

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

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*“Not everything that can be counted counts,  
and not everything that counts can be counted.”<sup>1</sup>*

*Professor Mack, a tenure track finance 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 for both teaching and service standards. The requirements for research in her department state 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 thus denied tenure and receives her final one year contract from the college.*

*However, had Professor Mack been a tenure track faculty member in another department in that college of business, she would have received tenure because of her performance in teaching, service and research. The difference in outcomes reflects the asymmetry between departments’ differing 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’ impact to Professor Mack’s career is 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, and her career pursuits will be forever marred by 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 of business could raise under the Equal Protection Clause of the United States Constitution.

At most universities, there is no requirement that the standards for tenure be 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.<sup>2</sup> 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*.

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<sup>1</sup> Attributed to Albert Einstein.

<sup>2</sup> One of authors has been at two universities with different tenure standards among the departments. For other examples, see New Mexico State University, <http://business.nmsu.edu/administration/promotion-tenure/> (last visited January 27, 2012); Kansas State University, <http://www.k-state.edu/academicpersonnel/add/bus/business.htm> (last visited Jan. 27, 2012).

However, the question of whether or not to retain a tenure track faculty member, regardless of department or college, is similar.

The reason for examining only business colleges' 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. Regardless of whether a faculty member is hired to teach in management, marketing, accounting, or some other area within the college, publications must be in some type of academic business journal.<sup>3</sup> One of the contributing factors to this homogeneity is the accreditation 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.<sup>4</sup> AACSB has created a set of standards that must be met for accreditation; these standards include guidelines for “intellectual contributions.”<sup>5</sup> 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.<sup>6</sup>

Because of these factors, as well as 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, where a 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. Having outlined the factual backdrop for this paper, we turn our attention to the methodology by which tenure standards are created.

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<sup>3</sup> 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 as well as pedagogical journals on how to teach those subjects.

<sup>4</sup> Approximately 25 percent of institutions in the United States and 5 percent worldwide, are AACSB accredited, [www.aacsb.edu](http://www.aacsb.edu).

<sup>5</sup> The Association to Advance Collegiate Schools of Business, *Eligibility Procedures and Accreditation Standards for Business Accreditation*, Standard 2 (January 31, 2010), [http://www.aacsb.edu/accreditation/business\\_standards.pdf](http://www.aacsb.edu/accreditation/business_standards.pdf) (last visited Jan. 27, 2012).

<sup>6</sup> See DELTA STATE UNIVERSITY, FACULTY PROMOTION (2010), available at <http://www.deltastate.edu/pages/2473.asp?manid=%7B81775AC8-5346-4E8A-9802-D96D73CE050F%7D&id=%7BC06DFA79-6FCE-4CC5-BB9D-8694FD633457%7D>; See also, THE UNIVERSITY OF BALTIMORE, PROMOTION AND TENURE POLICY AND PROCEDURES (2010), available at, <http://www.ubalt.edu/policies/index.cfm?page=105>.

## II. THE METHODOLOGY AND PROCESS OF CREATING TENURE STANDARDS

### A. *The Trickledown of Tenure Requirements*

The process for creating the standards for retention, promotion, and tenure typically follows the same hierarchy in all state university systems. Generally, these standards 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.<sup>7</sup> The University standards will then be further refined at the various college levels; finally, the various departments within the colleges will refine them further still.<sup>8</sup> 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 which states that: "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

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<sup>7</sup> 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.... Peter W. Low, *The University of Virginia Promotion and Tenure Policy*, University of Virginia (March 1, 2000), [http://www.virginia.edu/provost/docs\\_policies/tenure.html](http://www.virginia.edu/provost/docs_policies/tenure.html) (last visited Jan. 28, 2012).

