee work at the University level, the College level and the Department level, and research. The criteria for satisfactory research in the Accounting Department is that within the most recent five year period a faculty member who wants to be tenured must have three publications in peer reviewed journals. The journals, according to Cabell’s, or some other substantiated information, must have an acceptance rate of no more than 20%.
The Management Department has all of the same criteria for teaching and service, but it has changed the criteria for research. In the Management Department, in order to be tenured, the faculty member must have three publications within the most recent five year period, which must be published in a peer reviewed journal. However, the journal, according to Cabell’s or some other substantiated information must have an acceptance rate of no more that 30%.

In both departments, the acceptance rate is the surrogate for quality research. The faculty members on the committee do not make an independent determination of quality.

The guidelines in both departments fall within the broader guidelines established by the College of Business at Large State University in order to be granted tenure. Both departments use the College of Business guidelines for good teaching, and service. However, in regard to research, the College of Business requires that publications be in peer reviewed journals having an acceptance rate of no more than 30%. The College of Business standard goes on to say that the departments have the freedom to make the acceptance rate more stringent, but may not make it less stringent. Therefore, both departments are within what the College of Business standards allow because the 20% rate is not less stringent than the rate established by the college.

Professor Mack and Professor Sharma have almost identical portfolios in regard to teaching and service. Each of them meets those criteria. Professor Mack has three publications within the most recent five years in peer reviewed journals. The problem is that two of Professor Mack’s articles are published in journals with an acceptance rate of less than 20% and the other in a journal with an acceptance rate of between 20% and 30%. Therefore, based on the criteria in the Finance Department Professor Mack is denied tenure.

Professor Sharma has an identical publications record, but because of the different criteria, is recommended for tenure, and eventually receives tenure. Had Professor Mack been in
the other department he/she would have been tenured. The different result creates a potential legal issue under the Equal Protection Clause. In order to further understand the legal pitfall that such an asymmetry may create, a further explication of Whiting is required.

E. **Whiting, Surrogates, and the Potential for Judicial Intervention**

Removing the subjectivity that was the issue in Whiting is important to our argument; because it is clear that courts don’t want to interfere in something they consider a mostly subjective academic decision that is up to the faculty members’ expertise to resolve.

Traditionally, the courts have been reluctant to interfere in what has been basically deemed an academic exercise. The courts recognize that the evaluation of faculty performance is a "defining act of singular importance" to academic institutions and have accepted the performance evaluation process as essential to the "lifeblood and heartbeat" of academic excellence and vital to the efficient functioning of colleges and universities. For the most part, the courts have viewed the evaluation of academic performance as an exercise outside the expertise of the courts and one better left to academicians. Also, the judiciary has generally behaved as though it believed that evaluations were made only after careful deliberation and with procedural due process protections. In short, the judiciary has tended to act as if colleges and universities could be trusted to act in good faith.58

The Whiting opinion makes clear that the court believed that assessing the relative quality of research for a particular tenure candidate was a decision made after “careful
deliberation” by the academicians who are considered to have the expertise to make that decision. The court concludes, therefore, that these decisions are best left to academicians and not judges. However, as demonstrated by our discussion above, today, in most cases the quality of that scholarship/research is not judged after “careful deliberation”, rather it is “judged” by some outside third party standard such as faculty ranking, impact factor or Cabell’s. Therefore, the assumption held by the court in Whiting is now incorrect. Because in most instances quality is now established by some outside third party, and that ranking is the surrogate for quality of scholarship/research, the Court’s decision in Whiting becomes a moot point. Because of Whiting, an issue that has not been addressed by later court decisions is an equal protection argument based on the fact that surrogates for quality are now being used in the decision making process. Specifically, in our discussion, it is the objective standard of quality as established by some other third party that is used for judging the quality of the publications of a given faculty member, not the subjective judgment of the faculty who serve on the review committee.

No great chasm exists between the various departments in a school of business, which should require differing publication standards between the departments. The differing standards are arbitrary, and generally governed by the dictates of department chairs and/or departmental committees, as opposed to Constitutional fidelity. Thus, a “less restrictive alternative” is available to the state. This alternative would force publication requirements in differing departments of a school of business to be equalized. Because of the substantially similar positions of business faculty, equal publication requirements among all departments achieves the compelling state interest of requiring currency in one’s field, while also maintaining the integrity of all faculty member’s Constitutional rights under the Equal Protection Clause.

