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Tenure Matters: The Anatomy of Tenure and Academic Survival in American Legal Education

STEPHEN J. LEACOCK*

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I. INTRODUCTION[1]

"[R]are are wise and noble teachers."[2]

The President of the Association of American Law Schools, Professor Paul Marcus, recently reflected on some evolutionary developments in American legal education.[3] Actually, some commentators on recent events in American legal education may wonder whether tenure[4] needs to be mulled

1. *See* Jim Greif, *Reflecting on the Past, Preparing for the Future, A Q&A with AALS President Paul Marcus*, 2017-4 AALS NEWS 1, 1, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1431&context=popular_media ("The last four decades have seen tremendous changes in [American] law schools.").

2. ALBERT EINSTEIN, IDEAS AND OPINIONS 28 (Carl Seelig et al. eds, 1954).

3. *See* Greif, *supra* note 1, at 1-2 (quoting President Paul Marcus' answers to articulated questions). *See also* Stephanie Francis Ward, *Cooley Law Seeks TRO to Prevent ABA from Releasing Accreditation Findings*, ABA J. (Nov. 16, 2017, 8:00 AM), http://www.abajournal.com/news/article/cooley_law_seeks_tro_to_prevent_aba_from_releasing_accreditation_findings/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email; Stephanie Francis Ward, *Valparaiso Law School Told By Board to Not Admit First-Year Students in 2018*, ABA J. (Nov. 16, 2017, 4:04 PM), http://www.abajournal.com/news/article/valparaiso_law_school_told_by_board_to_not_admit_first-year_students_in_201/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email; Stephanie Francis Ward, *ABA Places Thomas Jefferson School of Law On Probation*, ABA J. (Nov. 15, 2017, 12:03 PM), http://www.abajournal.com/news/article/ABA_Thomas_Jefferson_School_of_Law_probation/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email; Stephanie Francis Ward, *Charlotte School of Law Closes After ABA Legal Ed. Council Rejects Teach-Out Plan*, ABA J. (Aug. 15, 2017, 2:17 PM), http://www.abajournal.com/news/article/charlotte_school_of_law_must_close_north_carolina_ags_office_says; Stephanie Francis Ward, *FIU Law School Alumni Ask Their Former Dean to Quit Trump's Cabinet*, ABA J. (Aug. 30, 2017, 1:55 PM), http://www.abajournal.com/news/article/fiu_law_school_alumni_ask_their_former_dean_to_quit_trumps_cabinet.

4. *See, e.g.*, Wilson v. Clark Atlanta Univ., Inc., 794 S.E.2d 422, 432 (Ga. App. 2016) ("The term 'tenure' means . . . 'a status granted after a trial period to a teacher that gives protection from summary dismissal.'") (citation omitted). *See also* 12 TEX. JUR. 3D *Colleges & Universities* § 41 fn. 3, Westlaw

over in this era of change.[5] Irrefutably, tenure is ubiquitous in the law school, medical school, and other university settings.[6] Indeed, its conferment is the quintessence of a faculty member's dream come true.[7] In a way, tenure is the gold standard of the pursuit of any professor's achievement goals.[8] Furthermore, three commentators expressed the opinion that in the context of shareholder voting in corporations, the concept of tenure can be both viable and valuable.[9] Of course, the conception of tenure in relation to shareholdings in corporations[10] and tenure in the context of directors of corporations[11] differ from tenure in American legal education, as discussed in this article.[12] Nevertheless, the use of tenure in the dual contexts of shareholders of corporations[13] and directors of corporations[14] demonstrates tenure's versatility.[15] It may be more dynamic than might appear at first blush.

With regard to parallels, tenure's impact in the educational context is similar in the following respects to its potential impact in the context of tenured shareholder voting in corporations.[16] In the context of American legal education, tenure provides educational institutions with a "core base of [faculty members] who are interested in the long term"[17] development of the employing educational institutions.[18] Tenure also embodies a tenured

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(database updated July 2018) ("Regents Rule 6.2 of the Rules and Regulations of the Board of Regents of the University of Texas System [defines tenure] as 'a status of continuing appointment as a member of the faculty' of the university.").

5. *See* Karen Sloan, *ABA Panel Favors Dropping Law School Tenure Requirement*, 2013 NAT'L L.J. 1, 3 (Aug. 12, 2013), http://www.nationallawjournal.com/id=1202614832071?id=1202614832071&kw=ABA%2520Panel&slreturn=20170806092219.

6. *See* Johns Hopkins Univ. v. Ritter, 689 A.2d 91, 93 (Md. App. 1996) ("Well over 90% of American colleges and universities, public and private, have a tenure system. It is a core part of the college-faculty relationship."). *See also* David J. Berger et al., *Tenure Voting and the U.S. Public Company*, 72 BUS. LAW. 295, 307 (2017) ("Tenure voting may . . . provide companies with a core base of investors who are interested in the long term . . . .").

7. *See* Albert H. Yoon, *Academic Tenure*, 13 J. EMPIRICAL LEGAL STUD. 428, 428 (2016) ("In academia, tenure is one of the most coveted milestones of one's career.").

8. *See* Blasdel v. Nw. Univ., 687 F.3d 813, 816 (7th Cir. 2012) ("With mandatory retirement now unlawful, the grant of tenure is often literally a lifetime commitment by the employing institution, barring dementia or serious misconduct.").

9. *See* Berger et al., *supra* note 6, at 307 ("Tenure voting may . . . provide companies with a core base of investors who are *interested in the long term* . . . .") (emphasis added).

10. Berger et al., *supra* note 6, at 307.

11. *See, e.g.*, Yaron Nili, *The "New Insiders": Rethinking Independent Directors' Tenue*, 68 HASTINGS L.J. 97, 118 (2016).

12. *See infra* Section III.

13. *See* Berger et al., *supra* note 6, at 297.

14. *See* Nili, *supra* note 11, at 117.

15. *See* Berger, et al., *supra* note 6, at 297; Nili, *supra* note 11, at 117.

16. *See* Berger et al., *supra* note 6, at 307, 308.

17. *Id.* at 307.

18. *See Ritter*, 689 A.2d at 93 ("Well over 90% of American colleges and universities, public and private, have a tenure system. It is *a core part* of the college-faculty relationship.") (emphasis added).

professor's property interest[19] mandatorily protected by the due process clause of the Fourteenth Amendment of the U.S. Constitution.[20] In the educational context, tenure is a property right derived from[21] and defined by state law.[22] In effect, an award of tenure emerges from the substantive application of contract law, which is itself a derivative of state law.[23] Moreover, constitutionally, "matters within the exclusive province of the state [law exist], so long as [they] *do not clash* with the [U.S.] Constitution."[24]

Irrefutably, the conferment of academic freedom[25] on tenured professors is a fundamental goal[26] of educational institutions that award tenure.[27] This is matched by an equal value—quantified in terms of institutional expertise—for awarding educational institutions.[28] The judiciary recognizes this balance of inherent comparative value by respecting universities' and colleges' entitlement to judicial acknowledgment of their protectable interests in institutional autonomy.[29] Judicial recognition of the merit of this protectable interest "is in keeping with [the judiciary's] tradition of [according the

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19. *See* Edinger v. Bd. of Regents of Morehead State Univ., 906 F.2d 1136, 1138 (6th Cir. 1990) (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)). *See also* Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CAL. L. REV. 75, 103 (2016) ("Teachers' due process rights stem from a property right in their jobs.") (citations omitted).

20. U.S. CONST. amend. XIV, § 1.

21. *See, e.g.*, Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 567 (1972) ("As a matter of [Wisconsin] statutory law, a tenured teacher cannot be 'discharged except for cause upon written charges' and pursuant to certain procedures.") (citation omitted).

22. *See Edinger*, 906 F.2d at 1138 (citing *Roth*, 408 U.S. at 577).

23. *See* New York v. United States, 505 U.S. 144, 188 (1992) ("The Constitution [] 'leaves to the several States a residuary and inviolable *sovereignty*,' . . . reserved explicitly to the States by the Tenth Amendment.") (emphasis added) (citations omitted).

24. *See* Voeller v. Neilston Warehouse Co., 311 U.S. 531, 535 (1941) (emphasis added).

25. *See* Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."). *See also* Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U.L. REV. 67, 67 (2006).

26. *See, e.g.*, *Law School Faculty Governance*, 2005 BARRY U. DWAYNE O. ANDREAS SCHOOL L. 1, 12 (2005), http://www.csale.org/files/Barry.CTT.2011.pdf ("Tenure is [] recognized as promoting favorable conditions for the exercise of *academic freedom* . . . .") (emphasis added). *See also* President and Fellows of Harvard Coll., *Governance, Appointment, and Promotion Handbook*, 1 HARV. MED. SCH. & HARV. SCH. DENTAL MED. 1, 17 (2016), https://fa.hms.harvard.edu/files/hmsofa/files/fom_handbook.july2016.v2_0.pdf ("In keeping with the traditional concepts of *academic freedom*, faculty . . . are all entitled to the classical protection of the academy in the pursuit of knowledge, in their teaching, and in the publication of findings and opinions.") (emphasis added).

27. *See* Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

28. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("[T]he interest asserted by . . . [an educational institution] is . . . [entitled to] tak[e] into account complex educational judgments in an area that *lies primarily within the expertise* of the university.") (emphasis added).

29. *Id.*

appropriate] degree of *deference* to a university's academic decisions, within constitutionally prescribed limits."[30]

Moreover, "[academic] freedom is . . . a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[31] In these respects, tenure is a double-edged sword.[32] This Janus-like transcendent value investment rewards both the institutions that grant tenure, as well as each deserving grantee of the quintessential accolade of tenure.[33]

The judiciary recognized these institutional values by creating "deference jurisprudence" with respect to educational institutions' decisions.[34] This educational institution deference is akin to Administrative Law deference to agency decisions.[35] Indeed, in some respects, the judicial deference accorded to educational institutions in this context may be even more enhanced than the deference that the judiciary accords to agency decisions in the context of Administrative Law.[36] This judicial deference to educational institutions that award tenure is *sui generis*.[37]

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30. *See id.* (citations omitted) (emphasis added). *See also Blasdel*, 687 F.3d at 816 ("A university's prerogative 'to determine for itself *on academic grounds* who may teach' is an important part of our long tradition of academic freedom.") (citing Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (emphasis added)).

31. *See Keyishian*, 385 U.S. at 603.

32. *See Blasdel*, 687 F.3d at 816 ("[A]cademic freedom includes the authority of the university to manage an academic community and evaluate teaching and scholarship free from interference by other units of government, including the courts.") (citing Hosty v. Carter, 412 F.3d 731, 736 (7th Cir. 2005)).

33. *See Blasdel*, 687 F.3d at 816 ("[T]he grant of tenure is often literally a lifetime commitment by the employing institution, barring dementia or serious misconduct.").

34. *See Shelton*, 364 U.S. at 487, 498. *See also Blasdel*, 687 F.3d at 816 ("[C]ourts tread *cautiously* when asked to intervene in the tenure determination itself.") (emphasis added); Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 557 (4th Cir. 2011) ("Following the Supreme Court's directive, courts have been reluctant to trench on the prerogatives of state and local educational institutions [because of the courts'] responsibility to safeguard their *academic freedom*, a special concern of the First Amendment.") (citations omitted) (emphasis added).