<sup>8</sup> See, e.g., the policy at Robert J. Trulaske, Sr., College of Business, University of Missouri which 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 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: The College of Business and Public Administration Faculty at University of Missouri, *Promotion and Tenure Guidelines* Robert J. Trulaske, Sr. College of Business, University of Missouri (1995), <http://business.missouri.edu/1114/default.aspx> (last visited Jan. 28, 2012); See also, "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." Ohio University College of Business Faculty, *Tenure and Promotion Policies and Procedures*, Ohio University College of Business (March 4, 2005), <http://aspnet.cob.ohio.edu/isms/cobContent.aspx?cid=1299> (last visited Jan. 28, 2012).

needs of the particular institution and its components parts. Written criteria for these decisions shall be developed by the appropriate institutional faculty bodies.”<sup>9</sup>

Typically, a college of business is made up of several departments.<sup>10</sup> 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 comply with the broader standards established by the college. Therefore, the departments within each college create the final, most specific version of the standards, which are then used to make tenure decisions. For that reason there can be, and often are, variances among the departments within a particular college.<sup>11</sup> This incongruity creates the situation wherein a business college 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.<sup>12</sup>

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<sup>9</sup> See, e.g., University of Wisconsin System, *University of Wisconsin System Faculty Appointments*, University of Wisconsin (1997), <http://www.legis.state.wi.us/rsb/code/uws/uws003.pdf> (last visited Jan. 28, 2012). See also, “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.” The University of North Carolina at Greensboro College of Business, *University-Wide Evaluation for Promotion*, The University of North Carolina at Greensboro (2009), <http://provost.uncg.edu/documents/personnel/evaluationPT.pdf> (last visited Jan. 28, 2012); See also, “Each institution shall establish definite and stated criteria, consistent with Regents’ policies and the statutes of the institution, against which the performance of each faculty member will be evaluated.” University System of Georgia Board of Regents, Board of Regents Policy Manual, University of Georgia (May 6, 2011), [http://www.usg.edu/policymanual/section8-policy/8.3\\_additional\\_policies\\_for\\_faculty](http://www.usg.edu/policymanual/section8-policy/8.3_additional_policies_for_faculty) (last visited Jan. 28, 2012) Primary units develop criteria that explicate the teaching, research and service expectations for faculty, such as expectations for articles, books, and/or research grants, measures of clinical excellence, etc., in terms of their scholarly field. These primary unit criteria, once reviewed for rigor, fairness and consistency with regent requirements and approved by the dean and vice chancellor for academic affairs, are included in the candidate’s dossier and shall guide evaluation at every level of review. For additional examples see University of Colorado Board of Regents, *University of Colorado Board of Regents Policy*, University of Colorado (April 12, 2009), <https://www.cu.edu/regents/Policies/Policy5M.htm> (last visited Jan. 28, 2012).

<sup>10</sup> 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.

<sup>11</sup> *Supra*, note 5, 6, 7 & 8. These examples are a very common way that university systems establish the criteria.

<sup>12</sup> See, e.g., The College of Business and Public Administration Faculty at University of Missouri, *Promotion and Tenure Guidelines* (1995), Robert J. Trulaske College of Business, University of Missouri (1995), <http://business.missouri.edu/1114/default.aspx> (last visited Jan. 28, 2012), “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.” See also Delta State University, *Policy Manual*, Delta State University (2010), <http://www.deltastate.edu/pages/2473.asp?manid=%7B81775AC8-5346-4E8A-9802-D96D73CE050F%7D&i d=%7BC06DFA79-6FCE-4CC5-BB9D-8694FD633457%7D> (last visited Jan. 28, 2012). “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.”

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.'<sup>13</sup>

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 has almost always been placed 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.<sup>14</sup> 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, namely, the variances among the standards utilized for tenure evaluation, have not been addressed, because after a careful search of legal databases, no case was found with that issue as the substantive basis for a lawsuit. We will look at these substantive issues later in this paper. First, however, we dispense with the myth that tenure decisions are not, primarily, an assessment of the quality of research for a particular tenure candidate.

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<sup>13</sup> New Mexico State University Promotion and Tenure Policy Task Force, Promotion and Tenure Policy for New Mexico State University (August 1, 2008), <http://www.nmsu.edu/~fsenate/ptp/P&TPolicy.pdf> (last visited January 28, 2012).

<sup>14</sup> "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." *See Id.* See Delta State University, Faculty Promotion (August 9, 2010), <http://www.deltastate.edu/pages/2473.asp?manid=%7B81775AC8-5346-4E8A-9802-D96D73CE050F%7D&id=%7BC06DFA79-6FCE-4CC5-BB9D-8694FD633457%7D>; *See also*, The University of Baltimore, Promotion and Tenure Policy and Procedures (June 29, 1989), <http://www.ubalt.edu/policies/index.cfm?page=105> (last visited Jan. 28, 2012) for a typical description of the process to be followed.