**IV. Recommendations**
We have considered the possible legal issues involved in tenure decisions as they are currently made in many colleges of business. The risk of a lawsuit in today’s economic climate is much higher than it may have been in the past. The chance of a faculty member prevailing in such a lawsuit appears to be fairly high based on both the current economic climate and the nature of the lawsuit. For example, based on a study by Adam Winkler, the chances of prevailing in an equal protection claim that involves a fundamental right when the defendant is an educational institution is 80%. Winkler states that, “Strict scrutiny as applied to educational institutions, such as universities, public schools, and libraries is fatal in all but 20 percent of observed applications.”

Therefore, our recommendation is for colleges of business to review the tenure requirements of the various departments, and if the requirements vary, especially in regard to the research component of granting tenure, they should consider making modifications to that. The component changes could be accomplished in several ways. The easiest would be for each department to have the same requirements, which would eliminate the Equal Protection issue. However, most college faculty members would not like that choice because it takes away some of the flexibility among departments, which is part of the culture in an academic environment. If having the same requirements is not feasible, there is another choice, but that involves much more time and involvement by faculty members who are on the review committee.

The other choice is to take back the responsibility for making the quality decisions internally instead of using the surrogates described above. The Court in Whiting said, “the question is how those publications may have been evaluated by proper academic authorities as a basis for determining whether the faculty member had demonstrated ‘continued growth by scholarly contributions in his field.’” It is a quality, not quantity, which is to be evaluated and it is
that evaluation with respect to which courts are not qualified to ‘second guess’ the professional experts. Therefore, if the faculty committees take back the role of making quality decisions that are not based on some outside source that becomes the surrogate for quality, the courts will not interfere with that process. This would require that faculty members look at the actual research of the tenure candidate, and make a determination as to the quality of the candidate’s research. It does not mean that such things as impact factor, acceptance rate, and journal ranking may not be considered. Rather, it means that those outside factors may not be the only thing that are considered. If tenured faculty members in the substantive area of the faculty who is being reviewed actually read the research articles and make that part of the decision process, then there is an internal monitoring component regarding the quality of a candidate’s research. This monitoring component would provide persuasive evidence to a Court, that academic experts are still making “quality” assessments regarding research. The articles could also be sent out to peers at other institutions for feedback as to the quality of the article. The committees could develop a form to be filled out that asks the typical questions such as, “Do you believe that this article contributes to the knowledge base? If yes, please describe how.” Such a questionnaire could then be used to help make an assessment as to the quality of the article. The model for the questions that can be asked on such a form already exist. Whenever an article is submitted for publication at any refereed journal, the reviewers use such a form to evaluate the article for possible publication. It would be simple to use such a form as a starting point for both internal and external reviewers during the tenure decision process. There are some colleges of business that already use external peer reviewers to help in assessing a faculty member’s publications. Adherence to the above-described process will avoid the problem of committees outsourcing tenure decisions to third-parties who provide a surrogate for the quality decisions that should be
made by faculty. This process would, therefore, insulate a college of business from judicial interference.

Therefore, the recommendation is that in order to preserve some flexibility among departments, the use of either inside reviewers and/or outside reviewers should be part of the process to judge quality. When that is done, the faculty is making their own assessment of the quality of the research, and the use of surrogates is either eliminated or a secondary source for quality.

V. Conclusion

Even though this issue has not yet been raised in litigation, it is important to understand that a college of business, and perhaps other colleges where departments are as homogeneous (e.g., psychology and sociology), must use a system were the criteria for retention, promotion and tenure of faculty is put back into the hands of faculty in regard to making quality of research decisions. If the departments have a criterion that differs, and the quality decisions are left to an outside surrogate, and the difference could cause a faculty member from one department to not receive tenure who would otherwise receive it in another department, then an Equal Protection Clause issue is raised, with its resultant “strict scrutiny” standard of review. In all likelihood such discrimination against a faculty member would be found unconstitutional. It is our belief that it is only a matter of time before this issue is tested in court. Therefore, colleges need to be aware of this risk, and the subsequent cost, and proactively scrutinize their policies to determine whether it would be in their best interest to make them uniform across homogeneous departments or to employ the method described in our recommendation section. It is our opinion that the
best practice is for faculty to take back the determination of what is quality research, which the courts feel is well within their purview, rather than abdicating that responsibility to a third party.