35. *See e.g.* Stephen J. Leacock, *Chevron's Legacy, Justice Scalia's Two Enigmatic Dissents, and His Return to the Fold in City of Arlington, Tex. v. FCC*, 64 CATH. U.L. REV. 133, 136 (2014) ("[T]he *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* decision created a significant shift in the U.S. Supreme Court's approach to administrative law deference jurisprudence with respect to agency decisions.") (citations omitted).

36. *See Adams*, 640 F.3d at 557.

If a federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, *far less is it suited* to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision making. *Id.* (citations omitted) (emphasis added).

37. *See* Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 225 (1985).

When judges are asked to review the substance of a genuinely academic decision . . . *they should show great respect for the faculty's professional judgment.* Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. *Id.* (citations omitted) (emphasis added). *See also* Moffie v. Oglethorpe Univ., 367 S.E.2d 112, 113 (Ga. App. 1988) ("The exercise of *academic judgment alone* governs the conferring of tenure.") (emphasis added); Leacock, *supra* note 35, at 142.

Judicial deference for educational institutions' decisions is complimented by the judiciary's emphasis on caution[38] when an educational institution's tenure decision is challenged.[39] In adjudicating such challenges, the judiciary acknowledges that the burden of proof rests upon "[a] disappointed candidate" who is denied tenure.[40] The judiciary also acknowledges that subjective factors *may* be present in tenure decisions.[41] This does *not* support any conclusions that arbitrariness or capriciousness[42] play a role in educational institutions' decision-making deliberations.[43] In the final analysis, since the burden of proof to invalidate a tenure-denial decision falls upon the denied faculty member, the weight of the burden of proof matters. Additionally, certain "practical considerations make a challenge to the denial of tenure at the college or university level an uphill fight–notably [because of] the absence of fixed, objective criteria for tenure at that level."[44]

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38. *See Blasdel*, 687 F.3d at 816 ("[C]ourts tread cautiously when asked to intervene in the tenure determination itself.").

39. *Id.*

40. *Id.* at 824 ("Summary judgment was therefore *rightly* granted in favor of the university.") (emphasis added).

41. *See id.* at 817 ("[O]ffice politics frequently plays a role in the award or denial of tenure; friendships and enmities, envy and rivalry . . . can figure in tenure recommendations by the candidate's colleagues, along with disagreements on what are the most promising areas of research."). *See also Adams*, 640 F.3d at 559 ("Subjectivity in such promotion decisions is permitted so long as it lacks discriminatory intent.") (citations omitted); Mayberry v. Dees, 663 F.2d 502, 519 (4th Cir. 1981) ("[M]any and varied, inevitably *subjective* factors . . . [go] into a decision to offer tenure . . . .") (emphasis added) (footnotes omitted).

42. *See, e.g.*, *Roth*, 408 U.S. at 588 (Marshall, J., dissenting) ("[F]ederal and state governments and governmental agencies are restrained by the Constitution from acting *arbitrarily* with respect to employment opportunities that they either offer or control.") (emphasis added).

43. *See e.g. Blasdel*, 687 F.3d at 822 ("There is no indication that any member of the medical school's appointments, promotion, and tenure committee, or the dean, or the provost discriminates against women scientists.").

44. *See Id.* at 815, 816 ("[T]enure decisions are a source of unusually great disagreement . . . . [T]he stakes are high, the number of relevant variables is great and there is no common unit of measure by which to judge scholarship.") (citations omitted). Posner, Circuit Judge, who wrote the opinion in *Blasdel v. Nw. Univ.* should know because of his own personal experiences as a tenured faculty member at the University of Chicago Law School "back in the day" before his elevation to the bench as a Judge on the United States Court of Appeals, Seventh Circuit. *See Judge Richard A. Posner: Brief Biographical Sketch*, U. CHI., http://home.uchicago.edu/~rposner/biography (last visited Sept. 14, 2018).
Posner entered law teaching in 1968 at Stanford as an associate professor, and became professor of law at the University of Chicago Law School in 1969, where he remained . . . until his appointment to the Seventh Circuit in 1981 . . . . He continues to teach part time at the University of Chicago Law School, where he is Senior Lecturer, and to write academic articles and books. *Id.* Judge Posner recently announced his retirement from the Judicial Bench on the United States Court of Appeals for the Seventh Circuit. *See* Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html?module=WatchingPortal®ion=c-column-middle-span-region&pgType=Homepage&action=click&mediaId=thumb_square&state=standard&contentPlacement=17&version=internal&contentCollection=www.nytimes.com&contentId=https%3A%2F%2Fwww.nytimes.com%2F2017%2F09%2F11%2Fus%2Fpolitics%2Fjudge-richard-posner-retirement.html&eventName=Watching-article-click&_r=0 ("Judge Richard A. Posner, whose restless intellect, withering candor and superhuman output made him among the most provocative figures in American law in the last half-century, recently announced his retirement.").

Essentially, professors "who are interested in the long term"[45] accomplishments of the educational institutions at which they are tenured provide those centers of higher learning "with a core base"[46] of stability and achievement that is the foundation for academic ingenuity.[47] Moreover, since the legal power to award tenure is contractual in nature,[48] properly appointed arbitrators under a legally binding arbitration clause cannot grant an award of tenure unless specifically authorized to do so by a lawful contractual provision.[49] Essentially, "[t]enure is . . . [the] contractually enforceable institutional promise relating to the duration of a faculty appointment."[50] Professors therefore lawfully achieve tenure by an appointment letter from the pertinent educational institution[51] that promotes such faculty members to a position of unlimited duration.[52] As a result, such employment can usually be terminated only for a limited number of narrowly-tailored reasons.[53]

The reciprocal advantages of tenure to faculty members[54] and their employing institutions[55] enhance and promote the prosperity of both[56] and continue to motivate American universities to offer tenure appointments to those faculty members who earn it.[57] The lure and prospect of tenure therefore attract and secure for a university "the best possible faculty to promote its mission and goals."[58] Indeed, since a university's faculty is its

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45. Berger et al., *supra* note 6, at 307.

46. *Id.*

47. *See* Lawrence White, *Academic Tenure: Its Historical and Legal Meanings in the United States and Its Relationship to the Compensation of Medical School Faculty Members*, 44 ST. LOUIS U.L.J. 51, 65 (2000). Tenure is a means to certain ends; specifically, (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are *indispensable to the success of an institution* in fulfilling its obligations to its students and to society.
Id. (emphasis added) (citation omitted).

48. *See Roth*, 408 U.S. at 578 ("[T]he . . . [faculty member's] 'property' interest in employment at Wisconsin State University-Oshkosh was created and defined by *the terms of his appointment*.") (emphasis added).

49. *See* Penn. Emp't Law Letter, 26 No. 4, 2 (McCabe, Arb.).

50. *See* White, *supra* note 47, at 65.

51. *See, e.g.*, Murphy v. Duquesne Univ. of the Holy Ghost, 777 A.2d 418, 420 (Pa. 2001) ("[T]enured status at the University was afforded by contract."). *But see* Hanaway v. Parkesburg Grp., LP, 168 A.3d 146, 157 (Pa. 2017) (describing how the court was not going to follow *Murphy* in the instant case).

52. *See Ritter*, 689 A.2d at 93 (Tenure, "denotes a commitment by the school, as a direct or implied part of its faculty employment agreement, that, upon a determination that the faculty member has satisfied the conditions established by the school, the member's employment will be continuous, *subject to termination only for adequate cause*.") (emphasis added). *See also* White, *supra* note 47, at 65 ("Tenure is a contractually enforceable institutional promise *relating to the duration of a faculty appointment*.") (emphasis added) (citation omitted).

53. *See* White, *supra* note 47, at 66.

54. *See Blasdel*, 687 F.3d at 815, 816-17.

55. *Id.*

56. *See* White, *supra* note 47, at 65.

57. *Id.* at 68.

58. *Murphy*, 777 A.2d at 430.

quintessence, one of a university's most significant missions is the attraction and retention of excellent scholars.[59] Tenure is therefore a superlative prize in the academic citadel and is revered for the unmistakable freedom that it confers on faculty members to evolve intellectually.[60] Tenure confers upon those faculty members the rewarding freedom to innovate.[61] In a different context, but arguably similarly valid when applied to tenure, "[the late Professor Schumpeter] argued that innovation require[s] effort and, of course, ingenuity . . . ."[62]

This article is a modest journey into the universe of tenure in order to discover the components of its value to educational institutions and their faculty, and to effectively appraise this value. Very briefly, the article discusses the history and nature of tenure and then addresses factors implicated in its attainment and loss including litigation by applicants who were unsuccessful in the quest to acquire it in the first place.[63] The criteria applied by educational institutions' evaluators in deciding whether to grant tenure, as well as matters pertinent to its retention, loss and legal measures attendant on these events are also discussed, analyzed and evaluated.[64] After the introduction in Part I, Part II explores the origins of tenure, and Part III discusses the nature of tenure.[65] Part IV analyzes its legal prerequisites and Part V discusses the procedures for earning an award of tenure as well as the concept of de facto tenure.[66] Part VI concentrates on tenure's benefits to faculty members and Part VII acknowledges criticisms of tenure.[67] Part VIII examines certain bases for termination of tenure.[68] Part IX is the conclusion.[69]

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59. *See* Winterberg v. Univ. of Nev. Sys., 513 P.2d 1248, 1250 (Nev. 1973).

60. *See* Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957) ("For society's good—if understanding be an essential need of society—[intellectual] inquiries [by faculty members] . . . must be left as unfettered as possible.").

61. *Id.* at 262.

62. *See* Peter Temin, *Entrepreneurs' Evangelist*, HARV. MAG., July-Aug. 2007, at 22.

63. *See infra* Section II, III.

64. *See infra* Section IV, V.

65. *See infra* Section II, III.

66. *See infra* Section IV, V.

67. *See infra* Section VI, VII.

68. *See infra* Section VIII.

69. *See infra* Section IX.

II. ORIGINS

A. European Influence and American Development

Although the theory of tenure dates back to twelfth century Europe,[70] the concept of tenure in the United States achieved momentum between the seventeenth and nineteenth centuries.[71] This momentum was predictably influenced by the dominance of Oxford and Cambridge Universities from which most of the American colonies' educators graduated.[72] Moreover, in England, institutional governance developed through the actions of autonomous governing boards ("fellows").[73] These fellows assigned to "tutors" the task of classroom instruction.[74] Tutors were selected for a specific, relatively short duration, but could request reappointment for additional terms; although, their requests did not confer on them any legal rights to reappointment.[75]

Significant levels of freedom emerged once educators were no longer required to submit requests for reappointment as their predecessor tutors did.[76] Additionally, German University influences on American educators from exposure to German university practices played an important role in the early American evolution of tenure.[77] As one commentator observed, "[t]enure and the associated concept of . . . tenured associate professors, and tenured full professors, are relatively new phenomena in American higher education."[78]

Indeed, another commentator observed that, "[t]he direct and most immediate stimulant to the birth and growth of tenure comes not from the old schools in New England, but from [the] fresh faces on the West Coast, the

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70. *See* White, *supra* note 47, at 55 n.13. *See also* James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save all of the Others*, 21 PACE L. REV. 159, 163 n.10 (2000); Adams, *supra* note 25, at 67 n.2.

