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ARTICLES

Freedom of Association for College Fraternities after *Christian Legal Society* and *Citizens United*

Mark D. Bauer 247

The First Amendment and its associational rights and freedoms are not tested by popular groups or causes. Only controversy can help establish the limits of constitutional rights. Fraternities and sororities (“fraternities”) have certainly been controversial during their 236 years of existence. Colleges often regulate fraternities more strictly than any other organization. Fraternity members may be barred from wearing their letters or mentioning their affinity during certain times of the year. Recruitment of new members is generally permitted only at certain times and in certain ways. Fraternity members may be required to engage in philanthropy or maintain a specific grade point average, where unaffiliated students have no such requirement. And many colleges have banned entire fraternity systems, while encouraging substantially similar themed dormitory housing, or fraternity-like living arrangements controlled by the school. At some point these restrictions certainly must violate First Amendment associational freedoms. Two recent Supreme Court cases suggest that there is a greater freedom of association for college fraternities than has been previously recognized by lower courts. This article discusses in great detail the history of fraternities and the freedom of association. The article discusses and critiques every relevant case and analyzes existing case law in light of *Christian Legal Society* and *Citizens United*. The article concludes by suggesting that these two Supreme Court cases may have opened a new path for fraternities to assert their associational freedoms under the First Amendment.

The University Curriculum and the Constitution: Personal Beliefs and Professional Ethics in Graduate School Counseling Programs

Todd A. DeMitchell, David J. Hebert, Loan T. Phan 303

Two students in two different graduate programs in school counseling brought suit against their universities. While both students passed their

courses, faculty decided that the students had an academic deficiency due to the students' dispositions and unwillingness to adhere to the *American Counseling Association Code of Ethics*. This clash between professional ethics and personal beliefs in graduate school counseling programs arose twice in 2010, with appellate decisions handed down in 2011 and 2012. This article explores those two recent cases in which graduate students in school counseling programs essentially argued that they have the right to disregard the profession's *Code of Ethics* or to interpret that *Code* differently than their program faculty because of their religious beliefs, despite the fact that the *Code* is a part of their graduate program to which they voluntarily applied and enrolled. This article explores the intersection of personally held beliefs and a professional code of ethics in university graduate programs in school counseling.

Who is the University? Birnbaum's Black Box and Tort Liability

Neil Jamerson 347

The evolution of higher education has required courts to reexamine institutional liability for student injury. In response, legal theorists have proposed tort standards that expand an institution's duty. This article argues the proposed standards are lacking on two points. First, current standards treat colleges and universities like a single, rational actor—or, in tort terms, a “reasonable man.” However, organizational theory research suggests colleges and universities are anything but reasonable; Robert Birnbaum's seminal work argues this is due to loose coupling among the many systems that compose an institution. The nature of colleges and universities must be taken into account when developing a workable tort standard. Second, current standards fail to fully consider the policy implications of expanding institutional duty. Legal theorists understand expansion will increase institutional costs but argue risk management and loss spreading will alleviate the negative effects. However, organizational theory research also suggests colleges and universities are poor risk managers. Data on both the prevalence of student injuries and institutional revenue-streams indicate a great deal of loss spreading would therefore have to occur via tuition increases. Tuition increases decrease college access and, by correlation, degree attainment. As there are many public and private benefits to individuals earning a college degree, the policy implications of expanded institutional duty must be taken into account when developing a tort standard. Accordingly, this article proposes courts adopt the Black Box Model, created in order to account for the unique nature of colleges and universities and to balance the public policies of college access and compensation for injured students.

Pouring New Wine into Old Wineskins: Why “On Premise” Software Source Code Escrow Arrangements are Ill-Suited for Remotely Hosted “Off Premise” Software as a Service License Agreements

Kingsley Osei 383

Software vendors are rapidly migrating the licensing and distribution of computer software from “on premise” installation and delivery to offsite hosting, licensing and delivery of computer software. This phenomenon, generally known as “Software as a Service” (“SaaS”), is part of a wider trend of migrating information technology infrastructure and platforms to externally hosted systems or the “cloud.” It raises novel legal issues. It is unclear whether the protections offered to “on premise” licensees by the Intellectual Property in Bankruptcy Act will avail an SaaS licensee if the parties to a software agreement follow the time tested practice of depositing the computer source code with an escrow agent to assure the licensee access if the licensor should file for bankruptcy. There are, however, contractual strategies that the licensee may adopt to blunt any adverse industry practices that may be used to deny the licensee recourse. This article examines the inadequacies of the on premise/product-oriented software escrow protections frequently relied upon by colleges and universities in their SaaS acquisitions when a software licensor or SaaS provider files for bankruptcy, ceases to support or maintain the software application, or experiences a disruptive application access event that prevents the licensee’s use of the licensed software. It will also offer alternative considerations that SaaS licensees may take into account to optimally address an application access disruption event, including portability and disaster recovery issues.

The Endangered Citizen Servant: *Garcetti* Versus the Public Interest and Academic Freedom

Larry D. Spurgeon 405

First Amendment protection for public employee speech seeks to serve both individual and societal interests. It aspires to attract the “citizen servant,” the person who hopes to combine avocation with vocation, but also to further the public interest. In *Garcetti v. Ceballos*, the U.S. Supreme Court established a per se rule which undermines those interests. The Court’s *Pickering/Connick* test had long granted protection to public employee speech if made as a “citizen” on a “matter of public concern,” so long as the employee’s rights were not outweighed by the employer’s interests. *Garcetti* held that a public employee does not speak as a “citizen” when acting “pursuant to official duties.” The result is a clash with two constitutional principles. The first is to further the public interest by protecting the citizen servant. This article argues that the Court should

overturn *Garcetti* and return to the *Pickering/Connick* test. Short of that, a modified approach is needed, one that eliminates the per se rule and allows courts to assess the relative value of the speech to the public interest. It sets out a proposal for that approach. The second principle is the importance of academic freedom for the development of knowledge and to benefit the democracy. The *Garcetti* majority conceded that some academic speech may present constitutional interests not adequately accounted for by the Court's public employee speech jurisprudence. Lower courts have read this "caveat" differently, some applying the *Garcetti* per se rule to academia. The Court should expressly exempt academic speech from the public employee speech analysis and establish a framework for judicial

review of academic speech cases. This article suggests that the basis for such a framework is the tradition of judicial deference to the community of scholars.

"It Got Too Tough to Not Be Me": Accommodating Transgender Athletes in Sport

Elizabeth M. Ziegler, Tamara Isadora Huntley 467

Transgender athletes wishing to compete in a sport that matches their internal sense of gender identity currently face a regulatory landscape that varies widely based on standards that differ according to level of competition and type of sport. Not following their sport's policy could have dire consequences for the athlete, including a complete and total ban from participation. Sport-governing bodies need to adopt fair, well-reasoned policies for the inclusion of transgender athletes in the participation of sport, not only in the spirit of equality and participation for all, but also to comply with federal and state anti-discrimination laws. The best policy is one that strives to include as many transgender participants as possible without overreacting to outdated stereotypes regarding perceived advantages in competition supposedly enjoyed by transgender athletes.

FREEDOM OF ASSOCIATION FOR COLLEGE FRATERNITIES AFTER *CHRISTIAN LEGAL SOCIETY* AND *CITIZENS UNITED*

MARK D. BAUER*

I. INTRODUCTION	248
II. THE DEVELOPMENT OF AMERICAN COLLEGE FRATERNITIES AND ASSOCIATIONAL RIGHTS.....	250
A. Origins of Fraternities	250
B. Common Restrictions on Fraternity Associational Rights	254
1. Structured and Deferred Recruitment.....	256
2. Permission to Exist and Requirements Relating to National Affiliation.....	260
3. Restrictions on Housing Options	262
4. Regulating Membership and Banning Fraternity Systems	265
III. THE DEVELOPMENT OF A FREEDOM OF ASSOCIATION	270
A. Origins	270
B. <i>NAACP</i> and the Recognition of the Right.....	272
C. Banning Specific Student Groups at Public Colleges and Universities.....	274
IV. ASSOCIATIONAL RIGHTS OF VOLUNTARY ORGANIZATIONS	277
A. The <i>Roberts</i> Case	277
B. Aftermath of the <i>Roberts</i> decision	280
V. <i>CHRISTIAN LEGAL SOCIETY</i> AND <i>CITIZENS UNITED</i>	289
A. <i>Christian Legal Society</i>	289

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B. <i>Citizens United</i>	295
VI. CONCLUSION.....	298

I. INTRODUCTION

Freedom of association for college and university¹ fraternities² is dead—or is it? Inconsistent decisions considering the extent of such a right (or even whether the right exists at all) impact all social groups. And while it is not unreasonable to find the tortured jurisprudence of the freedom of association convoluted, it is most evident when reviewing court decisions affecting college and university fraternities.

Of course there is no specific freedom of association recognized in the Constitution or in the Bill of Rights.³ Yet without a foundational freedom of association underlying the enumerated rights, a right to free speech, religion, or assembly would have little muscle.⁴

A focus on college and university fraternities may at first glance seem an odd test for the boundaries of free association. After all, philanthropic work and social bonds aside, the press is replete with incidents of unacceptable behavior by specific fraternity chapters.⁵ The limits of constitutional rights, however, are best tested by unpopular causes. And fraternities present an excellent example of organizations existing for a noble purpose⁶ where Americans are regularly denied some or all rights to

1. Except when used in reference to a specific institution's name, the words "college," "university," and "school" will be used interchangeably.

2. The term "fraternities" will be used throughout to describe men's and women's college and university social fraternities, as well as coeducational fraternities. Most "sororities" are formally "women's fraternities." WILLIAM R. BAIRD, JACK L. ANSON & ROBERT F. MARCHESANI, *BAIRD'S MANUAL OF AMERICAN COLLEGE FRATERNITIES* § I-12, I-37, IV-1-74 (20th ed. 1991) [hereinafter *BAIRD'S MANUAL*]; see also Brief for Amici Curiae North American Interfraternity Conference and National Panhellenic Conference in Support of Plaintiffs-Appellees, and in Support of the District Court's Decision at 1, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2d Cir. 2007) (No. 06-4111-cv) (noting that the terms sorority and fraternity "are used interchangeably"). Indeed, a number of the so-called "social fraternities" are formally "literary societies." See, e.g., ALPHA DELTA PHI, <http://www.alphadeltaphi.org> (last visited June 5, 2012) (fraternity founded as literary society). See generally *Psi Upsilon History*, PSI UPSILON, <http://www.psiu.org/about/history.html> (last visited June 5, 2012).

3. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

4. *Id.*; *Nat'l Ass'n for Advancement of Colored People v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958).

5. See *infra* note 23 (discussing incidents of negative fraternity behavior).

6. See, e.g., Alpha Epsilon Pi Fraternity, *Mission Statement*, <http://www.aepi.org/?page=MissionStatement> (last visited Feb. 23, 2012); Alpha Tau Omega, *The Creed of Alpha Tau Omega Fraternity*, <http://www.ato.org/AlphaTauOmega/atohistory/atocreed.aspx> (last visited Feb. 23,

congregate, socialize, express themselves, or even petition apparatus of the state.⁷

College and university fraternities have been forbidden or denied recognition at state colleges or universities,⁸ prohibited from choosing members as they see fit,⁹ prevented from advertising their existence,¹⁰ and even stopped from gathering for meetings on campus.¹¹ But courts have routinely failed to recognize fraternities' associational rights, despite Supreme Court precedent to the contrary that seems to be on point.¹²

Recently, however, while considering other issues, the Supreme Court has given new hope for fraternities, and indeed all voluntary social organizations. Two decisions concerning other issues, *Christian Legal Society v. Martinez* ("CLS")¹³ and *Citizens United v. Federal Election Commission*,¹⁴ suggest that those groups may have more associational and expressive rights than have been previously recognized.

In Part II, this article will first trace the roots of fraternities, and delve into the expression of associational rights that create some inherent tensions with host colleges and universities. Short of a complete prohibition of fraternities, the vast majority of schools impose rules on fraternities that restrict associational freedoms to some degree. While many such rules are tied to the school's educational mission and general need to control order and discipline, some of these policies do not appear to

2012); Beta Theta Pi Fraternity, *About Beta*, <http://www.betathetapi.org/about.html> (last visited Feb. 23, 2012); Delta Chi Fraternity, Inc., *Values of Delta Chi*, <http://deltachi.org/values/index.php> (last visited Feb. 23, 2012); Delta Tau Delta, *About Us*, <http://www.delts.org/main/about.html> (last visited Feb. 23, 2012); Pi Kappa Alpha, *About Pike*, <http://www.pikes.org> (follow "About Pike" hyperlink) (last visited Feb. 23, 2012); Psi Upsilon, *The Psi Upsilon Experience*, <http://psiu.org/about.html> (last visited Feb. 23, 2012); Sigma Phi Epsilon, *About SigEp*, <http://www.sigep.org/about/> (last visited Feb. 23, 2012); Zeta Psi, <http://zetapsi.org> (last visited Feb. 23, 2012); see also *Waugh v. Univ. of Miss.*, 237 U.S. 589, 596-97 (1915) ("It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied.").

7. See *infra* II(b) and accompanying notes (explaining common restrictions on fraternity associational rights).

8. *Infra* Part II(b)(ii).

9. *Infra* Part II(b)(i).

10. *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 142 (2nd Cir. 2007). See also *infra* n. 54–55 (fraternity members may be required to self-censor speech and attire).

11. *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d at 148. See also *infra* n. 249 and accompanying text (fraternities may be denied associational rights granted to unaffiliated organizations).

12. See *infra* notes 177–227 and accompanying text. See generally *Roberts v. U.S. Jaycees*, 468 U.S. 609, 621 (1984) (discussing associational rights of voluntary organizations).

13. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010).

14. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

be narrowly tailored to that end. Substantially none of these restrictions have been court-tested, and this section will serve merely to highlight the importance of further research and advocacy in this area. Part III will review critical cases that recognize and set parameters for a freedom of association, as well as early case law that considers the rights of fraternities. Part IV will examine the *Jaycees v. Roberts* decision, and other cases that directly review whether a freedom of association extends to fraternities and other voluntary social groups, and under what limitations. Part V will consider *Christian Legal Society* and *Citizens United*, and how these cases may impact future court decisions concerning any right to association for fraternity members. Part VI will present conclusions and suggestions for additional work.

II. THE DEVELOPMENT OF AMERICAN COLLEGE FRATERNITIES AND ASSOCIATIONAL RIGHTS

A. Origins of Fraternities

The first college or university fraternity, Phi Beta Kappa, was founded at the College of William and Mary in 1776.¹⁵ While now purely an academic honorary organization, Phi Beta Kappa served as the model and catalyst for fraternity development and expansion.¹⁶ The oldest all-male fraternity emphasizing social intercourse is the Kappa Alpha Society, founded at Union College, in Schenectady, New York, in 1824.¹⁷ The oldest all-female fraternity is Alpha Delta Pi, founded at Wesleyan Female College, in Macon, Georgia, in 1851.¹⁸

From these modest beginnings, the American college or university fraternity has expanded to over 8,612 individual chapters on at least 800 college or university campuses.¹⁹ Total undergraduate membership in 2012

15. WILLIAM R. BAIRD ET AL., *BAIRD'S MANUAL OF AMERICAN COLLEGE FRATERNITIES* 5 (J. Robeson ed. 1977).

16. From its inception, Phi Beta Kappa possessed many characteristics of modern fraternities, including "secrecy, a ritual, oaths of fidelity, a grip, a motto, a badge for external display, a background of high idealism, a strong tie of friendship and comradeship, an urge for sharing its values through nationwide expansion." BAIRD'S *MANUAL*, *supra* note 2, at § I-10 (20th ed. 1991). Phi Beta Kappa transformed itself into a purely honorary society with a public ritual after anti-Masonic (and anti-secret) fervor swept the United States; in 1831, William Morgan, who claimed to be a Mason, threatened to betray the secrets of his organization and publish its ritual. *Id.* Morgan was murdered and an anti-Masonic movement spread throughout the United States, resulting in the formation of a major political party, the "Anti-Masonic Party." *Id.* With all the anti-Masonic sentiment in the country, Phi Beta Kappa became a purely honorary fraternity with a non-secret ritual. *Id.*

17. *Id.* at 6.

18. *Id.* at 414.

19. North-American Interfraternity Conference, *Press Room*,

exceeds 300,000.²⁰ Fraternities reflect the college or university population at large from which they are comprised; the relevant age group is capable of generating much controversy through positive and negative behavior.

Statistics show there is much positive about fraternities. In 2009, fraternities contributed approximately 3.6 million hours of community service, raised \$20.1 million for philanthropic causes, and the men's fraternities achieved a grade point average in excess of the general men's grade point average.²¹ The same year, the University Learning Outcomes Assessment ("UniLOA"), conducted by Indiana State University, found fraternity membership was correlated with some increase in critical thinking, communication, and appreciation of diversity.²² But also in 2009, specific fraternity chapters were alleged to be complicit in hazing, alcohol poisoning, and sexual assault.²³ It is difficult to reconcile these extremes.

<http://www.nicindy.org/press> (last visited Feb. 17, 2012); National Panhellenic Conference, *NPC Statistical Information June 2009*, http://www.npcwomen.org/resources/pdf/2009%20Stats_Final.pdf (last visited Feb. 17, 2012).

20. *Id.*

21. *Id.* The National Panhellenic Conference website does not contain grade point average information for the women's organizations. *See also* Rachel Louise Ensign, *Four Ways That Colleges Have Raised Graduation Rates*, CHRON. OF HIGHER EDUC. (Dec. 5, 2010). *But see* Social Science Research Council, *Learning in Higher Education*, http://highered.ssrc.org/?page_id=28 (last visited Feb. 17, 2012) (reporting fraternity grade point averages are lower than general student population). *See generally* Henry Wechsler, *Alcohol and the American College Campus: A Report from the Harvard School of Public Health*, 28 CHANGE 20, 20 (July–Aug. 1996).

22. Center for Learning Outcomes Assessment, Inc., *The American College Fraternity: Impact of Membership on Student Growth, Learning, and Development*, <http://www.measuringbehaviors.com/ImpactofFraternityMembership.pdf> (July 2009).

23. *See, e.g.*, Jerome Birdy, *Fraternity Suspended During FAU Inquiry*, S. FLA. SUN-SENTINEL (Dec. 19, 2009), http://articles.sun-sentinel.com/2009-12-19/news/0912190152_1_hazing-incident-hazing-research-rapid-fire-drinking-games; Jim Bush, *University Suspends 1 Fraternity, Places 2 On Probation For Violations*, PURDUE UNIV. NEWS SVC. (Dec. 11, 2009), http://www.purdue.edu/newsroom/students/2009/091210_MalavendaFraterniti.html; *Drake Fraternity Members Still in House*, DES MOINES REGISTER (Dec. 1, 2009); Jennifer Baker, *911 Call Gives Sex Assault Details*, CINCINNATI ENQUIRER (Sept. 19, 2009), <http://news.cincinnati.com/apps/pbcs.dll/article?AID=/AB/20090918/NEWS0107/309170094/>; Joanna Lin & Jia-Rui Chong, *USC Fraternity Suspended after Alleged Sex Assault*, L.A. TIMES (Apr. 17, 2009), <http://articles.latimes.com/2009/apr/17/local/me-usc-sexual-assault17>. This Article makes no attempt to answer or judge the problematic behavior of college and university students in some fraternities, whether that behavior is disproportionate to the general college and university student population, and whether such behavior would exist without fraternities. Indeed, while none of this behavior is acceptable or excusable, some of it may be traced, at least chronologically, to the demise of college supervision through *in loco parentis*. *See* Dixon v. Alabama, 294 F. 2d 150 (5th Cir. 1961); ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* 5 (Carolina Academic Press 1999); Eric Hoover, 'Animal House' at 30: O Bluto, Where Art Thou, CHRON. HIGHER EDUC. (Sept. 5, 2008).

Fraternalities have been controversial since they were first founded in the United States.²⁴ Colleges and universities in America's early years tightly constrained students' educational choices and "social life was extremely limited, if it existed at all."²⁵ College and university faculties exercised "absolute power" and "students were regulated closely from morning vespers through the evening meal."²⁶ With a curriculum that was "a combination of medieval learning, [and] devotional studies judged conducive to the preservation of confessional religious piety,"²⁷ students developed secret literary societies, with related mottos, passwords, and symbols to provide a forum for students to "express themselves freely on the foremost topics of the day as well as the more enduring questions prompted by their studies."²⁸

Eventually, fraternities convinced faculties that their societies shared intellectual and moral ambitions with the colleges and universities, and could be useful adjuncts in a general education.²⁹ Meeting a need to ease the tedium of studying classics and religion with fellowship, lively discussion, and debate, fraternities filled a void for students and quickly spread to almost every college and university.³⁰

At a time when England had only 4 colleges and universities, the United States already had opened 250.³¹ Most religious denominations founded at

24. The North American college fraternity has remained unique to the United States and Canada, although one fraternity, Zeta Psi, installed a chapter at Oxford University in the United Kingdom in 2008. See Zeta Psi, *Our Chapters*, <http://www.zetapsi.org/about/chapters> (last visited Feb. 29, 2012). While there are certainly student organizations in other nations, none fully replicate the broad diversity of activities found within a fraternity chapter, including fellowship, philanthropy, housing and dining, academic support, networking, and mentoring by alumni. Indeed, many of these prominent features are found within fraternities because colleges did not offer or promote these activities for decades.

25. WILLIAM A. BRYAN, *THE EIGHTIES: CHALLENGES FOR FRATERNITIES AND SORORITIES I* (Robert A. Schwartz ed., Am. Coll. Personnel Ass'n Media 1983).

26. *Id.* The earliest published rules at Harvard stated, "Every one shall consider the main end of his life and studies to know God and Jesus Christ, which is eternal life . . . and therefore to lay Christ in the bottom, as the only foundation of all sound knowledge and learning . . ." CHRISTOPHER J. LUCAS, *AMERICAN HIGHER EDUCATION: A HISTORY 104* (St. Martin's Griffin 1994). Each scholar was to read the scriptures twice daily so that he shall be ready to give such an account of his proficiency therein, both in theoretical observations of the language, and logic, and in practical and spiritual truths, as his tutor shall require, according to his ability. *Id.*

27. LUCAS, *supra* note 26, at 109.

28. BAIRD'S MANUAL, *supra* note 2, at § I-1.

29. HANK NUWER, *WRONGS OF PASSAGE: FRATERNITIES, SORORITIES, HAZING, AND BINGE DRINKING 102* (Ind. Univ. Press 1999).

30. Maureen Sirhal, *Fraternalities on the Rocks*, HOOVER INST'N, (Feb. 1, 2000) <http://www.hoover.org/publications/policy-review/article/8032>.

31. LUCAS, *supra* note 26, at 117. The English universities each had multiple colleges.

least one college or university.³² New England pioneers pushing west founded Carleton and Oberlin.³³ States established public colleges and universities to prevent tuition dollars from being spent in other states.³⁴ Even small towns found that establishing a college or university would boost the population by bringing faculty and students, as well as enriching the local community financially.³⁵

But most of these new colleges and universities had very little money. Some opened with no money, no resources to build even rudimentary facilities, and very few students.³⁶ Few American colleges and universities had money to build dormitories.³⁷ Fraternities not only filled a social void, but also began to supply members with room and board.³⁸

Colleges and universities that previously had been opposed to fraternities because of their secrecy, or at least had not wholly approved of the organizations, now enthusiastically welcomed fraternities and encouraged them to provide lodging and board services for their students.³⁹

After World War II, many colleges and universities received large sums of money from government grants and increased their size to accommodate returning veterans—who received government-paid tuition under the GI Bill.⁴⁰ Colleges and universities built dormitories and improved campus life, and often saw less need for fraternities.⁴¹ While hazing may have

32. OSCAR HANDLIN & MARY F. HENDLIN, *SOCIALIZATION AS A FUNCTION OF HIGHER EDUCATION* 25 (McGraw-Hill Book Co. 1970). Many of the earliest American universities had religious affiliation. Presbyterians founded Princeton, Congregationalists founded Dartmouth, Baptists founded Brown, and the Dutch Reformed Church founded Rutgers. LUCAS, *supra* note 26, at 105-06.

33. LUCAS, *supra* note 26, at 118.

34. *Id.* at 117-18. Many of these colleges and universities were founded before the Morrill Land-Grant Acts of 1862 and 1890, 7 U.S.C. §§ 301, 321, which promoted the creation of agricultural and mechanical colleges and universities.

35. HANDLIN & HENDLIN, *supra* note 32, at 25-26.

36. LUCAS, *supra* note 26, at 117.

37. *Id.* at 117, 125-28. *See generally* HANDLIN & HENDLIN, *supra* note 32, at 27. Influential German universities did not concern themselves with dormitories or supervising student activities, and this encouraged many American colleges and universities to focus only on classroom activities. GREGORY A. BARNES, *THE AMERICAN UNIVERSITY: A WORLD GUIDE* 28, 33 (ISI Press 1984); LUCAS, *supra* note 26, at 142; BAIRD'S MANUAL, *supra* note 2, at § I-14.

38. BAIRD'S MANUAL, *supra* note 2, at § I-14; Guillermo de los Reyes and Paul Rich, *Housing Students: Fraternities and Residential Colleges*, 585 ANNALS AM. ACAD. POL. & SOC. SCI. 118, at 121 (January 2003).

39. MARIANNE R. SANUA, "HERE'S TO OUR FRATERNITY": ONE HUNDRED YEARS OF ZETA BETA TAU 1898-1998 3 (Brandeis University Press 1998). "[F]ew presidents failed to perceive the advantages of the fraternities, which took the college out of the lodging business, freed capital for other uses, and spared the faculty the tasks of supervision." HANDLIN & HENDLIN, *supra* note 32, at 40.

40. LUCAS, *supra* note 26, at 203-04.

41. *Id.*

existed prior to World War II, the returning veterans brought military-style hazing into fraternities, not only endangering new members, but creating justifiable conflict between fraternities and their host colleges and universities.⁴²

B. Common Restrictions on Fraternity Associational Rights

Litigation sometimes occurs when a college or university bans all fraternities, or engages in a contentious disciplinary matter with one or more fraternities.⁴³ But most associational restrictions on fraternities are neither litigated nor discussed in academic literature, at least with regard to the First Amendment.

The most troubling restrictions occur at public colleges and universities; as arms of the state, “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴⁴ Still, there may be some limits to the extent private colleges and universities can regulate fraternities that are otherwise permitted to exist, particularly when such regulation creates profoundly disparate treatment between student organizations.⁴⁵

42. See Michael Locke, *Hazing in Historical Perspective*, INSIDE HAZING (Mar. 2009), <http://www.insidehazing.com/headlines.php?headlines2Page=46&idno=1172>; Lambda Chi Alpha Fraternity, *Fraternity News: Hazing's Culture*, CROSS & CRESCENT (Nov. 2006), <http://stage.lambdachi.org/candc/hazings-culture>. See generally NUWER, *supra* note 29, at 128.

43. See, e.g., *Phelps v. Presidents & Trs. of Colby Coll.*, 595 A.2d 403 (Me. 1991) (discipline of students for participation in a fraternity after abolition of all fraternities); *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 439 (3d Cir. 2000) (suspension of a fraternity); *Psi Upsilon v. Univ. of Pa.*, 591 A.2d 755, 758 (Pa. Super. Ct. 1991) (same).

44. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

45. At least two courts would agree that the distinction between private and public colleges and universities is blurred, leaving open the possibility that private colleges and universities could be treated as state actors. Judge Skelly Wright held that the activities of a private college or university constitute state action: “[c]learly, the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state’s shoes? And, if so, are they not then agents of the state, subject to the constitutional restraints on governmental action . . . ?” *Guillory v. Adm’rs of Tulane Univ.*, 203 F. Supp. 855, 859 (E.D. La. 1962), *vacated*, 306 F.2d 489 (5th Cir.). On remand no state action was found, 212 F. Supp. 674 (E.D. La. 1962). See also *Alpha Tau Omega v. Univ. of Pa.*, 10 Phila. 149, 150 n.1 (Common Pleas Ct. 1983) (the University of Pennsylvania “receives substantial support from the Commonwealth of Pennsylvania . . . many of its students received federal grants . . . [i]t is also subject to regulations as are state institutions of higher education and state affiliated institutions . . . Providing higher education has traditionally been a state function . . . At least since 1862, pursuant to the First Morrill Act, it is a matter of national policy that higher education is a public function”). Other courts, however, have used similar logic in finding state action in a private college or university. *Ryan v. Hofstra Univ.*, 67

Nonetheless, without the very public battle over abolishing an entire fraternity system, or denying recognition (or existence) to a particular fraternity chapter, a large number of colleges and universities, both public and private, have regularly curtailed, foreclosed, or otherwise disrupted the rights of fraternities to freely associate.⁴⁶ These restrictions may be directly related to the success of fraternities, and a response by colleges and universities to assert greater control over campus student life, as well as to create a stronger institutional bond with each undergraduate than that created by fraternity membership. Indeed, even some colleges and universities with consistently well-run and well-behaved fraternities may believe that greater restrictions on the associational freedoms of these organizations will lead to higher national rankings.

These restrictions fall across a wide array of associational activities and may be quite narrowly or extremely broad. Some of the broader restrictions on fraternities by colleges are unique in the way they chill associational rights, and go well beyond settled case law. The academic literature thus far has not attempted to catalogue all the restrictions, let alone determine whether a public or even a private⁴⁷ college or university

Misc. 2d 651, 663–69, 324 N.Y.S.2d 964, 977–83 (Sup. Ct. 1971), *supplementary judgment*, 68 Misc. 2d 890, 328 N.Y.S.2d 339 (Sup. Ct. 1972) (private colleges and universities perform a “governmental function” and the state financed and regulated “private” colleges and universities). Other courts have disagreed, *see, e.g.*, *Robinson v. Davis*, 447 F.2d 753 (4th Cir. 1971) (act of college not state action); *Blackburn v. Fisk Univ.*, 443 F.2d 121 (6th Cir. 1971) (same); *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969) (same); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968) (same); *Grossner v. Trs. of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968) (same).

46. Sometimes these powers are devolved from the college or university to a student organization, such as a student government or an interfraternity council.

47. The essential nature of the relationship between a private college or university and its students is one of contract, and the infringement of civil rights by a private college or university is not attributable to the state. *See, e.g.*, *Psi Upsilon v. Univ. of Pa.*, 591 A.2d 755, 758 (Pa. Super. Ct. 1991); *Boehm v. Univ. of Pa. Sch. of Veterinary Med.*, 573 A.2d 575, 578 (Pa. Super. 1990) (citing *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), *cert. den.*, 368 U.S. 930 (1961)); Hoover, *supra* note 72. *See generally* *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982); Valier L. Brown, *College Fraternities and Sororities: Tort Liability and the Regulatory Authority of Public Institutions of Higher Education*, 58 EDUC. L. REP. 1, n. 13 (Mar. 5, 1990); Nancy S. Horton, *Traditional Single-Sex Fraternities on College Campuses: Will They Survive In The 1990s?* 18 J.C. & U.L. 419, 428–29 (Spring 1992); Robert E. Manley, *First Amendment Freedoms on Private Campuses*, FRATERNAL LAW (March 1992); Terrence E. Milani & William R. Nettles III, *Defining the Relationship Between Fraternities and Sororities and the Host Institution in Fraternities and Sororities on the Contemporary College Campus*, NEW DIRECTIONS FOR STUDENT SVCS. 40, 57–74 (Winter 1987); Ralph S. Rumsey, *Legal Aspects of the Relationship Between Fraternities and Public Institutions of Higher Education: Freedom of Association and Ability to Prohibit Campus Presence of Student Membership*, 11 J.C. & U.L. 467 (1985). Therefore while there may be some issues related to ending a fraternity system for existing students, there is no legal dilemma to forbidding newly matriculating students from joining fraternities. Private colleges and universities that have banned

can take any substantial action against its own students and student groups. This section is intended to be a start.