B. *The Primacy of Research in Tenure Decision Making*

As seen above, 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 reviews of 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 tenured.

Even though teaching and service are considered in tenure decisions, they do not generally present as large of a problem as found in 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."<sup>15</sup> That leaves the issue of research and how it shall be judged. "(J)udging research performance is a challenging task. It requires consideration of the quality and quantity of publications, as well as a host of other factors such as the overall nature of an individual's research portfolio, for which there may be fewer well-established local benchmarks."<sup>16</sup>

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.<sup>17</sup> Research may include a number of things, which are 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..."<sup>18</sup> The faculty member's "scholarship" is generally evidenced by publications in "top ranked" journals.

Generally, Promotion & Tenure (P&T) committees are made up of tenured faculty members from the department. Serving on these committees is part of the service requirement for faculty, and they are not additionally compensated for the work they perform on the P&T committee. Therefore, the P&T committee members: "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."<sup>19</sup>

For that reason, what has evolved over the years is a system of ranking journals by quality. "Within business, rankings first became prominent in accounting, economics, and

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<sup>15</sup> Alan R. Dennis, Joseph S. Vlacich, Mark A Fuller and Christoph Schneider, *Research Standards for Promotion and Tenure in Information Systems*, 30 MIS Quarterly 1, 2 (March 2006).

<sup>16</sup> *Id.* at 1.

<sup>17</sup> The three areas are research, teaching ability and service. Because research is most important, we will not consider the other two any further.

<sup>18</sup> *Id.*; also see, 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, (1996).

<sup>19</sup> Nancy J. Adler and Anne-Wil Harzing, *When Knowledge Wins: Transcending the Sense and Nonsense of Academic Rankings*, 8 Academy of Management Learning & Education 72, 85-86 (2000).

finance.”<sup>20</sup> Today, most of the disciplines within a college of business have “identified a set of top journals to serve as proxies for quality.”<sup>21</sup>

Because of the need to conserve time yet also make an attempt to judge quality, “[t]he 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.*”<sup>22</sup>

There appear to be several ways to rank journal quality. Each of these methods is used by unbiased third parties to distill a list of unranked journals into a list ranked in order from the best journals down to those journals deemed quality or support journals. 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 published in the journals. There is much literature discussing how to rank journals.<sup>23</sup> Ultimately, the faculty committees and other gatekeepers of 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 is published to establish its “quality.”

The most common methods used to rank journals include the so-called impact factor, surveying faculty for their perception of quality journals, or acceptance rates based on sources such as Cabell’s Directory of Publishing Opportunities (Cabell’s).

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<sup>20</sup> *Id.* at 74.

<sup>21</sup> *Id.* at 78.

<sup>22</sup> Red Jasper’s Center for Journal Ranking (2010),

<http://www.journal-ranking.com/ranking/web/content/intro.html> (emphasis added)(last visited Jan. 28, 2012).

<sup>23</sup> See, e.g., Alan R. Dennis, Joseph S. Vlacich, Mark A Fuller and Christoph Schneider, *Research Standards for Promotion and Tenure in Information Systems*, 30 *MIS Quarterly* 1, (2006); Andrew C. Inkpen, *A Note on Ranking the International Business Journals*, 32 *Journal of International Business Studies* 193 (First Quarter 2002); Nancy J. Adler and Anne-Wil Harzing, *When Knowledge Wins: Transcending the Sense and Nonsense of Academic Rankings*, 8 *The Academy of Management Learning and Education (AMLE)* 72 (March 2009); G.Singh, K.M. Haddad, and C.W. Chow, *Are Articles in “Top” Management Journals Necessarily of Higher Quality?* 16 *Journal of Management Inquiry* 319 (2007); Somnath Saha, Sanjay Saint, and Dimitri A. Christakis, *Impact Factor: A Valid Measure of Journal Quality?* 91 *J. Med. Libr. Assoc.* 42 (January 2003); Kirby P. Lee, Marieka Schotland, Peter Bacchetti and Lisa A Bero, *Association of Journal Quality Indicators with Methodological Quality of Clinical Research Articles*, 287 *JAMA* 2805 (2002); S. J. Liebowitz and J. P. Palmer, *Assessing the Relative Impacts of Economics Journals*, 22 *Journal of Economic Literature* 77 (March 1984); Sarah E. Bonner, 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. Carraher, 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.