71. *See* White, *supra* note 47, at 55–56.

72. *Id.*

73. *Id.* at 56.

74. *Id.*

75. *See id.*

76. White, *supra* note 47, at 56.

77. *See* James J. White, *Tenure, The Aberrant Consumer Contract*, 89 CHI.-KENT L. REV. 353, 353 (2014) ("In Germany, the universities have *never* had governing boards of outsiders of the kind that are the norm in the United States. So, apart from an occasional intrusion by the state, German academics were free to do as they pleased without much oversight or outside intrusion.") (citations omitted) (emphasis added). *See also* White, *supra* note 47, at 57.

78. White, *supra* note 47, at 55.

Middle West, and the South."[79] This stimulus ultimately led to the birth of the American Association of University Professors in 1915.[80]

Of course, in the modern context, American educational institutions normally establish tenure committees.[81] These committees are somewhat similar to historical "governing boards"[82] in the following sense. Modern day committees are charged with reviewing candidates and making recommendations to promote faculty members whose performances and achievements clearly meet or exceed the institution's mandated contractual expectations.[83]

B. Creation of the American Association of University Professors (AAUP)

In 1913, several professors at Johns Hopkins University collectively wrote letters to their colleagues at other "leading [American] universities" proposing a new national organization to establish a number of fundamental principles applicable to tenured professors.[84] This ultimately led to the creation of the American Association of University Professors ("AAUP").[85] The creation of the AAUP intentionally modeled its structural format after the American Bar Association and the American Medical Association.[86] The AAUP's goals were essentially twofold.[87] First, the essential objective of the AAUP determined whether academic freedom had been subjected to interference by administrative authorities of any educational institution.[88] Second, an additional objective was to establish a representative, investigative judicial committee to "establish 'judicial hearings' before dismissal."[89]

Later, in 1940, the Association of American Colleges and the AAUP negotiated a joint statement of principles with the intent for them to be, "essentially a consensual, ethical relationship between employer and

79. White, *supra* note 77, at 354.

80. *See id.* at 356 ("It appears that the formation of the AAUP in 1915 was a direct reaction to [] four notorious cases . . . between 1890 and 1903 and, . . . from several other dismissal cases between 1903 and 1925.") (citations omitted).

81. *See, e.g.*, *Law School Faculty Governance*, *supra* note 26, at 10.

82. *See* White, *supra* note 47, at 56.

83. *See, e.g.*, *Murphy*, 777 A.2d at 431.

84. *See* Fishman, *supra* note 70, at 166-67 (citations omitted).

85. *Id.* at 167.

86. *Id.*

87. *See id.* at 166 ("The purpose of the association was to protect . . . [faculty members] institutional interests, specifically by the formulation of general principles [i] respecting tenure and [ii] legitimate grounds for dismissal of faculty.").

88. *See id.* at 167, 167-69 (citations omitted).

89. *See* White, *supra* note 77, at 356 (citations omitted). *See also* Fishman, *supra* note 70, at 166-67 (citations omitted).

employee."[90] Additionally, an informal, but conceivably overwhelmingly effective, practice of the AAUP developed.[91] This practice, psychologically perceived as "shaming" educational institutions that deserved to be shamed, emerged from the AAUP's investigations of a number of complaints.[92] These complaints emanated from professors who concluded that their employing educational institutions treated them less than fair.[93] It apparently worked quite well.[94] Arguably, the Principles have been effective in contributing to the accomplishment of the AAUP's goals for faculty members of academic freedom to research and teach, as well as the acquisition of a sufficient measure of economic security and well-being to live a decently productive life as a tenured professor.[95]

III. NATURE OF TENURE

[A] Employment Right

Tenure consists of the acquisition of the following right.[96] This right entitles the tenured faculty member to continue to be employed in a particular teaching position at an educational institution as follows.[97] The tenured faculty member is legally required to retain and use the teaching skills defined by the valid, binding, and enforceable contract; the tenured faculty member must also exhibit the behavior required under the terms of the employment contract.[98] The 1940 Statement of Principles on Academic Freedom and Tenure developed by the Association of American Colleges and the AAUP represent the "most widely-accepted academic definition of tenure.'"[99] However, both the faculty member and employing educational institution enjoy the fundamental characteristics of freedom of contract and all of the orthodox principles of contract law apply.[100]

By virtue of its Standard 405, the American Bar Association ("ABA")[101] acknowledges the significance of tenure as a foundational prerequisite of

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90. Fishman, *supra* note 70, at 169.

91. *See* White, *supra* note 77, at 358 ("[N]amely shaming").

92. *Id.*

93. *Id.*

94. *Id.*

95. *See* White, *supra* note 47, at 64-65.

96. *See Roth*, 408 U.S. at 566 ("Having acquired tenure, a teacher is entitled to continued employment 'during efficiency and good behavior.'"). *See also* Black, *supra* note 19, at 103 ("Teachers' due process rights stem from a property right in their jobs.") (citations omitted).

97. *Roth*, 408 U.S. at 566.

98. *Id.*

99. Krotkoff v. Goucher Coll., 585 F.2d 675, 679 (4th Cir. 1978) (quoting Brown, *Tenure Rights in Contractual and Constitutional Context*, 6 Journal of Law and Education 279, 280 (1977).

100. *Id.* at 680 ("Parties to a contract may, of course, define tenure differently in their agreement.").

101. *See About the American Bar Association*, AM. B. ASS'N, https://www.americanbar.org/about_

legal education in a developed society.[102] Actually, in 2013, the ABA did consider the potential elimination of tenure as a continuing basic requirement for accreditation of an American law school.[103] Simultaneously, however, the ABA acknowledged that the provision of "some form of job security for law school faculty" is fundamental to American legal education.[104] Consequently, the ABA must have ultimately realized that the continuing embrace of tenure as intrinsic to American legal education is irrefutably the best solution.[105] Thus, the ABA must have concluded, as Justice Cardozo acknowledged, "in obedience to the law of parsimony of effort . . . it is easier to follow the beaten track than it is to clear another."[106]

Under American constitutional law, tenure confers a property interest on each tenured teacher.[107] As Justice Marshall explained,[108] "'the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.'"[109] Its inherent value to faculty member recipients probably cannot be exaggerated. Indeed, as the United States Court of Appeals, Seventh Circuit articulated, "[w]ith mandatory retirement now unlawful, the grant of tenure is often literally a lifetime commitment by the employing institution, barring dementia or serious misconduct."[110]

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the_aba.html (last visited Sept. 12, 2018) ("The American Bar Association is one of the world's largest voluntary professional organizations, with over 400,000 members . . . . [T]he ABA . . . accredit[s] law schools [in the U.S.] . . . .").

102. *See ABA Standards and Rules of Procedure for Approval of Law Schools*, 2018-2019 AM. B. ASS'N 1, 29 (2018), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABAStandardsforApprovalofLawSchools/2017_2018_standards_chapter4.authcheckdam.pdf [hereinafter *ABA Standards*] (Standard 405 covers Professional Environment where, "(a) A law school shall establish and maintain conditions adequate to attract and retain a competent faculty. (b) A law school shall have an established and announced policy with respect to academic freedom and tenure . . . .").

103. *See* Sloan, *supra* note 5, at 1.

104. *Id.*

105. *See ABA Standards*, *supra* note 102, at 29 (Standard 405 discusses Professional Environment where, "(a) A law school shall establish and maintain conditions adequate to attract and retain a competent faculty. (b) A law school shall have an established and announced policy with respect to academic freedom and tenure . . . .").

106. *See* BENJAMIN NATHAN CARDOZO, *Growth of the Law*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE 185, 215 (Margaret E. Hall ed., 1947).

107. *Roth*, 408 U.S. at 567 ("[A] tenured teacher cannot be 'discharged except for cause upon written charges' and pursuant to certain procedures.") (citation omitted); *see also* Black, *supra* note 19, at 103 ("Teachers' due process rights stem from a property right in their jobs.") (citations omitted).

108. *See Roth*, 408 U.S. at 588 (Marshall, J., dissenting) (citations omitted).

109. *Id.*

110. *Blasdel*, 687 F.3d at 816.

[i] Potential

Since tenure appointments conferred by the university upon deserving professors are based on contract law,[111] tenure decisions with regard to each faculty applicant are forward-looking in scope.[112] Therefore, "such decisions necessarily rely on subjective judgments about academic *potential* . . . ."[113] Of course, in other instances, evaluation of *past* academic accomplishments [114] may loom large in considerations relating to the termination of tenure.[115] Moreover, the forward-looking aspects of the pertinent evaluation inevitably concede that the realization of potential [116] may not always be forthcoming.[117] Sometimes, that anticipated potential may not fully emerge with respect to a specific individual.[118] The act of making tenure decisions acknowledges that, at the time when a tenure decision is made, such "'tenure decisions have always relied primarily on judgments about academic potential, and there is no algorithm for producing those judgments.'"[119] Additionally, although the commitment between the university and the tenured faculty member is primarily contractual; nevertheless, a faculty member's award of tenure may be somewhat influenced by other factors, such as collegiality.[120]

[ii] Collegiality

The judiciary is amenable to educational institutions' determinations that collegiality can be a component of the institution's tenure decision.[121] "[O]ffice politics frequently plays a role in the award or denial of tenure; friendships and enmities, envy and rivalry . . . can figure in tenure recommendations by the candidate's colleagues . . . ."[122] Undoubtedly, harmonious interactions between individual faculty members tend to

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111. *See Roth*, 408 U.S. at 578 ("[T]he . . . [faculty member's] 'property' interest in employment at [the university] . . . was created and defined by the terms of his appointment.").

112. *See Blasdel*, 687 F.3d at 815 (citing Vanasco v. National-Louis Univ., 137 F.3d 962, 968 (7th Cir.1998)).

113. *Id.*

114. *Blasdel*, 687 F.3d at 816 ("[A] tenured professor is very hard to fire even if he or she has ceased to be a productive scholar.").

115. *Id.*

116. *See id.* at 817 ("[The University] . . . hired [the candidate] . . . in the expectation that [the candidate] . . . would be doing research on Parkinson's disease as well as teaching students and seeking grants of outside funding for [the candidate's] . . . research.").

117. *Id.* at 819 ("As [the faculty member's] four-year probationary period neared its end, [the faculty member] realized that she hadn't published enough and obtained enough external funding, to be awarded tenure.").

118. *Id.* at 819.

119. *See Blasdel*, 687 F.3d at 815 (quoting Namenwirth v. Bd. of Regents of Univ. of Wisconsin, 769 F.2d 1235, 1243 (7th Cir.1985)).

120. *Blasdel*, 687 F.3d at 815.

121. *See id.* at 817 (citations omitted).