The associational restrictions colleges and universities place on fraternities have many different names, but generally fall into consistent categories: 1) structured and deferred recruitment; 2) permission to exist and requirements relating to national affiliation; 3) restrictions on housing options; and 4) regulating membership and even banning all fraternities. This article will review each in turn.

1. Structured and Deferred Recruitment

Fraternities do not exist in a vacuum, and ideally serve as useful adjuncts to a college or university's program of education. Thus in order to encourage students to bond first to the college or university, rather than the fraternity, as well as to allow students time to immerse themselves in classroom activities without distraction, a large number of colleges and universities have required fraternities to postpone recruitment.⁴⁸ These

existing fraternities include Williams, Amherst, Colby, and Bowdoin. See Leo Reisberg, *Fraternities in Decline*, CHRON. HIGHER EDUC. (Jan. 7, 2000); Sirhal, *supra* note 30. Hamilton and Denison permit only non-residential fraternities. See Alan D. Miller, *Denison Braces for Possible Trouble Over Fraternity Vote*, COLUMBUS DISPATCH (Apr. 19, 1995), at 1A; *Hamilton Coll.*, WL 172652 at *3 (N.D. New York April 12, 1996); *Trustee Resolution Concerning Fraternities*, Apr. 23, 1994, reprinted in DENISON MAGAZINE, (Spring 1995). Middlebury permits only coeducation fraternities. Timothy Spears, BLOGS DOT MIDDLEBURY, *One Dean's View: Further (Historical) Observations on Fraternities and Sororities* (Apr. 21, 2009), <http://blogs.middlebury.edu/onedeansview/2009/04/21/further-historical-observations-on-fraternities-and-sororities>. Some colleges and universities have never permitted fraternities, including the University of Notre Dame, Brandeis University, Rice University, and Georgetown University. Katie Perry, *Domers Defend Dorm Life at Notre Dame*, THE OBSERVER (updated Aug. 11, 2009), <http://www.ndsmcobserver.com/2.2754/domers-defend-dorm-life-at-notre-dame-1.265824>; *University Policy on Fraternities and Sororities*, BRANDEIS STUDENT HANDBOOK, at 36, <http://www.brandeis.edu/studentaffairs/srcs/pdfs/tr2009.pdf> (last visited Mar. 2, 2012); *Timeline*, RICE HISTORICAL SOCIETY, http://www.ricehistoricalsociety.org/timeline_20.html (last visited Mar. 2, 2012); Georgetown Univ., *Speech and Expression Policy*, ¶24, <http://studentaffairs.georgetown.edu/policies.html#SpeechandExpressionPolicy> (last visited Mar. 2, 2012). It is, however, ironic, that at some of the nation's finest liberal arts colleges, inspiring students to confront and embrace knowledge, fraternities must meet in secret to avoid expulsion. See Sirhal, *supra* note 30. Even if the relationship between a college or university and its students is one of contract, query whether some of these restrictions on associational rights are so severe as to make the contract unconscionable.

48. In 2007, the University of Miami reported that 156 colleges deferred recruitment from the fall for freshmen. Greg Linch, *U Miami to Defer Fraternity, Sorority Rush for Freshman*, THE MIAMI HURRICANE (Mar. 9, 2007). See, e.g., Elizabeth F. Farrell, *Fraternity Leaders Oppose Rule That Would Postpone Rush Activities in Bid to Curb Alcohol Abuse*, CHRON. HIGHER EDUC. (Apr. 1, 2005); BAIRD'S MANUAL, *supra* note 2, at I-10; Lance Vaillancourt, *CU's Frats Happy to*

deferrals can be as long as weeks, months, semesters, or years.⁴⁹ Many colleges and universities bar recruitment unless and until a student has achieved a specific minimum grade point average,⁵⁰ or earned a specified number of credit hours.⁵¹

These rules facially restrict free association, but may be tied to a goal of furthering a college or university's educational mission. They may, however, prevent entering students from getting to know, and being mentored by, upperclassmen.⁵²

Some colleges and universities have rules, however, that go much further, leading to odd restrictions on speech and association. For example, a fraternity member may be required to censor speech with students who are not members of fraternities, or to avoid all mention of fraternities.⁵³ Fraternity members may be barred from wearing apparel with fraternity

Stay Independent, DAILY CAMERA (Apr. 24, 2009).

49. See, e.g., Baylor University, *IFC and Local Fraternity Recruitment*, <http://www.baylor.edu/studentactivities/greeklife/index.php?id=74966> (last visited Feb. 23, 2012); Princeton University, *Princeton to Ban Freshman Affiliation with Fraternities, Sororities as of Fall 2012* (Aug. 23, 2011), <http://www.princeton.edu/main/news/archive/S31/40/49Q43/index.xml?section=topstories>; Wake Forest University, *Interfraternity Council*, <http://wakeforest.orgsync.com/org/wfugreek/ifc> (last visited Feb. 23, 2012); BAIRD'S MANUAL, *supra* note 2, at I-10.

50. See, e.g., Cornell University, *Greek Life*, http://dos.cornell.edu/greek/info_for_students (last visited Feb. 23, 2012); University of Central Florida, *Fraternity and Sorority Life*, <http://fsl.sdes.ucf.edu/join> (last visited Feb. 23, 2012); BAIRD'S MANUAL, *supra* note 2, at I-10.

51. See, e.g., Gettysburg College, *Fraternity Recruitment*, http://www.gettysburg.edu/about/offices/college_life/greek/fraternityrecruitment (last visited Feb. 23, 2012); Texas Tech Greek Life, *Recruitment Information*, <http://ttu.orgsync.com/org/ttuifc/recruitment> (last visited Feb. 23, 2012); BAIRD'S MANUAL, *supra* note 2, at I-10.

52. See, e.g., W. Raymond Ollwerther, *Freshmen to Be Prohibited from Fraternities, Sororities*, PRINCETON ALUMNI WEEKLY (Sept. 14, 2011), <http://paw.princeton.edu/issues/2011/09/14/pages/3739/index.xml>.

53. See e.g., Hope College, *Rush Rules*, <http://www.hope.edu/student/life/greek/rushrules.html> (last visited Feb. 23, 2012); Columbia University, *Columbia University Panhellenic Council Formal Recruitment Rules and Ethics*, http://www.columbia.edu/cu/panhel/Panhellenic/Documents_files/Recruitment%20Rules-2011%20Final%20version.doc (last visited Feb. 23, 2012); University of Denver, *Membership Recruitment Rules and Procedures*, http://du.orgsync.com/org/dugreeklife/Sorority_Recruitment_Rules (last visited Feb. 23, 2012); Furman University, *Constitution of the Inter-Fraternity Council of Furman University* (amended Jan. 17, 2009), <http://ifc.furman.edu/storage/IFCConstitutionJan09.pdf>; Josh White, *Unfair Sorority 'Silence Period' Shrouds Reality*, MICHIGAN DAILY (Ann Arbor, MI) (Sept. 16, 1997); Inter-Fraternity Council of the University of Virginia, *Regulations*, http://www.student.virginia.edu/~ifcouncil/rush_regulations.php (last visited Feb. 23, 2012); Massachusetts Interfraternity Council, *Recruitment Rules 2011*, <http://ifc.mit.edu/docs/2011%20rush%20rules.pdf> (last visited Feb. 23, 2012).

letters or logos at certain times during the school year.⁵⁴ Some colleges have required fraternities to admit any student seeking membership in a fraternity.⁵⁵ Such restrictions may begin to impinge on a freedom of association.⁵⁶

Fraternity recruitment, when permitted, may be extensively regulated by a college or university. A common requirement is to allow for recruitment only during a specific period of time.⁵⁷ The likely reason for this is that it imposes fewer burdens on both the fraternity members and the new recruits when their primary attention should be on school work. Still, it is possible that a shortened recruitment season may have the unintended

54. See, e.g., Dax Thomas, *Post-Break Panhellenic Rules Bar Wearing Letters*, DAILY PENNSYLVANIAN (Dec. 2, 2003), http://thedp.com/index.php/article/2003/12/postbreak_panhellenic_rules_ban_wearing_letters; Penn State University Panhellenic Council, *2009 Recruitment Code of Conduct*, http://www.greeks.psu.edu/phc/Recruitment_Code_of_Conduct.doc (last visited Feb. 23, 2012). See also Baylor University, *Pan-Hellenic Recruitment Policies*, <http://www.baylor.edu/studentactivities/greeklife/index.php?id=76214> (last visited Feb. 23, 2012); Cal. State Polytechnic University, Pomona, *Greek Life Guidelines*, http://dsa.csupomona.edu/osl/greeklife/files/PPP_Greek_Life_Policies-Draft_1_7777.pdf (last visited Feb. 23, 2012). In addition, some colleges and universities seek volunteers to counsel students on recruitment, and forbid these counselors from wearing fraternity sportswear or otherwise demonstrating their affiliation with a fraternity. See, e.g., East Central University, *Recruitment Rules*, http://www.ecok.edu/campus_life/greek_life/recruit_rules.htm (last visited Feb. 23, 2012); Emory Interfraternity Council, *Bylaws*, http://euifc.com/files/library/IFC_Bylaws_Jan_2012.pdf (last visited Feb. 23, 2012); University of California at Merced, *Recruitment Advisor Application Packet 2011-2012*, <http://fraternitysorority.ucmerced.edu/sites/fraternitysorority/files/public/Rho%20Alpha%20Application%20-%202011-12.doc> (last visited Feb. 23, 2012).

55. See, e.g., Philip F. Smith, *The Demise of Fraternities at Williams*, CHRON. HIGHER EDUC. (Apr. 2, 1999); Zachary Rosenfeld, *Esty Raises the Bar for Class Presidents*, THE AMHERST STUDENT (Oct. 25, 2005), <http://amherststudent2.amherst.edu/current/arts/view.php?year=2005-2006&issue=07§ion=arts&article=02>; *New Dorms Threaten Amherst Fraternities*, HARVARD CRIMSON (Mar. 26, 1962), <http://www.thecrimson.com/article/1962/3/26/new-dorms-threaten-amherst-fraternities-pa> (last visited Feb. 23, 2012); WILLIAM R. BAIRD & JOHN ROBSON, BAIRD'S MANUAL OF COLLEGE FRATERNITIES 31 (17th ed. 1963). See generally *Frank v. Ivy Club*, Nos. PL 05-1678, 05-1679, 05-1680, at 5 (N.J. Dep't of Law & Public Safety, Div. on Civil Rights, Finding of Probable Cause, Feb. 6, 1986) (noting that most eating clubs at Princeton University used a lottery system to choose new members).

56. *Healy v. James*, 408 U.S. 169, 181 (1972) ("If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students.").

57. See, e.g., Lehigh University, *Strengthening Greek Life*, <http://www.lehigh.edu/ofsa/strengtheningqa.shtml> (last visited Feb. 23, 2012) (four weeks); Northern Arizona University, *Fraternity Recruitment*, <http://home.nau.edu/greeklife/fraternityrecruitment.asp> (last visited Feb. 23, 2012) (seven days); San Diego State University, *Joining a Fraternity or Sorority*, <http://greeklife.sdsu.edu/join.html> (last visited Feb. 23, 2012) (five days).

consequence of forcing students to focus too heavily on recruitment during a shortened period. Shorter recruitment periods favor larger fraternity chapters, which can spread the work between more members than a smaller chapter.⁵⁸

Restrictions on recruitment are often created to protect academically-challenged students. A college or university may require students to maintain a grade point average above a certain level before becoming eligible for membership, or at least be a student in good standing academically.⁵⁹ A college or university may require that fraternities limit membership to students attending the host institution, barring association with others.⁶⁰

Recruitment activities may be carefully regulated by a college or university. Restrictions often include a ban on alcohol,⁶¹ perhaps uncontroversial since the vast majority of students entering school are under twenty one years of age. But schools may also dictate specifically what types of activities are permitted or prohibited.⁶²

58. See generally *Winning Formal Recruitment (aka Rush) at Sigma Phi Epsilon*, <http://www.sigep.org/documents/winning-formal-recruitment.pdf>; Tiffany Webber, *Rush Ends, Reactions of Frats Vary*, THE CHRONICLE (Feb. 1, 2006), <http://dukechronicle.com/article/rush-ends-reactions-frats-vary>.

59. See, e.g., Miami University of Ohio, *Fraternity Eligibility Requirements*, <http://www.units.muohio.edu/saf/gra/IFCRecruitment.htm> (last visited Feb. 21, 2012) (minimum GPA of 2.5). Ironically, studies show that fraternity members are far more likely to graduate than non-fraternity members, and some studies suggested that fraternity members achieve a higher grade point average than non-fraternity members.

60. See, e.g., Johns Hopkins University, *Office of Greek Life Policies*, http://web.jhu.edu/studentlife/greek_life/greeklifepolicies.html (last visited Mar. 1, 2012) (“membership must be exclusive to students of Johns Hopkins University.”).

61. See, e.g., Elizabeth F. Farrell, *Berkeley Bans Booze in the Greek System*, CHRON. HIGHER EDUC. (May 20, 2005); Inter-Fraternity Council University of Virginia, *Regulations*, http://www.student.virginia.edu/~ifcouncil/rush_regulations.php (last visited Feb. 23, 2012) (no alcohol permitted during recruitment); MIT Division of Student Life, *Policies and Procedures*, <http://studentlife.mit.edu/mindandhandbook/policiesandprocedures/risk> (last visited Feb. 23, 2012) (same); University of California Irvine, *Dry Rush Enforcement Board Policies and Procedures*, <http://www.dos.uci.edu/greeklife/documents/IFC%20-%20DREB%20PROCEDURE.pdf> (last visited Feb. 23, 2012) (same). See *supra* note 22.

62. See, e.g., Cornell University, *Interfraternity Council*, <http://www.cornellifc.org/Recruitment/Formal%20Recruitment.html> (last visited Feb. 23, 2012) (schedule includes list of permitted activities); Furman University, *Constitution of the Inter-Fraternity Council at Furman University* (amended Jan. 17, 2009), <http://ifc.furman.edu/storage/IFCConstitutionJan09.pdf> (recruitment activities, dates, and hours established by Interfraternity Council); University of Colorado at Boulder, *Greek Life Membership Recruitment Guidelines*, <http://www.colorado.edu/greeks/recruitment/guidelines.html> (last visited Feb. 23, 2012) (permitted activities specified). Historically white women’s fraternities and sororities, regulated by the National Panhellenic Conference, tend to have a more highly structured recruitment period than other fraternities. National Panhellenic

It is uncontroverted that colleges and universities may regulate student activities.⁶³ Some of these restrictions, however, particularly regarding speech and character of activity, may go beyond even the most expansive reading of court decisions on school regulations.⁶⁴

2. Permission to Exist and Requirements Relating to National Affiliation

Many colleges and universities tightly regulate the number of fraternities permitted to be affiliated with the college or university.⁶⁵ Even those that otherwise deny student organization recognition to fraternities may still regulate the existence of fraternities on that campus.⁶⁶ Colleges and universities or student organizations may forbid new fraternity expansion, regardless of the enthusiasm of students for that endeavor.

While these decisions likely fall within generally accepted college and university powers to regulate campus life, other colleges and universities

Council, *Putting it All Together*, <https://www.npcwomen.org/resources/pdf/MRABAIntroduction-ThoseAssistingWithSigningofMRABAs.pdf> (last visited June 4, 2012) (restrictions on speech); National Panhellenic Conference, *Frequently Asked Questions about Sorority Recruitment*, <https://www.npcwomen.org/resources/pdf/FAQ-AboutRecruitment.pdf> (last visited June 4, 2012) (restrictions on activities).

63. *Healy v. James*, 408 U.S. 169, 180, 192 (1972).

64. *See infra* note 255.

65. *See, e.g.*, Dartmouth College, *Interfraternity Council Rules for Expansion*, <http://www.dartmouth.edu/~ifc/expansion.html> (last visited Feb. 23, 2012) (Interfraternity Council and college must approve expansion); Lehigh University, *Expansion Policy for NIC Affiliated Chapters*, http://mylehigh.lehigh.edu/s/1127/images/editor_documents/expansionpolicytimeline.pdf (last visited Feb. 23, 2012) (university must approve expansion); University at Albany, State University of New York, *Expansion Guidelines*, <http://www.albany.edu/involvement/expansion.shtml> (last visited Feb. 23, 2012) (same); University of Florida, *Policy on Expansion for Social Sororities and Fraternities*, <https://www.studentinvolvement.ufl.edu/Portals/1/Documents/Greeks/Docs/OSFA%20-%20Expansion.pdf> (last visited Feb. 23, 2012) (same); University of South Florida, *Fraternity and Sorority Life*, http://usfgreeklife.com/page.php?page_id=15387 (last visited Feb. 23, 2012) (same); Virginia Tech, *OFSL Administrative Expansion Policy for Fraternities and Sororities*, http://www.greeklife.vt.edu/assets/doc/ExpansionPolicy_8162010.pdf (last visited Feb. 23, 2012) (university and student umbrella group must approve expansion). Some colleges and universities have devolved the authority to authorize new fraternities to an interfraternity council, or work in partnership with a student organization to make the decision.

66. *See e.g.*, Benjamin Pokross, *Two Fraternities Under Fire After Bias Claims*, CHICAGO MAROON (May 25, 2012), <http://chicagomaroon.com/2012/05/25/two-fraternities-under-fire-after-bias-claims> (last visited June 4, 2012) (fraternities not recognized by University of Chicago); The University of Chicago, *Greek Life on Campus*, <https://studentactivities.uchicago.edu/involved/greek.shtml> (last visited June 4, 2012) (information about University of Chicago office regulating fraternities).

have requirements regarding outside affiliation. Some require a fraternity to be nationally⁶⁷ affiliated.⁶⁸ Presumably, national affiliation, which comes with a broad set of rules and regulations, professional oversight from headquarters, and engaged alumni supervision, lessens the managerial role for the college or university and results in better-run fraternity chapters. Ironically though, some colleges and universities have chosen the opposite, and ban any national affiliation of local fraternities.⁶⁹ A decision to forbid national affiliation may be rooted in concerns of the single-gender requirements of most fraternities, or merely an effort by the college or university to avoid ceding any control over students to an outside organization. This may deny students the associational benefits of networking and mentoring within a national organization.⁷⁰

Schools that require national affiliation are requiring students to associate and pay fees to an organization for which they may have no bond, affinity for, or connection. Indeed, there may be fraternity chapters that receive little for the fees they pay. Alternatively at other colleges, despite the wish to associate with like-minded students at other schools, students may be prohibited from doing so. These restrictions on association have

67. The term “national” is inappropriate, since a large number of North American fraternities have chapters in both the United States and Canada. Inaccurate though it may be, the common term used to refer to the headquarters, central office, or umbrella organization is “national.”

68. See, e.g., Johns Hopkins University, *Constitution of the John Hopkins University Inter-Fraternity Council*, http://web.jhu.edu/studentlife/greek_life/InterfraternityCouncil/ifcconstitution.html (last visited Feb. 23, 2012); University of South Florida, *Fraternity and Sorority Life*, http://usfgreeklife.com/page.php?page_id=15387 (last visited Feb. 23, 2012); Virginia Tech, *OFSL Administrative Expansion Policy for Fraternities and Sororities*, http://www.greeklife.vt.edu/assets/doc/ExpansionPolicy_8162010.pdf (last visited Feb. 23, 2012) (national affiliation required for recognition).

69. See, e.g., Stephanie Bluemle, *It Started with Tennis and Ended with Greeks: Despite Doubters, Fraternities and Sororities Were Here to Stay*, AUGUSTANA COLLEGE, <http://www.augustana.edu/x19619.xml> (last visited Feb. 23, 2012). Colleges and universities that previously permitted only local fraternities include Otterbein University, Albright University, Trinity University, Clemson University, Pepperdine University, and Baylor University. See generally Krista Langlois, *Dartmouth Task Force Eyes Hazing*, VALLEY NEWS (Feb. 8, 2012), <http://www.vnews.com/02082012/8342574.htm> (requiring sororities to disaffiliate from national organizations would allow more organizations to serve alcohol).

70. See Br. for Amici Curiae N. Am. Interfraternity Conference and Nat'l Panhellenic Conference in Support of Plaintiffs-Appellees, and in Support of the District Court's Decision at 1, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007) (No. 06-4111-cv) (“Throughout the past 200 plus years, countless members of Greek organizations have gone on to lead the country in various professions. For example, approximately 48% of all United States presidents, 42% of all Senators, 30% of all members of Congress, 40% of Supreme Court Justices, and 30% of Fortune 500 Executives have been members of Greek organizations.”).

not been court-tested under the current Supreme Court case law on associational rights of student groups.

3. Restrictions on Housing Options

The issue of student housing has always been complicated and controversial. Colleges and universities have debated whether to have student housing,⁷¹ whether students should be required to live in college-owned housing,⁷² and what conditions and opportunities student housing should offer.⁷³ Those issues have frequently been tied to the existence of fraternity housing.⁷⁴

Offering students housing and dining options with co-curricular (or even curricular) activities has been common in the United States, particularly since World War II. Many colleges and universities consider the ability to offer students these options critical to their competition for students with other schools as well as to achieve a high ranking in U.S. News & World Report.⁷⁵ College and university admissions is more of an art than a science, in that it is difficult to predict with certainty the exact number of students who will matriculate in a given year. At the same time, colleges or universities attempting to house some or all of their students depend on some certainty with regard to the student population in order to avoid losing money or crowding their facilities with too many students.

The existence of fraternities can complicate the issue. While the television and movie images of a fraternity house conjure a proud Georgian

71. BAIRD, *supra* note 2, at § I-14.

72. See, e.g., Eric Hoover, *Campuses See Rising Demand for Housing*, CHRON. OF HIGHER EDUC., Aug. 1, 2008, at A1.

73. See, e.g., Ben Gose, *Colleges Invest Millions on Improvements to Keep Upperclassmen in Campus Housing*, CHRON. HIGHER EDUC., Feb. 13, 1998; Lawrence White, *What Legal Issues Will Keep Colleges Busy in the Year 2012?*, CHRON. HIGHER EDUC., May 27, 2005, at B1.

74. See, e.g., SANUA, *supra* note 39, at 3; HANDLIN & HENDLIN, *supra* note 32, at 40; BAIRD, *supra* note 2, at § I-3.

75. See, e.g., Quinn Bernier, *New College Ranking System Rekindles Criticism*, THE CHICAGO MAROON (Oct. 17, 2003), <http://chicagomaroon.com/2003/10/17/new-college-ranking-system-rekindles-criticism>; *Letter from Gerhard Casper, President, Stanford University, to James Fallows, Editor, U.S. NEWS & WORLD REPORT* (Sept. 23, 1996), available at <http://www.stanford.edu/dept/pres-provost/president/speeches/961206gcfallow.html>; *National Opinion Research Center, A Review of the Methodology for the U.S. News & World Report's Rankings of Undergraduates Colleges and Universities*, WASH. MONTHLY (2003), <http://www.washingtonmonthly.com/features/2000/norc.html>; Michael Crissey, *Changes in Annual College Guides Fail to Quell Criticisms on Their Quality*, CHRON. HIGHER EDUC., Sept. 5, 1997; Nicholas Thompson, *Playing With Numbers*, WASH. MONTHLY (Sept. 2000), <http://www.washingtonmonthly.com/features/2000/0009.thompson.html>.

structure owned in fee simple on valuable land adjacent to an idyllic quadrangle, the truth has always been more complicated than that. While the majority of fraternities (65%) own their house and land, making them the nation's largest non-profit student landlords other than universities, other arrangements exist.⁷⁶ Some fraternities own their land or their house, but not both, with the college or university often owning the other.⁷⁷ Some colleges or universities own fraternity houses,⁷⁸ or house fraternities in sections of college or university residence halls, sometimes with extensive modifications made to create a resemblance to an old fraternity house⁷⁹ and sometimes not.⁸⁰ Some colleges or universities forbid any form of residential fraternity.⁸¹

Colleges or universities that forbid residential fraternities are the most interesting for freedom of association issues. For example, a college or university may permit or encourage themed housing, centered on some affinity such as lifestyle, language, or political belief, while at the same time the college or university may prohibit fraternities.⁸²

76. *Collegiate Housing and Infrastructure Act*, CAPITAL FRATERNAL CAUCUS, http://www.fraternalcaucus.org/index.php?option=com_content&task=view&id=39&Itemid=45. Fraternities supply housing for more than 250,000 students at no cost to the host schools or the taxpayers. *Id.* Most public universities and many private colleges rely on fraternities to house a large percentage of their students. *See, e.g.*, Gene Warner, *Housing, Inexperience Tied to MIT Death*, BUFFALO NEWS, Oct. 2, 1997, at C1.

77. *See Collegiate Housing*, *supra* note 76 (different ownership arrangements exist for fraternity houses).

78. *See, e.g.*, Ben Gose, *One-Stop Shopping for Campus Housing*, CHRON. HIGHER EDUC., Jan. 28, 2005, at B4.

79. *See, e.g.*, *Pace Accelerates for House System*, UNION COLL. MAG. (Fall 2002), http://www.union.edu/N/DS/edition_display.php?e=748&s=3196 (Union College required fraternities to move from historic houses into renovated dormitories).

80. *See, e.g.*, Julianne Basinger, *How Nan Keohane Is Changing Duke*, CHRON. HIGHER EDUC., Nov. 3, 2000, at A35 (fraternity housing at Duke).

81. Ben Gose, *Do Bans on Fraternities Violate the First Amendment?*, CHRON. HIGHER EDUC., Nov. 27, 1998, at A37. *See, e.g.*, *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 60 (2d Cir. 1997) (where college banned residential fraternities); *Convocation 2010*, REED MAG. (Dec. 2010), http://web.reed.edu/reed_magazine/december2010/columns/eliot_circular/1.html (stating that Reed does not permit fraternities); *Fraternities, Policies, Procedures, and Regulations*, WILLIAMS COLL., <http://web.williams.edu/Registrar/handbook/policies.html#Fraternities> (stating that Williams does not permit fraternities).

82. *See, e.g.*, Alex P. Kellogg, *Lawrence U. Ends Fraternities' Right to Housing Privileges*, CHRON. HIGHER EDUC., Nov. 2, 2001, at A55. Alfred, Amherst, Colby, and Williams all prohibit fraternities while providing for and encouraging themed housing. *See Residence Life: Overview*, ALFRED UNIV., http://www.alfred.edu/students/living_at_au/residence_life.cfm (Hillel, Environmental Studies, Honors, Language, and International. Alfred also offers Joel's House, "which provides housing for 22 students in a family-like setting." *Joel's House*, ALFRED UNIV., <http://www.alfred.edu/map/joel.cfm>); *Theme Houses*, AMHERST COLL.,

In order to enforce a non-residential fraternity rule, some colleges or universities may go further. A college or university may require membership rolls of fraternities and prohibit more than a small number of members from living together as roommates or hall mates so as to prevent the existence of de facto fraternity housing.⁸³ In situations like this, it is possible that colleges and universities are restricting association for a disfavored group while encouraging it for others. Some colleges and universities have been very aggressive in enforcing fraternity bans.⁸⁴

Colleges and universities may restrict whether students live off-campus; this is often done to ensure that the college- or university-owned housing maintains full occupancy. However, a college or university may allow some students to live off-campus while forbidding fraternity members from doing so, concerned that they will essentially create a banned off-campus fraternity house.⁸⁵

A recent trend is for colleges and universities to require “adult supervision” of fraternity houses.⁸⁶ In many respects, this harkens back to

<https://www.amherst.edu/campuslife/reslife/housing/theme> (French, German, Russian, Spanish, Black, Arts, Asian, Healthy & Wellness, Latino, and Co-op); *Residential Experience*, COLBY COLL., http://www.colby.edu/alumni_parents_cs/parents/handbook/life_at_colby/residence.cfm (Green and Music & Arts); *Co-op Housing*, WILLIAMS COLL., <http://student-life.williams.edu/student-housing/upperclass-housing/co-op-housing> (“Co-ops are small houses where seniors live in small groups, providing students with a more independent living experience.”).

83. See, e.g., *Housing Lottery Guidebook*, HAMILTON COLL., <http://www.hamilton.edu/residentiaallife/lottery/housing-lottery-guide/blocking-lottery>; *Anchor Housing*, WILLIAMS COLL., http://wso.williams.edu/wiki/index.php/Anchor_housing; *Room Draw*, AMHERST COLL., <https://www3.amherst.edu/~dos/roomdraw>. Even some towns may attempt to prohibit de facto fraternity houses, although this is likely related to land use and noise issues rather than free association. See generally, Holly Kurtz, *Deland’s Housing Change Delayed*, ORLANDO SENTINEL (Aug. 18, 1998), http://articles.orlandosentinel.com/1998-08-18/news/9808170626_1_commissioners-deland-task-force.

84. Jim Terhune, *A Letter to the Colby Community Regarding Secret Fraternities*, THE COLBY ECHO (Nov. 9, 2011), <http://www.thecolbyecho.com/opinion/a-letter-to-the-colby-community-regarding-secret-fraternities>; *Policies, Procedures, and Regulations*, WILLIAMS COLL., <http://web.williams.edu/registrar/handbook/policies.html#fraternities>; *Trustees’ Resolution on Fraternities and College Council Statement on the Fraternity Policy*, AMHERST COLL., <https://www.amherst.edu/campuslife/deanstudents/handbook/studentrights#Fraternities>.

85. See, e.g., Claire Michalewicz, *New Wesleyan Policy Bans Student Use of Unapproved Houses*, MIDDLETOWN PRESS (Feb. 24, 2011), <http://www.middletownpress.com/articles/2011/02/24/news/doc4d65c0e187679065802866.txt> (stating that students may not live in fraternity houses if unrecognized by school).

86. See, e.g., Elizabeth F. Farrell, *Fraternity Leaders Oppose Rule That Would Postpone Rush Activities in Bid to Curb Alcohol Abuse*, CHRON. HIGHER EDUC., Apr. 1,

the system of house mothers that were often found in fraternity housing in the past.⁸⁷ Certainly there are many benefits that can be created by such a system, including restraints on bad behavior and positive mentoring.⁸⁸ Yet some applications of the system may require fraternities to have older persons living in a house but not impose the same requirement on other college or university housing. Being part of a disfavored group that is then forced to live with a person who is not a member of the group may be a test of the limits of college- or university-mandated supervision of student activities.

4. Regulating Membership and Banning Fraternity Systems

Colleges and universities may also place affirmative requirements on fraternity membership not required of other students. For example, a college or university may specifically require fraternities to engage in philanthropy or perform community service but not require unaffiliated students to do the same.⁸⁹ Certainly most fraternities are encouraged by their colleges and universities to perform community service, but it is not clear that non-members receive the same encouragement.

Fraternities are frequently required to accept collective responsibility for the actions of individual members.⁹⁰ While this typically means that a

2005, at A45; *MIT Moves on Plan to Put Resident Advisers in Fraternity Houses*, CHRON. HIGHER EDUC., July 24, 1998.

87. See, e.g., Michelle Hillenbrand, *Frats Getting Live-In Dad*, DAILY IOWAN, Feb. 17, 2010, <http://www.dailyiowan.com/2010/02/17/Metro/15662.html>; WILLIAM R. BAIRD & JOHN ROBSON, *supra* note 55, at 18.