1 Attributed to Albert Einstein.

2 For the purposes of this article we will use the generic term “business journal” as a broad category of journals that focus on the various areas of business – marketing, management, accounting, finance, etc. They will also include law journals for the business law faculty and pedagogical journals on how to teach those subjects.


4 For example, the guidelines include the following:

**Portfolio of Faculty Contributions**

A generalized categorization of intellectual contributions includes contributions to learning and pedagogical research, contributions to practice, and discipline-based scholarship. Institutions customize these contributions, indicate their relative importance, and add additional responsibilities in their mission statements. The portfolio of faculty contributions must fit with the prioritized mix of activities as stated in the mission statement and demanded by the degree programs and other activities supported by the school. While not every faculty member must contribute in each of the three categories, the aggregate faculty must provide sufficient development in the past five years. The school’s mission determines the appropriate balance of activity among the three types of contribution. The portfolio of faculty contributions should reflect that balance.

The school’s mission or supporting materials, including stated policies, should clearly indicate the nature and focus of the intellectual contributions that are expected from its faculty. Three types of intellectual contributions are described below and the actual portfolio may include all three types; however, the school’s mission and array of degree programs should influence the school’s policies and the mix of actual intellectual contributions that are produced:

- **Learning and pedagogical research** contributions influence the teaching-learning activities of the school. Preparation of new materials for use in courses, creation of teaching aids, and research on pedagogy all qualify as Learning and pedagogical research contributions.

- **Contributions to practice** (often referred to as applied research) influence professional practice in the faculty member’s field. Articles in practice-oriented journals, creation and delivery of executive education courses, development of discipline-based practice tools, and published reports on consulting all qualify as Contributions to practice.

- **Discipline-based scholarship** (often referred to as basic research) contributions add to the theory or knowledge base of the faculty member’s field. Published research results and theoretical innovation qualify as Discipline-based scholarship contributions.

…(S)chools should have clear policies that state expectations to guide faculty in the successful production of a portfolio of intellectual contributions that are consistent with the school’s
mission and insures that a “substantial cross section of the faculty in each discipline” is producing intellectual contributions. Generally, intellectual contributions should meet two tests: Exist in public written form, and Have been subject to scrutiny by academic peers or practitioners prior to publication. Id. at pages 21-22.

The reason we focus on the college of business context is because what is typically required to meet the research criteria are publications in business journals. The type of publications and the type of research for most of the journals is very similar and only reflect the different disciplines within the college of business. By contrast, a liberal arts college will have faculty from history, art, music, psychology, etc. These disciplines are very different and require different types of research/creative activities. Therefore, the various criteria for retention/promotion/tenure are different due to the very nature of the variety of disciplines. Colleges of business are more homogeneous, and therefore, the focus of this article. However, there may be other departments within other colleges that are just as homogeneous as the departments within a college of business, which would give rise to the same arguments we present.

See, e.g., The University of Virginia Promotion and Tenure Policy states that, “Each school or division must have a written policy for promotion and tenure that reflects the standards of its disciplines and its own considered aspirations. Differences among disciplines are appropriate, indeed inevitable, but each set of standards must be justified against an articulated mission, must establish procedures that assure their fair and reasoned application, and must be consistent with the policies and procedures outlined below.” Peter W. Low, Vice President and Provost of the University, The University of Virginia Promotion and Tenure Policy http://www.virginia.edu/provost/docs_policies/tenure.html (last visited September 27, 2009);

See, e.g., The policy at Robert J. Trulaske, Sr., College of Business, University of Missouri states, “The College level expectations, as described in the above three sections, shall apply to all units, but shall provide flexibility and permit greater restrictiveness for individual units. Specific performance standards for each of the areas and relative weightings may vary among units within the College. Nonetheless, each unit's criteria and procedures shall meet or exceed the minimum College guidelines, as described in this document.” at Promotion and Tenure Guidelines (1995), http://business.missouri.edu/1114/default.aspx (last visited May 22, 2010). Also see, “The Group I members of each School/Department in the College may promulgate a set of tenure and promotion guidelines which is in conformity with, but no less stringent than, the College guidelines.” http://www.cob.ohiou.edu/cms.aspx?cid=1299 (last visited May 22, 2010).