122. *Id.*

eliminate, or at least ameliorate, interpersonal tensions as well.[123] Two academic commentators seem to share the point of view that "[t]he benefits to the campus of a more civil, collegial faculty are enormous."[124]

[B] Contractual Factors

Faculty appointments are contracts between the university and the faculty member and may therefore be tenured or untenured.[125] Of course, the freedom achieved by faculty members who attain tenure is not unlimited.[126] On the contrary, the courts will interpret the specific faculty member's contract by ascertaining and then giving "effect to the intent of the contracting parties . . . to be regarded as being embodied in the writing itself."[127] The fundamental components of the contract consist of the appointment letter,[128] the faculty handbook,[129] and in some appropriate cases, trade custom and usage.[130] Actually, some courts have determined that even when the faculty handbook is not expressly or impliedly referred to in the appointment letter, the court may nevertheless consider it in the interpretation of the contract between the parties.[131] Of course, the courts perceive such arguments as persuasive rather than mandatory.[132]

In *Abramson v. Board of Regents, University of Hawaii*,[133] the Supreme Court of Hawaii clarified this issue.[134] The court stated "[w]e are not aware of any way in which [a document] could create rights [for a professor] except to the extent that it was incorporated by implication into [the professor's]

123. Mary Ann Connell & Frederick G. Savage, *The Role of Collegiality in Higher Education Tenure, Promotion, and Termination Decisions*, 27 J.C. & U.L. 833, 836 (2001).

124. *Id.*

125. *See* Clutts v. S. Methodist Univ., 626 S.W.2d 334, 336 (Tex. App. 12th 1981) ("[S]ince [the faculty member's] contract clearly and expressly indicates that her employment by [the University] as an associate professor was 'without tenure,' it would be unreasonable to imply the 'indefinite' tenure provision of [the University's] by-laws into [the professor's] employment contract.").

126. Robertson v. Drexel Univ., 991 A.2d 315, 318 (Pa. Supp. Ct. 2010).

127. *See id.* at 318.

128. *See Roth*, 408 U.S. at 578 ("[T]he [faculty member's] 'property' interest in employment at [the university] was created and defined by the terms of his appointment.").

129. *See, e.g.*, *Wilson*, 794 S.E.2d at 433 ("[T]he statement that the professors were 'subject to' the provisions of the handbook manifests the parties' intent that the scope of the professors' tenure and tenure-track protection granted by the one-page contracts would be governed by the handbook."). *See also* Brown v. Sessoms, 774 F.3d 1016, 1022 (2014) ("It is well established that, under District of Columbia law, an employee handbook such as the Howard University Faculty Handbook defines the rights and obligations of the employee and the employer, and is a contract enforceable by the courts.") (citations omitted).

130. *See* Adams, *supra* note 25, at 73-74.

131. *See id.* at 73.

132. *See id.* at 68 n.4, 73-74, 86.

133. *See generally* Abramson v. Bd. of Regents, 548 P.2d 253 (Haw. 1976) (discussing whether the court has the power to enforce or establish a claim to academic tenure). *But see In re Robert's Tours & Transp., Inc.*, 85 P.3d 623 (Haw. 2004).

134. *Abramson*, 548 P.2d at 261.

employment contracts . . . ."[135] The court certainly acknowledged that such rights could validly be created based upon "a legitimate expectation that the policy . . . expressed [in the document] would be applied in [a particular professor's] case."[136] This means that such conceptions cannot be extrapolated beyond reasonable boundaries.[137] Thus, "[i]n the face of [an] *express* contract, it is not possible to imply a different agreement incorporating [a different document]."[138]

One commentator proposed that tenure controversies differ between private and public universities.[139] The commentator also concluded that faculty members at public universities have a constitutional safeguard not necessarily available to professors in private institutions.[140] However, the fundamental principle of freedom of contract means that when a faculty member receives an appointment letter from a university, the courts will restrict the parties to the contract and to the express and implied terms of the agreement.[141] It is entirely up to the parties who create a contract to protect themselves at the drafting phase of the agreement when the parties are collectively as close as they will ever come to omnipotence under contract law.[142]

According to the 1940 Statement of Principles on Academic Freedom and Tenure, a faculty handbook might usefully include helpful language.[143] However, the university determines the provisions included in its faculty handbook.[144] Therefore, a shrewd faculty member must possess enough foresight to negotiate inclusion of express terms that reflect self-empowerment, whereby the faculty member successfully protects her best interests.[145] The obligations of tenure are as reciprocal with respect to faculty member and educational institution as interpretation of the language and implications of the contract permit.[146] Thus, express obligations of the faculty

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135. *Id.*

136. *Id.*

137. *See, e.g.*, *id.* *But see In re Robert's Tours & Transp., Inc.*, 85 P.3d 623 (2004).

138. *Abramson*, 548 P.2d at 261 (citations omitted) (emphasis added).

139. *See* Adams, *supra* note 25, at 74 ("At a private institution, tenure disputes are governed by contract law, while a dispute at a public university is a matter of state administrative law.").

140. *Id.*

141. *See* White, *supra* note 47, at 68.

142. *Id.* at 66.

143. *See, e.g.*, *Wilson*, 794 S.E.2d at 433 ("We are not holding that the handbook itself constituted a contract; instead, we hold that it defines the scope of protection afforded to the 'tenured' and 'tenure-track' positions . . . ."). *See also* Adams, *supra* note 25, at 73.

144. *See* Adams, *supra* note 25, at 73, 74.

145. White, *supra* note 47, at 66, 68.

146. *See* Adams, *supra* note 25, at 79, 91.

member to maintain "continued professional development and maintenance of professional standards"[147] are quite typical.[148]

[C] Tenured Faculty Member's Breach

After achieving tenure, a faculty member's breach of contract with the employing university is based upon orthodox contract interpretation by the courts.[149] This is consistent with judicial interpretation of the parties' intentions whether derived from fundamental provisions of the parties' contractual intentions *prior* to achieving tenure, at the time of achieving tenure, or subsequent to achieving tenure.[150] This stems from interpretation of the specific terms articulated in the contract in the contextual setting of applicable provisions of the educational institutions faculty handbook provisions.[151] The courts can deem the failure to perform contractual obligations at a professional level, consistent with that shown during the probationary period, a breach of contract.[152] In circumstances where the university fully discharged its burden to prove a valid breach of the tenure contract, the university is free to consider the breach as non-material; alternatively, the university can invoke the process of termination where the contract substantively so provides.[153]

For example, in *Murphy v. Duquesne University of the Holy Ghost*,[154] the Supreme Court of Pennsylvania decided that nothing in the tenure contract provided that university decisions regarding the faculty member's continued employment could be overridden by the courts.[155] The Supreme Court of Pennsylvania concluded, "it would be unreasonable to believe that the parties intended that the process for deciding the matter of tenure forfeiture, which was so carefully elaborated in their Contract to the point of final determination, could be completely circumvented by the filing of a civil action."[156]

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147. *See id.* at 91.
148. *Id.*
149. *See, e.g.*, *Wilson*, 794 S.E.2d at 434. *See also* Brown, 774 F.3d at 1022.
150. *Wilson*, 794 S.E.2d at 433.
151. *Brown*, 774 F.3d at 1022.
152. *See, e.g.*, *Wilson*, 794 S.E.2d at 432, 434, 436. *See also Brown*, 774 F.3d at 1022.
153. *Murphy*, 777 A.2d at 432, 433.
154. 777 A.2d 418 (2001).
155. *Murphy*, 777 A.2d at 433.
156. *Murphy*, 777 A.2d at 433-34.

[D] University's Breach

Of course, the university can breach the contract with a tenured faculty member by dismissing the employee without good cause.[157] If the university terminates the contract of a tenured faculty member without good cause,[158] the faculty member is empowered to file suit against the university for wrongful termination with viable prospects of success.[159] However, the converse is also valid.[160] Understandably, the terminated faculty may request the court to award specific performance seeking reinstatement of the faculty member's position at the university.[161] However, an award of specific performance rests within the sound discretion of the particular court.[162] Therefore, a court is arguably less likely to award specific performance in a wrongful termination case against a private university than it would tend to do in a state-run university controversy.[163]

For example, in *Robertson v. Drexel*,[164] the Superior Court of Pennsylvania explained that "'private parties . . . may draft employment contracts which restrict review of professional employees' qualifications to an internal process that, if conducted in good faith, is *final* within the institution and precludes or prohibits review in a court of law.'"[165] However, in public universities, tenure tends to be governed by statute.[166] So, in faculty member controversies against state universities, applicable statutes governing tenure may very well include the grant of specific performance as a remedy.[167] In such instances, a court may grant restoration of the faculty member's position prior to dismissal.[168]

Moreover, in *Dugan v. Stockton State College*,[169] the Superior Court of New Jersey, Appellate Division came to the aid of an employee who was denied tenure after thirteen years of continuous employment.[170] The State

157. *See Wilson*, 794 S.E.2d at 438 ("[W]e affirm . . . the jury's determination that the university is liable for breach of contract . . . ."). *See also* White, *supra* note 45, at 68.

158. *See Wilson*, 794 S.E.2d at 436 ("[W]e find that this case does *not* involve any academic judgment to which this court should defer.") (emphasis added).

159. *See id.* at 433, 436.

160. *See* Fishman, *supra* note 70, at 198 ("[W]here cause exists, and faculty exercise their responsibilities of peer review, termination will occur *and be supported by the courts*.") (citations omitted) (emphasis added).

161. *See, e.g.*, *Wilson*, 794 S.E.2d at 429.

162. *See* RESTATEMENT (SECOND) OF CONTRACTS §357(1) (AM. LAW INST. 1981).

163. Adams, *supra* note 25, at 74.

164. 991 A.2d 315 (2010).

165. *Robertson*, 991 A.2d at 320 (emphasis added).

166. *See, e.g.*, Fishman, *supra* note 70, at 169 n.38. *See also* Adams, *supra* note 25, at 74.

167. *See also* Adams, *supra* note 25, at 74.

168. *See also id.*

169. 586 A.3d 322 (1991).

170. *Dugan*, 586 A.2d at 326 ("If her duties were academic during any of the time periods set forth in [the state statute] she is entitled to tenure and such other relief as may flow from such finding.").

College Tenure Act specifically defined the conditions under which a faculty member became entitled to tenure.[171] The petitioner, therefore, asserted that the college changed her employment titles throughout her career to allegedly avoid granting her tenure.[172] On appeal, the appellate division court reversed the decision of the State Board of Higher Education, explaining that the elevation of "form over substance" would not be judicially tolerated.[173] On remand, the appellate division court ordered that, if the petitioner proved her duties were academic in nature, then she was entitled to be granted tenure.[174] Thus, the court acknowledged that the applicable statutes "should not be interpreted to permit avoidance of tenure by manipulation of job titles."[175]

IV. PREREQUISITES OF TENURE

"The two most important . . . elements of the tenure decision are the evaluations of scholarship and teaching . . . . [S]ervice [is] the third element of most law school tenure decisions."[176] An American educational institution normally decides whether to grant tenure to a faculty applicant based upon its tenure procedures.[177] In light of the structural safeguards inherent in these procedures, in the employment discrimination context, a challenger to a negative decision faces "practical considerations [that] make a challenge to the denial of tenure at the college or university level an uphill fight—[because of] the absence of *fixed, objective criteria* for tenure at that level."[178]

Before a faculty member can obtain tenure, the conferring institution usually conducts a rigorous examination of the employee, conducted in the context of fairness, and free from arbitrariness and bias.[179] Of course, this requires the decision-makers to reach their decision in a manner analogous to, but *not* identical to judges.[180] According to one professor of psychology commentator, judges "attempt to set emotion aside to render a decision by

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171. *Id.* at 324-25.