88. See, e.g., *MIT Moves on Plan*, *supra* note 86.

89. See generally, e.g., *Fraternity and Sorority Life: New Member Education Program Requirements*, FLA. INST. OF TECH., <http://www.fit.edu/greeklife/documents/NewMemberProgramRequirements.pdf> (last visited Mar. 29, 2013) (community service required of fraternity members); *2011 Chapter Accreditation Program*, PENN STATE UNIV., <http://studentaffairs.psu.edu/hub/greeks/pdf/ChapterAccreditationProgram.pdf> (last visited Mar. 29, 2013) (community service required of fraternity members); *FAQs*, Univ. of Ga, the Interfraternity Council, <http://ifc.uga.edu/faqs.html> (community service required of fraternity members); *Fraternity & Sorority Chapter Standards of Excellence 2011*, UCLA, <http://www.greeklife.ucla.edu/documents/Document12011.pdf> (community service required of fraternity members); *Fraternities and Sororities*, WORCESTER POLYTECHNIC INST., <http://www.wpi.edu/offices/sao/fratsandsors.html> (community service required of fraternity members).

90. See, e.g., *Greek Guide*, STANFORD UNIV., <http://osa.stanford.edu/greek/greekguide/principles.htm>; *Fraternity/Sorority Advisory Board Disciplinary Charter*, UNIV. OF PA., http://www.upenn.edu/provost/PennBook/fraternity_sorority_advisory_board_disciplinary_charter; *Fraternity and Sorority Life, Anti Hazing*, UNIV. OF CONN., http://www.greeklife.uconn.edu/hazing_rights.html (last visited March 1, 2012); *Individual Housing Agreement for 34th Street Housing 2011–2012*, DREXEL UNIV., <http://www.drexel.edu/dbs/universityHousing/34thStreet/howtoApply/> (follow “2012–2013 34th Street Housing Agreement [PDF]”

fraternity chapter may be sanctioned for the acts of individuals, it also may mean that individuals are sanctioned for the actions of others.⁹¹ There are likely few, if any, other student organizations treated similarly.

The issue of coeducation is often at the heart of friction between a college or university and its fraternities.⁹² While some colleges and universities see benefits to single gender organizations and housing, others believe it inappropriate in the current era.⁹³ Regardless of a college or university's discomfort, fraternities are privileged organizations under federal law and exempt from any federal requirements to admit opposite sex members under the 1974 Bayh Amendment to Title IX of the Education Amendments of 1972.⁹⁴ Private universities, however, while

hyperlink); *Fraternity and Sorority Standards for Recognition & Awards (FSR)*, UNIV. OF VT., <http://uvmgreeklife.celect.org/fsr>; *SDSU Policies for Social Fraternities and Sororities*, SAN DIEGO STATE UNIV., http://greeklife.sdsu.edu/documents/SDSUPoliciesforSocialFraternitiesandSororitiesExpanded_000.doc. Cf. 6 Am. Jur. 2d Associations and Clubs § 47 (“mere membership in a voluntary association does not make all the members liable for acts of their associates done without their knowledge or approval . . .”). See generally Shaheen v. Burgess Harrison Yonts, 2008 U.S. Dist. LEXIS 16020, 11-12 (W.D. Ky. 2008); Sitrin v. Meneghini, 1996 Mass. App. Div. 148 (Mass. Dist. Ct. 1996).

91. See, e.g., *Psi Upsilon v. Univ. of Pa.*, 591 A.2d 755, 759 (Pa. Super. Ct. 1991) (upholding collective responsibility).

92. See, e.g., Billie Wright Dziech, *Forcing Greek Organizations to Go Coeducational Won't Lead to Greater Diversity*, CHRON. HIGHER EDUC., Apr. 2, 1999, at B4; Ben Gose, *Dartmouth Plan Would Let Fraternities Continue*, CHRON. HIGHER EDUC., Jan. 21, 2000, A48; Carol Innerst, *Coed or Out*, WASH. TIMES, Mar. 7, 1992, at A3; Adam Rashkoff, *Fraternities No Longer Required To Be Co-Ed*, WESLEYAN ARGUS, Feb. 2, 2010, <http://wesleyanargus.com/2010/02/02/fraternities-no-longer-required-to-be-co-ed>; Fran Silverman, *Trinity Orders Greek Groups To Become Coed by 1995*, HARTFORD COURANT, Sept. 20, 1992, at D1; Maureen Sirhal, *Fraternities on the Rocks*, HOOVER INST. STANFORD UNIV. POLICY REVIEW, Feb. 2000, <http://www.hoover.org/publications/policy-review/article/8032>; *The Idea of Coeducational Fraternities Is Catching On in the Northeast*, N.Y. TIMES, Apr. 8, 1990.

93. See *id.*

94. Title IX otherwise prohibits discrimination on the basis of gender in educational institutions. Title IX states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that: . . . (6) this section shall not apply to memberships practice-(A) of a social fraternity or social sorority which is exempt from taxation under s§ 501(a) of Title 26 [of the Internal Revenue Code], the active membership of which consists primarily of students in attendance at an institution of higher education.

20 U.S.C. § 1681(a) (1988). Also excluded are the Boy Scouts, Campfire Girls, Girl Scouts, YMCA, and YWCA. *Id.* § (a)(6)(B). In offering this amendment, Senator Birch Bayh of Indiana, the sponsor of Title IX, stated that “[f]raternities and sororities have been a tradition in the country for over 200 years. Greek organizations . . . must not be destroyed in a misdirected effort to apply Title IX.” 120 Cong. Rec. 39992 (1972). Prior to the Bayh Amendment, Congress amended the 1957 Civil Rights Act to

generally the recipients of some federal funding, have been held to have authority to ban single sex organizations.⁹⁵

While a few fraternities have embraced (or at least accepted) coeducation in some or all of their chapters, most fraternities remain single sex.⁹⁶ Forced coeducation of fraternities by colleges and universities has resulted in at least one lawsuit, but the college prevailed.⁹⁷

The greatest restriction on freedom of association occurs when colleges and universities abolish entire fraternity systems,⁹⁸ or forbid them from ever taking root.⁹⁹ This extreme restriction is the focus of Part III of this Article.

Students may be subject to a code or affirmation that prohibits them

prevent scrutiny of the single-gender status of most fraternities. 42 U.S.C. § 1975c(b). In 1964, Congress accepted and passed an amendment to the Civil Rights Act of 1964 that prohibited the federal government from regulating single-sex fraternities. 20 U.S.C. § 1144(b). In 1998, fraternities received some modicum of additional protection. The Higher Education Act of 1965 was amended to read:

It is the sense of Congress that no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under an education program, activity, or division of the institution directly or indirectly receiving financial assistance under the Higher Education Act of 1965, whether or not such program, activity, or division is sponsored or officially sanctioned by the institution.

20 U.S.C. §§ 1011; 1011a(c)(2). The Amendment received broad support; the House voted 414–4 and the Senate 96–1, in favor of adoption. Explicitly linking the Amendment to the protection of fraternities was the sponsor, Representative Robert Livingston of Idaho. On the House floor, Congressman Livingston said “[a] number of colleges throughout this country are vigorously attacking their students’ constitutionally protected right of free speech and association. The controversy centers on a decision by some private schools to ban all single-sex organizations like fraternities and sororities and restrict any student involvement with them, even if it is off-campus and on their own time.” Steven Menashi, *Editorial: Talk to My Lawyer*, DARTMOUTH REVIEW, Feb. 7, 2000.

95. See generally, e.g., *Phelps v. Presidents & Trs. of Colby Coll.*, 595 A.2d 403 (Me. 1991); Timothy Spears, *One Dean’s View: Further (Historical) Observations on Fraternities and Sororities*, Blogs Dot Middlebury (Apr. 21, 2009, 7:27 AM), <http://blogs.middlebury.edu/onedeanview/2009/04/21/further-historical-observations-on-fraternities-and-sororities> (Apr. 21, 2009).

96. See *Chi Iota*, 443 F. Supp. 2d at 388 (fraternity choosing to remain single sex).

97. See Wilson Ring, *Despite Bans at 5 Eastern Colleges, Fraternities Survive*, L.A. TIMES, Nov. 20, 1994, at 32; Sirhal, *supra* note 30; Spears, *supra* note 95. See generally Innerst, *supra* note 92; *Phelps*, 595 A.2d at 403. See also *Brzica v. Trs. of Dartmouth Coll.*, 791 A.2d 990 (N.H. 2002).

98. See, e.g., *Santa Clara U. to Shut Down All Fraternities and Sororities*, CHRON. HIGHER EDUC., Apr. 6, 2001, at A47.

99. See, e.g., Susanna Ashton, *Making Peace with the Greeks*, CHRON. HIGHER EDUC., Nov. 17, 2006.

from joining fraternities.¹⁰⁰ While the power of private colleges and universities to take such action is very broad,¹⁰¹ the lawfulness of such action by public colleges and universities is questionable.¹⁰²

According to the College Board, 143 public four-year colleges and universities have no fraternity systems.¹⁰³ While it is difficult to determine why none of these schools have fraternities; at some there is likely no interest, and at others there may be gentle dissuasion by the college or university administration.¹⁰⁴ Several public colleges and universities¹⁰⁵

100. See, e.g., *Fraternity Activity*, COLBY COLL., http://www.colby.edu/administration_cs/student-affairs/deanofstudents/studentconduct/policies_procedures/other_policies/fraternity-activity.cfm (last visited Mar. 29, 2013); *Student Code of Conduct*, WAYNESBURG UNIV., <http://tps.waynesburg.edu/web/about/student-code-of-conduct>; *Fraternities*, WILLIAMS COLL., <http://web.williams.edu/registrar/handbook/policies.html>.

101. See sources cited *supra* note 47.

102. See *infra* Part III(c) (discussing the issue of whether public universities may ban specific student groups).

103. This was determined utilizing “College Board College Search” at <http://collegesearch.collegeboard.com/search/index.jsp> (last visited Feb. 22, 2012). The search requested all public four-year colleges in the United States without fraternities or sororities. Among other programs, the College Board is responsible for authoring the SAT and Advanced Placement exams. *What We Do*, COLL. BD., <http://about.collegeboard.org/what> (last visited Feb. 22, 2012). The actual number of traditional public colleges banning fraternities is likely less than 143; some of these schools appear to be restricted to graduate students (e.g. SUNY Upstate Medical University, Texas Tech University Health Sciences Center, University of Arkansas for Medical Sciences), adult education (e.g. SUNY Empire State College), or military academies (e.g. U.S. Air Force Academy, U.S. Naval Academy). Some public schools have banned fraternities in the past; for example, Texas A&M University banned fraternities until 1973; they were not officially recognized until after the university was forced to recognize a gay student’s organization. See *infra* note 111. California State University, Chico suspended all existing fraternities and sororities on November 15, 2012, after an alcohol-related death at one fraternity. David Bienick, *Chico State bans all fraternities, sororities*, KCRA TV (November 16, 2012), available at <http://www.kcra.com/news/Chico-State-bans-all-fraternities-sororities/-/11797728/17433900/-/ismw0yz/-/index.html>.

104. See, e.g., Chelsea Krotzer, *CWU Students Eye Greek System*, DAILY RECORD, Feb. 12, 2010, http://www.dailyrecordnews.com/article_58833ac0-1803-11df-9e1d-001cc4c03286.html?TNNNoMobile; *You Asked The President!*, E. CONN. STATE UNIV., http://nutmeg.easternct.edu/housing/pdf/pres-visits/Spring_2009.pdf; *Residence Life Frequently Asked Questions*, ST. MARY’S COLL. OF MD., <http://www.smc.edu/residencelife/faqs/index.html>; *Listening Tour 2010: Meeting with the UH Hilo Student Association and Chartered Student Organization Officers*, Univ. of Haw. at Hilo (Oct. 25, 2010), <http://hilo.hawaii.edu/strategicplan/documents/FINALLTSummarynote-UHHSACSOs.pdf>. “Gentle dissuasion” against fraternities is harder to identify, but the State University of New York at Purchase’s admissions website may be an example. *School of Liberal Arts & Sciences*, Purchase Coll. State Univ. of N.Y., <http://www.purchase.edu/Departments/Admissions/AreasofStudy/liberalartsandscience.aspx> (stating with approval that the college has no fraternities).

105. There are likely others. For example, The Citadel bans fraternities and sororities but can likely make a strong argument that such organizations might disrupt

actively deny recognition to fraternities, including Alfred University,¹⁰⁶ Framingham State University,¹⁰⁷ University of Mary Washington,¹⁰⁸ College of Staten Island of the City University of New York,¹⁰⁹ all Vermont State Colleges,¹¹⁰ and Western Washington University.¹¹¹

unity in a military academy. *See College Regulations*, THE CITADEL (Aug. 4, 2011), http://www.citadel.edu/root/images/Faculty/college_regulations_after_august_2011_meeting.08-04-11.pdf.

106. *Alfred University Trustees Vote to Eliminate Fraternities and Sororities*, Alfred Univ. (May 20, 2002), <http://www.alfred.edu/pressreleases/viewrelease.cfm?ID=1701>. Alfred University is difficult to categorize; it is a private university that contracts with the state of New York to host and administer several collegiate programs that would otherwise be resident at a state university. *About AU*, Alfred Univ., <http://www.alfred.edu/glance> (Alfred is “private, non-sectarian, with state-sponsored programs in engineering and art and design.”). *See also* State v. White, 82 Ind. 278 (Ind. 1882) (wherein as a condition of admission, university required students to pledge not to join fraternities).

107. *RAM Student Handbook 2011–2012*, FRAMINGHAM STATE UNIV., <http://www.framingham.edu/student-affairs/documents/1112ramhandbook.pdf#nameddest=80> (last visited Mar. 29, 2013).

108. *See* James Sennett, *LETTER: New Kappa Sigma Fraternity Looking for School Recognition and Members*, THE BULLET (Feb. 9, 2011), <http://umwbullet.com/2011/02/09/letter-new-kappa-sigma-fraternity-looking-for-school-recognition-and-members/>; Kat Saunders, *Frat OK'd on Campus*, THE BULLET, (Feb. 28, 2008), <http://umwbullet.com/2008/02/28/frat-okd-on-campus/>.

109. *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007).

110. The four-year Vermont State Colleges are Castleton State College, Johnson State College, Lyndon State College and Vermont Technical College. VERMONT STATE COLLEGE, <http://www.vsc.edu> (last visited Feb. 23, 2012). *See 2011–2012 College Handbook*, Castleton State Coll., <http://www.castleton.edu/campus/CollegeHandbook/handbook.pdf>.

111. Samantha Wohlfeil, *Western's Potential Big, Fat Greek Row?*, THE WESTERN FRONT, Apr. 5, 2011, http://www.westernfrontonline.net/news/article_9093c460-05f4-5735-a7df-d578991748af.html?mode=print; Admin, *So Where Do I Pledge*, THE AS REVIEW, Oct. 1, 2007, <http://as.wvu.edu/asreview/so-where-do-i-pledge/>. In the past, South Carolina, Arkansas, and Michigan have banned fraternities at all state universities. BAIRD & ROBSON, *supra* note 56, at 28. Virginia Tech, Virginia Military Institute, and Texas A&M University have all previously banned fraternities. *Id.*; Kara Bounds Socol, *The Evolution of Aggie Greeks*, TEX. A&M UNIV., (Aug. 3, 2010), <http://tamunews.tamu.edu/the-evolution-of-aggie-greeks/>. The State University of New York at Buffalo, at one time a private institution, required its fraternities to sever contact with national and international organizations when it became part of the state university. *See also* Webb v. State Univ. of N.Y., 125 F. Supp. 910 (N.D.N.Y. 1954) (wherein the university prevailed when local fraternity challenges policy forbidding affiliation with national or international organization); Beta Sigma Rho, Inc. v. Moore, 261 N.Y.S2d 658 (N.Y. Sup. Ct. 1965), *aff'd* 25 A.D.2d 719 (N.Y. App. Div. 1966) (no social organization with national affiliation permitted). Fraternities at Buffalo are now permitted outside affiliation. *See Greek Affairs*, UNIV. AT BUFFALO, STATE UNIV. OF N.Y., <http://www.greeklife.buffalo.edu>. In November, 2012, a fraternity member at Chico State University died from alcohol poisoning. Jill Tucker, *Chico State Rethinks Party Life after Death*, SFGATE (San Francisco, CA), November 16, 2012, available at <http://www.sfgate.com/education/article/Chico-State-rethinks-party-life-after-death->

III. THE DEVELOPMENT OF A FREEDOM OF ASSOCIATION

A. Origins

It is difficult to point to the earliest recognition of the importance of a freedom of association. Certainly the Founders were influenced by the Enlightenment and contemporary discussion of natural or innate rights of man, particularly the philosophy of John Locke and Thomas Paine.¹¹² It is also possible that both the Founders of the United States and fraternities were at least partially informed by the free association embodied in the Freemason movement.¹¹³

4045680.php. One day later, the university suspended all 26 social fraternities and sororities. *Id.* In the Spring of 2013, fraternities and sororities may petition to be recognized by the university. *See Spring 2013 Reinstatement Timeline*, CHICO STATE UNIVERSITY, available at <http://www.csuchico.edu/greeklife/documents/ReinstatementTimeline.pdf>. In February of 2013, after allegations of hazing and alcohol abuse by certain fraternities and sororities, the University of Central Florida suspended most activities of the 48 recognized Greek organizations. *UCF Halts Some Fraternity, Sorority Events over Alcohol, Hazing*, WESH.COM, <http://www.wesh.com/news/central-florida/orange-county/UCF-halts-some-fraternity-sorority-events-over-alcohol-hazing/-/12978032/19005596/-/9qjw9gz/-/index.html> (last visited April 4, 2013). Most of the fraternities and sororities were reinstated on April 1, 2013. Denis-Marie Ordway, *UCF Lists Suspension for Most Fraternities Sororities*, ORLANDO SENTINEL, April 1, 2013, available at http://articles.orlandosentinel.com/2013-04-01/features/os-ucf-fraternities-suspension-lifted-20130401_1_ucf-officials-fraternities-sororities. At both Chico State and the University of Central Florida, the question remains whether a public university can impose a prior restraint upon organizations without disciplinary problems and without due process.

112. *See generally* Randy E. Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have - the Case of Associational Freedom*, 10 HARV. J.L. & PUB. POL'Y 101, 102-104 (1987); H. Wayne House, *A Tale of Two Kingdoms: Can There be Peaceful Coexistence of Religion with the Secular State?* 13 BYU J. PUB. L. 203, 219-20, 227-28, 231, 233 (1999); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 18, 47 (2001); Barbara Stark, *Deconstructing the Framers' Right to Property: Liberty's Daughters and Economic Rights*, 28 HOFSTRA L. REV. 963, 973-74, 996-97, 1000, 1012-13 (2000). Interestingly, the Supreme Court once seemed to attribute the Freedom of Association to Alexis de Tocqueville. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 n. 80 (1982). *Cf.* Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 HARV. J. L. & PUB. POL'Y 91, 98-99 (1987).

113. Many college fraternities were patterned on Freemasonry. NUWER, *supra* note 29, at 102; ALAN AXELROD, *INTERNATIONAL ENCYCLOPAEDIA OF SECRET SOCIETIES & FRATERNAL ORDERS* 52 (1997). The modern Masonic movement, established in 1717, was an early organization to take advantage of association unrelated to religion, business, or royalty. *See* JASPER RIDLEY, *THE FREEMASONS* 33 (1999); MARGARET C. JACOB, *THE ORIGINS OF FREEMASONRY* 11, 21, 18-20, 22, 24, 47, 48, 55 (2006). Among the many Masons prominent in the founding of the United States were Ben Franklin, George Washington, John Hancock, James Madison, James Monroe, Paul

A freedom of association was recognized in several early state constitutions, and its absence from the proposed federal constitution may have been germane to the reluctance of several states to ratify it. Virginia and North Carolina each proposed an amendment to the Constitution stating that “there are certain natural rights of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.”¹¹⁴ Virginia and North Carolina also proposed an amendment “that the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the Legislature for redress of grievances.”¹¹⁵ New York and Rhode Island offered similar amendments.¹¹⁶

James Madison proposed that “[t]he people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances, for redress of their grievances.”¹¹⁷ On August 19, 1789, the House approved “[t]he freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed.”¹¹⁸ But the Senate deleted the reference to “common good.”¹¹⁹ This left an ambiguity that exists today, as to whether the First Amendment recognizes a right to assembly for petitioning the government or whether the right to assembly was separate and apart from the right of petition.¹²⁰

The Federalist noted the necessity of freedom of association when

Revere, and John Paul Jones. RIDLEY, *supra*, at 108-9. Nine of the fifty-five signers of the Declaration of Independence were Masons, as were thirteen of the thirty-nine signers of the Constitution. *Id.* at 96. The Masons championed such ideas as self-government and free speech and the use of voluntary associations as a school for government. JACOB, *supra*, at 24, 47-48, 55.

114. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 657 (Jonathan Elliot ed., 1937) (amendments proposed by the Virginia Convention on June 27, 1788); 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 240, 243 (Jonathan Elliot ed., 1937) (amendments proposed by the North Carolina Convention on Aug. 1, 1788).

115. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 140 (Neil H. Cogan ed., 1997).

116. *Id.* at 141.

117. *Id.* at 129.

118. *Id.* at 143.

119. *Id.* at 70-71, 77.

120. John D. Inazu, *The Forgotten Freedom of Assembly*, 84. TUL. L. REV. 565, 573 (2010).

reviewing the role of factions in a republic.¹²¹ Strongly suggested in this discussion was the need for the people to freely associate in order for the republic to function.¹²²

Madison noted in *The Federalist* that while democracy could not survive with factions, a tyranny of the majority would occur without them.¹²³ He suggested that a republic might resolve that dilemma, because voluntary private associations would be put to work to maximize the opportunities for self-realization and to minimize the dangers attendant to a government with centralized power.¹²⁴ If the citizens were allowed to be secure in their freedom to freely associate, a wide variety of dynamic groups would develop, ensuring the vitality and strength of the republic.¹²⁵

Although the exact reasons for its absence are lost to history, no express endorsement of a freedom of association was added to the Constitution or Bill of Rights.¹²⁶

B. NAACP and the Recognition of the Right

The Supreme Court first formally acknowledged a freedom of association in *NAACP v. State of Alabama ex. rel. Patterson*,¹²⁷ where the Court held that a state law requiring the NAACP to release a membership list violated the constitutional rights of the group's members to associate freely.¹²⁸ Noting that curtailing the freedom to association is subject to the closest scrutiny, and that Alabama's law violated both the First and Fourteenth Amendments, Justice Harlan wrote for the Court:

It is beyond debate that freedom to engage in association for the

121. THE FEDERALIST NOS. 10, 54 (James Madison).

122. DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 67 (1984).

123. *Id.*

124. *Id.* at 58-59.

125. *Id.* at 59-60.

126. The lack of specific endorsement of a freedom of association may best be explained by Alexander Hamilton who stated, writing about freedom of the press, "Why, for instance should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed? I will not content that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible preference for claiming that power." THE FEDERALIST NO. 84 (Alexander Hamilton). *See also* Erwin Chemerinsky and Catherine Fisk, The Expressive Interest of Associations, 9 WM. & MARY BILL RTS. J. 595, 597-98 (2001).

127. 357 U.S. 449 (1958); *see also* Healy v. James, 408 U.S. 169, 181 (1972) ("While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition.").

128. Specifically, the question presented before the Supreme Court was "whether Alabama, consistently with the Due Process Clause of the Fourteenth Amendment, can compel petitioner to reveal to the State's Attorney General the names and addresses of all its Alabama members and agents, without regard to their positions or functions in the Association." *NAACP*, 357 U.S. at 451.

advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.¹²⁹

While *NAACP* stated that the Constitution protected “political, economic, religious or cultural matters,” it remained unclear whether purely social organizations were protected.¹³⁰

A few years later, commenting on its *NAACP* decision, the Court noted that the Constitution protected associations that were “not political,” but that existed for the social, legal, or economic benefit of its members.¹³¹

The right of “association,” like the right of belief, is more than the right to attend a meeting; it includes the right to express one’s attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.¹³²

With this, the Supreme Court gave recognition to relationships forged through associations that had no direct political impact and that could be structured outside an immediate family setting.¹³³

129. *Id.* at 460-61 (internal citations omitted).

130. Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 *YALE L.J.* 1, 20 (1964).

131. *Griswold v. Conn.*, 381 U.S. 479 (1965).

132. *Id.* at 483.

133. The Court eventually recognized the dual character of expressive and intimate association in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

C. Banning Specific Student Groups at Public Colleges and Universities¹³⁴

The issue of whether a public college or university may control students' associational rights through its program of education has been examined in detail only in a relatively old line of cases and largely in the setting of secondary schools.¹³⁵ In 1915, the U.S. Supreme Court considered *Waugh v. Board of Trustees of the University of Mississippi*,¹³⁶ which tested a Mississippi statute that abolished all secret orders, fraternities, and sororities at all educational institutions supported by state funds, including the University of Mississippi.¹³⁷

To meet the requirements of the statute, the University of Mississippi required each student desiring admission to the university to sign a pledge stating they were not a member, and would not become members, of any fraternity—essentially creating a prior restraint.¹³⁸ The plaintiff, an applicant to the University of Mississippi, refused to sign the pledge and was denied admission to the university, though he was otherwise

134. This essay generally considers fraternities' associational rights at public colleges and universities. Fraternities at private colleges and universities have had less success in asserting associational rights. For example, after Colby College in Maine banned all fraternities in 1984, twenty-nine members of Lambda Chi Alpha were suspended, placed on probation, and required to reapply for admission to Colby for continuing their active membership. Mark Blaudschun, *Party's Over for Colby Fraternity*, BOS. GLOBE, Sept. 20, 1990, at 89. Thirty other Lambda Chi members received less severe sanctions. *Id.* The students sued Colby under the Maine Civil Rights Act. *Phelps*, 595 A.2d at 403. The trial court denied relief to the students, and the Maine Supreme Court affirmed, holding that the Act did not authorize "Maine courts to mediate disputes between private parties exercising their respective rights of free expression and association." *Id.* at 407. See also *People ex rel. Pratt v. Wheaton Coll.*, 40 Ill. 186 (Ill. 1866) (holding that a private college may forbid students from joining a secret society). There are, however, other ramifications to colleges banning fraternities. The year after Colby abolished its fraternity system, alumni contributions declined by 33%. COLBY COLLEGE ECHO, May 7, 1985. While private colleges are likely free to ban fraternities as a contractual term for admission and matriculation, it is not as clear that colleges can ban fraternities for existing students. In addition, if a private college chooses to permit fraternities, there is the question whether there are some particularly odious regulations which exceed what is permitted by the First Amendment and Equal Protection Clause. See generally *infra* note 49-103 and accompanying text.

135. Ralph Rumsey, *Legal Aspects of the Relationship Between Fraternities and Public Institutions of Higher Education: Freedom of Association and Ability to Prohibit Campus Presence of Student Membership*, 11 J.C. & U.L. 465, 468 (1985).

136. 237 U.S. 589 (1915).

137. *Id.* at 591. Cf. *White*, 82 Ind. at 278, which states, while a college has authority to regulate a fraternity system, it could not ask incoming students to pledge not to join a fraternity. N.B. It is not clear whether the Indiana Supreme Court was interpreting the U.S. or Indiana Constitution, the Morris Land Grant Act, or generalized common law.

138. *Waugh*, 237 U.S. at 593.

qualified.¹³⁹ Appealing from a decision of the Mississippi Supreme Court, the plaintiff urged the U.S. Supreme Court to find that Mississippi denied his rights under the Fourteenth Amendment.¹⁴⁰

Without considering the plaintiff's argument that the University of Mississippi denied the plaintiff his right to association, the *Waugh* Court held that colleges maintain full discretion to interpret their educational mission and ways to carry out that goal as a means of enforcing discipline.¹⁴¹ Accordingly, the right of the state to create and enforce educational policy outweighed the unique circumstances of individual prospective students.¹⁴² As to the rights of students to associate in fraternities generally, the Court only noted that while "the right to pursue happiness and exercise rights and liberty are subject in some degree to" regulation, there are limits to the extent of those regulations under the Fourteenth Amendment.¹⁴³

Waugh may also represent a cul-de-sac in Constitutional jurisprudence.¹⁴⁴ Although never expressly overruled, *Waugh* relies on a rights-versus-privileges theory of higher education, no longer followed by courts;¹⁴⁵ in fact, at least two Supreme Court cases directly conflict with *Waugh's* analysis and conclusion.¹⁴⁶ Specifically, *Waugh* suggests that higher education at a public institution is a privilege, rather than a right, and thus a candidate for admission could be forced to abandon a Constitutional right in order to receive the privilege of education. Since that time, the Supreme Court and lower courts have held citizens cannot be compelled to give up Constitutional rights in exchange for a state-offered privilege.

A case that does appear to be much more relevant, however, is *Healy v.*

139. *Id.*

140. Specifically, the plaintiff alleged the University of Mississippi denied his "property right, liberty and his harmless pursuant of happiness." *Id.* at 593. The plaintiff also alleged violation of Mississippi law. *Id.*

141. *Id.* at 596.

142. *Id.*

143. *Id.*

144. James C. Harvey, *Rights, Privileges and Fraternities: Requiem for Waugh*, 35 FRATERNAL LAW 3, 4 (January 1991).

145. See Van Alstyne, *The Demise of the Rights-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Nancy S. Horton, *Traditional Single-Sex Fraternities on College Campuses: Will They Survive In The 1990s?* 18 J.C. & U.L. 419, 429-30 (Spring 1992); see also *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961) (university cannot expel student without due process).

146. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (students' freedom of expression may not be restricted without proof that its exercise would materially and substantially interfere with school activities or other students' rights); *Healy v. James*, 408 U.S. 169 (1972) (students' freedom of association may not be supported as a prior restraint based on unsupported fear of disruption).

James,¹⁴⁷ a 1972 case in which the U.S. Supreme Court had another occasion to consider a prior restraint to undergraduates' right to association in a student group.¹⁴⁸

In *Healy*, a state university in Connecticut denied official recognition to a student activism group based on the potential for disruption and violence.¹⁴⁹ The university argued that the denial of recognition abridged no associational rights because the student group could meet as a group off-campus, distribute written material off-campus, and informally meet together on-campus as individuals.¹⁵⁰ Additionally, the university claimed broad authority to limit students' expressive activity to further its overall educational goals.¹⁵¹

The Supreme Court, however, rejected the college's arguments and held that non-recognition stifled the exercise of the student group's associational rights; meeting off-campus did not mitigate the impact of non-recognition.¹⁵² The Court stated "the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities."¹⁵³

Where the lower court placed the burden of proof on the student group to show that it was entitled to recognition, the Court held that the burden rested on the university to justify its rejection of the student group's

147. *Tinker*, 408 U.S. 169. Between *Waugh* and *Healy*, federal courts considered some aspects of the issue of fraternities and associational rights, but did not face the issue squarely. See e.g. *Sigma Chi Fraternity v. Regents of the Univ. of Colo.*, 258 F. Supp. 515 (D. Colo. 1966) (university denied recognition after finding fraternity restricted membership on the basis of race); *Webb v. State Univ. of N.Y.*, 125 F. Supp. 910 (N.D.N.Y. 1964) (affirming college's authority to control discipline and distinguished by *Healy*); *Beta Sigma Rho, Inc. v. Moore*, 46 Misc. 2d 1030, 261 N.Y.S.2d 658 (N.Y. Sup. Ct. 1965), *aff'd* 25 A.D.2d 719, 269 N.Y.S.2d 1012 (N.Y. App. Div. 4th Dept. 1966) (decided on the basis of contract and equal protection). The Supreme Court distinguished these cases from *Healy* because they did not involve a political organization and because the *Healy* case involved procedural issues. *Healy*, 408 U.S. at 1279-80.