The impact factor is based on citations of papers published by a scientific journal.<sup>24</sup> “The measurement used to create this ranking...is the number of citations that authors make to articles appearing in various journals.”<sup>25</sup> The use of this method presumes that the more an article is cited, the higher the quality of that article. Assessing the 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 table found at Appendix A shows that a journal’s rank can change over time, based on the number of times its articles are cited in other academic journals. For example, the *Journal of Marketing* moved from #2 in 2003-07, down to #4 in 2007.<sup>26</sup>

Another method frequently used is simply to focus on whether or not a journal is peer reviewed and to assess the acceptance rate.<sup>27</sup> 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.<sup>28</sup> Cabell’s website states: “[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.”<sup>29</sup>

Many institutions use one of these methods as a proxy for quality for academic publications.<sup>30</sup> Indeed, it is not unusual for a college to provide and maintain a list of highly 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:

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<sup>24</sup> Tobias Opthof, *Sense and Nonsense About the Impact Factor*, 33 *Cardiovascular Research* 1 (1997), available at, <http://www.sciencegateway.org/impact> (last visited Jan. 28, 2012) “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.” See also, Alan Fersht, *The Most Influential Journals: Impact Factor and Eigenfactor*, Nat’l Acad. of Sci. of U.S. (2009), available at, <http://www.pnas.org/content/106/17/6883.full> (last visited Jan. 28, 2012) “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).”

<sup>25</sup> Liebowitz, *supra* note 21, at 77.

<sup>26</sup> This change in ranking will obviously create additional issues that are not part of the discussion for this article.

<sup>27</sup> 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.

<sup>28</sup> Cabell Publishing, Inc. Home Page, <http://www.cabells.com> (last visited Jan. 28, 2012).

<sup>29</sup> Cabell Publishing, Inc. About Page, <http://www.cabells.com/about.aspx> (emphasis added) (last visited Jan. 28, 2012).

<sup>30</sup> See, e.g., Dr. Roney Perry, *The Relative Value of American Law Reviews: A Critical Appraisal of Ranking Methods*, 11 *Va. J.L. & Tech.* 1 (Winter 2006).

The UT Dallas' School of Management has created a database to track publications in 24 leading business journals .... 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.<sup>31</sup>

When one of the methods described above is used, the "quality" of the journal is based on some objective measurement created by a third party. Therefore, the faculty review committee does not have to personally rank the publications of a faculty member asking to be tenured. In other words, the faculty committee is not making a subjective decision; rather, it is simply utilizing 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 the federal case of *Clark v Whiting*,<sup>32</sup> 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 of potential legal issues surrounding this case to which we now turn our attention.

### III. CLARK V. WHITING: SUBJECTIVITY IN THE EVALUATION PROCESS

In *Whiting*, a Professor Clark claimed that North Carolina Central University violated his Equal Protection rights by treating his request for promotion to professorship differently from others "in the past." In his department, one criterion for promotion was that the scholarly contributions of a professor going up for tenure evidenced a "continued growth."<sup>33</sup> 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."<sup>34</sup> 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 achievements' as were used 'in the past' in passing on promotions of other faculty members."<sup>35</sup> In response to the plaintiff's argument, the court said:

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<sup>31</sup> The UTD Top 100 Business School Research Rankings, <http://top100.utdallas.edu> (last visited Jan. 28, 2012); *also see*, Journal-Ranking.com by Red Jasper, <http://www.journal-ranking.com> (last visited Jan. 28, 2012), for a website that provides information on ranking of academic journals. (emphasis added).

<sup>32</sup> 607 F. 2d 634 (4<sup>th</sup> Cir. 1979).

<sup>33</sup> *Id.* at 636.

<sup>34</sup> *Id.* at 637-638.

<sup>35</sup> *Id.* at 639.