172. *Id.* at 325.

173. *Id.* at 324 ("This exaltation of form over substance permits an intolerable evasion of the County and State College Tenure Act.").

174. *Id.* at 326.

175. *Dugan*, 586 A.2d at 325.

176. *See* Devon W. Carbado & Mitu Gulati, *Tenure*, 53 J. LEGAL EDUC. 157, 159 (2003). *See also* Adams, *supra* note 25, at 97 ("[T]enured faculty must continue to exhibit the highest levels of professionalism in teaching, scholarship, and service.").

177. *See also* Adams, *supra* note 25, at 97.

178. *See Blasdel*, 687 F.3d at 815 (emphasis added) (citations omitted).

179. *See id.* at 817 ("Granting tenure, like appointing a federal judge, is a big commitment . . . . [I]nvidious considerations . . . may play *no role* in the actual tenure decision . . . .") (emphasis added).

180. *See id.*

pure reason[.]"[181] However, opinions vary with respect to the capacity of human beings to ascend to such lofty heights of dispassion.[182]

Moreover, as the commentator cited earlier suggested, "[f]or centuries, laws in the United States have been shaped by the classical view of emotion . . . . [A] belief that assumes emotion and reason are distinct entities."[183] However, whereas judges make the final decision in cases, tenure-determination committee members typically do not do so.[184] These committees usually make *recommendations* to the Dean of the particular department of the educational institution.[185] The Dean then usually makes an independent recommendation of her own[186] to the Provost or Trustees of the educational institution.[187]

In this sense, tenure committees' recommendations are not final.[188] Such decisions may be more similar to the decisions of World Trade Organization ("WTO") panels [189] consisting of panelists from states that are members of the WTO.[190] Such "members" are selected pursuant to the rules of the WTO's Dispute Settlement Body ("DSB")[191] to decide trade disputes between member states.[192] As two commentators explain, in the context of intellectual and emotional independence: "[T]he [Dispute Settlement Understanding] DSU refers to individuals on the [Appellate Body][193] AB as 'members,' not

181. *See, e.g.*, LISA FELDMAN BARRETT, HOW EMOTIONS ARE MADE: THE SECRET LIFE OF THE BRAIN 220 (2017).

182. *See, e.g.*, *Blasdel*, 687 F.3d at 817 ("[O]ffice politics frequently plays a role in the award or denial of tenure; friendships and enmities, envy and rivalry . . . can figure in tenure recommendations by the candidate's colleagues, along with disagreements on what are the most promising areas of research.") (citations omitted).

183. *See* BARRETT, *supra* note 181, at 220.

184. *See, e.g.*, *Law School Faculty Governance*, *supra* note 26, at 12.

185. *See, e.g.*, *id.*

186. *Id.* (describing that the Dean must prepare an independent recommendation whether the Dean is concurring or disagreeing with the committee's recommendation).

187. *See, e.g.*, *id.*

188. *Id.*

189. WORLD TRADE ORG., https://www.wto.org/english/thewto_e/thewto_e.htm (last visited Oct. 15, 2018) ("The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations."). *See, e.g.*, Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT'L L. 225, 260 (2017) ("Issues of law and legal interpretation by panels can be appealed to the WTO's Appellate Body . . . .").

190. *See* Dunoff & Pollack, *supra* note 189, at 260 ("The WTO's dispute settlement system has as its foundation the rules and procedures set out in the WTO's Dispute Settlement Understanding (DSU), which is administered by the Dispute Settlement Body (DSB), consisting of representatives of all WTO members.") (citations omitted).

191. *See Dispute Settlement Body*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm (last visited Oct. 15, 2018) ("The General Council convenes as the Dispute Settlement Body (DSB) to deal with disputes between WTO members.").

192. *See Dispute Settlement Body*, *supra* note 191.

193. *See* Dunoff & Pollack, *supra* note 189, at 227, 262 ("[T]he WTO Appellate Body [AB] is a particularly high-accountability court, whose members are appointed for short, renewable four-year terms.").

'judges;' . . . the AB is called a 'body,' rather than a 'court;' [and] the AB makes 'recommendations,' not 'rulings;' [moreover] the AB issues 'reports' not 'judgments,' that WTO members, acting collectively as the DSB, are then empowered to accept or reject."[194]

Of course, faculty members as employees do strive to meet the expectations of the employer university. Furthermore, these efforts start from the faculty member's initial employment and continue during the probationary period.[195] During these early stages, the faculty member is usually evaluated annually by the employing institution to determine whether the newcomer is on the right track.[196] This requires that the faculty member's performance must demonstrate the likelihood of achieving tenure in due course.[197]

A. Probationary period

Prior to attaining tenure, faculty members are under observation by their peers and by the employing institution's administration in order to evaluate their performances.[198] Furthermore, the probationary period can last from six to ten years.[199] The essential reason for such an extensive pre-tenure period is to ensure that the university will ultimately make a well-informed decision on its long-term investment.[200] These exhaustive analyses are not perfect, and a significant number of the cases in which universities revoked tenure related to issues that initially emerged during the probationary period.[201]

B. A faculty member's Achievement of tenure

A faculty member striving to attain tenure must devote her time to "teaching, scholarship, [professionalism,] and service."[202] Teaching performance is essentially determined by faculty and student assessment of the professor's demonstrated pedagogical skills, but faculty evaluation predominates.[203] In order to evaluate scholarship, the university typically examines the faculty member's published work-product.[204] Of course, professionalism, service, and collegiality also play an intrinsic role in

194. *See id.* at 262.
195. *See Law School Faculty Governance, supra* note 26, at 13.
196. *See id.*
197. *See id.*
198. *See* Adams, *supra* note 25, at 77-78.
199. *See id.* at 77.
200. *See id.* at 78.
201. *See id.* at 77.
202. *See id.* at 78.
203. *See* John D. Copeland & John W. Murray, Jr., *Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance*, 61 MO. L. REV. 233, 242 (1996).
204. *Id.* at 241.

tenure.[205] Thus, one of the most important skills of the tenured faculty member is to be able to work effectively with colleagues to '"demonstrate good academic citizenship, or contribute to a collegial atmosphere.'"[206] The faculty member is also expected to participate in collegiate or community service.[207]

V. PROCEDURES FOR AWARDING TENURE & DE FACTO TENURE

A. PROCEDURES FOR AWARDING TENURE

Procedurally, pursuant to an application from a candidate to the appropriate university department[208] or committee[209] created under the authority of its Board of Trustees,[210] an initial determination is made by the department[211] or committee.[212] The initial determination ascertains whether the applicant properly qualifies for an award of tenure.[213] The determination takes the form of a recommendation[214] to a specified university official[215] or committee[216] operating within the context of a hierarchical procedural structure put in place by the educational institution.[217] Specific criteria are applicable to the initial determination, usually made pursuant to notice, at a meeting of the appropriate committee in accordance with the educational institution's governing provisions.[218]

The institution's hierarchical structure is buttressed by additional levels of review[219] in order to ensure dispassionate and objective review of the

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205. *See* Adams, *supra* note 25, at 82-83.
206. *See id.* at 84
207. Copeland & Murray, *supra* note 203, at 243.
208. *See Blasdel*, 687 F.3d at 820 ("[The faculty member] submitted her tenure application . . . [to] [t]he physiology department [which] recommended tenure for her in an enthusiastic letter . . . .").
209. *See, e.g.*, *Law School Faculty Governance*, *supra* note 26, at 10, 11.
210. *See, e.g.*, *id.*
211. *See Blasdel*, 687 F.3d at 820.
212. *See id.*
213. *See, e.g.*, *Law School Faculty Governance*, *supra* note 26, at 10.
214. *See Blasdel*, 687 F.3d at 816, 820.
215. *See, e.g.*, *Law School Faculty Governance*, *supra* note 26, at 12.
216. *See Blasdel*, 687 F.3d at 820 ("An ad hoc reviewing committee . . . seconded the [physiology] department's tenure recommendation . . . [which] was then reviewed by two members . . . of the medical school's . . . appointments, promotion, and tenure committee.").
217. *See Blasdel*, 687 F.3d at 820. *See also, e.g.*, *Law School Faculty Governance*, *supra* note 26, at 10, 12.
218. *Law School Faculty Governance*, *supra* note 26, at 10, 12.
219. *See Blasdel*, 687 F.3d at 822 ("[T]he medical school's appointments, promotion, and tenure committee unanimously recommended against tenure for [the applying faculty member] . . . . The dean of the medical school concurred in the recommendation, as did the university's provost—the ultimate decisionmaker."). *See also, e.g.*, *Law School Faculty Governance*, *supra* note 26, at 12 ("Following receipt of the [RPT] Committee's recommendation, the Dean must prepare an independent recommendation . . . for transmittal to the Provost . . . . The Provost . . . reviews the recommendations of the [RPT] Committee and the Dean and makes a final recommendation to the President.").

recommendations from the committees or institution's officials who conducted the reviews below.[220]

B. *DE FACTO TENURE*

De facto tenure is a somewhat residual type of tenure, and "[d]etermining whether an individual has obtained de facto tenure is an inherently fact-driven inquiry . . . ."[221] The United States District Court, Middle District of Louisiana explained the "fact-driven inquiry."[222] The investigation necessitates "the examination of factors such as the individual's length of service, representations made to the individual directly by the institution or tacitly through its practices and procedures."[223]

The United States District Court, Middle District of Louisiana's explanation empowers a court to determine whether *de facto* tenure was created as a result of the unique facts of each particular controversy.[224] The unique facts of a specific case can conceivably create a due process right[225] for an otherwise non-tenured faculty member.[226] So, a non-tenured professor may demonstrate a property interest sufficient to implicate de facto tenure by establishing "a legitimate claim to continued employment."[227] In determining de facto tenure, the inquiry is fact-specific[228] and courts examine a plethora of factors.[229] These include the employee's length of employment, any

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for transmittal to the Provost . . . . The Provost . . . reviews the recommendations of the [RPT] Committee and the Dean and makes a final recommendation to the President.").

220. *See Blasdel*, 687 F.3d at 817.

221. *Heerden v. Bd. of Supervisors of Louisiana State Univ. and Agric. and Mech. Coll.*, 2010 U.S. Dist. LEXIS 140698 at *6 (D. La. 2011). *See Perry v. Sindermann*, 408 U.S. 593, 599 (1972).

[T]he Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract.

Perry, 408 U.S. at 599.

222. *Heerden*, 2010 U.S. Dist. LEXIS 140698 at *6.

223. *Id.*

224. *Id.*

225. *See Perry*, 408 U.S. at 599.

> [T]he Constitution does not require opportunity for a hearing before the nonrenewal of a nontenured teacher's contract, unless he can show that the decision not to rehire him somehow deprived him of an interest in "liberty" or that *he had a "property" interest* in continued employment, despite the lack of tenure or a formal contract.