148. A few years earlier, the Supreme Court had recognized a student right to freedom of speech in *Tinker*, 393 U.S. at 506 (students do not lose their rights to freedom of speech and expression "at the schoolhouse gate"). *Tinker* played an important role in *Healy*, decided three years later, which recognized a corresponding right of association for students. 408 U.S. at 180-2.

149. *Healy*, 408 U.S. at 172-4, 176 n. 4.

150. *Id.* at 182-83. Interestingly, the college in *Healy* confronted an organization that was known for violence and disruption, but still preserved the right of students to meet and distribute literature off-campus, and to gather informally on campus. Several colleges, however, have even prohibited those activities on the part of fraternity members. See *infra* note 248.

151. *Healy*, 408 U.S. at 187-88.

152. *Id.* at 183.

153. *Id.*

application for recognition.¹⁵⁴ Since rejection of recognition was a form of prior restraint, the burden of proof lay with the university to prove such restraint was appropriate.¹⁵⁵ Furthermore, the denial of recognition needed to be based on the organization's activities rather than its philosophy.¹⁵⁶

IV. ASSOCIATIONAL RIGHTS OF VOLUNTARY ORGANIZATIONS

A. The *Roberts* Case

The watershed for considering freedom of association in the context of voluntary and private social organizations was in *Roberts v. United States Jaycees*.¹⁵⁷ The United States Jaycees—or Junior Chamber of Commerce—“gives young people between the ages of 18 and 40 the tools they need to build the bridges of success for themselves in the areas of business development, management skills, individual training, community service, and international connections.”¹⁵⁸ At the time of the case, membership was restricted to men, with non-voting associate membership available to women.

Two local chapters in Minnesota decided to admit women as full members and were sanctioned by the national organization.¹⁵⁹ The Minnesota chapters responded by suing the national organization under the Minnesota public accommodations statute;¹⁶⁰ the national organization countered that allowing chapters to admit women violated male members' freedom of association.¹⁶¹

At the Supreme Court, the Minnesota chapters prevailed and their right

154. *Id.* at 184, 190, 193–4. The *Healy* court anchored students' associational rights in the First Amendment, rather than the Equal Protection Clause. *See generally id.* at 171–3.

155. *Id.* at 186.

156. *Id.* at 188–189. Despite this guidance from *Healy*, in 1976 Texas A & M University tried unsuccessfully to ban a student homosexual organization because of its philosophy, despite the fact that the organization did not seek formal recognition and only desired to meet on campus and use student bulletin boards. *Gay Student Servs. v. Texas A&M Univ.*, 737 F.2d 1317, 1319–1320 (5th Cir. 1984), *cert. denied* 471 U.S. 1001 (1985), *reh'g denied* 471 U.S. 1120 (1985) (Texas A&M argued that “the stated purposes and goals of the ‘Gay Student Services’ are not ‘consistent with the philosophy and goals that have been developed for the creation and existence of Texas A & M University.’”). After the gay student organization prevailed, Texas A&M for the first time gave official recognition to fraternities. Kara Bounds Socol, *The Evolution of Aggie Greeks* (Aug. 3, 2010), <http://tamunews.tamu.edu/2010/08/03/the-evolution-of-aggie-greeks> (last visited Feb. 23, 2012).

157. 468 U.S. 609 (1984).

158. Jaycees, *Learn More about the Jaycees*, <http://www.usjaycees.org> (last visited September 23, 2011).

159. *Roberts*, 468 U.S. at 614.

160. MINN. STAT. § 363.03(3) (1982).

161. *See generally Roberts*, 468 U.S. at 617.

to admit women was affirmed in contravention of the national rules. The Court held that the right to associate for expressive purposes was not absolute. Infringements on that right could be justified by state regulations adopted to serve compelling interests that could not be achieved through means significantly less restrictive of associational freedoms, provided that the restrictions were unrelated to the suppression of ideas.¹⁶² Writing for the majority, Justice Brennan found that the state of Minnesota had a compelling interest in providing women the economic benefits that came with membership in the Jaycees.

The Court grouped associations into three categories: expressive, intimate,¹⁶³ and economic; the decision focused, however, on expressive and intimate associations.¹⁶⁴ Intimate associations are an element of personal liberty; human relationships that “must be secured against undue intrusion by the State because of the role of such relationships in safeguarding . . . individual freedom[s].”¹⁶⁵ Expressive associations are protected by the First Amendment to allow groups to engage in speech, assembly, petitioning for the redress of grievances, and the exercise of religion.¹⁶⁶

162. *Id.* at 623.

163. *Id.* at 618.

164. *Id.*; *See also id.* at 632–34 (O’Connor, J., concurring) (the Court used the term “commercial association” in *Roberts*, but the academic literature has referred to it as an economic association); *See, e.g., id.* at 626, 629; *id.* at 632–34 (O’Connor, J., concurring); Richard A. Epstein, *Church and State at the Crossroads: Christian Legal Society v. Martinez*, 2010 CATO SUP. ST. REV. 105, 117–18 (2009–2010) (Justice Brennan’s majority opinion suggested there were four types of associations: 1) intimate expressive; 2) intimate non-expressive; 3) non-intimate expressive; and 4) non-intimate non-expressive); John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 CONN. L. REV. 149, 155–56 (2010) (since Jaycees, it has become clear that intimate associations receive the highest level of Constitutional protection, regardless of whether they are expressive. *Id.* at 156. Indeed, all associations likely have expressive potential. The very act of gathering may be expressive. The categories of speech and standard of review is notoriously complicated, indeed somewhat confused); *see, e.g., Eugene Volokh, Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1963 (2006) (“Strict scrutiny doctrine is notoriously hard to transport from one field to another. In equal protection and free speech cases it has with few exceptions been ‘strict in theory, fatal in fact.’”).

165. *Id.* at 618; The Court added that the government may impermissibly burden the freedom to associate in a variety of ways, including “impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group” and “interfer[ing] with the internal organization or affairs of the group.” *Id.* at 622–23; Freedom to associate “plainly presupposes a freedom not to associate.” *Id.* at 623; *see also* Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 544–45 (1983).

166. *Roberts*, 468 U.S. at 618; *see also* John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 CONN. L. REV. 149, 153–54 (2010) (“Expressive association fails to account for the expressive potential inherent in all groups”). (Expressive association requires strict scrutiny); *Christian Legal Soc’y*, 130

The Court provided little guidance on the strictures or boundaries of expressive association, suggesting it was a characteristic of groups advancing “a wide variety of political, social, economic, educational, religious, and cultural ends.”¹⁶⁷

But the Court made it clear that the right to expressive association could be limited or abridged when “justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”¹⁶⁸ Essentially, an “individual’s statutory freedom from discrimination trumps a group’s constitutional freedom of expressive association unless that group can establish a nexus between its exclusionary policy and its expressive association.”¹⁶⁹

Focusing on intimate association, the Court emphasized that such groups are characterized by their size, selectivity, and intimacy.¹⁷⁰ The Court then determined that the Jaycees were not small, selective, or intimate, and thus

S. Ct. at 2985–86 (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)).

167. *Roberts*, 468 U.S. at 622. The Court added that expressive association was “especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.” *Id.* Three years later the Court considered similar circumstances in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1983). In *Rotary* the Court examined the purpose of the organization, which encouraged chapters to create in membership a cross-section of the business and professional life of a community. *Id.* at 546. The organization’s broad purpose, high turnover rate, vigorous recruitment, and policy of encouraging guests to attend meetings failed to meet the Court’s standard for an intimate association. *Id.* at 547. *Boy Scouts of America v. Dale* refined the Court’s explanation of expressive association. 530 U.S. 640 (2000). “It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity. See *Roberts*, *supra*, at 636, 104 S. Ct. 3244 (O’CONNOR, J., concurring) (‘Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement’).” *Dale*, 530 U.S. at 650 (internal citations included). But *Dale* is less relevant to this discussion because it focuses on the forced inclusion to a group of an unwanted person. *Id.* at 648.

168. *Id.* at 623.

169. Bryson J. Hunter, *Introduction to Perspectives on Constitutional Exemptions to Civil Rights Laws: Boy Scouts of America v. Dale*, 9 WM. & MARY BILL RTS. J. 591, 593 (2001). The Court’s analysis of expressive association was explained in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). See also *Bd. of Dir’s of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987) (“In many cases, government interference with one form of protected association will also burden the other form of association”); “Although a group may have some right as a group, all of the Supreme Court’s decisions concerning freedom of association have emphasized its protection based on the rights of the individuals involved.” Erwin Chemerinsky and Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 605–06 (internal citations omitted).

170. *Roberts*, 468 U.S. at 621. The Court also noted that purpose, policies, congeniality, and other characteristics might be pertinent in other cases. *Id.* at 620.

were not a protected intimate association.¹⁷¹

Specifically, the Jaycees existed as an association to engage in civic activities. The average Jaycees chapter was not small, having over four hundred members, with some chapters as large as nine hundred members.¹⁷² Selectivity played no role in enrolling new Jaycees members.¹⁷³ And since Jaycees involved outsiders in most of its activities, and sought extensive media coverage of its civic and philanthropic events, the Jaycees did not operate in intimate seclusion.¹⁷⁴

Because individual fraternity chapters invariably have fewer than four hundred members, are selective in membership decisions, and conduct many (if not most) activities in seclusion,¹⁷⁵ the *Jaycees* decision suggested that fraternities were entitled to some associational rights. Two court decisions that followed seemed to extinguish that hope.

B. Aftermath of the *Roberts* decision

In 1996, Pittsburgh police raided the Pi Lambda Phi fraternity house at the University of Pittsburgh, arresting several members and confiscating illegal drugs and drug paraphernalia.¹⁷⁶ The university subsequently determined that the membership at large either tacitly approved of the drug activity, or failed to take responsibility for other members' actions. Based on that finding, the university suspended the fraternity for one year and imposed sanctions on its members.¹⁷⁷ Ultimately, the university withdrew recognition of the fraternity.¹⁷⁸ Members of the fraternity sued the university and alleged, *inter alia*, that the university had violated the fraternity members' rights to free association under the First and

171. *Id.* at 618–19; *see also* *Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548–49 (1987).

172. *Roberts* 468 U.S. at 621.

173. *Id.* at 620.

174. *Id.* *See also* *Bd. of Directors of Rotary Int'l*, 481 U.S. 537.

175. Br. for Amici Curiae N. Am. Interfraternity Conference and National Panhellenic Conference in Support of Plaintiffs-Appellees, and in Support of the District Court's Decision at 7, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007) (No. 06-4111-cv) (“During [] weekly chapter meetings, Greek organizations meet with the members of their chapter to discuss the critical aspects of their organization. Such topics generally include the private business of the chapter, along with discussions of potential members. These meetings are often held using the respective organization's ritual and require seclusion from all but members of that particular organization”).

176. *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 439 (3d Cir. 2000).

177. *Pi Lambda Phi, Inc. v. Univ. of Pittsburgh*, 58 F. Supp. 2d 619, 622 (W.D. Pa. 1999).

178. *Pi Lambda Phi Fraternity*, 229 F.3d at 439–40.

Fourteenth Amendments.¹⁷⁹

Perhaps because tied to the serious criminal allegations against the fraternity, the trial court reviewed the intimate association claim cursorily, stating, “[t]he personal relationships protected by the right to intimate association are ‘those that attend the creation and sustenance of a family—marriage, . . . the raising and education of children, . . . and cohabitation with one’s relatives’ [c]learly, plaintiffs are not engaged in the sort of intimate human relationships that give rise to First Amendment protection.”¹⁸⁰ And finding that the purpose of a fraternity was “social,” the court found no right to expressive association.¹⁸¹ In fact, according to the court, “[e]ven assuming that the fraternity is an expressive association . . . [t]he university defendants were entitled to regulate the [fraternity’s] conduct with respect to drug use”¹⁸²

The Third Circuit affirmed the trial court noting the *Roberts* standard for intimate association based on smallness, selectivity, and seclusion, and holding that Pi Lambda Phi failed to meet that standard.¹⁸³

Specifically, the Third Circuit confused two separate concepts related to size and selectivity. Citing *Roberts* and *Rotary*, the court noted that chapters in the Jaycees and Rotary had membership in a range of fewer than twenty to as many as nine hundred members.¹⁸⁴ While that put the Pi Lambda Phi chapter, with eighty members, roughly in the same rubric, the Third Circuit intertwined that number with an analysis of both Jaycees’ and Rotary’s inclusiveness. Rotary Clubs were instructed by its central organization to include all qualified members within its geographic

179. *Pi Lambda Phi*, 58 F. Supp. 2d at 622. The fraternity also alleged the university violated its rights to equal protection, and substantive and procedural due process. *Id.*

180. *Id.* at 623 (quoting *Roberts*, 468 U.S. at 619–20).

181. *Id.* at 624. Interestingly, while there may be strong arguments that Pi Lambda Phi was not an expressive association under the *Roberts* criteria, the trial court relied on three odd cases as support for the proposition that the only purpose of a fraternity is social. The court cited *Cornelius v. Benevolent Protective Order of the Elks*, 382 F. Supp. 1182, 1195 (D. Conn. 1974) (“the associational activities of the Elks and Moose are purely social and not political and therefore do not come within the core protection of the right to associate”); *Sigma Chi Fraternity v. Regents of the Univ. of Colo.*, 258 F. Supp. 515, 526 (D. Colo. 1966) (court notes lack of Supreme Court precedent concerning freedom of association as it relates to a social organization in 1966; the Supreme Court did consider relevant cases after 1966 and before Pi Lambda Phi was decided. Further, it is not clear from the case that either the University of Colorado or Sigma Chi termed the fraternity a social organization); and *Phinney v. Dougherty*, 307 F.2d 357, 361 (5th Cir. 1962) (for purposes of the internal revenue code college fraternities are social organizations).

182. *Pi Lambda Phi*, 58 F. Supp. 2d at 624.

183. *Pi Lambda Phi Fraternity*, 229 F.3d at 438.

184. *Id.* at 442.

territory, and to avoid arbitrary limits on growth.¹⁸⁵ Jaycees chapters were “large and basically unselective,” and the only reason anyone could recall a prospective member being rejected was for their gender.¹⁸⁶

Essentially the Third Circuit conflated the fact that Pi Lambda Phi overlapped in size with smaller Jaycees chapters and Rotary Clubs, and then presumed that resulted from a lack of selectivity. But there is nothing in the decision to support that analysis, other than the court’s conclusory statement that Pi Lambda Phi was “not particularly selective in whom it admits.”¹⁸⁷ In fact, fraternities are typically very selective in choosing new members, and often criticized for their exclusivity.¹⁸⁸

While the court’s analysis is inexplicable with respect to the standards the Supreme Court set forth in *Roberts*,¹⁸⁹ fraternity members had violated the law and, rather than accept what was likely a just punishment, the fraternity litigated to avoid group responsibility.¹⁹⁰ Indeed, if this decision is viewed as regulating conduct rather than expressive or intimate speech, then it is possible that this was a strong decision and outlier intended to

185. *Bd. of Directors of Rotary Int’l*, 481 U.S. at 546.

186. *Roberts*, 468 U.S. at 621.

187. *Pi Lambda Phi Fraternity*, 229 F.3d at 442. The court also pointed out that the fraternity recruited from the general student body, held parties open to non-members, and participated in university events, although it is not clear why those attributes would make an organization unselective in choosing new members. *Id.* at 442. The court also held that the fraternity was not an expressive association. *Id.* at 438; see *Roberts*, 468 U.S. at 622–23; *Bd. of Directors of Rotary Int’l*, 481 U.S. at 548–49; see also *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); see also *Chi Iota*, 443 F. Supp. 2d at 385.

188. See generally *Hamilton Chapter of Alpha Delta Phi v. Hamilton Coll.*, 128 F.3d 59, 61 (2nd Cir. 1997); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 443 F. Supp 2d 374, 387 (E.D.N.Y. 2006) (overruled) (“Plaintiffs noted at oral argument that fraternities and sororities are generally portrayed as and criticized for being exclusive and selective . . . in the case at bar, plaintiffs have provided several details regarding the Fraternity’s selectivity in membership”); *Phelps v. President & Trs. of Colby Coll.*, 1990 Me. Super. LEXIS 176, 2 (Me. Super. Ct. Aug. 23, 1990); *Reardon v. Wroan*, 811 F.2d 1025, 1028 n. 2 (7th Cir. 1987); BAIRD’S MANUAL 17th at 3–4; Nuwer, *supra* note 29, at 45; Susanna Ashton, *Making Peace with the Greeks*, CHRON. HIGHER EDUC. (Nov. 17, 2006); Bassinger, *supra* note 80; Nicholas Syrett, *Schools Are Culpable*, NEW YORK TIMES (May 6, 2011), <http://www.nytimes.com/roomfordebate/2011/05/05/frat-guys-gone-wild-whats-the-solution/colleges-condone-fraternities-sexist-behavior> (last visited Feb. 28, 2012).

189. Several commentators have suggested that this is the inherent flaw in *Roberts*’ categories of intimate and expressive association. See, e.g., John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 CONN. L. REV. 149, 150–53 (2010).

190. At least one commentator has suggested that in application to groups with unpopular compositions and messages, the Jaycees standards are unworkable. Inazu, *supra* note 189, at 149. Professor Inazu suggests instead that the categories of intimate and expressive association be merged into a general right of assembly. *Id.* at 200; see also John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (Feb. 2010).

punish unacceptable behavior.¹⁹¹ But in 2007, the Court of Appeals for the Second Circuit applied *Roberts* similarly, and in a case where the fraternity may have been a much more sympathetic plaintiff.

In 2005, the College of Staten Island, a branch of the public City University of New York (“CUNY”), denied recognition to Chi Iota Colony, an all-male Alpha Epsilon Pi (“AEPi”) expansion group, because it discriminated on the basis of gender.¹⁹² AEPi was a men’s fraternity founded in 1913 “to provide opportunities for the Jewish college man seeking the best possible college and fraternity experience,”¹⁹³ and the Chi Iota Colony was the national fraternity’s effort to install a chapter at the College of Staten Island. As all fraternities, the goals of the organization were noble, seeking “to promote and encourage among its members: Personal perfection, a reverence for God and an honorable life devoted to the ideal of service to all mankind; lasting friendship and the attainment of nobility of action and better understanding among all faiths”¹⁹⁴

191. Many colleges and universities attach some form of “collective responsibility” to acts carried out by members of fraternities. See, e.g., Jim Puzanghera, *Stanford Burglary Gets More Serious*, SAN JOSE MERCURY NEWS (San Jose, CA), Apr. 11, 1995. And some have taken umbrage at the application of collective responsibility. See, e.g., *Psi Upsilon v. Univ. of Pa.*, 591 A.2d 755, 759, 761 (Pa. Super. Ct. 1991). But fraternities do choose their members and by the nature of fraternal bonds accept some responsibility for the actions of their brothers and sisters, particularly when the act was carried out in the name of the fraternity. And certainly some good comes from collective responsibility as well. See, e.g., Shaun R. Harper, *The Effects of Sorority and Fraternity Membership on Class Participation and African American Student Engagement in Predominantly White Classroom Environments* (Jan. 2008), available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=sharper>.

192. *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007).

193. *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 443 F. Supp 2d 374, 376 (E.D.N.Y. 2006), *overruled by* *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d 136 (2nd Cir. 2007) (quoting AEPi Mission Statement); see also Alpha Epsilon Pi, *Mission Statement of AEPi*, <http://www.aepi.org/?page=MissionStatement> (last visited Feb. 21, 2012) (“As a secular Jewish organization with Brothers from all denominations, Alpha Epsilon Pi is non-discriminatory and open to all who are willing to espouse its purpose and values”); AEPi, *Jewish Life*, <http://www.aepi.org/?page=JewishLife> (last visited Feb. 21, 2012). AEPi was associated with Jewish organizations such as the AIPAC, B’nai B’rith, and Taglit Birthright Israel Trips. *AEPi Jewish Identity Enrichment Programming*, <http://www.aepi.org/?page=JewishLife> (last visited Feb. 21, 2012). AEPi has also partnered with the organization “Taglit-Birthright Israel” to send members on cost-free trips to Israel. *Id.*

194. *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 443 F. Supp 2d at 377 (quoting AEPi by-laws).

Plaintiffs further describe the Fraternity’s purpose as achieving a ‘lifelong interpersonal bond termed brotherhood,’ which ‘results in deep attachments and commitments to the other members of the Fraternity among whom is shared a community of thoughts, experiences, beliefs and distinctly personal aspects of their lives.’ Plaintiffs explain that ‘[t]he single-sex, all-

The fraternity appeared deeply important to AEPi's members. According to its past president, the fraternity was a "lifelong interpersonal bond termed brotherhood," which "results in deep attachments and commitments to the other members of the Fraternity among whom is shared a community of thoughts, experiences, beliefs and distinctly personal aspects of their lives."¹⁹⁵ As to the single-sex composition of the organization, the fraternity explained:

The single-sex, all-male nature of the Fraternity is essential to achieving and maintaining the congeniality, cohesion and stability that enable it to function as a surrogate family and to meet social, emotional and cultural needs of its members. Furthermore, non-platonic, *i.e.*, romantic relationships between members and the inevitable jealousies and other conflicts would pose a grave threat to the group's brotherhood, thus, maintaining the Fraternity's brotherhood is best achieved by maintaining an all-male membership.¹⁹⁶

The colony was established in 2002, and from that time until the lawsuit was filed in 2005, it never had more than twenty members. In 2004 it applied to the college for recognition, which was rejected. The college's response was that "[m]embership in a chartered club must be open to all students. Because your constitution appears to exclude females, it contravenes the College's non-discrimination policy. . . . In addition . . . your proposed constitution provides for the practices of rushing and pledging. College policy . . . prohibits rushing and pledging."¹⁹⁷

The denial of recognition prohibited AEPi from using college facilities, bulletin boards, mailboxes, workspace in the campus center, or meeting space on campus.¹⁹⁸ AEPi was also precluded from using the college's name in association with the group or applying for funding from the

male nature of the Fraternity is essential to achieving and maintaining the congeniality, cohesion and stability that enable it to function as a surrogate family and to meet social, emotional and cultural needs of its members. Furthermore, non-platonic, *i.e.*, romantic relationships between members and the inevitable jealousies and other conflicts would pose a grave threat to the group's brotherhood, thus, maintaining the Fraternity's brotherhood is best achieved by maintaining an all-male membership.'

Id. (internal citations omitted).

195. *Id.*

196. *Id.*

197. *Id.* at 380. Other branches of the City University of New York permit single-sex fraternities (and rushing and pledging). See, e.g., Brooklyn College, *Student Clubs*, <http://www.brooklyn.cuny.edu/web/campuslife/clubs.php> (last visited Mar. 1, 2012); The City College of New York, *Fraternities and Sororities, Overview of Greek Life at CCNY*, <http://www1.cuny.cuny.edu/current/student/activities/greek/index.cfm> (last visited Mar. 1, 2012).

198. *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 443 F. Supp 2d at 380.

student government.¹⁹⁹ Perhaps most importantly, AEPi was specifically prohibited from handing out flyers to students on campus, hanging banners advertising events, or using chalkboards to make announcements.²⁰⁰ AEPi further explained that holding “meetings off-campus has caused difficulty for students who depend on public transportation.”²⁰¹

In 2005 AEPi sued in the United States District Court for the Eastern District of New York alleging the group’s rights to intimate and expressive²⁰² association had been violated.²⁰³ The district court granted a preliminary injunction against the college on AEPi’s intimate association claim, but the U.S. Court of Appeals for the Second Circuit reversed on appeal from the college.²⁰⁴

The Second Circuit balanced the fraternity’s associational rights against CUNY’s interest in preventing discrimination, and found the balance in favor of CUNY.²⁰⁵ The court’s analysis, focusing on intimate association, was puzzling.²⁰⁶

The Second Circuit noted that in *Roberts*, an average Jaycees chapter

199. *Id.*

200. *Id.*

201. *Id.*

202. Neither the trial court nor the appellate court analyzed the expressive association issue in depth. The Second Circuit, while acknowledging that AEPi was primarily a fraternity for Jewish men, seemed to suggest that the fraternity was not quite Jewish enough. *See generally* 502 F.3d at 140-142. Chi Iota, in testimony, seemed to suggest otherwise, e.g. AEPi is “predominantly Jewish male fraternity,” “we’re a Jewish fraternity,” “extending bids to non-Jewish potential members has been ‘an issue with some brothers.’” *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 443 F. Supp. 2d at 378. The national organization of AEPi, describes itself as “the Global Jewish Fraternity” and it “was founded to provide opportunities for a Jewish man seeking the best possible college and fraternity experience. We have maintained the integrity of our purpose by strengthening our ties to the Jewish community and serving as a link between high school and career. Alpha Epsilon Pi develops leadership for the Global Jewish community at a critical time in a young man’s life.” Alpha Epsilon Pi, <http://www.aepi.org> (last visited Mar. 1, 2012). AEPi associates itself with Jewish organizations including B’nai B’rith, and “Taglit Birthright Israel,” which sends members on cost-free trips to Israel. *See* Alpha Epsilon Pi, *Jewish Life*, <http://www.aepi.org/?page=JewishLife> (last visited Mar. 1, 2012).

203. *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 443 F. Supp 2d at 376. AEPi also claimed a violation of equal protection. *Id.*

204. *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d 136. The District Court also rejected AEPi’s claim based on expressive association. 443 F. Supp. 2d at 445. The Second Circuit remanded the case for a full trial, noting that AEPi’s “interests in expressive association are relatively weak.” 502 F.3d at 149. Sometime during the pendency of the appeal, AEPi at the College of Staten Island disbanded. John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 CONN. L. REV. 149, 191 (2010).

205. *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F. 3d at 139.

206. The court did not consider AEPi’s expressive association as a matter of procedure. *Id.* at 149, n. 2.

had four hundred members and as many as nine hundred members. While the Second Circuit recognized that the Alpha Epsilon Pi had only eighteen members, it held that its size²⁰⁷ was low by circumstance rather than a desire to maintain intimacy.²⁰⁸

Although precise data is hard to find for fraternity chapters across North America, in 1999–2000 the average chapter size for women was 54; in 2011 the average chapter size for men was 63.²⁰⁹

With regard to selectivity, the court found that the fraternity's aggressive recruitment practices suggested it was not selective, as did its affiliation with the national Alpha Epsilon Pi organization.²¹⁰ Finally, as to seclusion, the court found that while some fraternity activities were restricted to members, the fraternity also invited non-members to some parties,

207. Beyond the general rubric of the *Roberts* Court instructing that size is to be a factor considered for intimate association, there is nothing in that decision that suggests that size alone prevents intimate association. Indeed, some families, related by blood or marriage, are quite large, and certainly larger than an eighteen member fraternity such as AEPi. There are no bright lines separating the types of relationships that receive heightened protection; instead, courts must carefully assess “where that relationship’s objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.” *Roberts*, 468 U.S. at 620.

208. *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d at 145. It is important to point out the procedural posture: this was an appeal from a preliminary injunction and extensive testimony had not yet occurred. It is also worth noting that the College of Staten Island had, at the time, over 11,000 students, and Alpha Epsilon Pi included only .2% of the total student population (and 1.1% of its male population); 443 F. Supp. 2d at 386; 502 F.3d at 145. Additionally, as Justice O’Connor wrote in another matter concerning associational rights, “[i]n a city as large and diverse as New York City, there surely will be organizations that . . . are deserving of constitutional protection. For example, in such a large city, a club with over 400 members may still be relatively intimate in nature, so that a constitutional right to control membership takes precedence.” *New York State Club Ass’n, Inc. v. City of N.Y.*, 487 U.S. 1 (1988) (O’Connor, J., concurring); see also *Louisiana Debating & Literary Ass’n v. City of New Orleans*, 42 F.3d 1483, 1487, n. 28 (5th Cir. 1995). Staten Island is one of the five boroughs of New York City. See generally *Staten Island USA*, <http://statenilandusa.com> (last visited Feb. 20, 2012). The Alpha Epsilon Pi trial court also noted that the Supreme Court in *Rotary Club* found that while the association had no upper limit for membership, the Court’s focus was more on a lack of selectivity than on the need for a numerical cutoff. 443 F. Supp. 2d at 386.

209. Encyclopedia of American Education, *Fraternity* (June 25, 2011, 2:47 PM), <http://american-education.org/875-fraternity.html>; North American Interfraternity Conference, *2011 NIC/NPC Congressional Visit Packet*, available at http://www.nicindy.org/uploads/files/2011_Visit_Materials-FINAL.pdf (last visited Mar. 1, 2012).

210. According to the court, “[f]raternity members invite approximately one out of ten men they meet on campus—and about a third of the men they know through Jewish groups—to rush events. Most of those who attend a first rush event are invited back for later events, and the majority of those who attend multiple events are asked to pledge.” 502 F.3d at 145. Keeping in mind that this effort resulted in eighteen members out of four thousand five hundred men attending the college, query whether most intimate associations, including marriage, are significantly more selective.

recruitment activities, and participated in some CUNY activities.²¹¹

Critics have questioned the courts' logic in *Pi Lambda Phi* and *Alpha Epsilon Pi*.²¹² While there may have been no regulated upper limit to the fraternity's membership, no fraternity chapter has four hundred members, which was the size of the Minnesota Jaycees chapters.²¹³ In fact, the overwhelming majority of fraternity chapters have fewer than one hundred members.²¹⁴ Indeed, on a large number of college campuses, fraternity members live in dedicated restricted housing (whether privately- or college-owned) and share meals together, allowing an even greater degree of intimacy than most organizations.²¹⁵

Over the years, fraternities have frequently been accused of being too selective, not unselective.²¹⁶ Individual chapters are seeking members generally called "brothers" or "sisters," suggesting a close relationship. Fraternities are focused on individual growth and mentoring within the confines of a closely bound membership, rather than the primary purpose of the Jaycees, which is to contribute to the community.²¹⁷

Fraternity membership is not only restricted to students attending a specific college or university, but generally students of the same gender.²¹⁸ Because these students will often live and dine together, fraternities require a vote on new members, with some fraternities or chapters requiring a supermajority or unanimous vote.²¹⁹ In some respects membership is restricted to the chapter that initiated a student; fraternities often have restrictive rules governing whether an initiated member can participate in another chapter of the same fraternity upon transferring schools, or attending another school as a graduate student where there may be another

211. *Id.* at 146–47.

212. *See, e.g.,* John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149 (2010).

213. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612 (1984).

214. *See infra*, note 209 (stating average chapter size).

215. *See* BAIRD'S MANUAL, *supra* note 3, at I–10.

216. *See Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 443 F. Supp. 2d at 386. Indeed, some of the greatest criticisms of fraternities is that membership selection is too selective. Most fraternities previously had rules restricting membership to Caucasian men. BAIRD'S MANUAL, *supra* note 3, at I–22–23; *see supra* note 188, 210; *see also supra* notes 201–206 (discussing exclusivity and voting for members).

217. *Roberts*, 468 U.S. at 612–13.

218. *See, e.g.,* North-American Interfraternity Conference, *Statement of Position Regarding Single-Gender Membership*, [http://www.nicindy.org/about/resolutions/#Single Gender Membership](http://www.nicindy.org/about/resolutions/#Single%20Gender%20Membership) (last visited Mar. 2, 2012) (emphasizing the NIC's strong support in single-gender membership).

219. *See Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 443 F. Supp. 2d at 386; *see also e.g.,* FarmHouse International Fraternity, *The Bylaws 2010–2012*, <http://farmhouse.org/guides/bylaws.pdf> (last visited Mar. 2, 2012); Alpha Epsilon Pi Fraternity Supreme Const. art. II (amended Aug. 1997), *available at* http://www.aepi.org/resource/resmgr/files/supreme_constitution.pdf.

chapter of the fraternity.²²⁰

The membership structure of fraternities presumes students will graduate at some point, and thus the organizations must recruit new members. Accepting for argument's sake that fraternity recruitment is selective in a single year, it is not clear why repeating the process annually to replace graduating members makes an organization unselective. Indeed, that alumni often stay involved in local chapters and the national organization for life suggests that there was some degree of intimacy in the organization and its selection process. It is also not clear why the court believed the existence of an umbrella organization comprised of similarly organized locally managed chapters reduces the selectivity of local chapters.