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.<sup>36</sup>

The *Whiting* opinion underscores reluctance on the part of the courts to inject their own subjective, qualitative assessments and, thereby, supplant better qualified "professional experts". Therefore, "[g]iven 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."<sup>37</sup> With *Whiting*, the challenge to winning a case based on the "quality" of the research by a faculty member appears to have hit a roadblock in an appellate court decision. However, that roadblock may not be relevant, based on the method of reviewing the quality of academic research in today's environment. Therefore, even though *Whiting* and other cases say that the courts will not second guess the "professional experts" making those judgments during the review process, because the basis for establishing the quality of the research has dramatically changed, the holding of *Whiting* may no longer be applicable.

As one commentator has stated: "Journal publication is a primary consideration in the promotion and tenure decision for faculty in the United States...."<sup>38</sup> The review process involves a determination of the quality of the publications in the respective journals. However, that quality determination is no longer made by the local faculty committees because today, the quality standard is generally judged by using one of various methods of journal ranking as a proxy for establishing the quality of a journal. It is not, therefore, solely a subjective local faculty issue, because in most colleges of business, the relative 'quality' of a publication is gauged by an objective third party

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<sup>36</sup> *Id.* at 640; see also, *Hernandez Loring v. Universidad Metropolitana*, 62 F. Supp. 2d 450 (1999 1<sup>st</sup> Cir.); *Kramedas v. Board of Education*, 523 F. Supp. 1268 (1981 3<sup>rd</sup> Cir.); *Dorsett v. Board of Trustees for State Colleges & Universities*, 940 F.2d 121 (1991 5<sup>th</sup> Cir.), the courts said that they do not want to micromanage these types of decisions, at 124; also cited for same proposition by *University Education Association. v. Regents of University of Minnesota*, 353 N.W.2d 534 (1984 Minn.).

<sup>37</sup> Copeland, *supra* note 16, at 239.

<sup>38</sup> 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).

standard.<sup>39</sup> In fact, in most instances, there is no subjective element to this evaluation process at all by the faculty committee. 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 established by a third party, effectively a proxy for quality. Peter Lawrence has stated that we have become an “audit society, in which each indicator is invested with a specious accuracy and becomes an end in itself.”<sup>40</sup> Therefore, the current process of evaluating faculty research by the faculty tenure committee evades the judicial pitfall of *Whiting*, wherein the court did not want to get involved out of fear of having to “second guess” the faculty.

The *Whiting* issue of “second guessing” the faculty experts is moot because the faculty committee is not deciding the quality on an *ad hoc* basis for each tenure request anymore; 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 find some outside ranking source to determine the “quality” of each publication. Thus, other than counting articles, and looking at some outside source, little else is required of a committee member evaluating publication requirements for tenure.

Removing the subjectivity of faculty making the quality decision, which was the issue in *Whiting*, is important to our argument, because it is clear that courts do not want to interfere in something they consider a mostly subjective academic decision that is up to the faculty members’ expertise to resolve. As stated by others:

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.<sup>41</sup>

Probably because of *Whiting* and the belief that courts will not second guess faculty expertise, an issue that has not been addressed by any court is an equal protection argument when

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<sup>39</sup> See the discussion above under the heading of “The Primacy of Research in Tenure Decision Making”, see also e.g., “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.” Ohio University, College of Business, College of Business Tenure and Promotion Policies and Procedures (March 4, 2005), <http://aspnet.cob.ohio.edu/isms/cob-Content.aspx?cid=1299>.

<sup>40</sup> Peter A. Lawrence, *The Politics of Publication*, 422 *Nature* 259 (March 2003).

<sup>41</sup> Copeland, *supra* note 16, 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).

surrogates for quality are being used in the decision making process.<sup>42</sup> Specifically, 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. We now turn to a discussion of that issue.

#### IV. TENURE-TRACK EMPLOYMENT AS PROPERTY: THE EQUAL PROTECTION ISSUE

##### 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 for the Fourteenth Amendment to be applicable.<sup>43</sup>

When individuals in substantially the same circumstances are treated differently by the government due to variations 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 of individuals in substantially similar conditions by the government. Thus, because the mere fact that individuals in substantially similar situations are treated differently by the government does not, by 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.<sup>44</sup>

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<sup>42</sup> See, e.g. *Clark v. Whiting*, 607 F.2d 634 (4<sup>th</sup> Cir. 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.