Id. (emphasis added).

226. *See* Copeland & Murray, *supra* note 203, at 274.

227. *See, e.g.*, *Heerden*, 2010 U.S. Dist. LEXIS 140698 at *6, 7 (unfortunately, the faculty member failed to establish a property interest on the facts of this case).

228. *Id.* at *6.

229. *Id.*

specific language in the faculty handbook or other correspondence, and representations made by the institution through its agents.[230]

De facto tenure must be shown by evidence that successfully meets the specific burden of proof of "an objectively reasonable expectation of continued employment."[231] However, the burden of proof is by no conception an easy one to meet.[232] For example, the United States Court of Appeals for the Eighth Circuit concluded that, based upon all the material facts in issue, the professor plaintiff in *Geddes v. Northwest Missouri State University*,[233] "did not demonstrate the existence of a legitimate expectation of continued employment and therefore had no constitutionally protected property right."[234]

Additionally, in *Heerden v. Board of Supervisors of Louisiana State University*,[235] an associate professor filed suit asserting that although he was not formally tenured, he was deprived of the due process right to a hearing regarding the nonrenewal of his contract.[236] Heerden argued that he had obtained de facto tenure by virtue of a letter from the university that encouraged him to "'take ten months of hard money and turn it into nine months with a salary increase of hard money and change [his] position into an academic position.'"[237] The court determined from the evidence that "hard money" meant "payments derived from [the] state, rather than grant or contract, funds and typically reserved for academic faculty."[238]

Nevertheless, the court concluded that the facts of this case did not successfully prove de facto tenure.[239] The attempted proof was not successful because the plaintiff was repeatedly told that he was not employed in a tenure-track position.[240] Furthermore, the court concluded that when an institution "has a formal, written procedure for conferring tenure upon employees [this fact] is generally *fatal* to a plaintiff's claim of de facto tenure."[241] The fatal impact stemmed from the existence of the *express* contractual tenure program because such a policy precluded any prospective implication of de facto tenure.[242] This is because a decision that de facto tenure could arise in such

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230. *Id.*
231. *See* Geddes v. Nw. Missouri State Univ., 49 F.3d 426, 429 (8th Cir. 1995).
232. *Id.*
233. 49 F.3d 426 (1995).
234. *See Geddes*, 49 F.3d at 430.
235. 2010 U.S. Dist. LEXIS 140698 (D. La. 2011).
236. *Heerden*, 2010 U.S. Dist. LEXIS 140698 at *1.
237. *Id.* at *2 (citation omitted).
238. *Id.* at *1.
239. *Id.* at *3.
240. *Id.*
241. *Heerden*, 2010 U.S. Dist. LEXIS 140698 at *3 (emphasis added) (citations omitted).
242. *Id.*

circumstances would contradict the educational institution's formal tenure policy.[243]

Of course, in the Supreme Court of the United States case of *Perry v. Sindermann*,[244] the Court decided that although there *was* a formal policy, the professor had the essential equivalent of de facto tenure and was wrongfully denied an opportunity for a hearing.[245] Sindermann asserted that the nonrenewal of his employment violated the Fourteenth Amendment of the United States Constitution because the decision to not rehire him was based on his public criticism of the college administration; and therefore his free speech rights had been unconstitutionally infringed.[246]

The college had not provided Sindermann with any reasons for his nonrenewal, nor had it permitted him an opportunity for a hearing to challenge his removal.[247] The Court of Appeals for the Fifth Circuit reversed the District Court's grant of summary judgment to the college based upon the Fifth Circuit court's acknowledgment of the sufficiency of the proven facts that supported an "'expectancy' of re-employment."[248] Therefore, failing to allow the faculty member an opportunity for a hearing violated the U.S. Constitution's procedural due process guarantee.[249] This was the case because the plaintiff's claim was based on a violation of his free speech right.[250]

Although the pertinent employer did not have a formal tenure program, nevertheless, Sindermann relied on the property right of continued employment based upon a provision in the Faculty Guide that stated:

> Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.[251]

Sindermann's reliance on the reasonable interpretation of this specific language conferred upon him a judicially discernible property right of continued employment.[252] This decision may be a cautionary tale for

243. *Id.* at *3.
244. 408 U.S. 593 (1972) *overruled on other grounds by* Rust v. Sullivan, 500 U.S. 173 (1991). *See also* Ricciuti v. Gyzenis, 834 F.3d 162, 170 (2d Cir. 2016).
245. *Perry*, 408 U.S. at 593.
246. *Id.* at 595.
247. *Id.*
248. *Id.* at 596.
249. *Id.*
250. *Perry*, 408 U.S. at 596.
251. *Id.* at 600.
252. *Id.* at 600-01.

educational institutions when drafting provisions in Faculty Guide documents.

Controlling substantive judicial precedent supported the conclusion that there may be rational common law support that permits appropriate employees, in a university setting, to attain the equivalence of tenure even though a formal tenure program is not expressly articulated.[253] The court did not go as far as holding that de facto tenure entitled him to be reinstated.[254] However, the conception of de facto tenure *did* obligate the university to grant him a hearing in order to apprise him of the grounds for his dismissal and also to provide an opportunity for him to challenge the college's decision.[255]

VI. BENEFITS

Faculty members desire tenure not only for the prestige that it engenders, but for the academic freedom to teach what they prefer. For those faculty members who desire tenure in the context of public universities, there is also a desire for the conferment of a property interest.[256]

[A] Freedom[257]

Faculty members desire tenure for the job security, but a more important feature of tenure to both the faculty member and the university is the freedom of the employee to teach and explore ideas without the fear of persecution.[258] "[T]he primary purpose of tenure . . . [is] providing a benefit to society by the unimpeded search for truth and its exposition."[259]

This freedom is especially beneficial to the university because it advances the "'integrity of the university.'"[260] The tenured faculty member is able to delve into research that, without the freedom of tenure, might very well have

253. *Id.* at 602.
254. *Id.* at 603.
255. *Perry*, 408 U.S. at 603 (quoting Odessa Junior College Faculty Guide).
256. *See, e.g.*, *Roth*, 408 U.S. at 577.

> To have a property interest in a benefit, a person clearly must have . . . a legitimate claim of *entitlement* to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that *must not be arbitrarily undermined.*

Id. (emphasis added).

257. *See* Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 L. & CONTEMP. PROBS. 325, 328 (1990) ("The conferral of tenure makes it very difficult thereafter to dismiss a professor for views expressed in the classroom, in scholarly writing, or in public arenas.") (citations omitted).
258. *See* Hall v. Ohio State Univ. Coll. of Humanities, No. 11AP-1068, 2012 WL 5336049 (Ohio Ct. App. 10th Dist. 2012).
259. *See* Adams, *supra* note 25, at 81.
260. *See id.* at 80.

been conceptually too precarious to consider.[261] The idea of tenure offering protection to the faculty member is conceptualized by allowing the faculty to research and convey such opinions that may be highly controversial; or in some instances, disliked by various groups.[262] Thus, scholarly pursuits may very well be provided to some faculty members based upon innovative or otherwise hypothetical concepts.[263] Tenured faculty members who become brave, unintimidated by institutional employment power, and unafraid of persecution for their unconventional and heterodox theories may ultimately imagine these concepts.[264]

[B] Property Interest[265]

Courts have recognized that public employees (tenured faculty at state universities) have a property interest when granted a position of tenure through the state system.[266] "Whether a [faculty member] has a property interest depends on whether [he or] she can make a "'legitimate claim of entitlement.'"[267] "A 'legitimate claim of entitlement' . . . is 'defined by existing rules or understandings that stem from an independent source such as law.'"[268] There needs to be more than just unilateral faculty member expectations arising from the faulty member's subjective conceptions, motivated essentially by self-interest.[269] The faculty member must satisfy her burden of proof by establishing objective, substantive support for a valid claim; in order to convincingly sustain an asserted property interest in continued employment.[270]

When validly proven, such a property interest confers upon the pertinent employee a due process right under the Fourteenth Amendment of the United States Constitution.[271] For instance, in *Board of Regents of State Colleges v. Roth*,[272] the faculty member, Roth, claimed that although he was hired for a fixed, one-year appointment and had no apparent tenure rights, the university's reason for not rehiring him was due to his public criticism of the

261. *See id.* at 81.
262. *See id.* at 80.
263. *See id.* at 81.
264. *See* Adams, *supra* note 25, at 81.
265. *See Roth*, 408 U.S. at 569-70 ("When protected interests are implicated, the right to some kind of prior hearing is paramount.") (citation omitted). *See also* Black, *supra* note 19, at 103 ("Teachers' due process rights stem from a property right in their jobs.") (citations omitted).
266. Robert Charles Ludolph, *Termination of Faculty Tenure Rights Due to Financial Exigency and Program Discontinuance*, 63 U. DET. L. REV. 609, 614 (1986).
267. Harbaugh v. Bd. of Educ. of the City of Chi., 815 F. Supp. 2d 1026, 1029 (N.D. Ill. 2011).
268. *Id.* at 1029.
269. *See Geddes*, 49 F.3d at 429.
270. *Id.*
271. *See* Ludolph, *supra* note 266, at 614.
272. 408 U.S. 564 (1972).

administration.[273] Roth asserted that he was deprived of his Fourteenth Amendment rights granted by the United States Constitution.[274] He supported this claim by alleging infringement of his free speech and due process rights.[275] The District Court granted summary judgment to Roth and the Court of Appeals affirmed,[276] with one judge dissenting.[277]

However, the Supreme Court of the United States reversed the lower courts' decisions and found that Roth did not have a constitutional right to a hearing by the university.[278] The Supreme Court of the United States concluded that nothing in the record showed that Roth was deprived of interests encompassed by the Fourteenth Amendment's protection of liberty and property.[279] The Court acknowledged that Roth may have had an "abstract" speculation about being rehired; however,. he was unable to establish the appropriate factual and conceptual backing for proof of a property interest that would require the University to grant him a hearing prior to his termination.[280]

Nevertheless, the United States Supreme Court's decision in *Roth* may be usefully compared to its own decision in *Perry v. Sindermann*.[281] In *Sinderman*, the faculty member was a professor at Odessa College which had no formal tenure system.[282] Notwithstanding this factual reality, the policy promulgated and followed by the College - expressed in the Faculty Guide - included an "unusual provision" that existed for a number of years and articulated that permanent tenure could exist, "as long as [the faculty member's] teaching services [were] satisfactory. . . ."[283]

Sindermann therefore asserted that Odessa College created a faculty employment context that could be reasonably interpreted to have also created a legally valid claim to a property interest.[284] Sindermann's assertions persuaded the Supreme Court of the United States to rule in his favor in this respect.[285] The Court, however, concluded that although the pertinent property interest obligated Odessa College to conduct a hearing to determine

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273. *Roth*, 408 U.S. at 564.
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.* at 569.
278. *Roth*, 408 U.S. at 570 ("[T]he range of interests protected by procedural due process is *not* infinite.") (emphasis added).
279. *Id.* at 569.
280. *Id.* at 578.
281. *Perry*, 408 U.S. at 593.
282. *Id.* at 600.
283. *Id.*
284. *Id.* at 601.
285. *Id.* at 603.

whether Sindermann should be retained or not, it did not go as far as entitling Sindermann's reinstatement as a faculty member.[286]

VII. CRITICISM OF TENURE[287]

"Sometimes numbers tell us what adjectives and adverbs cannot."[288]

Over the years as tenure has become more popular among universities, one commentator has warned of the evolution of attendant negative macro-repercussions in the context of legal education.[289] This commentator has proposed that "[w]omen on tenure track gain tenure at lower rates than men."[290] Additionally, potentially negative micro-repercussions may also materialize, such as the emergence of mediocrity and an over emphasis on collegiality, because a faculty member attains tenure.[291]

[A] Mediocrity

A common fear universities associate with tenure is that faculty members will become apathetic and indifferent.[292] This fear also seems to include conceptions that achieving tenure will tend to eliminate creativity in the faculty member.[293] The concern is that because the contract gives a certain level of job security, the faculty member will become complacent and unproductive.[294]

[B] Collegiality

Although collegiality[295] is not invariably specified as one of the qualifications necessary to attain tenure, many, if not most, universities

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286. *Perry*, 408 U.S. at 603.