Although the *Pi Lambda Phi* and *AEPi* courts focused on the fact that some fraternity activities were non-private, the courts did not attempt to measure the importance or significance of the non-private events to members versus the importance or significance of fraternity activities that were conducted privately. The mere fact that any organization has a public face does not necessarily mean that its private activities are unimportant or irrelevant. There is also some irony that the fraternities were essentially punished by the courts for good citizenship through participation in campus and community activities, where they might have received greater protection were their activities restricted to members alone.

The most critical fraternity activities, such as meetings, ritual ceremonies, and initiations or bonding ceremonies, are universally private, and almost all are secret; most fraternity pledges and oaths include a promise to keep all such activities confidential.²²¹

The Second Circuit did not consider *AEPi*'s rights to expressive association.²²² The Amici, however, raised several intriguing arguments that fraternities were in fact protected expressive associations, noting the Supreme Court's statement that "[a]s we give deference to an association's

220. See, e.g., Theta Chi Fraternity Const. and By-Laws art. VI (Mar. 2012), <http://www.thetachi.org> (follow "Resources" hyperlink; then follow "Constitution and Bylaws" hyperlink); Psi Upsilon Constitution art. IX, § C (Oct. 2004), <http://www.psiu.org/ug/handbooks/Constitution%2009.pdf>; Delta Sigma Phi Fraternity, Constitution and Bylaws art. II, <http://www.deltasig.org> (follow "Chapter Resources" hyperlink; follow "Constitution and Bylaws" hyperlink under "Manuals"); see also Sigma Alpha Epsilon Fraternity, *The Fraternity Laws* § 47(D) (3) (2011), <http://www.saerecord.net/files/docs/FraternityLaws.pdf>.

221. Const. of Chi Psi Fraternity, art. 1 § 3.2 (Aug. 7, 2010), http://www.chipsi.org/resource/collection/2C613DFE-F5BE-4DBC-BF18-89EB6083E589/Constitution_-_as_of_7_August_2010.pdf; Delta Sigma Phi Fraternity Const. and Bylaws art. III § K (Aug. 2011), <http://www.deltasig.org/files/2011%20Revision%20Constitution%20&%20Bylaws.pdf>. Delta Upsilon Fraternity is an exception. BAIRD'S MANUAL 17th at 8. See also *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 443 F. Supp. 2d at 386.

222. *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d at 149, n. 2.

assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."²²³

The Amici pointed out that fraternities have existed on college or university campuses in the United States for over 200 years as single-sex organizations; the forced inclusion of all students could destroy the organizations' success.²²⁴ If coeducation were forced upon fraternities nationwide, significant changes would have to be made in thousands of houses, and the development of brotherhood and sisterhood might be "destroyed."²²⁵ Furthermore, if forced coeducation were not universal, it might prevent individual chapters from affiliating with single gender national fraternities.

One of the College of Staten Island's primary arguments against finding a right of expressive association for AEPi was that:

The mere fact that the Fraternity holds itself out as an all-male organization valuing "brotherhood" does not mean that the inclusion of women would significantly burden its expressive rights . . . an expressive association cannot "erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."²²⁶

That, however, ignores the fact that fraternities are exempt from the gender requirements of the antidiscrimination laws.²²⁷

V. CHRISTIAN LEGAL SOCIETY AND CITIZENS UNITED

A. Christian Legal Society

A nationally-organized Christian Legal Society ("CLS") sought university recognition for a local chapter at the state-supported University of California Hastings College of Law.²²⁸ In order to achieve official university recognition, Hastings required groups to take "all comers," in other words, to have membership open to all students attending the law

223. Brief for Amici Curiae NIC and NPC in Support of Plaintiffs-Appellees Chi Iota Colony of Alpha Epsilon Pi Fraternity at 10, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007) (No. 06-4111-cv) (citing *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000)).

224. *Id.* at 10–11.

225. *Id.* at 11.

226. Brief for State Defendants-Appellees at 48, *Chi Iota Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (No. 06-4111cv), 2006 WL 5013104 (citing *Dale*, 530 U.S. at 653).

227. *See supra* note 94 (discussing Title IX).

228. *Christian Legal Soc'y Chapter of the Univ. of Cal. Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971 (2010).

school.²²⁹ Because CLS required prospective members to attest to a statement of faith that banned “unrepentant homosexual conduct,” and thus effectively banned gay students, Hastings denied recognition to the group.²³⁰

Recognition by the law school afforded student groups certain benefits, including the ability to seek financial assistance from the law school (from a shared pool of four to five thousand dollars allotted for all recognized student organizations generated by a mandatory student activities fee),²³¹ place announcements in a school newsletter, advertise events on designated bulletin boards, send emails using a Hastings address, participate in a student activities recruitment fair, receive priority to use law school facilities for meetings, and to use the Hastings name and logo.²³² In return, Hastings required student groups to allow any student to join, and follow Hastings non-discrimination policy.²³³

229. *Id.* at 2979. *Cf.* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (government has power to reserve forums for specific groups). *See also* *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (college not required to open facilities to all non-students). Another type of “take all-comers” policy is found with common carriers, which have long been prohibited from engaging in discrimination with their customers. Richard A. Epstein, *Church and State at the Crossroads: Christian Legal Society v. Martinez*, 2010 CATO SUP. ST. REV. 105, 116 (2009–2010). Professor Epstein notes that the common law rule allowed firms without monopoly power to choose their trading partners, and to refuse to deal with one another for any reason at all. *Id.* *See, e.g.*, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). Professor Epstein further suggests that modern anti-discrimination laws are patterned on rules that applied to common carriers but applied to “all sorts of public accommodations that exercise no hint or whisper of monopoly power. . . . [T]runcat[ing] the right *not* to associate” Epstein, *supra* at 116–17 (emphasis in original). *See generally* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

230. *Christian Legal Soc’y*, 130 S. Ct. at 2980. CLS’s statement of faith also required members to attest to several tenets of Christian faith, thus barring non-Christians from membership. *Id.* Similar organizations have had difficulties at other campuses. *See, e.g.*, Thomas Bartlett, *Judge Dismisses Lawsuit Brought by Christian Fraternity Against U. of North Carolina at Chapel Hill*, CHRON. HIGHER EDUC., May 19, 2006.

231. 130 S. Ct. at 2979; *Id.* at 3002 (Alito, J., dissenting).

232. *Id.* at 2979.

233. *Id.* The non-discrimination policy stated that “[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.” *Id.* The parties agreed to a joint stipulation that the law school required recognized student groups to “allow any student to participate, become a member, or seek leadership positions in the organizations, regardless of [the student’s] status or beliefs.” *Id.* at 2982. This policy, however, was not specifically expressed in Hastings’ non-discrimination policy as written. *See generally* *Id.* at 2979. The Court did not consider the non-discrimination policy as written because of the parties’ joint stipulation. *Id.* at 2982. Additionally, the Court did not consider whether the “take all-comers” policy

CLS submitted an application for recognition and was rejected because the society barred students based on religion and sexual orientation.²³⁴ Hastings rejected CLS's request for an exemption to Hastings' non-discrimination policy, and instead offered CLS the use of Hastings facilities for meetings, and access to chalkboards and generally available bulletin boards to announce events.²³⁵ In other words, according to the Court, Hastings would not support CLS, but would do nothing to suppress its endeavors.²³⁶

CLS operated independently of Hastings for an academic year, and then filed suit alleging that the law school had violated the society's First and Fourteenth Amendment rights to free speech and expressive association.²³⁷ Affirming the U.S. Court of Appeals for the Ninth Circuit, the Court held that Hastings' "take all-comers" policy, required for recognition as a student organization, was sufficiently viewpoint neutral to withstand scrutiny within the limited public forum of the law school.²³⁸ Moreover, Hastings' restrictions served a compelling state interest unrelated to the suppression of ideas, and impossible to advance through less restrictive means.²³⁹

Beyond these conclusions, the Court offered substantial explanation for its decision. Specifically, the majority termed recognition for CLS as a form of state subsidy.²⁴⁰ To that end, the Court drew a distinction between policies that require university action, and those that withhold university benefits.²⁴¹ Here, where CLS participated within the limited public forum

was pretext because that had not been considered below. *Id.* at 2979. The majority did, however, permit the Ninth Circuit on remand to consider whether the issue was justiciable. *Id.* at 2995. The dissenting opinion, written by Justice Alito, argued that the governing issue in the case was not the "take all-comers" policy, but instead was the non-discrimination policy itself as it related to sexual orientation. *Id.* at 3000–05, 3016–19 (Alito, J., dissenting).

234. *Id.* at 2980.

235. *Id.* at 2981.

236. *Id.* at 2981. "In essence, Hastings preferred a policy of discrimination to one of total exclusion." Epstein, *supra* note 229, at 108.

237. 130 S. Ct. at 2981. CLS sued under 42 U.S.C. § 1983. *Id.* The suit also alleged that Hastings violated CLS's free exercise of religion. *Id.*

238. *Id.* at 2984. The Court contrasted this level of scrutiny to the strict scrutiny applied in *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, a university closed its facilities to a student group seeking space for worship and discussion. *Id.* at 265. The use of the limited public forum doctrine is somewhat at odds with *Healy*, which considered only whether the student group would be disruptive. *Healy v. James*, 408 U.S. 169, 192 (1972).

239. *Christian Legal Soc'y*, 130 S. Ct. at 2985.

240. *Id.* at 2986.

241. *Id.* at 2986. See also Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN L. REV. 1919, 1924 (2006) (government generally need not subsidize the exercise of constitutional rights). Professor Volokh has argued that the government is generally free not to fund the exercise of a constitutional right.

of students in a law school, the society faced no pressure to act (or conform its views), but only was denied certain benefits based on the group's conduct.²⁴² In other words, CLS could do "whatever it will," but it would receive no school subsidy if it failed to take all-comers.²⁴³

The Court found no constitutional shortcomings in Hastings' policies because the barriers to recognized status were viewpoint neutral, and because substantial alternative channels remained open for communication with students.²⁴⁴ And most important for fraternities, the Court found Hastings' policies to withstand scrutiny, in part, because Hastings offered CLS access to school facilities for meetings, and the use of chalkboards and generally available bulletin boards to advertise events.²⁴⁵ This is noteworthy because fraternities rarely ask for or receive the same status as other student organizations because of their choice to maintain selective membership and their ability to raise significant funds internally through membership dues.²⁴⁶ In fact, the Court noted "[p]rivate groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official school affiliation."²⁴⁷

This is, in fact, the most critical issue for fraternities: whether a fraternity may exist at all in some relationship, no matter how informal, with a host university. Tied to college or university recognition is the ability to meet, recruit, and affiliate with students. Indeed, the ability to advertise events and use school facilities for meetings may be advantageous for some fraternity chapters, but surely secondary to being permitted to exist. Students at some schools may be expelled for

Although he is undoubtedly correct regarding the funding of student activities, fraternities rarely seek funding from a college or university. *See infra*, note 258. Rather than lobbying for money, fraternities generally seek to use campus bulletin boards and email for publicity; newer and unhoused groups may ask for meeting space and tables in student lounges.

242. *Christian Legal Soc'y*, 130 S. Ct. at 2986; *see also* Volokh, *supra* note 241, at 1931.

243. *Christian Legal Soc'y*, 130 S. Ct. at 2989 n. 17. One of the most pervasive forms of associational discrimination is found in most colleges or universities, where programs are open only to students. *See* Volokh, *supra* note 241, at 1940 ("discrimination against certain associational decisions is present in the quintessential, and largely uncontroversial, example of a permissible designation for a public forum: university programs that are open to student groups"). As Professor Volokh notes, students are constitutionally entitled to associate with non-students, yet, for example, a student group aimed at fighting homelessness may not have any non-student homeless individuals serve on its board. *Id.*

244. *Christian Legal Soc'y*, 130 S. Ct. at 2991.

245. *Id.* at 2991.

246. *See generally id.* at 2991-92; *supra* note 278 (discussing AEPi's request to forgo any school-distributed money and instead collect dues from its own members).

247. 130 S. Ct. at 2991-92.

membership in any fraternity.²⁴⁸ Other schools simply refuse to allow any fraternity the benefits the Supreme Court has embraced for even unrecognized organizations.²⁴⁹ And even many schools that permit fraternities may regulate and restrict new fraternity expansion.²⁵⁰

The majority may have been glib in asserting the unrestricted right CLS enjoyed to association on the Hastings campus, even without recognition. According to the dissent,²⁵¹ the Court “distorts the record with respect to the effect on CLS of Hastings’ decision to deny registration.”²⁵² Writing for the dissent, Justice Alito noted that while Hastings offered CLS access to school facilities, the offer was subject to important qualifications. It is possible that CLS may have been required to pay for the use of school facilities for meeting space, or for a table in a public area used at many schools to publicize the group or an event.²⁵³

Regardless, while public colleges and universities can certainly ban specific fraternity chapters for specific reasons (e.g. disciplinary problems), *CLS* suggests that a broad-based ban on fraternities from using college or university facilities, even on a paid fee-basis, may be an unconstitutional violation of free speech and association.²⁵⁴

248. See, e.g., Williams College Student Handbook, <http://web.williams.edu/Registrar/handbook/policies.html#fraternities> (last visited Feb. 28, 2012); Colby College Student Handbook, http://www.colby.edu/administration_cs/student-affairs/deanofstudents/studentconduct/policies_procedures/other_policies/fraternity-activity.cfm (last visited Feb. 28, 2012); University of Mary Washington, *Student Clubs and Organizations Handbook*, <http://students.umw.edu/studentactivities/student-organization-handbook/> (follow “Welcome” hyperlink) (last visited Feb. 28, 2012) (“The University will not recognize or condone student, faculty, or staff organizations that discriminate in selecting members.”).

249. *Infra* note 260; see also *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 858 (7th Cir. 2005) (student group was no longer able to reserve rooms for private meetings but could use classrooms to meet as long as other students and faculty were free to come and go from the room).

250. See *supra* note 65 (discussing the policies of several schools regarding expansion of new fraternities).

251. Justice Samuel Alito, joined by Chief Justice Roberts, and Justices Scalia and Thomas.

252. 130 S. Ct. at 3006 (Alito, J., dissenting). In fact, Justice Alito accused the majority of ignoring strong evidence that the “take all-comers” policy was merely pretext to justify Hastings’ discrimination against CLS. *Id.* at 3000–05, 3016–19. Justice Alito also wrote that the “take all-comers” policy was unconstitutional under the limited public forum doctrine, arguing that it was biased against minority viewpoints, and that it was less viewpoint neutral than had been suggested by the majority. *Id.* at 3013–16, 3016 n. 10.

253. *Id.* at 3006.

254. *Id.* at 2985. There has been some criticism of the Court’s conflation of speech and associational rights. See, e.g., Jack Willems, *Recent Development: The Loss of Freedom of Association In Christian Legal Society v. Martinez*, 34 HARV. J.L. & PUB. POL’Y 805, 806 (2011).

In some respects, the court's decision in *Alpha Epsilon Pi*²⁵⁵ was similar to that in *CLS*. A narrow view would suggest that the College of Staten Island was not trying to ban single-sex groups, but only that the College chose not to subsidize such activities.²⁵⁶

But similar to the dispute between the Court's majority and Justice Alito's dissent in *CLS*, the real issue was not that Alpha Epsilon Pi was denied a subsidy, instead, the fraternity's complaint centered on the fact that it was forbidden to reach out to any students on campus through reasonable and generally available fora. The college forbade Alpha Epsilon Pi from setting up recruitment tables on campus, advertising on campus bulletin boards or handing out fliers, appearing in a list of student organizations, or holding any activities—including meetings—on campus.²⁵⁷ While such activities on school property might be narrowly defined as a form of subsidy, it is not at all clear the *CLS* Court would agree. One reason the majority in *CLS* found that Hastings' policies withstood scrutiny was because Hastings offered to allow *CLS* to use school facilities for meetings, as well as to use chalkboards and generally available bulletin boards to advertise events.²⁵⁸

The College of Staten Island's chief objection to AEPi was that it maintained discriminatory practices in membership and therefore could not be a registered student organization.²⁵⁹ But freedom from viewpoint discrimination means that organizations can convey viewpoints, even disfavored viewpoints, on an equal footing with other organizations.²⁶⁰

255. *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d at 136.

256. Eugene Volokh, *Intimate Association, Fraternities, and Government Subsidies*, THE VOLOKH CONSPIRACY (Sept. 13, 2007, 2:26 PM), <http://volokh.com/posts/1158696685.shtml>.

257. *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d at 142. Alpha Epsilon Pi also wished to receive monies collected from the student activities fee. It is, however, very unusual for a fraternity to receive any funding from a college. Further, the Supreme Court's subsidy framework is not particularly helpful with regard to fraternities because what is at stake is not access to a benefit, but the ability to exercise citizenship in the fora of a college or university. See Chapin Cimino, *Campus Citizenship and Associational Freedom: An Aristotelian Take on the Nondiscrimination Puzzle*, 20 WM. & MARY BILL RTS. J. 533, 566–69 (2011).

258. 130 S. Ct. at 2981. Justice Alito also noted in his strongly worded dissent that Hastings in reality repeatedly ignored any requests by *CLS* to host a table on campus or use a classroom. *Id.* at 3006 (Alito, J., dissenting). *But cf.* *Healy v. James*, 408 U.S. 169, 182–83 (the college argued that the denial of recognition abridged no associational rights because the student group could meet as a group off-campus, distribute written material off-campus, and informally meet together on-campus as individuals).

259. *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d at 139.

260. Jack Willems, *Recent Development: The Loss of Freedom of Association in Christian Legal Society v. Martinez*, 34 HARV. J.L. & PUB. POL'Y 805, 817 (2011). See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (state colleges and universities may not regulate speech based on the content of message); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394

B. *Citizens United*

*Citizens United v. Federal Election Commission*²⁶¹ raises the question of whether colleges and universities may regulate or abridge the speech and association rights of fraternities, while allowing similar or identical conduct by individuals. It also suggests another issue: whether an association becomes protected under the First Amendment by asserting its right to exist by petitioning the state and courts.

In *Citizens United*, the United States Supreme Court considered whether a corporation could expressly advocate for or against a candidate in an election, or make contributions in support of a candidate.²⁶² Under the Bipartisan Campaign Reform Act,²⁶³ even non-profit advocacy groups faced criminal sanctions for certain forms of political speech in the days prior to an election.²⁶⁴

Citizens United was a non-profit corporation that produced a movie very critical of Secretary of State Hillary Clinton, then the junior Senator from New York.²⁶⁵ The issue before the Court was the constitutionality of a federal law prohibiting corporations “from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections” within 30 days of a primary election.²⁶⁶ In order to make the movie available, Citizens United sought declaratory and injunctive relief against the Federal Elections Commission.²⁶⁷ The Court held that corporate political speech may be regulated through disclaimer and disclosure requirements, but corporate political speech may not be fully suppressed.²⁶⁸

The Court held that the right to free speech, particularly in political

(1993) (government may not regulate speech showing preference for a particular viewpoint). The College of Staten Island allowed student organizations with favored viewpoints to use campus communication and facilities, while the single gender fraternity could not. *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d at 148.

261. *Christian Legal Soc’y*, 130 S. Ct. 876 (2010).

262. *Id.* See also *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 1307 (2012) (per curiam).

263. 2 U.S.C. § 441b (2000 ed.)

264. *Citizens United*, 130 S. Ct. at 897.

265. *Id.* at 887. This controversy occurred during Senator Clinton’s campaign for the presidential nomination of the Democratic Party in the 2008 election. The movie was entitled “Hillary: The Movie,” and it was a 90-minute documentary. *Id.* It features interviews with political commentators and other person, most quite critical of Senator Clinton. *Id.* The movie was originally produced with the intention of a theatrical release, but Citizens United sought to increase distribution by making it available through video-on-demand. *Id.*

266. *Id.*

267. *Id.* at 886.

268. *Id.*

debate, was largely immutable, regardless of whether the speaker was an individual or a corporation.²⁶⁹ Specifically, according to the Court, the government cannot identify certain preferred speakers, and may not determine what speakers are worthy of free speech.²⁷⁰ “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”²⁷¹ Government may not “ban political speech simply because the speaker is an association that has taken on the corporate form.”²⁷²

Citizens United may be applicable to speech and conduct of fraternities. Specifically, there is often some dichotomy at colleges and universities, where individuals may generally speak and associate freely, but fraternities—the corporations²⁷³—may not.

While colleges and universities may regulate speech with potential to cause disruption or violence, or otherwise impede a college or university’s non-discrimination statement and policies, fraternities may not be permitted to contact students, publicize events, or recruit new members freely.²⁷⁴

269. *Id.* at 904.

270. *Id.* at 899.

271. *Id.* at 904.

272. *Id.* The Court noted that the Constitution offered no basis for distinctions between types of corporations. Specifically, “media corporations” have no “constitutional privilege beyond that of other speakers.” *Id.* at 905. Labor unions were identified as a corporate form for which there were particular concerns about electioneering. *Id.* at 966.

273. For liability and streamlined governance, it appears that both the national organizations and colleges and universities typically require fraternities to be incorporated associations. *See, e.g.*, Tau Kappa Epsilon, *What is a Corporation?*, http://www.tke.org/member_resources/chapter_operations/colony_resources/how_to_incorporate (last visited Mar. 1, 2012) (requiring all Tau Kappa Epsilon chapters “to be an active, registered corporation in the state where they are located”); George Washington University Center for Student Engagement, *Student Organization Registration Provisions for Fraternities and Sororities*, http://gwired.gwu.edu/sac/index.gw/Site_ID/7/Page_ID/1308 (last visited Mar. 1, 2012) (requiring all fraternities to be incorporated); Stony Brook University, *Relationship Statement between Stony Brook University and its Affiliated Fraternities and Sororities*, <http://studentaffairs.stonybrook.edu/sac/docs/Relationship%20Statement%208.12.pdf> (last visited Mar. 1, 2012) (“it is expected that chapter will have a sponsoring body which is a legal corporation”); University of Florida, Chapter Facility Policy for Social Fraternities and Sororities, <http://www.greeks.ufl.edu/resources/docs/OSFAFacilityPolicy.pdf> (Mar. 1, 2012) (requiring fraternity chapter houses to be “owned and operated by a House Corporation incorporated within the State of Florida”); Delta Tau Delta Fraternity, *IRS Tax Filing Requirements*, <http://www.delts.org/media/IRS%20Tax%20Filing%20Requirements.doc> (last visited Mar. 1, 2012) (explaining federal tax filing requirements for college fraternities). The national organizations of fraternities are generally incorporated in states as organizations falling under 501(c)(7) of the Internal Revenue Code, 26 § 501(c). The chapters are subsidiary organizations generally separately incorporated, and required to file an IRS 990 subsidiary form each year.

274. *Supra* Part II(b).

Fraternities may be restricted from wearing insignia or letters, interacting with non-members, or hosting activities in a manner consistent with other organizations or individuals.²⁷⁵

When colleges and universities ban fraternities, the organizations are prevented from expressing support for single-sex brotherhood or sisterhood, which is also espoused merely by the existence of such single-sex societies. In *Roberts*, the Supreme Court acknowledged that maintaining single-gender status could be the association's message. If "the Jaycees is organized to promote the views of young men whatever those views happen to be, admission of women as voting members will change the message communicated by the group's speech because of the gender-based assumptions of the audience."²⁷⁶ On some campuses, supporting single gender associations is a highly contentious political message; banning fraternities prohibits the message and healthy debate.

But a particularly intriguing issue is whether colleges and universities have prohibited fraternities from assembling and petitioning the government, particularly when denied a right to exist or be recognized. Indeed, in *AEPi*, after being banned by the College of Staten Island, the sole remaining purpose of the group was to petition the government through the courts to plead for its existence. And during that time, the group was not extended the courtesies given to recognized student organizations, including using campus bulletin boards, email, and classrooms.

One important part of the dispute between the College of Staten Island and AEPi concerned membership dues. Specifically, the College prohibited recognized student organizations from collecting dues from its members; it was presumed that an organization would then receive money collected through the general student activities fee.²⁷⁷

But AEPi asked to be relieved of this rule; the fraternity wanted to collect money from its own members and was willing to forgo any school-distributed money.²⁷⁸ Under *Citizens United*, the payment of money to a voluntary association that engages in political activity is protected

275. Willems, *supra* note 260.

276. *Roberts*, 468 U.S. at 627. The Court found that the record supported no such supposition. *Id.* at 628.

277. See First Amended Complaint at ¶ 8, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007) (No. 05-cv-02919), 2005 WL 2547536; Complaint, 2003 WL 24127805 (Demand at 8); Reply Brief for State Defendants-Appellants at 6 n. 2, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007) (No. 06-4111cv), 2007 WL 4049097; Brief for State Defendants-Appellees, 2006 WL 5013104 at 48, *Chi Iota*, 502 F.3d 136

278. Reply Brief for State Defendants-Appellants at 6 n.2, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007) (No. 06-4111cv), 2007 WL 4049097.

speech.²⁷⁹ Payments to a voluntary association engaged in political activity are “[s]peech on public issues [which] occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”²⁸⁰ Indeed, association activities that merit First Amendment protection include taking positions on issues, and engaging in “civic, charitable, lobbying, [and] fundraising” activities.²⁸¹

Interestingly, while the *AEPi* case was largely about a right to intimate association, it is possible that at least during the pendency of the litigation (if not before), *AEPi* was also an expressive association, in the end existing solely to petition the government.²⁸² Whatever else one can say about the organization, the members cared about it enough to rush, pledge, participate in the fraternity’s activities, fight their college or university for recognition, and file a federal lawsuit.

It is an interesting chicken-egg argument that *Citizens United* does not answer. Does an organization, with disputed associational rights, become a protected organization when it fights for its survival by petitioning the state? This is worthy of additional study and debate.

VI. CONCLUSION

The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow-creatures, and of acting in common with them. I am therefore led to conclude that the right of association is almost as inalienable as the right of personal liberty. No legislator can attack it without impairing the very foundations of society.²⁸³

Fraternalities are not the most sympathetic candidate for free speech arguments. But constitutional rights are rarely tested on popular causes.

279. *Citizens United*, 130 S. Ct. at 905 (“All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech.”); *See also id.* at 898 (“As a ‘restriction on the amount of money a person or group can spend on political communication . . .’ that statute ‘necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.’”) (*quoting* *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (*per curiam*)).

280. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (*quoting* *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

281. *Roberts*, 468 U.S. at 626–27.

282. 443 F. Supp. 2d at 374, 375. *See generally* Inazu, *supra* note 166, at 178. Certainly that was an interest of the North-American Interfraternity Conference and the National Panhellenic Conference, both of which were amici. Brief for Amici Curiae North American Interfraternity Conference and National Panhellenic Conference in Support of Plaintiffs-Appellees, and in Support of the District Court’s Decision, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2d Cir. 2007) (No. 06-4111-cv)

283. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 196 (P. Bradley, ed. 1945).

Free speech protects not only the speaker, but protects society as a whole, including protagonists of the questionable speech. As Justice Holmes wrote:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.²⁸⁴

Justice Holmes' expression of a "free trade in ideas"²⁸⁵ analogizes freedom of expression to an economic free market, where the best policies will arise from competition of ideas.²⁸⁶ Colleges and universities, in particular, may have a responsibility to promote the free trade in ideas. As Thomas Jefferson wrote about the University of Virginia, "[t]his institution will be based upon the illimitable freedom of the human mind. For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it."²⁸⁷

Most fraternities were founded in an era when colleges and universities rigidly taught a classical curriculum and allowed students few outlets for fellowship and contemporary literary exercises. Some, particularly those justifiably angered by specific acts of delinquency, may argue that fraternities' time has long passed.

But the marketplace should determine fraternities' success or failure, not a utopian vision by a school administrator as to how, when, and in what form students will engage one another in a social context. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."²⁸⁸ Even widely unpopular views may benefit society as a whole in their debate.²⁸⁹

If fraternities are to die, then let it be through failure in the free trade of ideas. Indeed, the lasting success of fraternities, purely North American

284. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

285. Sometimes referred to as a "free marketplace in ideas."

286. There are many different theories as to the origins of "free trade in ideas." Elements of it can be found in the work of John Stuart Mill and John Milton. See generally JOHN STUART MILL, *On Liberty*, in ON LIBERTY AND OTHER ESSAYS 5 (John Gray ed., Oxford Univ. Press 1991) (1859); JOHN MILTON, AREOPAGITICA AND OTHER PROSE WORKS. (E.P. Dutton & Company 1927) (1644).

287. Letter, Thomas Jefferson to William Roscoe (1820) available at U.S. Library of Congress, <http://www.loc.gov/exhibits/jefferson/75.html> (last visited Feb. 15, 2012).

288. *Citizens United*, 130 S. Ct. at 898.

289. MILL, *supra* note 287, at 59.

organizations with humble roots founded over two hundred years ago, suggests that there is continuing value in the organizations. Although some fraternity chapters are disbanded after a failure to compete, this Article has provided many examples where college and university administrations have simply restrained or banned a popular, but disapproved, form of association and expression.

There is little doubt that fraternities benefit from some college and university regulation; students are in school to learn, and school policies governing fraternity activities can be a form of mentoring and leadership instruction, as well as providing a sound framework in business management skills. Regulations stifling or prohibiting fraternities in favor of a school-approved social structure unnecessarily chill freedom of association. The burden to show that such suppression is necessary to effectuate academic goals should be far greater than that found in current case law.

THE UNIVERSITY CURRICULUM AND THE CONSTITUTION: PERSONAL BELIEFS AND PROFESSIONAL ETHICS IN GRADUATE SCHOOL COUNSELING PROGRAMS

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I. INTRODUCTION	303
II. HIGHER EDUCATION CASES ON SEXUAL ORIENTATION	306
III. THE PROFESSIONAL CODE OF ETHICS.....	309
IV. THE CONSTITUTION AND THE CURRICULUM	314
V. GRADUATE COUNSELING STUDENTS, THEIR RELIGIOUS BELIEFS, AND THE CURRICULUM	316
A. <i>Keeton v. Anderson-Wiley</i>	316
B. <i>Ward v. Polite</i>	322
C. District Court Decision: <i>Ward v. Wilbanks</i>	325
D. Sixth Circuit Court of Appeals Decision	329
E. Recap of Cases	334
VI. DISCUSSION	336
A. Deeply Held Beliefs and the Professional Curriculum	338
B. Legislative Response to the Controversy	339
C. Deeply Held Personal Beliefs and Rendering Professional Service in the Public Square.....	340
VII. CONCLUSION	342

I. INTRODUCTION

What do professionals do that separates them from individuals in other

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occupations? William J. Goode, in his study of professions, asserts that there are two generating qualities that define professions. They are “(1) a basic body of abstract knowledge, and (2) the ideal of service.”¹ He asserts that professionals fashion solutions based on the needs of the client, “not necessarily [on] the best material interest or needs of the professional himself.”² Professional actions taken in pursuit of the best interest of clients involves “a high degree of self-control of behavior through codes of ethics.”³ Members of a profession are required to adhere to the code of ethics of their profession as a condition of membership.⁴ For example, the *American Counseling Association (ACA) Code of Ethics* serves five goals.⁵ Goal Three states that the *Code* “establishes the principles that define the ethical behavior and best practices” of its members.⁶ Goal Four states the purpose for the ethical behavior. It reads: “The *Code* serves as an ethical guide designed to assist members in constructing a professional course of action that best serves those utilizing counseling services and best promotes the values of the counseling profession.”⁷ Therefore, professionals must act in the best interests of their client, patient, or student. The *ACA Code of Ethics* further states that counselors, when faced with difficult-to-resolve ethical dilemmas, should base their decisions on that which “help[s] to expand the capacity of people to grow and develop.”⁸ The emphasis is

1. William J. Goode, *The Theoretical Limits of the Profession*, in *THE SEMI-PROFESSIONS AND THEIR ORGANIZATIONS: TEACHERS, NURSES, SOCIAL WORKERS* 277 (Amitai Etzioni ed., 1969).