<sup>43</sup> 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 state." Sherrie J. O'Brien, *J.E.B. v. Alabama ex rel. T.B.: The Collapse of the Peremptory Challenge*, 14 St. Louis U. Pub. L. Rev. 655, 659 (1995); "Likewise, the public university is unmistakably a government body: its facilities are state property and its employees are paid by the state. The financing of public education is, historically, also a function of the state." B. Andrew Bednark, *Preferential Treatment: The Varying Constitutionality of Private Scholarship Preferences at Public Universities*, 85 Minn. L. Rev. 1391, 1423 (May 2001).

<sup>43</sup> 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).

<sup>44</sup> *Id.* at 2386.

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.<sup>45</sup>

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.’”<sup>46</sup> 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.

#### 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 their employment.

In January 1972, the U.S. Supreme Court heard two cases that involved university faculty members' rights in regard to continued employment.<sup>47</sup> In *Board of Regents of State Colleges et al. v. Roth (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, applying Wisconsin law and regulations, 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 *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”<sup>48</sup> and that they include much more than just the normal understanding of property.

In *Perry et al. v. Sindermann (Sindermann)*, however, the outcome was different. There, 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.”<sup>49</sup> 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

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<sup>45</sup> Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 297, 303 (March 1997).

<sup>46</sup> *Independent School Dist. V. Rodriguez San Antonio*, 411 U.S. 1, 17 (1973).

<sup>47</sup> 408 U.S. 564; *Sindermann*, 408 U.S. at 593.

<sup>48</sup> *Roth*, 408 U.S. at 571.

<sup>49</sup> 408 U.S. 593.

had this expectancy, then due process would attach to that right.<sup>50</sup> 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.”<sup>51</sup> As one commentator has said, “In ... *Sindermann*, the Court ... [extended] the reach of Fifth and Fourteenth Amendment property.”<sup>52</sup>

In *Sindermann*, the claim of “expectancy” was based on a provision of the teacher handbook which, among other things, stated that faculty members should “feel that [they have] permanent tenure as long as [their] teaching services are satisfactory....”<sup>53</sup> Therefore, the court found that *Sindermann* had a property interest in being retained based on a factual situation very different from *Roth* in that it was based on what a faculty handbook allowed a faculty member to believe. In *Sindermann*, the expectancy was based on the wording in the faculty handbook. In this article, we are basing our “expectancy” on the fact that the faculty members are tenure track faculty members who were hired with a clear understanding that if their performance meets the established standard, they will receive tenure – hence, the property interest is very clear. *Sindermann* makes it clear that 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.”<sup>54</sup> Accordingly, certain faculty members have a property interest in their employment that is considered part of the Court’s concept of fundamental rights.<sup>55</sup>

It follows that this kind of expectancy creates a property interest, which is considered part of a person’s fundamental rights, and is subject to “strict scrutiny”. Therefore, any employment practice that falls under this standard is justifiable only if it furthers a compelling governmental purpose, and only if no less restrictive alternative is available.<sup>56</sup>

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<sup>50</sup> See generally, *Sindermann*. 408 U.S. at 597.

<sup>51</sup> *Sindermann*, 408 U.S. at 570-580.

<sup>52</sup> Michael L. Wells and Alice E. Snedeker, *State-Created Property and Due Process of Law: Filling the Void Left by Engquist v. Oregon Department of Agriculture*, 44 Ga. L. Rev. 161, 188-189 (2009).

<sup>53</sup> *Sindermann*, 408 U.S. at 603.

<sup>54</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 683 (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....”

<sup>55</sup> We also want to be clear that in any college of business, some 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 Amendment 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 thus be attached. As stated at the beginning of this article we are focusing only on those faculty members in a college of business who would have an expectation of continued employment under the Supreme Court standard discussed above.

<sup>56</sup> See, e.g., *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

C. *Alternatives: The Equal Protection Clause and the “Least Restrictive Means” Test*

The United States Supreme Court has held that when a government practice restricts “fundamental rights,” the practice is subject to “strict scrutiny.”<sup>57</sup> “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.”<sup>58</sup> We have previously shown that some faculty members have a fundamental right in being tenured. Therefore, we now address what is the “compelling state interest” 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.”<sup>59</sup> As some authors have noted: “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, which are evaluated by peers both locally and in the wider profession. These are the equivalent of the training and apprenticeships required for union cards in professional guilds.”<sup>60</sup>