287. *See* White, *supra* note 77, at 367 ("The reason to abolish tenure is to improve the quality of teaching and research by replacing poorly performing professors with others who are better teachers and stronger scholars.").

288. *See* Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 313 (2000).

289. *See id.* at 314 ("Perhaps the most stark finding is that *everywhere* in legal education the line between the conventional tenure track and the lesser forms of faculty employment has become a line of gender segregation.").

290. *Id.* at 336.

291. *See* Adams, *supra* note 25, at 78, 82.

292. *See id.* at 78.

293. *See id.*at 78, 86.

294. *See id.*at 78.

295. *See* Connell & Savage, *supra* note 123, at 833.

> Courts have upheld the right of a college or university to consider a faculty member's working relationship with his or her colleagues as a valid basis upon which to make a tenure, promotion, or termination decision for many years. However, the word 'collegiality' was not the focus of court decisions until 1981 . . . .

consider this quality essential to the tenure agreement.[296] Of course, the most serious concern relating to the use of collegiality as a factor in the decision to confer tenure on a faculty member is that "[this] subjective component . . . of the candidate's personality" could possibly rise or degenerate to the level of discrimination, whether intentional or unintentional.[297] Nevertheless, two academic commentators "have concluded that institutions of higher learning should feel confident in considering collegiality in faculty decisions."[298]

VIII. TERMINATION

Termination of a faculty member is very important and may be for-cause or not for-cause.[299] The evaluation that precedes the painful decision to terminate a faculty member includes factors such as financial exigency, discontinuation of program, and institutional merger or affiliation.[300] Of course, tenure is a contract between the university and the faculty member.[301] Therefore, each faculty member needs to keep the contracts' terms clearly in focus.[302]

[A] For-cause

For-cause terminations implicate the provisions articulated in the faculty handbook, contract, or appointment letter.[303] Therefore, a faculty member is well advised to be fully informed about the terms of the contract that specify what the particular university considers a sufficient basis to support for-cause termination.[304] As one can imagine, each university tends to include in its faculty handbook its own applicable standards pertaining to for-cause termination of tenured professors.[305] Of course, such standards "[need to relate], directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers."[306] This obligates the university to prove "adequate cause" for termination of a tenured faculty member's contract.[307]

Id. (citation omitted).

296. *See* Adams, *supra* note 25, at 86.

297. *See id.* at 86, 87.

298. *See* Connell & Savage, *supra* note 123, at 858.

299.. *See* White, *supra* note 47, at 68.

300. *See id.* at 69.

301. *See Robertson*, 991 A.2d at 318.

302. *See supra* Section III.

303. *See, e.g.*, *Law School Faculty Governance*, *supra* note 26, at 7.

304. *See, e.g.*, *id.* at 7-8.

305. *See supra* Section III; *Recommended Institutional Regulations on Academic Freedom and Tenure*, AM. ASS'N U. PROFESSORS, https://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure (last visited Sep. 14, 2018).

306. *Id.*

307. *Id.*

Of course, "[t]he construction of a written contract to determine its legal effect is a question of law."[308] Therefore, the party on whom contract law places the burden of proof must successfully establish that "adequate cause" is a condition precedent to valid termination of a tenured faculty member's contract.[309] Moreover, "adequate cause" is defined as (1) "demonstrated incompetence or dishonesty in teaching [or] research," (2) "substantial and manifest neglect of duty," or (3) "[personal] conduct which substantially impairs the individual's fulfillment of his or her institutional responsibilities."[310]

However, since each university is obligated to establish its own grounds for dismissal, universities can reasonably expand "adequate cause" by appropriate definition clauses.[311] For example, some universities define "adequate cause" to include sexual harassment or felony conviction.[312] In addition, some universities have terminated tenured employees for insubordination, although acting on a single instance of insubordination to justify termination may be problematic.[313] A pattern of such conduct would probably need to be factually established.[314] Moreover, particular state statutes may limit judicial review of tenure to inquiries as to whether the educational institution's decision-making machinery fully complied with a "substantial evidence" standard, where such a standard is statutorily mandated.[315] Furthermore, the Supreme Court of Louisiana defined "substantial evidence" as, "'evidence of such quality and weight that reasonable and fair-minded men in exercise of impartial judgment might reach different conclusions.'"[316]

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308. *See* Peterson v. North Dakota Univ. Sys., 678 N.W.2d 163, 173 (N.D. 2004) (citations omitted).

309. *See, e.g., id.*

> [The faculty member] contracted that the [educational institution] would be the final authority regarding whether there was adequate cause and [therefore, the court] must determine whether, on the evidence presented to the [educational institution], *a reasoning mind could conclude* there was clear and convincing evidence to dismiss [the faculty member] for cause.

Id. (emphasis added).

310. *Id.* at 167.

311. *See supra* Section III; *Recommended Institutional Regulations on Academic Freedom and Tenure*, AM. ASS'N U. PROFESSORS, https://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure (last visited Sep. 14, 2018).

312. *See* Adams, *supra* note 25, at 75.

313. *Id.* at 77.

314. *Id.*

315. *See* Irchirl v. Natchitoches Par. Sch. Bd., 103 So. 3d 1237, 1246 (La. App. 3th 2012). ("[W]e find there is *substantial evidence* to support the Board's decision that [the faculty member's conduct] . . . justif[ied] its decision . . . . [T]he law is clear that 'the district court must give *great deference* to the school board's findings of fact and credibility.'") (citations omitted) (emphasis added).

316. *See* Wise v. Bossier Par. Sch. Bd., 851 So. 2d 1090, 1094 (La. 2003) (citations omitted).

For example, under statutory law a Wisconsin State University teacher cannot be "'discharged except for cause upon written charges' and pursuant to certain procedures."[317] The statutes in that jurisdiction also protect non-tenured teachers to some extent during the one-year term of employment.[318] In such instances, courts are legally required to apply an objective standard in reaching each decision.[319] Therefore, an appeals court will most likely decline to reverse a decision by an educational institution, unless the educational institution's decision is clearly unsupported by substantial evidence.[320] Similarly, judicial reversal is unlikely unless the educational institution's decision is in such substantial conflict with applicable law that the decision is in effect "arbitrary and capricious," or amounts to "an abuse of discretion."[321]

This analysis clearly supports a conclusion that despite a faculty member's purported wrongdoing, a due process right survives.[322] This right entitles the faculty member to an appropriate hearing prior to any valid termination of such tenured faculty member's tenured appointment.[323] The hearing must be comprised of a Committee of the faculty member's colleagues empowered to hear the educational institution's assertions against their colleague, as well as their colleague's defenses.[324] Such Committees are usually contractually empowered by the contract between faculty member and employing institution to decide the outcome of the charges asserted by the educational institution against the pertinent faculty member.[325]

[B] Not for-cause

The AAUP Statement of Principles established that there are times when a university should be able to terminate a tenured faculty based upon specified instances, such as financial exigency, discontinuation of a program or programs, or institutional merger or affiliation.[326]

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317. *See Roth*, 408 U.S. at 567.

318. *See id.*

319. *See, e.g.*, Cameron v. Arizona Bd. of Regents, No. 1 CA-CV 10-0323, 2012 WL 1468517, at *6 ("In light of this record, we agree with the superior court that *substantial evidence* supports the plagiarism finding and just cause for [the faculty member's] termination.") (citations omitted) (emphasis added).

320. *Id.*

321. *Id.* at *8.

322. *See* White, *supra* note 47, at 66.

323. *See, e.g.*, *Law School Faculty Governance*, *supra* note 26, at 8. ("The aggrieved faulty member *may demand* a hearing by so notifying the Dean in writing . . . .") (emphasis added).

324. *See, e.g.*, *id.* at 8 ("A 'Complaint Review Committee' (CRC) shall be the adjudicator/decision-maker at the hearing.").

325. *See, e.g.*, *id.* at 9 ("[B]y clear and convincing evidence.").

326. *See, e.g.*, White, *supra* note 47, at 69.

[i] Financial exigency

Financial exigency has been codified in the "AAUP's policy as 'an imminent financial crisis which threatens the survival of the institution as a whole and which cannot be alleviated by less drastic means.'"[327] In the opinion of a Princeton professor in economics advocating financial exigency, it "exists 'when, taking into account all assets, potential assets, sources of funding, income and all alternative courses of action, the continued viability of the institution becomes impossible without abrogating tenure.'"[328] For example, financial exigency occurred after Hurricane Katrina devastated Tulane University, causing the institution to terminate sixty-five tenured employees (as well as many other non-tenured employees.)[329] Many universities also include in their faculty handbook an express definition of financial exigency in order to put faculty members on notice of the institution's substantive juridical meaning of the term.[330]

When an institution declares financial exigency, the institution can terminate a tenure contract without the termination being a valid breach of contract.[331] Although courts do grant universities deference to terminate tenure contracts, universities may be required to show attempts to alleviate the burden on the tenured faculty member.[332] For example, the court may require the university to effectively prove that genuine efforts to find substitute placement positions for the affected faculty member(s) are factually substantiated.[333] The AAUP has recommended that prior to taking the drastic action of financial exigency termination, the pertinent educational institutions need to provide appropriate notice to the targeted tenured faculty members.[334] In addition, the educational institutions should discuss the reason(s) for the imminent termination, as well as providing the tenured faculty members with a reasonable severance package.[335]

327. *See, e.g.*, White, *supra* note 47, at 70.

328. *See* Am. Ass'n of Univ. Professors v. Bloomfield Coll., 322 A.2d 846, 854 (N.J. Super. Ct. 1974).

329. Adams, *supra* note 25, at 74.

330. *See, e.g.*, Gwen Seaquist & Eileen Kelly, *Faculty Dismissal because of Enrollment Declines*, 28 L.J. & EDUC. 193, 195 (1999) ("Most colleges and universities have adopted AAUP guidelines and, in addition, have explicit, written guidelines in their own internal documents defining financial exigency and the procedure for dismissing faculty.").