2. *Id.* at 278.

3. Bernard Barber, *The Sociology of the Professions*, in *THE PROFESSIONS IN AMERICA* 18 (Kenneth S. Lynn ed., 1965).

4. See, e.g., AM. PSYCHOLOGICAL ASS'N, *Ethical Principles of Psychologists and Code of Conduct: 2010 Amendments*, available at <http://www.apa.org/ethics/code/index.aspx> (the *American Psychological Association's Ethical Principles of Psychologists and Code of Conduct* sets “forth enforceable rules for conduct as psychologists”); AM. MEDICAL ASS'N, *AMA Code of Medical Ethics*, available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/principles-medical-ethics.page?> (American Medical Association's Preamble to its Principles of Medical Ethics states, “The following Principles adopted by the American Medical Association are not laws, but standards of conduct which define the essentials of honorable behavior for the physician”); Rule 8.4 Misconduct, *Model Rules of Professional Conduct Maintaining The Integrity Of The Profession*, available at http://www.abanet.org/cpr/mrpc/rule_8_4.html (according to the American Bar Association, “It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another”).

5. AM. COUNSELING ASS'N, *ACA Code Of Ethics* (2005), available at <http://www.counseling.org/ethics/feedback/ACA2005Code.pdf>, at 3. Hereinafter, *ACA Code of Ethics*.

6. *Id.* at 3.

7. *Id.*

8. *Id.*

placed on the interests of the client, not on the interests of the professional counselor. As demonstrated by the *ACA Code*, ethical behavior and best practices are designed to help the client. The predicate of a profession is the best interests of the client, not the needs, interests, or desires of the professional.

But what happens when there is a conflict between the established code of ethics of a profession (being taught in graduate programs of school counseling) and the deeply held beliefs of an aspiring practitioner? What must give way? Can aspirants compel the profession through the preparation program, to make room for their deeply held position, or can the profession compel the aspirant to demonstrate acceptance of and willingness to follow the complete *Code of Ethics* regardless of their convictions? Specific to this article, the essential question is, must a graduate student in school counseling adhere to the American Counseling Association's *Code of Ethics* as part of the counseling program's requirements in order to complete a graduate degree and become a state credentialed school counselor, even if he or she disagrees with certain sections of the *Code of Ethics* based on deeply held beliefs?⁹

This clash between professional ethics and personal beliefs in graduate school counseling programs arose twice in 2010 with appellate decisions in 2011 and 2012. How have the courts threaded the needles of supporting individual rights, affirming the authority of the university to control its educational programs, and meeting the requirements of a profession? This article explores those two recent cases in which graduate students in school counseling programs essentially argued that they have the right to disregard the profession's *Code of Ethics* or to interpret that *Code* differently than their program faculty because of the student's religious beliefs, despite the fact that the *Code* is a part of their graduate program to which they voluntarily applied and enrolled.¹⁰ Two recent federal cases, one from the Eleventh Circuit Court of Appeals¹¹ and the other from the Sixth Circuit Court of Appeals,¹² are discussed to assist in the exploration of the issue of whether the role of the *Code of Ethics* of a profession can be selectively

9. See William E. Thro & Charles J. Russo, *Preserving Orthodoxy on Secular Campuses: The Right of Student Religious Organizations to Exclude Non-Believers*, 250 EDUC. L. REP. 497, 515 (2010) ("If freedom of religion means anything, it means that individuals can have whatever belief they choose, can associate with those who share their beliefs, and can exclude those that disagree").

10. See James T. Wolf, *Teach, But Don't Preach: Practical Guidelines for Addressing Spiritual Concerns of Students*, 7 ACSA PROF. SCH. COUNSELING 363, 363 (2004) (offering an interesting discussion for school counselors on this topic by parsing spirituality from religious beliefs. He states that they are not interchangeable. He concludes: "When spiritual issues do present themselves in a counseling session, it is unethical for school counselors to advocate for their personal spiritual beliefs").

11. Keeton v. Anderson-Wiley, 664 F.3d 865 (11th Cir. 2011).

12. Ward v. Polite, 667 F.3d 727 (6th Cir. 2012).

followed according to the beliefs of the aspirant counselor or whether the *Code of Ethics* is meant as a cohesive, binding statement of professional conduct for all members of the profession, including its aspirants. This is one of the classic dilemmas of a profession—the standards of conduct required by the profession at times conflict with the personal beliefs of its members. Specifically, this conflict manifests with a refusal to give counseling to gay, lesbian, or transgender students.

The discussion of the intersection of personal beliefs on gays and lesbians as counseling clients and professional ethics starts with a review of higher education sexual orientation cases. Next, Part III lays the foundation of the role and the substance of professional codes of ethics. Part IV explores the role of the Constitution in the development and delivery of the higher education curriculum. It explicitly reviews who controls the curriculum. Part V analyzes the two court cases brought by graduate counseling students. And finally, Part VI brings the controversy into focus and draws a conclusion about the conflict of deeply held beliefs and rendering professional service in the public square of the public school.

II. HIGHER EDUCATION CASES ON SEXUAL ORIENTATION

While sexual orientation issues occur with regularity in the public primary, middle, and secondary schools,¹³ “there seems to be a disproportionately low amount of litigation on the subject arising out of college campuses.”¹⁴ Higher education has largely avoided the legal and social issues that have characterized sexual orientation in other organizational settings. For example, college and university campuses have rallied in response to attacks on a person’s sexual orientation and identity,¹⁵ and have integrated lesbian, gay, bi-sexual, transsexual, and/or queer lifestyle (GLBTQ) content in courses and developed degree programs such as minors in queer studies.¹⁶

In a closely watched case, a deeply divided Supreme Court upheld via a

13. See generally, Todd A. DeMitchell, Suzanne Eckes, & Richard Fossey, *Sexual Orientation and the Public School Teacher*, 19 B. U. PUB. INT. L. J. 65 (2009); See also RICHARD FOSSEY, TODD A. DEMITCHELL, & SUZANNE E. ECKES, *SEXUAL ORIENTATION, PUBLIC SCHOOLS, AND THE LAW* (2007).

14. Todd A. DeMitchell & Suzanne Eckes, *Sexual Orientation and the College Campus*, 254 EDUC. L. REP. 19 (2010).

15. *Gilles v. Davis*, 427 F.3d 197, 202 (3rd Cir. 2005). (Gilles exhorted a crowd of college students, warning them to “‘watch out [because] the homosexuals are after you on this campus’ and pronounced that ‘nothing is lower than a lesbian.’” He also proclaimed that homosexuals were headed for hell and that “‘there was no such thing as a Christian lesbian . . . [or] Christian homosexual”).

16. See, e.g., Columbia University, Graduate School of Arts and Sciences, Teaching Center, *Inclusive Teaching: Resources for Incorporating Sexual Orientation into Your Teaching*, available at http://www.columbia.edu/cu/tat/pdfs/sexual_orientation.pdf.

five-to-four decision the right of the University of California, Hastings College of Law to refuse to grant the Christian Legal Society (CLS) the status of a “Registered Student Organization.”¹⁷ The CLS denies voting membership to anyone who does not affirm the Statement of Faith, which is interpreted to exclude “unrepentant homosexual conduct.”¹⁸ Hastings College of Law considers this a violation of its nondiscrimination policy.¹⁹ The CLS brought suit for violations of the First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion.²⁰

The Court found that the Hastings Law School’s all-comers policy was viewpoint neutral, rejecting CLS’s arguments that the policy was merely a pretext for discrimination against the group.²¹ Justice Alito wrote a lengthy dissent in which he charged the majority with abandoning the Supreme Court’s long-established precedents of First Amendment jurisprudence in order to endorse a rule that allows public colleges and universities to suppress student speech that is politically incorrect.²² In Justice Alito’s view, the majority opinion had provided a “misleading portrayal of the case” and had ignored strong evidence that Hastings Law School’s all-comers policy was merely a pretext to justify viewpoint discrimination against CLS.²³

The CLS tried to carve out a safe harbor from the nondiscrimination policy of the law school. Had CLS prevailed, would all student groups, or possibly all students, have been able to assert an exemption from the nondiscrimination policy based on religious, or perhaps, personal beliefs? If the answer is yes, it is likely that Hastings’ commitment to nondiscrimination would have been eviscerated.²⁴

17. *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010); Christian Legal Society, *Vision, Mission Statement & Core Value*, available at <http://www.clsnet.org/society/about-csl/purpose>. (the CLS is a nationwide association founded in 1961, of legal professionals who share a common Christian faith, which guides their associational activities. The mission of the CSL is “to inspire, encourage, and equip lawyers and law students, both individually and in community, to proclaim, love and serve Jesus Christ through the study and practice of law, the provision of legal assistance to the poor, and the defense of religious freedom & the sanctity of human life”).

18. *Christian Legal Society*, 130 S. Ct. at 2980.

19. *Id.* at 2980–81. “[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, or sexual orientation. This nondiscrimination policy covers admission, access, and treatment in Hastings-sponsored programs and activities.” *Id.* at 2979.

20. *Id.* at 2981.

21. *Id.* at 2989–90.

22. *Id.* at 3000–20 (Alito, J., dissenting).

23. *Id.* at 3009 (Alito, J., dissenting).

24. *Id.* at 2998 (Stevens, J., concurring) (“The expressive association argument of [CLS] presses, however, is hardly limited to these facts. Other groups may exclude or

The time around when *Christian Legal Society* was decided appears to signal a shift with a marked increase in litigation on issues of sexual orientation in higher education. Legal commentators noted that six federal courts, including the United States Supreme Court, decided cases about whether a public institution of higher education violated the rights of students and faculty who expressed negative views of gays and lesbians and in some cases acted upon those beliefs.²⁵ Professors, students, and student organizations citing their right to free speech and right to assembly, asserted their right to hold, voice, and act on beliefs, most religiously based, against the acceptance of a gay, lesbian, bi-sexual, transsexual, and/or queer lifestyle.²⁶ This pushes against the seemingly rising tide of acceptance of GLBTQ lifestyles²⁷ as more individuals assert the right to be out of the closet.²⁸

Two of those cases, *Keeton v. Anderson-Wiley*²⁹ and *Ward v. Polite*,³⁰ as

mistreat Jews, blacks, and women—or those who do not share their contempt for Jews, blacks, and women. A free society must tolerate such groups. It need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities.”).

25. Richard Fossey, Suzanne Eckes, & Todd A. DeMitchell, *Sexual Orientation, Higher Education and the First Amendment: Several Courts Consider Whether Public Universities Must Accept Groups or Individuals Who Oppose Homosexual Conduct*, 267 EDUC. L. REP. 425, 427 (2011) (“There was a prolonged period with few cases in higher education being litigated over sexual orientation. However, the tension around sexual orientation has recently resurfaced in the courts.”).

26. However, it should be noted that a religious response to gays and lesbians is not monolithic in nature. While some faiths and denominations actively and officially oppose gays and lesbians, others officially welcome and even ordain GLBTQ persons. Many GLBTQ individuals are members of organized religions. The fact that religions universally do not hold an anti-gay position does not diminish the deeply held belief of those who do.

27. See, e.g., Maura Dolan & Carol J. Williams, *Ban on Gay Marriage Overturned*, L. A. TIMES (August 5, 2010), available at <http://articles.latimes.com/2010/aug/05/local/la-me-gay-marriage-california-20100805> (a federal district court judge declared that California’s ban on same-sex marriages was unconstitutional asserting that “no legitimate state interest justified treating gay and lesbian couples differently from others and that ‘moral disapproval’ was not enough” to save the voter approved proposition. Northern District of California Chief Judge Vaughn Walker’s decision was upheld by the Ninth Circuit Court of Appeals on Feb. 7, 2012); See also *Perry v. Brown*, 671 F.3d 1052, 1076 (9th Cir. 2012) (focusing on whether Proposition 8’s singling out “same-sex couples for unequal treatment by *taking away* from them alone the right to marry” amounts to a constitutional violation of the Equal Protection Clause) (emphasis in original). The Supreme Court granted certiorari in *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) and heard oral arguments March 26, 2013.

28. STUART BIEGEL, *THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA’S PUBLIC SCHOOLS* 3 (2010) (“The right to be out has emerged today as a strong and multifaceted legal imperative.”).

29. 664 F.3d 865 (11th Cir. 2011).

30. 667 F.3d 727 (6th Cir. 2012).

indicated above, concerned school counseling students who held, espoused, and, in at least one situation, acted on religious beliefs that are non-accepting of gays and lesbians. In both cases, the graduate students brought suit against their university for its academic response to their decision to not conform to the requirements of the graduate program, which was held by the graduate program to be a breach of the *ACA Code of Ethics*, a code that had been incorporated into the curriculum of their graduate program.³¹

III. THE PROFESSIONAL CODE OF ETHICS

Professionalism is built around expert knowledge, usually gained through extensive education and training.³² A profession is distinguished from an occupation.³³ Professional work is complex and non-routine.³⁴ It involves a standard of practice recognized and adhered to by the practitioners.³⁵ Torts of negligence, including malpractice,³⁶ assist in defining the duty that a professional owes to those who receive his or her services. Professionals are expected to utilize a standard of care recognized by their profession as appropriate, based on the training received and consistent with the commonly held set of practices associated with the service rendered.³⁷ The higher level of training associated with professionals defines the duty owed to the recipient of professional services. Where common knowledge may apply in negligence cases not involving professionals, negligence cases involving professionals often require expert witness testimony to establish what is required of the reasonably competent professional.³⁸ The reasonable person standard applied to the analysis of the duty owed in negligence cases is transformed into the reasonable professional with the requisite training of the profession.

The standards are also enforced by the professional organization, typically through an internal code of ethics.³⁹ For example, the Preamble

31. *Ward*, 667 F.3d at 732; *Keeton*, 664 F.3d at 869.

32. *See generally* ELIOT FRIEDSON, *PROFESSION OF MEDICINE* 71–75 (1970).

33. *Id.* at 3–4.

34. *Id.*

35. *Id.*

36. Torts for educational malpractice have not been successful to date. *See* Todd A. DeMitchell, Terri A. DeMitchell, & Douglas Gagnon, *Teacher Effectiveness and Value-Added Modeling: Building a Pathway to Educational Malpractice*, 2012 BYU EDUC. & L.J. 257 (2012). *But see* *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115 (Iowa 2001) (for a successful malpractice suit involving a school counselor).

37. 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 189 (2011).

38. *See, e.g.*, James O. Pearson, *Modern Status of "Locality Rule" in Malpractice Against Physician Who is Not a Specialist*, 99 A.L.R.3d 1133, 1139 (1980).

39. Bernard Barber, *Some Problems in the Sociology of Professions*, 92

to the *Code of Ethics for Pharmacists* states that the *Code* is “intended to state publicly the principles that form the fundamental basis of the roles and responsibilities of pharmacists. These principles, based on moral obligations and virtues, are established to guide pharmacists in relationships with patients, health professionals, and society.”⁴⁰ Professionals exercise judgment within the accepted standards in the best interest of their client, patient, or student. The American School Counselor Association’s Preamble to its Ethical Standards for School Counselors asserts that its principles of ethical behavior are “necessary to maintain the high standards of integrity, leadership and professionalism among its members.”⁴¹ Similarly, the American Counseling Association’s Section C.1: “Knowledge of Standards” requires that “[c]ounselors have a responsibility to read, understand, and follow the *ACA Code of Ethics* and adhere to applicable laws and regulations.”⁴² Both Associations describe the importance of the professional responsibility of its members and provide a mandate for adherence to the code that binds them, and neither do the Associations nor their respective codes provide options for non-adherence to the code.

Noted educational policy researcher Linda Darling-Hammond writes, “Professionals are obligated to do whatever is best for the client, not what is easiest, most expedient, or even what the client himself or herself might want.”⁴³ Similarly, William J. Goode asserted that one of the two core principles of professionalism is a “service orientation.”⁴⁴ The second pillar of professionalism is the acquisition of a specialized body of knowledge. Simply put, professionals exercise the standard of accepted practice acknowledged by the profession within the structure of a recognized code of ethics that is developed in the best interests of the client, patient, or student. Professional practice is not exercised for the benefit of the practitioner; it is exercised for the benefit of the recipient of the service.

Counselors, like other professionals, through their associations adopt a

DAEDALUS 669, 672 (1963).

40. Am. Pharmacist Ass’n, *Code of Ethics for Pharmacists* (1994), available at <http://www.pharmacist.com/AM/Template.cfm?Section=Search1&template=/CM/HTMLDisplay.cfm&ContentID=2903>.

41. AM. SCH. COUNS. ASS’N, *Ethical Standards for School Counselors*, (2010 Revised), available at <http://asca2.timberlakepublishing.com/files/EthicalStandards2010.pdf>. (“School Counselor educators should know them, teach them to their students, and provide support for school counseling candidates to uphold them.”).

42. *ACA Code of Ethics*, *supra* note 5 at 9.

43. Linda Darling-Hammond, *Accountability for Professional Practice*, 91 TEACHERS C. REC. 59, 67 (1989).

44. William J. Goode, *Encroachment, Charlatanism, and the Emerging Profession: Psychology, Medicine, and Sociology*, 25 AMER. SOC. REV. 902, 903 (1960).

code of ethics with an expectation that their members will conform to that code. Failure to follow the code is commonly considered unprofessional conduct. School counselors use two codes of ethics: one developed by the American School Counselor Association, *Ethical Standards for School Counselors*,⁴⁵ and the other developed by the American Counseling Association, *ACA Code of Ethics*.⁴⁶ For the purposes of this article, we will focus on the *ACA Code of Ethics*. However, there is significant consistency between these two codes in the area of religious beliefs of the practitioner and the requirements of the profession.

The connection between the practitioner's ethical requirements and the actions of the graduate student being prepared for the profession is found in the following: "Counselors-in-training have a responsibility to understand and follow the *ACA Code of Ethics* and adhere to applicable laws [and] regulatory policies . . . Students have the same obligation to clients as those required by professional counselors."⁴⁷ Section F.6.d: "Teaching Ethics" requires the counseling faculty to make students aware of their ethical responsibilities and the standards of the profession by infusing "ethical considerations throughout the curriculum."⁴⁸ Consequently, students have the same obligations for practice when they are in their practicum or internships interacting with potential clients.

Two central requirements that build a foundation for this discussion are found in Section C.5: "Nondiscrimination." It reads:

Counselors do not condone or engage in discrimination based on age, culture, disability, ethnicity, race, religion, spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, socioeconomic status, or any basis proscribed by law. Counselors do not discriminate against clients, students, employees, supervisees, or research participants in a manner that has a negative impact on these persons.⁴⁹

In support of this nondiscrimination requirement, counselors must "take steps to maintain competence in the skills they use . . . and keep current with the diverse populations and specific populations with whom they work."⁵⁰ The counseling faculty is required to infuse multicultural and diversity awareness, knowledge, skills, and competency in their training and supervision practices.⁵¹ There is no provision in the code for

45. ASCA Ethical Standard for School Counselors, *supra* note 41.

46. *ACA Code of Ethics*, *supra* note 5.

47. *Id.* at 15.

48. *Id.*

49. *Id.* at 10.

50. *Id.* at 9.

51. *Id.* at 16; *See also* ASCA Ethical Standards for School Counselors, *supra* note

counselors or counseling graduate students to claim an exemption from the *ACA Code of Ethics*, nondiscrimination and diversity requirements based on their personal values.

However, there are two other exceptions in the *ACA Code of Ethics* that may be pertinent to this discussion. The first pertains to counseling for end-of-life situations. Section A.9.b recognizes the personal, moral, and competence issues related to end-of-life situations. A counselor may refer to this section so as to provide appropriate counseling services. This section does not specifically address the issue on non-discrimination against specific groups found in Section C5: “age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, socioeconomic status, or any basis proscribed by law”.⁵² A second exception is found in Section A.11: “Termination and Referral.” This section states that “[c]ounselors do not abandon or neglect clients in counseling.”⁵³ Specifically, Section A.11.b: “Inability to Assist Clients” allows a counselor to determine an inability to be of professional service to clients and, thus, refuse to enter into or continue a counseling relationship.⁵⁴ Section A.11.c provides for a counselor to end a counseling relationship when the client is being harmed.⁵⁵

These stated exceptions raise the issue of whether they can be used to refer clients or students to get around the non-discrimination requirement. Section C.2.c: “Qualified for Employment” states that counselors must only accept employment in “positions in which they are qualified and competent by education, training, supervised experience, state and national professional credentials, and appropriate professional experience.”⁵⁶ Thus, the question under this section becomes whether a counselor who refuses to work with individuals in a protected category, and who are likely to become their clients must not accept employment as a counselor. In other words, can a school counselor refer students to other counselors because they do not value who that client is (“homosexuals are condemned by God” for example) and still expect to be hired as a school counselor? This section asks whether the counselor in training who refuses to work with, and does

41, at 12 (“Monitor and expand multicultural and social justice advocacy awareness, knowledge and skills. School counselors strive for exemplary cultural competence by ensuring personal beliefs or values are not imposed on students or other stakeholders.”).

52. *ACA Code of Ethics*, *supra* note 5, at 10.

53. *Id.* at 6; *see also id.* (“Counselors assist in making appropriate arrangements for the continuation of treatment, when necessary, during interruptions, illness, and following terminations.”).

54. *Id.*

55. *Id.*

56. *Id.* at 9.

not learn to work with certain students the counselor is likely to encounter in the school, is qualified by education, training, and supervised experience to hold the job. And conversely, can a college or university's preparation program graduate students under Section C.2.c of the *ACA Code of Ethics* who refuse to work with specific clients and do not accept training in working with those individuals?⁵⁷ Under Section C.2.c, the answer should be no.

A case involving a school counselor is instructive in exploring the requirement to "behave in a legal, ethical, and moral manner in the conduct of their work."⁵⁸ Kathryn Grossman was a counselor in the South Shore Public School District in Port Wing, Wisconsin (population 500). Her contract was not renewed, and she brought suit against the school district claiming that the school district was hostile to her religious beliefs.⁵⁹ Based on her religious beliefs, Grossman asserted a preference for abstinence over birth control. Thus, she removed the student literature on birth control and replaced it with literature on abstinence. The small school showed a marked increase of teen pregnancies for its size. The court opined:

Six teenage pregnancies among the students at the school seem like a lot, and it is easy to understand how the people running the school would think it imprudent to retain a guidance counselor who throws out pamphlets instructing in the use of condoms and replaces them with pamphlets advocating abstinence.⁶⁰

In addition, on two occasions she asked two students who sought her help to join her in prayer. The Seventh Circuit Court of Appeals wrote:

Teachers and other public school employees have no right to make the promotion of religion a part of their job description and by doing so precipitate a possible violation of the First Amendment's Establishment Clause, even if the religious composition of the local community makes a legal challenge unlikely. The First Amendment is not a teacher license for uncontrolled expression at variance with established curricular content.⁶¹

The Seventh Circuit held that religious principles do not trump the requirements of the profession.⁶²

57. *Id.*

58. *Id.*; *see also id.* at 18-19; Section H: "Resolving Ethical Issues" (Introduction).

59. *Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097 (7th Cir. 2007).

60. *Id.* at 1099.

61. *Id.* at 1099-1100 (citations omitted).

62. *Id.* at 1100.

IV. THE CONSTITUTION AND THE CURRICULUM

Both *Keeton v. Anderson-Wiley*⁶³ and *Ward v. Polite*⁶⁴ turn on the issue of whether graduate students must adhere to the curriculum which is based, in part, on the *ACA Code of Ethics* of the counseling program, even when that curriculum is in opposition to their deeply-held religious views. The beginning point for the discussion is the level of control that a college or university exercises over its curriculum. The Supreme Court has held the analysis of student free speech and its intersection with the college or university's academic requirements is conducted "in light of the special characteristics of the school environment."⁶⁵ The most often cited constitutional basis for the authority of the college and university is found in Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*,⁶⁶ an early academic freedom case, in which he articulated four essential freedoms of the college and university—to "determine for itself on academic grounds, who may teach, what may be taught, how it shall be taught, and who may be admitted to study."⁶⁷ Similarly, in *Christian Legal Society v. Martinez*,⁶⁸ the Supreme Court stated, "A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process."⁶⁹ Clearly, the institution has broad authority to establish the curriculum.

The breadth of this right to control the curriculum is amply demonstrated in cases involving the rights of individual faculty members. Faculty members are hired to teach the adopted curriculum. For example, the Third Circuit Court of Appeals in *Edwards v. California State University of Pennsylvania*⁷⁰ held that professors "[d]o not have a constitutional right to choose curriculum materials in contravention of the University's dictates."⁷¹ Furthermore, the court concluded that the college or university, and not the professor, has the academic freedom to decide "what will be taught in the classroom."⁷² The First Circuit Court of Appeals similarly

63. 664 F.3d 865 (11th Cir. 2011).

64. 667 F.3d 727 (6th Cir. 2012).

65. *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981) (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).)

66. 354 U.S. 234 (1957).

67. *Id.* at 263 (Frankfurter, J. concurring).

68. 130 S. Ct. 2971 (2010).

69. *Id.* at 2988–89.

70. 156 F.3d 488 (3d Cir. 1998).

71. *Id.* at 492.

72. *Id.* at 491. For a discussion of institutional academic freedom, see Todd A. DeMitchell, *Academic Freedom—Whose Rights: The Professor's or the University's?*, 168 EDUC. L. REP. 1 (2002).

asserted in *Lovelace v. Southeastern Massachusetts University*⁷³ that the plaintiff professor did not have the freedom to unilaterally decide standards within the classroom and that course content, homework load, and grading policies are core university concerns.⁷⁴ The university was vested with the authority to establish the overall academic standards.⁷⁵ The First Circuit opined: “The first amendment [sic] does not require that each nontenured professor be made a sovereign unto himself.”⁷⁶ In *Bishop v. Aronov*⁷⁷ the Eleventh Circuit Court of Appeals held that a university could regulate a professor’s religious speech in his exercise physiology class. The court asserted that the classroom was reserved for instruction on the topic of the course and that the university had the right to regulate the professor’s classroom speech.⁷⁸ The court wrote, “The [Supreme] Court’s pronouncements about academic freedom . . . cannot be extrapolated to deny schools command of their own courses.”⁷⁹ And, finally, in *Stastny v. Central Washington University*⁸⁰ the court held that “[a]cademic freedom is not a license for activity at variance with job related [sic] procedures and requirements, nor does it encompass activities which are internally destructive to the proper function of the university or disruptive to the education process.”⁸¹ Two legal scholars, Neal Hutchens and Jeffrey Sun, note that in matters of classroom instruction the institution retains “considerable” authority.⁸²

The collective faculty develops the curriculum as part of their institutional duties; however, individual faculty members do not have a constitutional right to disregard the curriculum. Therefore, can a student successfully assert that she or he has the right to alter the requirements of the curriculum or the administration of the program when their professor in charge of the class does not possess that right? The Supreme Court in an early college student case stated, “[t]his Court has long recognized ‘the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.’”⁸³ For example, a nursing

73. 793 F.2d 419 (1st Cir. 1986).

74. *Id.* at 426

75. *Id.*

76. *Id.*

77. 926 F.2d 1066 (11th Cir. 1991).

78. *Id.* at 1077.

79. *Id.* at 1075.

80. 647 P.2d 496 (Wash. Ct. App. 1982).

81. *Id.* at 504.

82. Neal H. Hutchens & Jeffrey C. Sun, *Legal Standards Governing Faculty Speech*, CONTEMPORARY ISSUES IN HIGHER EDUCATION LAW 97, 109 (Richard Fossey et al. eds. 2d. ed., 2011).

83. *Healy v. James*, 408 U.S. 169, 180 (1972).

student brought suit against the School of Nursing at Auburn University for her dismissal from the program.⁸⁴ A federal district court in Alabama held that the student's opinion was not "entitled to the same weight as her instructors' and administrators' assessments of her performance."⁸⁵ The Eleventh Circuit Court of Appeals succinctly captured the issue of who decides what shall be taught, writing, "[i]n matters pertaining to curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity."⁸⁶

The courts are loath to intervene in the academic decisions made by college and university faculty and officials. For example, the Supreme Court in *Regents of the University of Michigan v. Ewing*⁸⁷ stated that the judiciary should only intervene in academic decisions when it has been shown that there was a "substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."⁸⁸ Consequently, the faculty member's right to alter the curriculum is attenuated and the student's right is virtually non-existent. In the marketplace of ideas, the college or university is the seller and the student can choose to buy its product or not.

V. GRADUATE COUNSELING STUDENTS, THEIR RELIGIOUS BELIEFS, AND THE CURRICULUM

This section examines the two counseling cases, stated, in which graduate students sought to compel the college or university to grant them religiously based exemptions to the adopted curriculum, specifically the counseling professions' codes of ethics.

A. *Keeton v. Anderson-Wiley*⁸⁹

The graduate program in school counseling at Augusta State University integrated the *ACA Code of Ethics* into its curriculum. A graduate student in the program ran afoul of the *Code* because of her religiously based beliefs on homosexuality.⁹⁰ Jennifer Keeton, a conservative Christian, publicly voiced her views about the gay and lesbian "lifestyle" in class

84. *Heenan v. Rhodes*, 761 F. Supp. 2d 1318, 1320 (M.D. Ala. 2011).

85. *Id.*

86. *Virgil v. Sch. Bd. of Columbia Cnty., Fla.*, 862 F.2d 1517, 1520 (11th Cir. 1989).

87. 474 U.S. 214 (1985).

88. *Id.* at 224; *see also*, *Mittra v. Univ. of Med. & Dentistry of New Jersey*, 719 A.2d 693, 697 (N.J. Super. Ct. App. Div. 1998) (reasoning "the role of the courts in resolving the dismissal of a student for academic reasons was limited to a determination whether the university complied with its own regulations and whether the institution's decision was supported by evidence.").

89. *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011).

90. *Id.* at 868.

discussions, written assignments, and in conversations with her professors. For example, in one assignment, she condemned “homosexuality based upon the Bible’s teachings.”⁹¹ In conversations with her fellow students she encouraged them to adopt her views on gays and lesbians. One student testified, “During one . . . discussion outside of the classroom, [Keeton] expressed to me her view that the gay population could be changed and that, *as school counselors*, we could help them.”⁹² At one point Keeton stated, “It would be difficult for her to work with GLBTQ clients and to separate her views about homosexuality from her clients’ views.”⁹³ She considered gays and lesbians to be suffering from identity confusion and attempted to convert them from being homosexual to being heterosexual.⁹⁴ Furthermore, when a faculty member posed a hypothetical question, she responded that as a high school counselor she would confront the sophomore in crisis by questioning his sexual orientation and would tell him that it is “not okay to be gay.”⁹⁵

At some point during Keeton’s graduate work at Augusta State, the counseling faculty became concerned that Keeton might not be able to separate her personal religious views from her professional obligation as a counselor and that she intended to violate several sections of the *ACA’s Code of Ethics*.⁹⁶ The faculty also concluded that Keeton’s personal views on sexual behavior were not consistent with psychological research.⁹⁷ Keeton, based on her religious convictions, expressed an interest in conversion therapy, sometimes called reparative therapy, for lesbian, gay,

91. Keeton v. Anderson-Wiley, 733 F. Supp. 2d 1368, 1371 (S.D. Ga. 2010).

92. *Id.* at 1374 (emphasis in original).