See, e.g., University of Wisconsin System, UWS 3.06 (1997), www.legis.state.wi.us/rsb/code/uws/uws003.pdf (last visited May 22, 2010). Also see, Guidelines on Tenure and Teaching in The University of North Carolina at Greensboro. “Department/Division guidelines for promotions and tenure are in accordance with and subordinate to unit documents. Each department/division is expected to establish comprehensive department/division-specific evaluation guidelines for each of the three common categories and for the fourth, directed professional activity, if the unit incorporates the fourth category into its criteria.” http://provost.uncg.edu/documents/personnel/evaluationPT.pdf

See, U.W. Eau Claire has the departments of Business Communications, Information Systems, Management & Marketing, and Accounting & Finance. U.W. La Crosse has the departments of Accountancy, Economics, Finance, Information Systems, Management, and Marketing. One of
the authors of this article, a business law professor, has been in a General Business Department, a Management Department, and an Accounting, Business Law and Finance Department.

10 *Supra* note 6, 7 & 8. These examples are a very common way that university systems establish the criteria.

11 See, e.g., Trulaske College of Business, University of Missouri, “The College level expectations, as described in the above three sections, shall apply to all units, but shall provide flexibility and permit greater restrictiveness for individual units.” at Promotion and Tenure Guidelines (1995), [http://business.missouri.edu/1114/default.aspx](http://business.missouri.edu/1114/default.aspx) (last visited May 22, 2010); Delta State University, “Evaluation shall be based on all three areas although it is realized that differences in emphasis may exist, depending on the academic discipline and the nature of the faculty member’s assignment.”; [http://www.deltastate.edu/pages/2473.asp?manid=%7B811775AC8-5346-4E8A-9802-D96D73CE050F%7D&id=%7BC06DFA79-6FCE-4CC5-BB9D-8694FD633457%7D](http://www.deltastate.edu/pages/2473.asp?manid=%7B811775AC8-5346-4E8A-9802-D96D73CE050F%7D&id=%7BC06DFA79-6FCE-4CC5-BB9D-8694FD633457%7D) (last visited May 22, 2010); McCoy College of Business, Texas State University, “Candidates for Tenure or Promotion must provide documentation that supports quality of teaching, scholarly/creative activity and leadership/service as defined in department and college criteria.” McCoy College of Business Administration, CBAPPS 5.05 ([http://www.business.txstate.edu/forms/policies/cbapps5/CBAPPS5_05.pdf](http://www.business.txstate.edu/forms/policies/cbapps5/CBAPPS5_05.pdf)) (last visited September 27, 2009); North Carolina State University, “Primary responsibility for RPT recommendations rests with each department, and they may choose to weigh the standards outlined below somewhat differently from one another consistent with the varying missions of the departments.” College of Management Reappointment, Promotion and Tenure Standards and Procedures (2008), [http://www.ncsu.edu/policies/employment/rpt/RUL05.67.503.php](http://www.ncsu.edu/policies/employment/rpt/RUL05.67.503.php) (last visited May 22, 2010).


13 See, e.g., a faculty member of a committee to create a new policy at New Mexico State University said, “People need to know what is expected of them and they need to know what the process is going to be. It’s not fair to tell somebody you have to publish this, this and this and then turn around and say ‘you’ve done that but your teaching isn’t any good.’ Somewhere, the criteria have to be laid out so the person knows they are responsible for teaching as well as for the research or responsible for the research as well as for the teaching.” [http://www.nmsu.edu/~ucomm/Releases/2008/july/tenure_release.htm](http://www.nmsu.edu/~ucomm/Releases/2008/july/tenure_release.htm); the following is a typical description of the process to be followed:

**CRITERIA FOR AWARDING TENURE**

Decisions in favor of awarding tenure are made in recognition of accomplishments in response to the following criteria: teaching, scholarship, and service, as well as the appropriate academic background for a tenure appointment. Evaluation shall be based on all three areas although it is realized that differences in emphasis may exist, depending on the academic discipline. Each of the criteria is defined below.