In order for a faculty member to be able to disseminate knowledge in the classroom and to engage in research that expands knowledge, there must be academic freedom. This principle is clearly stated and promoted by the American Association of University Professors (AAUP).<sup>61</sup> The AAUP statement says: “Tenure is a means to certain ends; specifically: (1) freedom of teaching and research. . . .tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.”<sup>62</sup> The AAUP principle is certainly one of the main reasons for tenure; however, in our opinion, the reasons for granting tenure may include other reasons, depending upon one’s perspective. From the university’s point of view, the basis for granting tenure is adequate performance of one’s job duties, which includes teaching, research and service to the institution. As seen in the above tenure standards, what the university wants, and what the public wants, is exactly the same - a competent professor. Those who are paying for an education want to be certain that they are receiving the best education for their money. Therefore, the compelling state interest for granting tenure includes promoting academic

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<sup>57</sup> *Id.*

<sup>58</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265, 357 (1978); *see also*, *Massachusetts Board of Retirement et al v. Murgia*, 427 U.S. 307 (1976); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). *See also*, John L. Unstroth, *Voluntary Self-Regulation of Complementary and Alternative Medicine Practitioners*, 70 ALB. L. REV. 209, 259 (2006).

<sup>59</sup> Dominique G. Homberger & A. Ravi P. Rau, *Two Paths to Tenure, Both in and Out*, Dec. 20, 2004, available at, [http://www.lsu.edu/orgs/aaup/docs/2004Dec20\\_TenurePaths.pdf](http://www.lsu.edu/orgs/aaup/docs/2004Dec20_TenurePaths.pdf) (last visited Jan. 28, 2012).

<sup>60</sup> *Id.*

<sup>61</sup> *See*, 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments, available at, <http://www.aaup.org/NR/rdonlyres/EBB1B330-33D3-4A51-B534CEE0C7A90DAB/0/1940StatementofPrinciplesonAcademicFreedomandTenure.pdf>.

<sup>62</sup> <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm>, (last visited January 27, 2012).

freedom to ensure that knowledge moves forward and making sure that a faculty member is competent. The review process is thus designed 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.

One of the performance factors reviewed is teaching ability, which 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 shown through the syllabi, student teaching evaluations, peer evaluations and other indications of ability to teach.

The other component, service, is mainly used to show that the faculty member is also participating in the university – as a “good university citizen.” In addition, there could be outside service to the public or to the profession.

Finally, the research component 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. As noted above, 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.

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, and 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, as pointed out above, 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 his field so that his/her teaching is current and relevant should be the same for each department in a 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 be 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, one that extends well beyond simply losing his or her 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."<sup>63</sup>

Therefore, the stigma of not being granted tenure could have a significant effect upon a faculty member's future career. If the rejection for 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.

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 fictional example in order to provide a more complete picture.

## V. THE TENURE SCENARIO

Professor Johnson is in the Finance 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 Finance 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 criterion for satisfactory research in the Finance 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, utilizing Cabell's, or some other substantiated information source, must have an acceptance rate of no more than 20 percent.

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 than 30 percent.

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 for granting tenure in both departments fall within the broader guidelines established by the College of Business at Large State University. 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 percent. 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 percent rate is not less stringent than the rate established by the college. Professor Johnson and Professor Sharma have almost identical portfolios in regard to

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<sup>63</sup> 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 (1996).

teaching and service. Each of them meets those criteria. Professor Johnson has three publications in peer reviewed journals within the most recent five years. The problem is that two of Professor Johnson's articles are published in journals with an acceptance rate of less than 20 percent and the third is published in a journal with an acceptance rate of between 20 and 30 percent. Therefore, based on the criteria in the Finance Department, Professor Johnson is denied tenure.

Professor Sharma has an identical publications record, but because of the different criteria, he is recommended for, and eventually receives, tenure. Had Professor Johnson been in the management department, he would have been recommended for tenure. This different result creates a potential legal issue under the Equal Protection Clause.