93. Keeton v. Anderson-Wiley, 664 F.3d 865, 868 (11th Cir. 2011).

94. *Id.* Keeton’s comment about GLBTQ students having identity confusion was stated in a paper following a Diversity Sensitivity course presentation on GLBTQ populations. *Id.* at 873.

95. *Id.* at 868.

96. *Id.* The *ACA Code of Ethics*, sections that Keeton’s statements indicated she would violate are:

(1) Section A.1.a: “The primary responsibility of counselors is to respect the dignity and to promote the welfare of clients”;

(2) Section A.4.b: “Counselors are aware of their own values, attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals. Counselors respect the diversity of clients, trainees, and research participants”;

(3) Section C.2.a: “Counselors gain knowledge, personal awareness, sensitivity, and skills pertinent to working with a diverse client population”; and

(4) Section C.5: “Counselors do not condone or engage in discrimination based on age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, socioeconomic status, or any basis proscribed by law.” *Id.* at 869.

97. *Id.* at 881.

bisexual, transgender, and queer/questioning populations.⁹⁸ In the faculty's view, conversion therapy violated the *ACA Code of Ethics* and was in opposition to the clinical literature.⁹⁹

The counseling faculty concluded, following the policies contained in their student handbook,¹⁰⁰ that Keeton was not making satisfactory progress regarding interpersonal or professional criteria. Consequently, the faculty placed Keeton on a remediation plan prior to allowing her engage in one-on-one counseling with a student. In order to have the remedial status removed she had to comply with the remediation plan crafted by the faculty.¹⁰¹ The faculty stated in the remediation plan that it was designed to help her learn to comply with the *ACA Code of Ethics* and to "improve her 'ability to be a multiculturally competent counselor, particularly with regard to working with [GLBTQ] populations.'"¹⁰²

The remediation plan had two parts. The first part was designed to improve her writing skills and Keeton had no problem with this part of the plan. The second part was intended to address issues of multicultural competence in working with GLBTQ student populations which she would encounter in the schools.¹⁰³ This portion of the remediation plan required her to complete several tasks. For example, she was required to attend at least three workshops that emphasized improving cross-cultural communication, developing multicultural competence, or enhancing diversity sensitivity toward working with GLBTQ populations.¹⁰⁴ She was also required to read at least ten scholarly articles that pertained to improving counseling effectiveness with GLBTQ populations.¹⁰⁵ Keeton was also directed to increase her exposure to, and interaction with, gay populations, and it was suggested that she attend the Gay Pride Parade in

98. *Id.* at 869, 873.

99. *Id.* at 876. ("Moreover, the ACA, in addition to several other professional organizations, including the American Psychology [sic] Association, holds that '[t]he promotion in schools of efforts to change sexual orientation by therapy or through religious ministries seems likely to exacerbate the risk of harassment, harm, and fear for [GLBTQ] youth.'") *Id.* at 876, citing to JUST THE FACTS COALITION, *Just the Facts About Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel*, 4 (2008), available at <http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf> [hereinafter *just the facts*] (the 12 member coalition states that reparative therapy runs counter to the general consensus of the major medical, health, and mental health professions and that efforts to implement it "have serious potential to harm young people because they present the view that the sexual orientation of lesbian, gay, and bisexual youth is a mental illness or disorder, and they often frame the inability to change one's sexual orientation as a personal and moral failure.").

100. *Keeton v. Anderson-Wiley*, 664 F.3d 865, 869 (11th Cir. 2011).

101. *Id.*

102. *Id.*

103. *Id.* at 869–70.

104. *Id.* at 870.

105. *Id.*

Augusta, Georgia.¹⁰⁶ Finally, Keeton was required to prepare some written reflections that summarized what she learned from her research on gay issues.¹⁰⁷ Failure to complete the remediation plan would result in expulsion from the counseling program.¹⁰⁸

According to the terms of the remediation plan, Keeton was required to meet twice with faculty prior to December 2010, after which the faculty would decide whether Keeton should continue in the counseling program.¹⁰⁹ Although Keeton initially agreed to participate in the second part of her remediation plan (the part that addressed exposure to lesbian populations), she changed her mind, stating, “I am not going to agree to a remediation plan that I already know I wouldn’t be able to successfully complete.”¹¹⁰

Keeton sued in federal court, alleging several constitutional violations, including viewpoint discrimination, retaliation, and compelled speech, in violation of her First Amendment rights and her right to free exercise of religion.¹¹¹

In an order dated August 20, 2010, federal district court Judge J. Randall Hall denied Keeton’s motion for a preliminary injunction, finding that she was unlikely to win her case on the merits.¹¹² Judge Hall began his decision by stating that:

This case is not about the propriety of Keeton’s view or beliefs or the views and beliefs of the ASU counseling faculty. Despite any suggestion to the contrary, this is not a case pitting Christianity against homosexuality. This case is only about the constitutionality of the actions taken by Defendants regarding [Keeton] within the context of [Keeton’s] Counselor Education masters degree program at . . . ASU, and no more.¹¹³

Keeton appealed. Keeton alleged that the ASU counseling program discriminated against her viewpoint on homosexuals, retaliated against her, and compelled her to express views she does not hold.¹¹⁴ The panel found that the counseling program was not a traditional public forum, nor was it a designated forum. Instead the program was a nonpublic forum in which the state university reserved its intended purposes as “‘a supervised learning experience,’ connected in this case to the requirements of a profession

106. *Id.*

107. *Id.*

108. *Id.* at 871.

109. Keeton v. Anderson-Wiley, 733 F. Supp. 2d 1368, 1373 (S.D. Ga. 2010).

110. Keeton v. Anderson-Wiley, 664 F.3d 865, 871 (11th Cir. 2011).

111. *Id.*

112. Keeton v. Anderson-Wiley, 733 F. Supp. 2d 1368, 1371 (S.D. Ga. 2010).

113. *Id.*

114. Keeton v. Anderson-Wiley, 664 F.3d 865, 871 (11th Cir. 2011).

whose accreditation is required for the school to offer a degree that allows its students to become licensed as professional counselors.”¹¹⁵ Consequently, the court reviewed Keeton’s viewpoint discrimination claim by asking whether the remediation plan was reasonable and whether it was viewpoint neutral.¹¹⁶

The court asserted that the evidence did not support Keeton’s claim. The remediation plan was not instituted because of her religiously based views on homosexuality. Rather, the plan was developed because Keeton “expressed an intent to impose her personal religious views on her clients, in violation of the *ACA Code of Ethics*.”¹¹⁷ The remediation plan was established to teach her how to effectively counsel all student populations, especially GLBTQ students, and to maintain ethical behavior in all counseling situations with all clients and not impose her religious views.¹¹⁸

The court rejected the plaintiff’s argument that she was singled out for disfavored treatment because of her views on homosexuality. Instead, the court asserted that the program required that all students counsel their clients regardless of their personal beliefs in accordance with the *ACA Code of Ethics*. Counselors are taught to support their client’s welfare, to respect the dignity and the autonomy of the client, and to assist the client in pursuing his or her own goals and to do this without imposing the counselor’s personal beliefs and views. The curriculum “requires that all students be competent to work with all populations, and that all students not impose their personal religious values on their clients, whether, for instance, they believe that persons ought to be Christians rather than Muslims, Jews, or atheists, or that homosexuality is moral or immoral.”¹¹⁹

The court acknowledged that Keeton is free to hold her beliefs and is free to express those views, but she cannot compel the ASU counseling program to accept her views in lieu of the ethical requirements of the *ACA Code of Ethics*.¹²⁰ She must be willing to set aside her beliefs and attend to the needs of the client. The counselor cannot, as Keeton states she would do, “impose their values on clients.”¹²¹ The remediation plan seeks to assist Keeton to meet the standards required of all graduate counseling students without regard to any personal beliefs that she may hold. The plan targets her unwillingness to comply with the *ACA Code of Ethics*, serving the

115. *Id.* at 871–72.

116. *Id.* at 872.

117. *Id.*

118. *Id.* at 873. (“These concerns arose from Keeton’s own statements that she intended to impose her personal religious beliefs on clients and refer clients to conversion therapy, and her own admissions that it would be difficult for her to work with the GLBTQ population and separate her own views from those of the client.”).

119. *Id.* at 874.

120. *Id.*

121. *Id.*

client's best interests, and leaving her personal beliefs outside of the counseling session. Consequently, ASU "provides an adequate explanation for its [remediation plan] over and above mere disagreement with [Keeton's] beliefs and biases."¹²²

After deciding that the imposition of the remedial plan was viewpoint neutral, the appellate court turned to the reasonableness of the plan. The Eleventh Circuit Court of Appeals cited *Hazelwood School District v. Kuhlmeier* as authority for the ASU decision to establish a remediation plan in response to Keeton's statements and curricular choices.¹²³ The court exercised caution so as to not substitute its judgment for the judgment of educators who are trained in educational policy and curricular matters. The court deferred to educators as to what constitutes sound educational policy and as to how their curriculum will be implemented. In addition, *Keeton* held that the decision to base the graduate counseling program and clinical practicum on the *ACA Code of Ethics*, which prohibits counselors from imposing their moral values on clients, is reasonable.¹²⁴

Keeton's argument of retaliation was quickly dispatched by the court because her speech was not protected. As the court reasoned, the ASU faculty imposed the remediation plan not because of her religious views, "but because she was unwilling to comply with the *ACA Code of Ethics*."¹²⁵

The last free speech argument that Keeton asserted was that the remediation plan constituted compelled speech forcing her to express beliefs with which she disagrees. The court asserted that Keeton was not compelled to profess a belief contrary to her beliefs; instead, she was required to comply with the *ACA Code of Ethics* and separate her personal beliefs from her work as a counselor. For example, the court wrote:

When a GLBTQ client asks, for example, if his conduct is moral, [counseling graduate] students are taught to avoid giving advice, to explore the issue with the client, and to help the client determine for himself what the answer is for him. If a client determines for himself that his conduct is moral, the *ACA Code of Ethics* requires the counselor to affirm the client, which means that the counselor must respect the dignity of the client by accepting the client's response without judgment, not that the counselor must say that she *personally* believes that the client is correct.¹²⁶

The critical portion of the court's statement is that affirming the values of the client is not an affirmation that the counselor agrees with the value.

122. *Id.* at 875 (internal quotations omitted).

123. *Id.* (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

124. *Keeton*, 664 F.3d at 876.

125. *Id.* at 878.

126. *Id.* at 878–79 (emphasis in original).

Affirmation is a non-judgmental acknowledgement of the client's values. Affirming a client's homosexuality is not a statement by the counselor approving or accepting the client's sexual orientation. The counselor can personally condemn homosexuality but professionally affirm the beliefs of the GLBTQ client. Similarly, a client may hold and espouse deeply held religious beliefs that are counter to the religious beliefs of the counselor. The *Code of Ethics* does not require that affirming the beliefs and values of the client must result in an abdication of the counselor's religious beliefs. In addition, the court held that a college or university may require its students to demonstrate that they have grasped the curricular material.¹²⁷ Answering questions on an exam, writing papers from a particular viewpoint,¹²⁸ and reading the words of a playwright as written¹²⁹ are not compelled speech.

Keeton's last allegation was the remediation plan violated her right to the free exercise of her religion. The court dispatched this claim in three paragraphs. The court found that the two threshold questions of the neutrality of the law and its general applicability were met. The defendant university met the test in that the *ACA Code of Ethics* is neutral and is generally applicable to all students and, thus, easily survives rationale basis review.¹³⁰ The court concluded, "[i]n seeking to evade the curricular requirement that she not impose her moral values on clients, Keeton is looking for preferential treatment, not equal treatment."¹³¹ The Eleventh Circuit Court of Appeals upheld the district court's denial of Keeton's motion for summary judgment.¹³²

B. *Ward v. Polite*¹³³

The Master's Degree program in counseling at Eastern Michigan University requires students to pass specific lecture/discussion classes as well as a practicum. The practicum involves actual counseling of real clients in a clinic operated by the University and supervised by University faculty. The practicum and the student handbook specifically state that all students in the counseling program must abide by the *ACA Code of Ethics*

127. *Id.* at 879 ("A school must, for instance, be free to give a failing grade to a student who refuses to answer a question for religious reasons, or who refuses to write a paper defending a position with which the student disagrees.").

128. *See, e.g.,* *Head v. Bd. of Tr. of Cal. State Univ.*, No. C 05-05328-WHA, 2006 WL 2355209, at *7 (N.D. Cal. Aug. 14, 2006) (a university may require students "to improve their understanding of other races and cultures so that they could better teach students in those groups.).

129. *See, e.g.,* *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).

130. *Keeton v. Anderson-Wiley*, 664 F.3d 865, 879-80 (11th Cir. 2011).

131. *Id.* at 880.

132. *Id.*

133. 667 F.3d 727 (6th Cir. 2012).

and the American School Counselor Association's *Ethical Standards for School Counselors*.¹³⁴ In addition, the state of Michigan requires school counselors to be trained in ethics.¹³⁵ Furthermore, the graduate-level counseling program "prohibits students from discriminating against others based on sexual orientation and teaches students to affirm a client's values during counseling sessions."¹³⁶

In 2006, Julea Ward, a high school teacher, began a master's degree program in counseling at Eastern Michigan University (EMU) with the goal of becoming a high school counselor.¹³⁷ Ward openly shared her religious-based views of homosexuality in classroom discussions. She made it clear that she believed homosexuality to be morally wrong by turning in a paper in which she discussed the potential for conflict when a counselor with religion-based values encounters a client with different values.¹³⁸ In such circumstances, Ward wrote, "standard practice" would be for the counselor to refer the client to a different counselor whose values were more compatible with the values of the client. Ward received a perfect score for the paper, and she received an "A" in all her classes.¹³⁹ In addition to stating that her faith precluded her from affirming a client's same-sex relationship, she could not affirm certain heterosexual conduct such as extramarital relationships.¹⁴⁰ "When Ward expressed these views, professors disagreed, sometimes kindly, sometimes less so, but consistently making the point that, as a counselor, she must support her clients' sexual orientation, whatever that may be."¹⁴¹

Three years after beginning her graduate counseling program, in January 2009, Ward ran into a conflict with the faculty during her practicum course. At some point during the course, she was assigned to counsel a client who had been suffering from depression but who had previously been counseled

134. *Id.* at 731; *see also* Ward v. Wilbanks, No. 09-CV-11237, 2010 WL 3026428, at *4 (E.D. Mich. July 26, 2010). (the court noted the Student Handbook outlines various behaviors that result in disciplinary action: "Academic disciplinary action may be initiated when a student exhibits the following behavior in one discrete episode that is a violation of law or of the *ACA Code of Ethics* and/or when a student exhibits a documented pattern of recurring behavior which may include, but is not limited to . . . [u]nethical, threatening, or unprofessional conduct; . . . [c]onsistent inability or unwillingness to carry out academic or field placement responsibilities; . . . inability to tolerate different points of view, constructive feedback or supervision.") (quoting EASTERN MICHIGAN UNIVERSITY, FINDING YOUR WAY: THE COUNSELING STUDENT HANDBOOK 13 (2011)).

135. MICH. COMP. LAWS § 333.18107(1)(b) (1978).

136. *Ward*, 667 F.3d at 729.

137. *Id.* at 730.

138. *Ward*, 2010 WL 3026428, at *1. ("Plaintiff strictly adheres to orthodox Christian beliefs, a fact which she shared in her application to the Program.")

139. *Id.*

140. *Ward*, 667 F.3d at 729.

141. *Id.* at 730.

about a homosexual relationship. Ward reviewed the client's file about two hours before the counseling session was scheduled to begin and noted that the client was homosexual. Ward contacted her supervisor, Dr. Callaway, and asked whether she should refer the client to another counselor because she could not affirm his homosexual behavior.¹⁴² Because of time constraints, which "precluded a full discussion of the conflict,"¹⁴³ Dr. Callaway decided that it was in the best interests of the client to cancel the appointment and reschedule it at a later time with a different counselor.¹⁴⁴

Dr. Callaway later told Ward that she would be assigned no more clients and told her that she would schedule an informal review before herself and Ward's advisor, Dr. Dugger, to assist her in improving her performance or to explore the option of voluntarily leaving the program.¹⁴⁵ At the informal review, Ward restated her religious objection to affirming same-sex relationships.¹⁴⁶ All three agreed that a remediation plan would not be possible given Ward's uncompromising view and the dictates of nondiscrimination and counselor affirming behavior.¹⁴⁷ Ward was given the option of withdrawing or requesting a formal review. She asked for a formal review.¹⁴⁸

Prior to the formal review, Dugger told Ward that she had violated the *ACA Code of Ethics* "by: (1) 'imposing values that are inconsistent with counseling goals,' Rule A.4.b, and (2) 'engag[ing] in discrimination based on . . . sexual orientation,' Rule C.5."¹⁴⁹ On March 10, 2009, Ward was given a formal hearing before four faculty members and one student representative. During this hearing, Ward told the panel "that while she objected to counseling homosexual clients on their same-sex relationships, she would counsel them on any other issue."¹⁵⁰ She also "refused to affirm any behavior that 'goes against what the Bible says.'"¹⁵¹ In addition, Ward

142. *Id.* at 731; *see also Ward*, 2010 WL 3026428, at *1 (the district court characterizes Ward's request to her supervisor under whose license she was practicing for a referral "because [Ward] could not affirm the client's homosexual behavior."); *Ward*, 667 F.3d at 731 (the Court of Appeals described the incident without a statement of the time constraint and depicted Ward's request as willing to meet but wanted to refer the client if the counseling required her to affirm the client's same-sex relationship or the school could reassign at the outset).

143. *Ward*, 2010 WL 3026428, at *1.

144. *Ward*, 667 F.3d at 731.

145. *Id.*

146. *Id.*

147. *Ward*, 2010 WL 3026428, at *9.

148. *Ward*, 667 F.3d at 731.

149. *Id.*; *see also Ward*, 2010 WL 3026428, at *9 (the district court characterized the charges as "not one referral, but rather plaintiff's refusal to counsel an entire class of people that resulted in her discipline.").

150. *Ward*, 2010 WL 3026428, at *2.

151. *Id.*

told the hearing panel that she “disagreed with the [American Counseling Association’s] prohibition on reparative therapy (viz., therapy targeted at changing a homosexual individual’s sexual orientation), but that she would comply with such rules.”¹⁵² It is unknown if Ward’s position in support of reparative therapy is religiously based. Ward’s belief in this type of therapy is similar to Keeton’s.¹⁵³

At the conclusion of the hearing, the panel unanimously decided to dismiss Ward from the counseling program for violation of the *ACA Code of Ethics* and her “unwilling[ness] to change [her] behavior.”¹⁵⁴ Ward appealed the committee’s decision to the Dean of the EMU College of Education who upheld the committee’s decision.¹⁵⁵

C. District Court Decision: *Ward v. Wilbanks*

Ward then sued several members of EMU’s counseling faculty in federal court, charging them with violating her constitutional rights to due process, freedom of speech, free exercise of religion, equal protection and violation of the Establishment Clause. In an opinion dated July 26, 2010, Judge George Caram Steeh granted the EMU defendants’ motion for summary judgment and dismissed Ward’s case.¹⁵⁶

The district court prefaced its analysis of Ward’s constitutional claims by first reviewing the requirements of the *ACA Code of Ethics* which begins with a central tenet “that a counselor’s primary responsibility . . . is to respect the dignity and to promote the welfare of clients.”¹⁵⁷ Furthermore, the “ACA also binds counselors to comply with a nondiscrimination policy, which prohibits them from ‘condon[ing] or engag[ing] in discrimination based on age, culture, . . . sexual orientation, marital status/partnership. . . . Counselors do not discriminate against clients . . . in a manner that has a negative impact. . . .’”¹⁵⁸ These requirements apply to counseling students as well as school counselors. Section F.8.a: “Standards for Students,” reads in pertinent part, “[s]tudents have the same obligation to clients as those required of professional counselors.”¹⁵⁹

The court denied each of Ward’s constitutional claims, beginning first with Ward’s due process claim. Ward argued that EMU defendants violated

152. *Id.* See *supra* text accompanying note 99 for a discussion of reparative/conversion therapy.

153. See *supra* accompanying text note 99.

154. *Ward*, 667 F.3d at 731.

155. *Id.* at 732.

156. *Ward*, 2010 WL 3026428, at *27.

157. *Id.* at *4 (quoting *ACA Code of Ethics*, *supra* note 5, at A.1.a).

158. *Id.* (quoting *ACA Code of Ethics*, *supra* note 5, at C.5).

159. *ACA Code of Ethics*, *supra* note 5, at 15.

her right to due process by disciplining her for violation of a “speech code” that was vague and overbroad and that did not give her fair notice that asking to refer a homosexual patient to another counselor could lead to her dismissal from the counseling program.¹⁶⁰ The court found that “the University’s disciplinary policy is not a speech code but is an integral part of the curriculum.”¹⁶¹ The student handbook outlined various behaviors that result in disciplinary action including violations of law, the *ACA Code of Ethics*, and “inability to tolerate different points of view, constructive feedback, or supervision.”¹⁶²

A central argument for Ward was that she, as stated in her paper that received a grade of “A,” can refer and should refer, under certain circumstances, a student/client to another counselor.¹⁶³ The court noted that the ACA recommends that “[i]f counselors determine an inability to be of professional assistance to clients, they avoid entering or continuing counseling relationships,” then a referral may be made.¹⁶⁴ However, ACA Chief Professional Officer, David Kaplan asserted “[t]here is no statement in the *ACA Code of Ethics* that referral can be made on the basis of counselor values’ unless they are counseling ‘terminally ill clients who wish to explore options for hastening their death.’”¹⁶⁵ Furthermore, Kaplan’s expert report agreed with the decision of the Review Committee that Ward “had violated the *ACA Code of Ethics* by imposing her own values on a client, which is ‘inconsistent with the counseling goal of nondiscrimination on the basis of sexual orientation.’”¹⁶⁶ Following this line of reasoning, Kaplan stated that had Ward refused to counsel a student based on the student’s race, because her values did not allow her to counsel people of color, she would also have violated the *ACA Code of Ethics*.¹⁶⁷ Ward did not refuse to counsel just one client, but rather refused to “counsel an entire class of people.”¹⁶⁸

When Ward was asked to discuss her behavior, “instead of exploring options which might allow her to counsel homosexuals about their relationships,” she adopted an uncompromising position that she would not engage in affirming gays, who she believed live an “immoral lifestyle.”¹⁶⁹ Ward’s dismissal stemmed, according to the formal charges, from a

160. *Ward*, 2010 WL 3026428, at *7.

161. *Id.*

162. *Id.* at *4 (quoting EASTERN MICHIGAN UNIVERSITY, FINDING YOUR WAY: THE COUNSELING STUDENT HANDBOOK 14 (2011)).

163. *Id.* at *8.

164. *Id.* at *4 (quoting *ACA Code of Ethics*, *supra* note 5, at A.11.b).

165. *Id.* (quoting *ACA Code of Ethics*, *supra* note 5, at A.9).

166. *Id.*

167. *Id.* at *18.

168. *Id.* at *9.

169. *Id.*

violation of the *ACA Code of Ethics* and a “stated intention to continue violating” the *Code*.¹⁷⁰ When asked about improper condoning of discrimination, Ward responded, “I would believe that persons involved in an interracial marriage to be improper, immoral, and contrary to the human condition.”¹⁷¹ It is not known whether this perceived immoral activity of interracial marriages would also preclude her ability to provide counseling services related to interracial marriage, such as counseling the children from an interracial marriage.¹⁷² Furthermore, the court held that Ward’s “statement that she would [only] counsel homosexuals on non-relationship issues demonstrates her lack of understanding of the nature of counseling.”¹⁷³ Counselors never know where their counseling session will take them. Therefore, it is impractical to bracket the issues the counselor will discuss. Counseling is a personal and unpredictable activity. “[T]he nature of issues and topics confronting individual clients are often unforeseen.”¹⁷⁴ “A counselor’s job is to facilitate answers that are right for the client,”¹⁷⁵ not what fits with the counselor’s worldview and beliefs.

Rejecting Ward’s arguments, the court concluded that EMU’s nondiscrimination policy for students in the counseling program was not a speech code. Rather, the policy, which incorporated the *ACA Code of Ethics*, was part of the curriculum. In the court’s view, Ward had notice of the policy, which was contained in the student handbook and taught in the curriculum. Thus, the court denied Ward’s due process claim.¹⁷⁶

Next, the court examined Ward’s free speech claim and dismissed it as well. Drawing on the Supreme Court’s ruling in *Hazelwood School District v. Kuhlmeier*,¹⁷⁷ the court concluded that the counseling program’s

170. *Id.*

171. *Id.* at *11.

172. *See* *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) (Chief Justice Burger wrote in a unanimous decision, which held that a child could not be removed from his white mother’s custody because she chose to live with an African American man, that the “Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”). Extending to this case, does the state through either its public university or an employing public school tacitly support a position of prejudice by allowing one of its students or employees to treat clients differentially because of the protected status of the client? *Cf.* *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (Justice O’Connor writing in her concurrence, “Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause . . .”).

173. *Ward*, 2010 WL 3026428, at *13.

174. *Id.* at *16. (“A counselor may hold himself out to specialize in a particular issue, like eating disorders, but that disorder may be due to underlying issues, perhaps, coming to terms with homosexuality.”).

175. *Id.* at *13.

176. *Id.* at *13–17.

177. 484 U.S. 260 (1988). While *Hazelwood* was a K-12 decision, the court and others have applied the framework to higher education cases, *see* *Hosty v. Carter*, 412

nondiscrimination policy formed part of the curriculum and was based on “legitimate pedagogical concerns.”¹⁷⁸ Citing to the Supreme Court, which first recognized that “[a] school need not tolerate student speech that is inconsistent with its ‘basic educational mission,’ even though the government could not censor similar speech outside the school,”¹⁷⁹ the district court found support for the EMU faculty’s decision.¹⁸⁰ In the classroom and practicum setting, the court pointed out, the faculty can restrict students’ speech for pedagogical purposes, and the faculty’s insistence that Ward set aside her personal beliefs about homosexuality when counseling a client did not violate Ward’s constitutional right to free speech. Ward was enrolled in a school-counseling program that believes, consistent with the code of ethics of counselors, its students need clinical experiences in order to learn to deal with counseling situations in an ethical manner. “Providing such skills to its graduates is the legitimate pedagogical concern of the University. EMU could not confer a counseling degree on a student who said she would categorically refer all clients who sought counseling on topics with which she had contrary moral convictions.”¹⁸¹

Ward also asserted a First Amendment retaliation claim arguing that she had been dismissed from the counseling program because providing “gay-affirmative” acts as part of her counseling “violated her religious beliefs.”¹⁸² The court held that her retaliation claim failed because she was not involved in a protected activity. Ward violated a valid curriculum requirement by refusing to counsel a client and her dismissal was academically legitimate.¹⁸³ Moreover, EMU’s counseling faculty did not require Ward to change or give up her religious beliefs; she was only required to set them aside during the counselor-client relationship and serve the best interests of the client, which is required by the counseling code of ethics.¹⁸⁴

Next, she alleged a violation of the Establishment Clause. The trial court also rejected Ward’s arguments that EMU’s faculty had violated the Establishment Clause in the way it conducted its counseling program. The court subjected the program to the three-part *Lemon* test¹⁸⁵ and concluded

F.3d 731 (7th Cir. 2005); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004); *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002). For a critique of the use of *Hazelwood* in higher education, see generally Karyl Roberts Martin, *Demoted to High School: Are College Students’ Free Speech Rights the Same as Those of High School Students*, 45 B.C. L. REV. 173 (2003).

178. *Ward*, 2010 WL 3026428, at *16.

179. *Id.* at *14 (quoting *Hazelwood*, 484 U.S. at 266).

180. *Id.* at *16.

181. *Id.*

182. *Id.* at *20.

183. *Id.*

184. *Id.*

185. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

that the program was not operated for the purpose of advancing religion or inhibiting religion, that the program's operation did not have the effect of inhibiting or enhancing religion, and that the program had not been excessively entangled with religion.¹⁸⁶ The court also dismissed the claim that the counseling program had established the "religion of secularism."¹⁸⁷

D. Sixth Circuit Court of Appeals Decision

Ward appealed the summary judgment ruling in favor of the university, asserting a denial of her free speech and her free exercise of religion.¹⁸⁸ The three-judge appellate panel reversed the trial court's grant of summary judgment, asserting, "When the facts are construed in Ward's favor, as they must be at this stage of the case, a reasonable jury could conclude that Ward's professors ejected her from the counseling program because of hostility toward her speech and faith, not due to a policy against referrals."¹⁸⁹ The court argued that the university did not have a non-referral policy upon which it based its decision to deny Ward's request for a referral. It further argued that the *ACA Code of Ethics*, the basis for the dismissal, contains no bar to a student being given a referral based on the counselor's values, "like the one Ward requested."¹⁹⁰ Thus, if there is no non-referral policy that was adopted prior to Ward's request and there is no bar to granting a referral under the *ACA Code of Ethics* adopted by the university, a reasonable jury could conclude that the basis for the dismissal was a pretext for "punishing Ward's religious views and speech."¹⁹¹ The three-judge panel notes, "The inquiry was not a model of dispassion,"¹⁹² calling the non-referral policy "an after-the-fact invention."¹⁹³

Turning to the free speech analysis, the appellate court, similar to the district court, found that the university's curriculum is a form of speech

186. *Ward*, No. 09-CV-11237, 2010 WL 3026428 at *21-23. (holding "the curriculum has a secular purpose, as it based on national accreditation standards, professional codes of ethics, and State licensing requirements.").

187. *Id.* at *24; *see also Id.* ("Clearly, the Program was designed to encourage respect for, not hostility toward, various points of view.").

188. *Ward v. Polite*, 667 F.3d 727, 732 (6th Cir. 2012).

189. *Id.* at 730.

190. *Id.* at 735.

191. *Id.*; *see also id.* at 737 ("On top of the absence of a written policy barring referrals in the practicum class, there is plenty of evidence that the only policy governing practicum students was the *ACA Code of Ethics*, which as shown contemplates referrals."). The Court of Appeals went on to cite Ward's comment that her professors told her that, once she got to the practicum, she was "'supposed to use everything that has been taught to you in previous courses,' including the code of ethics." *Id.* It can be reasonably argued that includes nondiscrimination based on sexual orientation.

192. *Id.* at 737.

193. *Id.* at 736.

over which it retains control of the message. The “selection and implementation of a curriculum—the lessons students need to understand and the best way to impart those lessons—and public schools have broad discretion in making these choices.”¹⁹⁴ In other words, the university could adopt a curriculum that incorporated the *ACA Code of Ethics*. Having adopted its curriculum, the educational institution must, through its faculty, “assure that participants learn whatever lessons the activity is designed to teach.”¹⁹⁵ And, once the curriculum and the class requirements have been laid out for all to see, “it is a rare day when a student can exercise a First Amendment veto over them.”¹⁹⁶

While developing a strong case for university control over its curriculum, the Court of Appeals, however, noted several limitations to the university’s speech. First, the restrictions on student speech must be reasonably related to a legitimate pedagogical concern.¹⁹⁷ The panel did not assert that the basis for adopting the curriculum or making any other academic decisions violated this principle. Rather, the panel found that there was a dispute as to a material fact on this point, over which it felt it was inappropriate to grant summary judgment. Second, the university is not permitted to “invoke curriculum ‘as a pretext for punishing [a] student for her . . . religion.’”¹⁹⁸ “Gauged by these requirements, Ward’s free-speech claim deserves to go to a jury.”¹⁹⁹

The court found, in opposition to the lower court, that the code of ethics allows for values-based referrals such as the one Ward requested.²⁰⁰ In other words, the court states that counselors, or counselors-in-training, can make referrals based on their values. The court reviews the two provisions, which formed the basis for the dismissal, and constructs an analysis that is different than the district court’s analysis. First, the panel addresses Section A.4.b: “Personal Values,” which reads “[c]ounselors are aware of their own values, attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals. Counselors respect the diversity of clients, trainees, and research participants.”²⁰¹ The court asks and answers the question of what Ward did wrong in making the referral

194. *Id.* at 732.