**DEPARTMENT/DIVISION TENURE AND PROMOTION COMMITTEE**

Each academic department/division in the University shall have a standing tenure and promotion committee. This Committee shall consist of at least three persons. All of the tenured faculty members of
the department/division, excluding the department/division chair, shall serve on the Committee. If there are not enough tenured faculty members within the division/department to meet this criterion, the tenured faculty, in consultation with the department/division chair, shall appoint tenured faculty to the Committee to meet the required criterion of at least three persons. The Committee members may come from tenured faculty within the same college or school or from tenured faculty in the same discipline outside the University. Department/division chairs shall notify tenure candidates of the non-departmental appointees to the Committee reviewing their application prior to the initiation of their review. Any concerns of the candidate regarding non-departmental appointees shall be forwarded to the Chair of the University Tenure and Promotion Committee, who shall meet with the departmental tenure and promotion committee to seek resolution. In the absence of agreement, the Provost will mediate a resolution. The department/division tenure and promotion committee shall have the responsibility for reviewing portfolios of candidates for tenure and making recommendations, with reasons, as to whether tenure should be granted. The Committee shall also be responsible, with assistance from the department/division chair and tenure-track faculty, for recommending tenure and promotion procedures and for recommending guidelines for the portfolio to be used by candidates from that department/division for promotion or tenure consideration.

UNIVERSITY TENURE AND PROMOTION COMMITTEE

The University shall have a standing tenure and promotion committee. This Committee shall consist of eleven tenured faculty. The Committee shall include three persons from the College of Arts and Sciences, three from the College of Business, three from the College of Education, one from the School of Nursing, and one from Library Services. No two members shall be from the same department/division. Members shall be elected by the tenured and tenure-track faculty in the college or school they represent and shall serve for staggered three-year terms. The Committee Chair shall rotate among the colleges and schools based on the following schedule: Arts and Sciences, Business, Education, Nursing, and Library Services. The faculty member within the appropriate college/unit with the most longevity of service on the Committee shall serve as Chair. The Committee shall serve several functions, including, but not limited to, the following: (1) to advise and consult with the Provost/Vice President for Academic Affairs on criteria, policies, and procedures related to tenure and promotion; and (2) to review all tenure and tenure policy recommendations transmitted from department/division committees for compliance with Board, University, and department/division policies. To assist with this process, deans will forward a list of tenure and promotion candidates to the chair of the University Tenure and Promotion Committee by December 1.

TENURE AND PROMOTIONS APPEALS COMMITTEE

The University shall have a standing tenure and promotions appeals committee. The Tenure and Promotions Appeals Committee shall consist of three tenured faculty members at the rank of Professor. No two members of the Committee shall be from the same college or school, nor shall they be members of the University Tenure and Promotion Committee. The members shall be appointed by the Faculty Senate as a standing committee at the beginning of the academic year and shall serve one-year terms. Committee members shall not hear appeals from members of their academic department/division. If a member of the Committee cannot hear a particular appeal, the Faculty Senate Chair shall appoint a temporary replacement.

PROCEDURES

TENURE APPLICATION. Consideration for tenure shall not be deferred beyond the seventh full year of service in the probationary period (sixth full year of service in the probationary period for faculty hired in 2005-06 and after). Department/division chairs shall notify faculty in writing of their eligibility for tenure
consideration by October 1 of the seventh year of service (sixth year of service for faculty hired in 2005-06 and after). By the end of seven years in the probationary period (six years for faculty hired in 2005-06 and after) in a tenure-track position, a faculty member shall be awarded tenure or given a terminal contract for the eighth year (seventh year for faculty hired in 2005-06 and after).