## VI. RECOMMENDATIONS

We have considered the possible legal issues involved in tenure decisions as they are currently made. 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 a lawsuit based upon an equal protection argument appears to be fairly high. For example, a study by Adam Winkler shows that the chances of prevailing in an equal protection claim that involves a fundamental right, when the defendant is an educational institution, is 80 percent. 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."<sup>64</sup>

Therefore, our recommendation is for colleges of business to carefully review the tenure requirements of the various departments, and, if the requirements vary, especially in the research component of granting tenure, consider making changes. The changes could be done in one of two ways. The easiest would be to require that each department has the same requirements. This would avoid implicating an equal protection challenge and still allow the use of the surrogate for quality. However, faculty may not like that choice, as it takes away some of the flexibility that is part of the culture in an academic environment. There is another choice, but this involves much more time and involvement by faculty members who are on the P&T committee.

The other choice is to reassume the responsibility for making the quality decisions internally, instead of using surrogates as described above. To reiterate, 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.' Quality, not quantity, research should be used to evaluate and it is that evaluation which courts are not qualified to 'second guess' professional experts."<sup>65</sup>

Therefore, if the faculty P&T committees take back the role of making quality decisions that are not based on some outside surrogate for quality, the courts will not interfere with that process. This would require that faculty members scrutinize the actual research of the tenure candidate and make an independent 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

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<sup>64</sup> Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 818-819 (2006).

<sup>65</sup> *Whiting*, 607 F. 2d at 640.

is considered. If faculty members judging the merits of a colleague's research actually read the research articles and make that review part of the tenure decision, 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, as some, but not all, institutions currently do. 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 of the quality of the article. The model for the questions that can be asked on such a form already exists. Whenever an article is submitted for publication at any refereed journal, the reviewers would 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. Adherence to the above-described process will avoid the problem of committees outsourcing tenure decisions to third-parties. This process would, therefore, insulate the colleges of business from judicial interference.

Therefore, the recommendation is that in order to preserve some flexibility among departments, the use of inside reviewers and/or outside reviewers should be part of the process for judging quality. When this is done, the P & T committee makes its own assessment of the quality of the research, and the use of surrogates is either eliminated or a secondary source for quality.

## VII. CONCLUSION

Even though this issue has not yet been raised in litigation, it is important to understand that a college of business must use an evaluation system where the criteria for retention, promotion and tenure of faculty is put back into the hands of faculty in regard to making research quality judgments. If the departments have differing criterion, the judgments regarding that criterion 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. It is then that 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.

No great chasm exists between the differing departments in a school of business, to lead the departments to require differing publication standards. The differing standards are arbitrary and generally governed by the dictates of department chairs and/or departmental committees as opposed to constitutional fidelity. There are "less restrictive alternatives" available to the State, which were described in our recommendations. Using either of these alternatives would still achieve the compelling state interest of requiring currency in one's field while also maintaining the integrity of all faculty members' constitutional rights under the Equal Protection Clause.

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 methods described in our recommendation section. The best practice, in our opinion, is for faculty to take back the determination of what is quality research.

**APPENDIX:  
JOURNAL RANK OVER TIME**

<b>Rank</b>	<b>2007 Impact Factor</b>	<b>Impact 2003-07</b>	<b>Impact 1981-2007</b>
<b>1</b>	Acad. Manage. Journal	Admin. Science Quart.	Admin. Science Quart.
	-5.02	-9.8	-81.86
<b>2</b>	Acad. Manage. Rev.	Journal of Marketing	Acad. Manage. Rev.
	-4.37	-7	-59.93
<b>3</b>	Marketing Science	Acad. Manage. Journal	Journal of Marketing
	-3.96	-7.43	-49.41
<b>4</b>	Journal of Marketing	Acad. Manage. Rev.	Acad. Manage. Journal
	-3.75	-6.9	-45.66
<b>5</b>	Admin. Science Quart.	Marketing Science	Strategic Manage. J.
	-2.91	-6.22	-40.52
<b>6</b>	Strategic Manage. J.	Strategic Manage. J.	J. Consumer Research
	-2.83	-5.9	-37.97
<b>7</b>	J. Int. Business Stud.	Journal of Management	J. Marketing Research
	-2.28	-5.11	-33.59
<b>8</b>	Journal of Retailing	J. Consumer Research	Journal of Management
	-2.05	-4.9	-24.85
<b>9</b>	Journal of Management	J. Business Venturing	Marketing Science
	-2	-4.44	-19.61
<b>10</b>	J. Management Studies	J. Marketing Research	Sloan Manage. Rev.
	-1.93	-4.1	-18.27