331. *See, e.g.*, Johnston-Taylor v. Gannon, No. 91-2398 (W.D. Mich. 1992) (Following the first appeal of this case, "we [] find sufficient evidence in the record to support the district court's conclusion that the college faced an exigent financial circumstance and that the choice of three of the fourteen criteria as the basis for terminating [the two faculty members] was reasonable.").

332. *See* White, *supra* note 47, at 71.

333. *See id.*

334. *See id.*

335. *See* Seaquist & Kelly, *supra* note 328, at 195, 196, 198, 199. *See also* Adams, *supra* note 25, at 74-75; White, *supra* note 47, at 71.

For example, in *Anderson v. Bessman*,[336] the court held that the administrators followed the proper process for eliminating academic positions due to financial exigency.[337] The university acted appropriately by appointing a committee to make recommendations, review academic qualifications, and review the needs of the specific programs.[338] Moreover, the university provided preference to tenured faculty members over non-tenured faculty members whenever they were equally qualified.[339]

In contrast, in *American Ass'n of University Professors v. Bloomfield College*,[340] the court held that the college did not meet its burden of proof as it did not prove the college acted in good faith.[341] The termination of some tenured faculty members was accompanied by placing others on one-year contracts.[342] Self-evidently, this constituted unequal treatment.[343] The court concluded that the educational institution's claim of financial exigency was substantively, and therefore legally, unconvincing.[344] The judiciary questioned the viability of providing immediate financial benefits by placing faculty on one-year contracts.[345] The court concluded that such action, "[could] only be interpreted as a calculated repudiation of a contractual duty without any semblance of legal justification."[346] The court also questioned the College's action of hiring twelve entirely new faculty members.[347] The court reasoned that the College's terminations predicated on financial exigency were unsubstantiated and ordered reinstatement of the affected faculty members.[348]

[ii] Discontinuation of program

In appropriate instances, a university may very well be free to terminate tenure appointments where such appointments are within a program the university will be discontinuing.[349] This particular justification for termination is controversial because program discontinuation can be effected for multiple reasons that are unrelated to financial exigency.[350] Essentially, a

336. 365 S.W.3d 119, 121 (Tex. Ct. App. 2011).
337. Anderson v. Bessman, 365 S.W.3d 119, 121 (Tex. Ct. App. 2011).
338. *Id.* at 122.
339. *Id.*
340. 322 A.2d 846 (N.J. Super. Ct. 1974).
341. Am. Ass'n Univ. Professors v. Bloomfield Coll., 322 A.2d 846, 856 (N.J. Super. Ct. 1974).
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.*
346. *Bloomfield Coll.*, 322 A.2d at 856.
347. *Id.*
348. *Id.* at 860.
349. *See* White, *supra* note 47, at 71.
350. *See id.*

university seeking to terminate a tenured faculty member without adequate cause could too easily assert that the faculty member's teaching area was so obscure that the educational institution would suffer an intolerable financial impact from continuing it.[351]

This risk has motivated the AAUP to promulgate a number of safeguards within its policies to limit the way in which a university can discontinue undesirable programs.[352] *Golden v. Alabama State Tenure Commission,*[353] is instructive in this regard.[354] In *Golden*, the university notified a tenured faculty member of the discontinuation of the program the faculty member taught, for a number of specified reasons,[355] and of the consequential cancellation of his contract.[356] When the faculty member contested cancellation of his contract, the Board of Education of the pertinent school district upheld the superintendent's decision and informed Golden of its decision.[357] Golden appealed the Board of Education's decision to the Alabama State Tenure Commission.[358] On the appeal, the Alabama State Tenure Commission ruled, "'the action taken . . . was in accordance with the tenure law and was neither arbitrarily unjust nor for personal or political reasons.'"[359]

Golden then petitioned the circuit court for a writ of mandamus, and when the circuit court denied Golden's petition for the writ of mandamus, Golden responded by filing an appeal to the Court of Civil Appeals of Alabama challenging the circuit court's decision.[360] The Court of Civil Appeals of Alabama reversed the circuit court's decision and concluded that, based upon Alabama Supreme Court precedential authority,[361] "the Board failed to meet its burden of showing that it had not placed non-tenured teachers in the same fields as those in which Golden was qualified to teach."[362]

In light of Court of Civil Appeals' ruling that the circuit court's denial of Golden's petition for mandamus was in error, it reversed the circuit court's ruling and remanded the case for a resolution consistent with its decision.[363]

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351. *See id.* at 71-72.
352. *See id.*
353. 718 So. 2d 73 (Ala. Civ. App. 1998).
354. Golden v. Alabama State Tenure Comm'n, 718 So. 2d 73, 73 (Ala. Civ. App. 1998).
355. *Id.* at 74.
356. *Id.* at 73.
357. *Id.* at 73, 74.
358. *Id.*
359. *Golden*, 718 So. 2d at 74.
360. *Id.*
361. *Id.* (*citing* Ex parte Alabama State Tenure Comm'n, 595 So.2d 479 (Ala. 1991)).
362. *Id.* (citation omitted).
363. *Id.*

[iii] Institutional merger or affiliation

In genuinely established circumstances, a university may be able to terminate tenured faculty members where the university undergoes an affiliation or merger with another university.[364] Of course, in appropriate, proven circumstances a corporation that merges with another corporation may take on the liabilities and obligations of the corporate entity that has spontaneously terminated.[365] For example, in *Gray v. Mundelein College*,[366] the educational institution provided witnesses who testified that the AAUP (who "publishes a 'Red Book' . . . [containing] '[viewpoints] on a variety of issues that affect faculty'") purportedly expressed the view that "an affiliate[ed] college is not obligated to preserve tenure for all tenured faculty."[367] The College's witnesses also explained that "an institution that acquires another . . . is not required to hire all the tenured faculty [members]."[368] However, in this case the court ruled that contractually, since the faculty handbook for Mundelein College did not include a merger as a valid reason for termination of tenured positions, the faculty validly under their contract with the educational institution "expected Mundelein to 'safeguard' their tenure rights."[369] Therefore, the binding nature of the parties' contractual obligations substantively mandated tenure protection.[370]

[iv] Procedures for termination

Essentially, when a tenured faculty member breaches his contract by acting in a manner that provides adequate cause for termination, the university is legally empowered to activate its applicable procedures for termination of the tenured faculty member's employment.[371] However, the employing educational institution is obligated to take such action in accordance with the employee's due process rights.[372] Usually, the educational institution writes a formal letter detailing the charges against the faculty member.[373] Moreover, some universities hold a predetermination hearing, that notifies the tenured employee of the university's charges against

364. *See* White, *supra* note 47, at 72.
365. Gray v. Mundelein Coll., 695 N.E. 2d 1379, 1388 (Ill. App. Ct. 1998).
366. *Id.* at 1384.
367. *Id.*
368. *Id.*
369. *Id.* at 1384, 1387.
370. *Gray*, 695 N.E. 2d at 1384, 1387.
371. *See* Adams, *supra* note 25, at 70.
372. *See, e.g.*, *Irchirl*, 103 So.3d at 1239 ("By letter . . . [the educational institution provided the faculty member with] a detailed listing of the ten willful neglect of duty charges levied against him.").
373. *See, e.g.*, *id.*

him, and may also provide an advisor for the faculty member who is charged.[374]

Under the applicable contractually mandated procedures, the faculty member may have a right to a pre-termination hearing where the professor typically may be represented by counsel.[375] The faculty member may also be accorded an opportunity to cross-examine witnesses and present his own witnesses, as well as receive a fair opportunity to submit exhibits that support his case.[376] The predetermination hearing tends to be held before the faculty member's peers who evaluate the charges that are brought, and they make a determination after a full review.[377] In some instances, the tenure contract may mandate that proof of a flagrant and egregious abuse of the faculty member's position empowers the educational institution to dismiss the faculty member immediately.[378] Of course, since termination of a tenured employee is often the end of his career, a transcendently fair and exhaustively complete peer review of the charges and all of the evidence against him must be self-evident.[379]

IX. CONCLUSION

The continuing survival of tenure in educational institutions supports a conclusion that it is one of the fittest[380] practices in education.[381] Yet, continuing criticism of tenure persists.[382] Moreover, one commentator's recent empirical inquiries reflects a "hands off" conclusion that "[o]ur results . . . do not provide categorical evidence to *justify or challenge* the tenure system."[383] However, as a different commentator concluded, "ineffective

374. *Murphy*, 777 A.2d at 422.

375. *Id.*

376. *Id.*

377. *See* Adams, *supra* note 25, at 77.

378. *See, e.g.*, Klinge v. Ithaca Coll., 663 N.Y.S.2d 735, 736 (N.Y. App. Div. 1997) ("[I]n certain cases involving a flagrant and egregious abuse of position by the professor, immediate dismissal without a prior letter of warning was an authorized course of action.").

379. *See* Adams, *supra* note 25, at 77.

380. *What's the Meaning of the Phrase 'Survival of the Fittest'?*, PHRASE FINDER, http://www.phrases.org.uk/meanings/340400.html (last visited Sep.14, 2018) ("The idea that species adapt and change by natural selection with the best suited mutations becoming dominant.").

381. The author confirms the phenomenal personal sigh of relief exhaled by a recipient of tenure on receiving the good news in 1981 from the employer Law School that the official decision granting tenure had become a legal reality. Perhaps, the emotional reaction is only matched by the reaction when one first learns that one has successfully passed the bar exam.

382. *See* Yoon, *supra* note 7, at 431 ("Critics of tenure counter that it is costly and inefficient."). *See also* White, *supra* note 77, at 378 ("It is beyond doubt that tenure injures our students, blocks the way to eager and highly competent professors, and generally degrades the efficiency of our schools."); Fishman, supra note 70, at 170.

383. *See* Yoon, *supra* note 7, at 453. *See also* Adams, *supra* note 25, at 79 ("[N]o *conclusive evidence* demonstrates that tenure adversely affects productivity or teaching effectiveness.") (citations omitted) (emphasis added).

teaching is a result of ineffective evaluation and support systems, *not the existence* of tenure."[384] Furthermore, the former commentator pointed out, "analysis reveals that after receiving tenure, law faculty maintain and, along some dimensions, *increase* their productivity."[385]

Essentially, tenure provides educational institutions "with a core base of [faculty members] who are *interested in the long term*"[386] evolution of institutional excellence, ingenuity, and accomplishments.[387] Additionally, tenure provides faculty members with job security, while providing the educational institutions that bestow it with a team of employees committed to diligently striving towards creative ideas that sustain and promote the credibility of both tenured professors and the educational institutions that have granted them tenure.[388] Therefore, tenure is reciprocally advantageous to both the faculty members on whom it is bestowed and the educational institutions that grant it.[389] Tenure promotes the welfare of the educational institutions that grant it, while empowering and energizing the individuals who earn it.[390] Thus, tenure is here to stay. Its positives outweigh its negatives.

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384. *See* Black, *supra* note 19, at 128 (citations omitted) (emphasis added).
385. *See* Yoon, *supra* note 7, at 429 (emphasis added).
386. *See, e.g.*, Berger et al., *supra* note 6, at 307 (referring to the impact of tenure in a different context but with similar effects).
387. *See* Adams, *supra* note 25, at 91.
388. *See id.* at 81.
389. *See id.* at 90-91, 91.
390. *See id.*