PRE-TENURE AND PRE-PROMOTION REVIEW. By February 1 of a faculty member’s third year and fifth year in a probationary appointment at the University (second year and fourth year in a probationary appointment for faculty hired in 2005-06 and after), the faculty member shall submit his/her portfolio to the chair of the department/division’s tenure and promotion committee. This committee shall review the portfolio and make recommendations in writing to assist the faculty member in advancing in an appropriate manner toward tenure and promotion. The department/division chair and the dean shall also review the portfolio and make written recommendations to the faculty member. Both the committee report and the department/division chair/dean reports are to be on file in the department/division chair’s office and in the dean’s office by March 15. In cases where minimal progress is made between the third year and fifth year (second year and fourth year for faculty hired in 2005-06 and after), as determined by the committee, the department/division chair, and/or the dean, the faculty member shall, in consultation with the chair, develop and have on file in the dean’s office by May 1 a plan of action for improvement. This pre-tenure and pre-promotion review process shall serve as a mentoring function for the faculty member to identify strengths and weaknesses, not as a vote on tenure/promotion consideration; see also University of Baltimore policy at http://www.deltastate.edu/pages/2473.asp?manid=%7B81775AC8-5346-4E8A-9802-D96D73CE050F%7D&id=%7BC06DFA79-6FCE-4CC5-BB9D-8694FD633457%7D; see also, University of Baltimore policy at http://www.ubalt.edu/policies/index.cfm?page=105.

14 Id. Adler at 85-86.
15 Supra note 14, Copeland and Murry at 241 (citation omitted).
16 Supra. Dennis et. al, note 22 at 1.
17 Id. Dennis, et. al, note 22 at 1.
18 Id. Dennis, et. al, note 22 at 1.
20 Id. Adler at 78.
21 http://www.journal-ranking.com/ranking/web/content/intro.html (emphasis added).
James W. Hesford, Wim A. Van der Stede, and S. Mark Young, The Most Influential Journals in Academic Accounting, 31 Accounting, Organizations and Society 663 (October 2006); Alan Reinstein and Tomas G. Calderon, Examining Accounting Departments’ Rankings of the Quality of Accounting Journals, 17 Critical Perspective on Accounting 457 (2006); L.D. Brown and R.J. Huefner, "The Familiarity with and Perceived Quality of Accounting Journals: Views of Senior Accounting Faculty in Leading U.S. MBA Programs", 11 Contemporary Accounting Research 223 (Summer 1994); Shawn M. Carracher, Terrence J Paridon. "Entrepreneurship Journal Rankings Across the Discipline" 19 Journal of Small Business Strategy 89 (Fall 2008/Winter 2009). There are numerous other articles on the same topic; this is just a representative sample.

23 Tobias Opthof, Sense and nonsense about the impact factor, 33 Cardiovascular Research 1 (1997); “The impact factor for a journal is calculated based on a three-year period, and can be considered to be the average number of times published papers are cited up to two years after publication.” http://www.sciencegateway.org/impact/; “Progress in science is driven by the publication of novel ideas and experiments, most usually in peer-reviewed journals, but nowadays increasingly just on the internet. We all have our own ideas of which are the most influential journals, but is there a simple statistical metric of the influence of a journal? Most scientists would immediately say Impact Factor (IF)” http://www.pnas.org/content/106/17/6883.full

24 Supra note 30, Liebowitz at 77 (citation omitted).

25 Acceptance rate is determined by the number of articles submitted to the journal for possible publications versus the number actually accepted for publication. If the journal receives 100 articles in a given year for consideration, but only accepts 10 of those for publication then it has a 10% acceptance rate, which is considered very good. See, e.g., Gordon Ford College of Business at Western Kentucky University, “The departmental committees will evaluate the quality of the various scholarly endeavors. Quality may be assessed by considering the ranking of the outlets, journals, acceptance rates, citations to the work, visits or downloads to electronic sights, etc… In determining target journals, the Department should consider the following characteristics: Low acceptance rate (maximum 20% or less).” http://74.125.95.104/search?q=cache:mA4XWs_EibsJ:www.wku.edu/gfcb/uploads/File/GFCB/Faculty%2520and%2520Staff%2520Resources/Policies/Promotion%2520and%2520Tenure%2520Guidelines.pdf+%22college+of+business+tenure+requirements%22&hl=en&ct=clnk&cd=39&gl=us

26 http://www.cabells.com. For an example of how it is used, see the University of Missouri at Kansas City website which says, “Cabell’s Directory list dozens of scholarly journals with their publication guidelines in the fields of accounting, economics and finance, management, marketing, education, and psychology. The directory helps scholars identify journals for publication and guides users in evaluating journal quality. Entries include contact information, manuscript guidelines, acceptance rates, review process, number of reviewers and audience.” (emphasis added) at http://library.umkc.edu/online/databases/cabells.htm


28 http://top100.utdallas.edu/; also see, http://www.journal-ranking.com for a website that provides information on ranking of academic journals. (emphasis added)

29 See, e.g. “In order to invoke the principle of equal protection, state action must be present. Traditionally, state action was seen as an action by a state actor whose authority comes from the

30 Benjamin G. Ledsham, Means To Legitimate Ends: Same-Sex Marriage Through The Lens Of Illegitimacy-Based Discrimination, 28 Cardozo L. Rev. 2373, 2386 (April 2007) (citations omitted)


33 316 U.S. 535, 541 (1942).


36 Roth at 571.

37 Sindermann at 577.

38 See generally, Sindermann

39 Sindermann at 570-580

40 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624; 63 S. Ct. 1178; 87 L. Ed. 1628 (1943). Where the Court states that “property” is one of the “fundamental rights”. “One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights…” at 638.


45 A. Ravi P. Rau, Two paths to Tenure, both In and Out, http://www.aaup.lsu.edu/TenurePaths-HR.pdf

46 Id.


48 John D. Copeland & John W. Murry, Jr., Getting Tossed From the Ivory Tower: The Legal Implications of Evaluating Faculty Performance, 61 MO. L. REV. 233, 238-239 (Spring, 1996)

49 Id. Copeland at 239.

50 Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979).

51 Id. at 636.
See the discussion below under the heading of “Ranking the Journals and Judging the Quality of the Research”, also see e.g., Ohio University College of Business, “At least six articles in journals…deemed sufficient in quality by peers…” Then in an asterisk to this it states, “Each department/school will have to determine an externally validated list of journals deemed sufficient in quality in the discipline for this criteria.” College of Business Tenure and Promotion Policies and Procedures (2005), http://www.cob.ohiou.edu/cms.aspx?cid=1299; the College of Business at New Mexico State University states, “(t)he College has traditionally recognized good quality, refereed articles in academic journals as the primary standard by which scholarly activity is judged for those candidates seeking tenure.” http://business.nmsu.edu/wordpress/wp-content/uploads/2008/10/cob-pt-guidelines-10jan08-efffall08.pdf.

Alan R. Dennis, Joseph S. Valacich, Mark A. Fuller and Christoph Schneider, Research Standards for Promotion and Tenure in Information Systems, 30 MIS Quarterly 1, 3 (2006)


Supra note 14, Copeland and Murry at 244-245; also see, Mark L. Adams, The Quest For Tenure: Job Security and Academic Freedom, 56 CATH. U.L. REV. 67, 82 (Fall, 2006) (citation omitted).

See, e.g. Clark v. Whiting, 607 F.2d 634 (1979) where the court did hear an equal protection claim and refused to address the issue of whether the faculty member’s denial of promotion violated equal protection because that faculty members research met the same standards as other faculty members who had been promoted “in the past”. The issue here was a judgment of quality of the research and whether his research showed “continued growth…in his field”. The court refused to make such a subjective decision. The case did not address whether the objective criteria used was different.


Supra, note 20.

Example of a review form:
I. **SUBSTANTIVE MATTERS** (please type the appropriate number in the space provided
(1 = poor; 5 = excellent)

<table>
<thead>
<tr>
<th>Importance and timeliness of topic</th>
<th>1 2 3 4 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall quality of author's analysis of topic</td>
<td>1 2 3 4 5</td>
</tr>
<tr>
<td>Suitability of Research for this College</td>
<td>1 2 3 4 5</td>
</tr>
<tr>
<td>Thoroughness of discussion</td>
<td>1 2 3 4 5</td>
</tr>
<tr>
<td>Thoroughness of research</td>
<td>1 2 3 4 5</td>
</tr>
</tbody>
</table>

II. **READABILITY** (1=poor; 5=excellent)

<table>
<thead>
<tr>
<th>Style (grammar, punctuation, etc.)</th>
<th>1 2 3 4 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organization (structure, transitions, flow, logical development of topics)</td>
<td>1 2 3 4 5</td>
</tr>
</tbody>
</table>

II.