195. *Id.* at 733; (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

196. *Id.* at 734; *see also Id.* at 733 (“That the First Amendment protects speech in the public square does not mean it gives students the right to express themselves however, whenever and about whatever they wish in school assignments or exams.”).

197. *Id.* at 732 (quoting *Hazelwood*, 484 U.S. at 271).

198. *Id.* at 734 (quoting *Settle v. Dickson Cnty. Sch. Bd.*, 53 F.3d 152, 155 (6th Cir. 1995)).

199. *Id.* at 735.

200. *Id.*

201. *Id.* (quoting *ACA Code of Ethics*, *supra* note 5, at A.4.b).

request. The three judges find that her referral was made “to *avoid* imposing her values on gay and lesbian clients.”²⁰² Ward’s willingness to counsel gay and lesbian clients on subjects other than sexual relations “respected the diversity of practicum clients,” the court stated.²⁰³ In other words, Ward will only counsel clients/students on her terms, and consistent with her values. Is the argument, I am not discriminating against you by refusing to counsel you because I am acting in your best interest? Can this argument be used as cover for all discrimination?

In practical terms, will Ward tell her homosexual clients upfront that she will help them as gay men with anything but their sexuality, or will she wait until the subject surfaces and then say she cannot counsel them because it offends her values? Either way it seems highly questionable whether Ward’s values will be imposed on her client and whether any respect for the gay client will have been communicated. It appears that the court’s reasoning is constructed so as to elevate the values, attitudes, beliefs, and behaviors of the counselor over the needs of the client—“as long as I am not offended by your problem or who you are, I will provide counseling.”

Second, the court believes Ward’s referral of the gay client is consistent with and not a violation of the nondiscrimination requirement of the *Code*.²⁰⁴ In fact, the court opined that there was no negative impact on the client because the client did not know and the client “perhaps received better counseling than Ward could have provided.”²⁰⁵ The court states that Ward was willing to work with the gay client as long as he did not discuss his sexuality. If the session turned to the gay client’s sexual relations, “the school’s affirmation directives” require her to affirm the sexual practices, which offend her values.²⁰⁶ The court drew the following analogy to find that Ward’s referral would not be discriminatory: a Muslim counselor would not be required to tell a Jewish client that his religious beliefs are correct.²⁰⁷ The court misconstrued the meaning of affirming the client’s values. An affirmation is not a statement of agreement with the client. A counselor can counsel a lesbian about sexual matters and affirm that the client holds certain values that define her behavior without stating that her

202. *Id.* at 735 (emphasis in original).

203. *Id.*

204. *Id.* (quoting *ACA Code of Ethics*, *supra* note 5, at C.5).

205. *Ward*, 667 F.3d at 735; this assertion begs the question as to what would the court say if the client knew that Ward had referred him to another counselor because of his sexual practices as a gay man and that those legal practices offended the values of the counselor. Would the client have felt discriminated against because of who he was as a person?

206. *Id.*

207. *Id.* (the court concluded this part of the analysis, writing, “[t]olerance is a two-way street. Otherwise the rule mandates orthodoxy, not anti-discrimination.”).

behavior and beliefs are 'correct.' Ward was not required to affirm that the gay client's values and behaviors were correct even though they conflicted with hers.

Cabining the counseling sessions to only those topics Ward finds acceptable is to misunderstand the realities of LGBT students' lives in school. Will she be able to institute policies at the school where she may work someday as a counselor, to protect LGBT students from harassment because of their sexual orientation when she reserves the right to not counsel them?²⁰⁸ Also, because LGBT students are often bullied at school, it is reasonable to assume that they may seek assistance from their school counselor in response to the bullying. There is a growing body of research that documents the elevated risk of victimization that these students face.²⁰⁹ Gay and lesbian students report physical and verbal harassment, stigmatization, and isolation with 91 percent hearing homophobic epithets and 39 percent reporting being bullied.²¹⁰ For the bullied LGBT students seeking help, can there be a counselor erected a firewall between the life of the student and the bullying which separates what topics counselors will provide counseling and what topics they will not counsel? There is simply no clear way to protect the school counselor from counseling bullied gay and lesbian students without the issue of sexual differences possibly arising. Many of the epithets hurled at them have explicit and implicit sexual connotations. What may start as a discussion on failing grades, may lead to a discussion of the bullying about his/her sexual orientation and its impact on the student's grades.

The court argues that the *ACA Code of Ethics* allows for referrals such as

208. For examples of educator discriminatory conduct directed towards LGBT students, *see* *Nabozny v. Podlesny*, 92 F.3d 446, 455-56 (7th Cir. 1996) (holding that the school violated the Equal Protection Clause by its failure to protect a harassed gay male student); *Henkle v. Gregory*, 50 F. Supp.2d 1067 (D. Nev. 2001) (finding discrimination under Title IX based on demands by school officials to keep his sexual orientation to himself).

209. *See, e.g.*, Russell B. Toomey, Caitlin Ryan, Rafael M. Diaz, Noel A. Card, & Stephen T. Russell, *Gender Non-Conforming Lesbian, Gay, Bisexual, and Transgender Youth: School Victimization and Young Adult Psychosocial Adjustment*, DEVELOP. PYSCH 1 (2010) available at http://lgbtguild.com/youth_files/APA%20-%20Gender-Nonconforming%20Lesbian,%20Gay,%20Bisexual,%20and%20Transgender%20Youth-%20School%20Victimization%20and%20Young%20Adult%20Psychosocial%20Adjustment.pdf. The authors call for examination of "the school context to gain a deeper understanding of effective protective measures that schools use to prevent the victimization and harassment of LGBT and gender-nonconforming students" at 8. School counselors who not prepared or are unwilling to work with LGBT students to provide a safe environment thus reducing victimization may be exacerbating the school context through their approach to LGBT students instead of ameliorating the school context.

210. V. Paul Poteat & Dorothy L. Espelage, *Predicting Psychosocial Consequences of Homophobic Victimization in Middle School Students*, 27 J. EARLY ADOLSC. 175, 176 (2007).

the one requested by Ward. Therefore, the university adopted the *Code* with its referral provisions, though the university denied the referral based on a policy. The court could not find a written rule for the blanket denial of referrals for counselor trainees.²¹¹ Thus, the policy could be an after-the-fact policy designed to obscure religious discrimination. As evidence, the court cited an instance in which a practicum referral was granted to a student. The student was grieving and received permission for referral from counseling a grieving client.²¹² The court used this as an indication of potential animus for Ward's religion.²¹³ The university characterized it as a "single incident of non-assignment."²¹⁴ The court characterized the policy implementation as riddled with "individualized exemptions."²¹⁵

The court concludes that the university has "ample" authority to adopt the *ACA Code of Ethics* and its non-discrimination provisions for its graduate school-counseling program. However, the problem is not the policy, it is the implementation and the application of the policy in an uneven manner that the court questions.²¹⁶ It left to the lower court on remand the issue of whether the policy contained in the code of ethics was applied in an even-handed manner and in a faith-neutral manner.²¹⁷ The court tried not to tip its hand as to the eventual outcome.²¹⁸ It concluded, "At this stage of the case and on this record, neither side deserves to win as a matter of law."²¹⁹

On December 10, 2012, the lawsuit ended. Eastern Michigan University and Julea Ward agreed upon a settlement of \$75,000.²²⁰ The Court of

211. *Ward*, 677 F.3d. at 736.

212. *Id.* at 737.

213. *Id.* The court questioned, "Why treat Ward differently? That her conflict arose from religious convictions is not a good answer; that her conflict from religious convictions for which the department at times showed little tolerance is a worse answer." *Id.* However, see Brief for Americans United for Separation of Church and State as Amicus Curiae Supporting Appellees, *Ward v. Wilbanks et al.*, No. 09-CV-11237, 2010 WL 3026428, at *9 (E.D. Mich. July 26, 2010) (Nos. 10-2100, 10-2145), 2011 WL 1460534 ("[Ward] was admitted into the University graduate program even after disclosing that she 'strictly adheres to orthodox Christian beliefs.' And she received A's in all of her classes, even though she was not shy about expressing her religious views.") (internal citations omitted).

214. *Ward v. Polite*, 667 F.3d 727, 737 (6th Cir. 2012).

215. *Id.* at 740.

216. *Id.* at 739.

217. *Id.*

218. *Id.* at 741; see also *Id.* at 740 ("Allowing a referral would be in the best interest of Ward (who could counsel someone she is better able to assist) and the client (who would receive treatment from a counselor better suited to discuss his relationship issues)."). This type of analysis could be used by a counselor to avoid counseling anyone for any reason, even a discriminatory reason.

219. *Id.* at 741.

220. See Doug Lederman, *Settlement in Counseling Conflict*, INSIDE HIGHER ED (December 11, 2012) available at <http://www.insidehighered.com/news/>

Appeals support of values based referrals that run counter to the non-discrimination portions of the *ACA Code of Ethics* appears to be the stance in the Sixth Circuit. Does this now mean that a school counselor can claim a values based referral so as not to counsel students with whom the counselor disagrees with their legal life choices? Thus, the calculus of private beliefs as a basis for referrals and professional non-discrimination responsibility remain unresolved.²²¹

The impact of the case and the settlement is unclear. The attorney for Ward stated it is clear from the Court of Appeals decision and the university's settlement that "public universities shouldn't force students to violate their religious beliefs to get a degree."²²² However, a visiting law professor at the University of Michigan stated "it was 'harder to know' whether faculty members in similar situations in the future 'will feel the need to compromise educational policies or give special accommodations to students based on religious beliefs simply out of fear of litigation, even when the policies are educationally necessary and applied fairly.'"²²³ The settlement in *Ward* may mean in the Sixth Circuit the control over a central aspect of counselor preparation, the supervised practicum, may have been turned over to students the power to decide who they will counsel and whom they will not counsel based on their personal values asserting that it is in the best interests of the client and discrimination.

E. Recap of Cases

The four courts in *Keeton v. Anderson-Wiley* and *Ward v. Polite* expressed a judicial philosophy that is deferential to the judgment of the

2012/12/11/university-and-student-settle-lawsuit-over-requirement-counseling-gay-people

221. See *id.* for conflicting statements on the meaning of the settlement.

For the plaintiff: "Besides that great settlement for Julea personally, we also got published decisions that put universities on notice that they need to tread very lightly in this area in the future," said Jeremy Tedesco, a lawyer for the alliance."

For the defendant University: "The resolution of the lawsuit leaves the university's policies, programs, and curricular requirements intact," Walter Kraft, Eastern Michigan's vice president for communications, said via e-mail. "Our faculty retains its right to establish, in its learned judgment, the curriculum and program requirements for the counseling program."

See also, Neal Hutchens, *Student and University Settle Over Her Dismissal From Counselor Education Program*, HIGHEREDUCATIONLAW (Dec. 13, 2012) available at <http://www.highereducationlaw.org/url/2012/12/13/student-and-university-settle-over-her-dismissal-from-counse.html> (writing, "[s]o, while I'm assuming the parties in the *Ward* litigation are relieved to have a conclusion to the lawsuit, the settlement agreement leaves some important legal questions in the air.").

222. *Id.*

223. *Id.*

higher education community regarding academic matters, so long as that judgment reflects academic norms and serves a legitimate pedagogical concern. The *Keeton* and *Ward* rulings upheld the curriculum incorporation of the *ACA Code of Ethics* as part of the required curriculum. For professional preparation programs, their curriculum can be anchored by the ethics of the profession.

The divergence occurred in the *Ward* appellate court decision. This court found in the *ACA Code of Ethics* a values-based exemption for counselors, asserting that the exemption imposes values or discriminates against clients. The courts *Keeton* and the district court in *Ward* did not find a values-based exemption that the plaintiff could assert as a shield for their actions. This argument allows the counselor to control who they will counsel and for what topics they will provide counseling. The assertion of the Sixth Circuit Court of Appeals that this does not run afoul of the general requirement that counselors not discriminate against their clients is highly suspect.²²⁴ It is hard to reconcile how a counselor's values-based exemption grounded in a belief of the immorality of the client is not an imposition of a counselor's personal values. The ability to withhold services for any reason that the counselor chooses based on the counselor's values, attitudes, and beliefs may thinly mask a discriminatory basis in violation of Section A.1.a: "Primary Responsibility." This section reads, "The primary responsibility of counselors is to respect the dignity and to promote the welfare of clients."²²⁵ The Sixth Circuit Court of Appeals argues that referring all members of a protected group to another counselor because the counselor finds the group objectionable is not discrimination. This appears to construct a safe harbor for discrimination. That counselors can assert that counseling a member of a group of clients offends the counselor's values and beliefs, and find cover for that discrimination through the assertion of the right to use a referral is not discrimination, seems like tortured reasoning and a misuse of the intent of the code of ethics. The assertion that the referral is made in the best interests of the client and not in the best interests of the counselor is highly debatable. Professionalism is not built on self-interest; it is built on serving the interests of the client. If the counseling student can refer all clients who are objectionable to their values and beliefs, can the professional counselor also only provide service to those of whom she or he approves? If yes, why incorporate codes of ethics that are meant to constrain and define actions if the true standard is the individual beliefs of the professional? How is the primary responsibility to clients served when the values of the

224. See Rita M. Marinoble, *Homosexuality: A Blind Spot in the School Mirror*, 1 PROF. SCH. COUNS. 4, 4-7 (1998) (asserting that school counselors who reject or judge GLBTQ students can create profound harm for this vulnerable student population).

225. *ACA Code of Ethics*, *supra* note 5, at 4.

counselor are the gatekeeper to providing a service? This issue is exacerbated when the counselor is a school counselor employed by a school district, which serves all students without regard to their race, religion, or sexual orientation.

VI. DISCUSSION

The decisions of the *Keeton* and *Ward* courts stand for the proposition that the university controls its curriculum and that students must adhere to its requirements. This broad authority includes the incorporation of a professional code of ethics with its required skills, knowledge, dispositions, and nondiscrimination requirements.

The public institution of higher education selects what shall be taught and what students must learn from the options of competing curricula. The selection of the curriculum can be viewed as government speech.²²⁶ For example, in a K-12 case, the federal district court of Massachusetts stated, “Public officials have the right to recommend, or even require, the curriculum that will be taught in public school classrooms. Doing so is a form of government speech, which is not generally subject to First Amendment scrutiny.”²²⁷ In the *Keeton* and *Ward* cases, the public universities adopted the *ACA Code of Ethics* as part of their curriculum. It was expected by their respective institutions that *Keeton* and *Ward* would adhere to the curriculum, which included a prohibition against discriminating against a client because of his or her sexual orientation. All four courts upheld this proposition. Even the Sixth Circuit Court of Appeals in *Ward* did not state that the university did not have the right to adopt its curriculum including the prohibition against discrimination. The Sixth Circuit panel in *Ward*, however, raised the issue on remand as to whether the university appropriately implemented the curriculum through its policies allowing for a student referral from counseling a gay student.

As we have seen, courts have traditionally given institutions of higher

226. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (“When the University determines the content of education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”); *Rust v. Sullivan*, 500 U.S. 173, 179 (1991), laid the foundation for the doctrine of government speech by stating that the government could selectively fund a program and require its employees to implement the program, including prohibiting its employees from mentioning abortion as an option. *Id.* at 179. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), is another example; a rare unanimous decision finding government speech in a decision of the State of Utah to not allow the erection of a monument on a government park. The Court asserted that government has the right to speak for itself: “‘It is entitled to say what it wishes,’ and to select the views it wants to express.” *Id.*, 555 U.S. at 467–68 (internal citations omitted).

227. *Griswold v. Driscoll*, 625 F. Supp. 2d 49, 54 (D. Mass. 2009).

education wide latitude “to create curricula that fit schools’ understandings of their educational missions.”²²⁸ This includes practica, internships, and clinical settings.²²⁹ The Sixth Circuit Court of Appeals in *Kissinger v. Board of Trustees of Ohio State University*, in which the plaintiff sought an exception to a surgery requirement on healthy animals on religious grounds, opined, “[The plaintiff] was not compelled to attend Ohio State for her veterinary training. She matriculated with the knowledge that operations on live animals were part of the curriculum established by the Ohio State program’s faculty. She cannot now come forward and demand that the college change its curriculum to suit her desire.”²³⁰ This case raises the argument that since adults are not compelled to attend any one program of post-secondary or graduate study, they should choose those programs that best fit their interests and needs. It is not reasonable that programs of study must accede to the exceptions and preferences that any student demands even if they fit best with the student’s sincerely held beliefs, religious or otherwise.

However, as one legal commentator points out, students should have the right to take reasoned positions against the curriculum and that the courts need to ensure that the faculty act in good faith when determining “that a student is unable to or unwilling to satisfy curricular requirements, including professional and ethical obligations.”²³¹ Raising questions about the curriculum is an appropriate and protected activity.²³² The perspective of students is important and can provide a mirror or counterbalance for review of the curriculum. And clearly the faculty must act in good faith and without animus towards student disagreements. Truth may be discovered through dissent rather than assent of accepted positions. But, an American Civil Liberties Union attorney commenting on the *Ward* case stated, “While no public university can discipline any student because of her beliefs, universities have a right to insist that their graduate students adhere to accepted standards of professionalism and place the needs of their clients first.”²³³

228. *Kissinger v. Bd. of Trust. of Ohio State Univ.*, 5 F.3d 177, 181 (6th Cir. 1993).

229. *See Doherty v. Southern Coll. of Optometry*, 862 F.2d 570 (6th Cir. 1988).

230. *Kissinger*, 5 F.3d at 180-81.

231. Neal H. Hutchins, *A Delicate Balance: Faculty Authority to Incorporate Professionalism Standards Into the Curriculum Versus College and University Students’ First Amendment Rights*, 270 EDUC. LAW REP. 371, 388 (2011).

232. *See Keeton v. Anderson-Wiley*, 664 F.3d 865, 882 (11th Cir. 2011) (Pryor, J., concurring) (“But we have never ruled that a public university can discriminate against student speech on the concern that the student might, in a variety of other circumstances, express views at odds with the preferred viewpoints of the university.”)

233. *6th Circuit Reinstates Student’s Lawsuit Against University*, FIRST AMENDMENT CTR. (Jan. 30, 2012, 10:45 AM), <http://www.firstamendmentcenter.org/6th-circuit-reinstates-student’s-lawsuit-against-university>.

A. Deeply Held Beliefs and the Professional Curriculum

Freedom of speech and the right to hold one's views is decidedly different than compelling the college, university, or the profession to make room for the individual to act in accordance with her or his own beliefs within the pedagogical interests of the college or university. Religious tenets may and should govern private conduct and can inform public actions. However, religious or personal precepts²³⁴ which are at odds with the professional service tenets of counseling, or other helping professions,²³⁵ cannot control the professional behavior of the individual when that person is working in the capacity of the professional. Professional standards of care required of the profession must dictate the quality of the service rendered and to whom it is rendered. When personal beliefs conflict with professional codes of conduct, something must give. The individual may retain his or her deeply held religious beliefs but may not require that the profession change its also deeply held propositions of the proper conduct of its members. To decide otherwise is to eviscerate what it means to have a code of ethics for all adherents that require a certain type of service rendered for the benefit of the public.

Julian Savulescu, the Director of the Oxford Centre for Practical Ethics at Oxford University, offered the following controversial statement²³⁶ about conscientious objection in medicine, "If people are not prepared to offer legally permitted, efficient, and beneficial care to a patient because it conflicts with their values, they should not be doctors."²³⁷ He raises an important question about whether professional practice must serve the conscience of the practitioner, or whether the professional must serve the conscience of the profession. A person who cannot perform the requirements of the profession, such as being a married priest, cannot assert that the church must conform to the needs, interests, and dictates of those

234. See *United States v. Seeger*, 380 U.S. 163, 166 (1965) (asserting that a person's religious beliefs need not be based in the traditional concept of "God," but may instead be grounded in a belief in something that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God . . .").

235. For a discussion of pharmacist refusal clauses based on a matter of personal conscience, see Heather A. Weisser, Note, *Abolishing the Pharmacist's Veto: An Argument in Support of a Wrongful Conception Cause of Action Against Pharmacists Who Refuse to Provide Emergency Contraception*, 80 S. CAL. L. REV. 865 (2007). Weisser asserts when pharmacists refuse to dispense a medication, such as emergency contraception, based on her or his personal beliefs "without concern for the greater dictates of the medical profession . . .," the pharmacist violates the tenants of the profession "to act in the best interest of the patient . . ." *Id.* at 881.

236. See, e.g., Christopher Kaczor, *Abortion, Conscience, and Doctors*, THE WITHERSPOON INST.: PUB. DISCOURSE, ETHICS, LAW, AND THE COMMON GOOD (Oct. 29, 2010), available at <http://www.thepublicdiscourse.com/2010/10/1922>.

237. Julian Savulescu, *Conscientious Objection in Medicine*, 332 BRIT. MED. J. 294, (2006), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1360408/>.

who want to be priests. Personal beliefs may trump professional ethics when the individual is acting as an individual. However, the profession should not be required to abandon its ethical precepts in favor of every professional's personal views when the person is acting as a professional.

All professions are dependent upon the post-secondary programs that prepare individuals for service in the profession. A counseling program, or for that matter any educational program, cannot exist if it must provide for a system of particularized exemptions that allows students to determine what elements of the curriculum or code of ethics they choose to follow. While individuals have the constitutionally protected right to exercise their religion, they do not have the right to require that a college or university program accede to their needs, demands, and desires, no matter how sincerely their beliefs are held. To allow otherwise is to shift the fulcrum toward the needs of the professional and away from the recipient of the professional service who depends on the service. This is unwise. Professionals meet the needs of their clients/students; clients do not have to meet the standards and requirements of the counselor.

B. Legislative Response to the Controversy

However, in contrast to this "collective professional conscience," Arizona House Bill 2565 seeks to allow a statutory exception for religious viewpoints in higher education in just the circumstance discussed in this commentary. The Bill reads, in pertinent part:

A university or community college shall not discipline or discriminate against a student in a counseling, social work or psychology program because the student refuses to counsel a client about goals that conflict with the student's sincerely held religious belief if the student consults with the supervising instructor or professor to determine the proper course of action to avoid harm to the client.²³⁸

This legislation, much like Keeton and Ward's positions, places the interests of the counselor over the interests of the client. This legislation appears to compel colleges and universities to erect separate programs for those students who have sincerely held beliefs that keep them from following the profession's code of ethics. If, according to the Arizona House Bill, school counseling students can elect not to counsel those students or clients with whom they disagree because of the life circumstances of the client or student, does the employing school district for these school counselors have to also provide the same exemption of only working with those students who comport with the counselor's

238. H.R. 2564, 2011 Leg., 1st Reg. Sess. (Ariz. 2011), *available at* <http://www.azleg.gov/legtext/50leg/1r/bills/hb2565s.pdf>.

sincerely and deeply held religious beliefs? It makes little sense to exempt graduate students in counseling programs from working with gay and lesbian students as part of their professional preparation to be a school counselor, and then require them to work with those same students in the schools as a school counselor for which they are totally unprepared to provide counseling. Therefore, should the exemption be transferred to the employing school so that counselors can choose which students they will not counsel? And, if deeply held religious beliefs require an exemption for counselors from working with gay and lesbian students and possibly other student populations, it can be reasonably argued that this exemption should be extended to all educators, not just to counselors. Once again, the calculus of what constitutes professional service shifts from what are the best interests of the client to the preferred interests of the counselor. What shall the curriculum of the college or university protect, the personal interests of the student or the professional ethics of the profession?

This legislation and its approach are unworkable in the public schools, which are designed to serve the public, all of the public. To identify a student population, which already faces discrimination, as being immoral and thus is not entitled to access counseling services like any other student at school, should be considered demeaning and discriminatory.²³⁹ If school counselors have an exemption from working with GLBTQ students, to what lengths can other students and other educators be emboldened to take action against these youths who have been identified as unworthy? Why should the teacher or the principal be forced to work with GLBTQ students when counselors can choose not to work with that student population? If it is not discrimination for counselors or counselors in training to withhold services to GLBTQ students that other students receive, based on their status alone, then it would not be discrimination for teachers to send those students whom they do not want to work with, to teachers who are willing to work with that student population. This is unworkable, unsustainable, and unethical.

C. Deeply Held Personal Beliefs and Rendering Professional Service in the Public Square

This intersection of deeply held religious beliefs and the public good as embodied in professional codes of ethics is not an easy intersection allowing traffic to flow easily on both avenues. An individual's right to hold a religious view must be scrupulously protected as an individual, personal right. Religious and other deeply held beliefs help to form the

239. See, e.g., *Harper v. Poway Unif. Sch. Dist.*, 445 F.3d 1166, 1178-79 (9th Cir. 2006) ("The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development.").

character of the individual. However, a profession by its very nature requires its members to set aside their personal preferences to serve the needs and interests of the person receiving their service. The ethics of the profession become individually-based when the school counselor can gather to himself or herself the right to decide which group of students is entitled and worthy of receiving their counseling service in a public school. Nondiscrimination is central to the counseling profession.²⁴⁰ When an individual is treated only as a member of a group and not as an individual, it is an easy step to discriminate because the person is shorn of individuality; she or he becomes a stereotype, the status ascribed to her or him by the speaker.

The Supreme Court has noted that there is no distinction between conduct and status. For example, in *Lawrence v. Texas*, Justice O'Connor noted that the criminalization of homosexual conduct invites discrimination of homosexual persons, based on their status.²⁴¹ The prohibition on conduct also targets "gay persons as a class."²⁴² Therefore, the argument that the counselor is only refusing to counsel the student because of the homosexual conduct is disingenuous in that it also targets the status of the person as gay or lesbian. Espousing an ethic of nondiscrimination while actively discriminating against a class of individuals by withholding services to them based on their status is professional dissonance and a violation of the *Code of Ethics*.

Individuals in their private life can and should follow the dictates of their conscience; they can associate with whomever they choose for whatever reason and they can choose not to associate with individuals for any reason. However, professionals must follow the ethics of their profession and render service that does not discriminate against individuals due to their group status. To upend this calculus is to elevate the private interests of the individual counselor over the professional requirement of service rendered in the best interests of the client/student. Professionals hold a privileged place in our society in part because the public, which relies on their services, believes that the professional works for their best interests and not the self-interest and personal values of the professional. While Jennifer Keeton and Julea Ward can assert that their refusal to counsel gay and lesbian students because of who the clients are is acting in the best interests

240. Dr. Donald C. Haldeman, former chairman of the American Psychological Association's committee on lesbian, gay, and bisexual concerns, in response to the *Ward* appellate decision, stated, "[W]e don't train our students in discriminatory patterns of treatment, and we don't permit them." Mark Oppenheimer, *A Counselor's Convictions Put Her Profession on Trial*, N.Y. TIMES, Feb. 3, 2012, <http://www.nytimes.com/2012/02/04/us/when-counseling-and-conviction-collide-beliefs.html>.

241. 539 U.S. 558, 583 (2003).

242. *Id.*

of the client, their assertion is wrong. Theirs is a triumph of the counselor's values over the values and needs of the client. Personal values are then substituted for professional ethics in the public square. GLBTQ students are implicitly told that they are of lesser value than the rest of the student body.²⁴³ Keeton and Ward appeared to send the message to GLBTQ students that they must seek the full range of counseling services offered to other students from another counselor (if one is available and also willing to work with GLBTQ students). This is unworkable in a public school where one study found that almost one-half of the GLBTQ student population sought assistance from their school counselor.²⁴⁴

College and university programs prepare individuals for service as a professional. The ethics in which colleges and universities infuse their preparation programs is important to the life of a profession. The working definition of a professional is dependent upon the preparation that its novices receive in their college and university preparation programs. As the First Circuit Court of Appeals asserted, a university's practicum "closely resembles an employer-employee relationship" because the supervised student teaching activity reflects "the rudiments of a profession."²⁴⁵ How the professional is trained influences how she or he will practice.

VII. CONCLUSION

Personal values are important, but in the public square where who can provide specific professional services is regulated by licensure, the college or university must be able to establish its curriculum to support the ethics of the profession.²⁴⁶ Individuals are free to advocate and act upon on their

243. See *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, n.15 (5th Cir. 2001) (asserting that a counselor who sought an accommodation to be excused from counseling clients on issues which conflicted with her religious beliefs "would have a potential negative impact on those being counseled" by being assigned to other counselors).

244. Diane E. Elze, *Gay, Lesbian, and Bisexual Youths' Perceptions of their High School Environments and Comfort in School*, 25 *CHILDREN & SCHOOLS* 225, 232 (2003).

245. *Hennessy v. City of Melrose*, 194 F.3d 237, 245 (1st Cir. 1999). See also *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006) (asserting that public employee professional responsibilities may reduce the speech rights "the employee might have enjoyed as a private citizen." Essentially, work-related speech of the public employee is the speech of the government employer, which the state may control).

246. See *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1294 (11th Cir. 2007) (holding that a state university could discipline a social work student for making religious comments during his required counseling practicum). See also Brief for Americans United for Separation of Church and State as Amicus Curiae Supporting Appellees, *Ward v. Wilbanks et al.*, No. 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010) (Nos. 10-2100, 10-2145), 2011 WL 1460534, at *8 ("The University was entitled to train its students to provide professional care to all of those clients, not just

religious beliefs in many venues, but there are boundaries to the relationship between state and religion. Government has been able, within constitutional bounds, to enact laws that incidentally conflict with religious beliefs.²⁴⁷ As the Supreme Court asserted in 1940, the Free Exercise Clause embraces two concepts — “freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.”²⁴⁸ The Supreme Court forty-six years later in *Bowen v. Roy* stated, “The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.”²⁴⁹ By way of analogy, because a graduate student holds a religious conviction that homosexuals are immoral and refuses to counsel those individuals, this is in opposition to a state college or university’s requirement that its students do not discriminate against individuals because of their sexual orientation. The college or university can require that its programs, including counseling services, not discriminate against designated groups. Just as occurred when an Amish employer sought an exemption from collection and payment of social security taxes because of his faith, the Supreme Court upheld the state requirement over religious objections.²⁵⁰ The Court wrote, “To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.”²⁵¹ The preparation of school counselors to work with all students is a public

those who make choices that its students embrace.”).

247. *See, e.g.*, *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879) (“Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”); *Emp’t Div. v. Smith*, 494 U.S. 872, 878–79 (1990) (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”); *McCullum v. Bd. of Educ.*, 333 U.S. 203, 235 ((1948) (Jackson, J. concurring) (“Each of them, through the suit of some discontented but unpenalized and untaxed representative, has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or is inconsistent with any of their doctrines, we will leave the public schools in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant lawsuits.”).

248. *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940); *see also Reynolds v. United States*, 98 U.S. 145, 166 (1879) (“Laws are made for the government actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”).

249. *Bowen v. Roy*, 476 U.S. 693, 700 (1986); *see also Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495, 505 (1952) (writing “the state has no legitimate interest in protecting any or all religions from views distasteful to them . . .”).

250. *United States v. Lee*, 455 U.S. 252 (1982).

251. *Id.* at 259.

good. Preparing interns to work with students in our schools involves more than acquiring technical competence; it is a casting aside of “self-serving status enhancement” and focusing on the development of “caring communities” that place the welfare and best interests of students at the center of service.²⁵²

One venue of action, the professional workspace, must be reserved for the ethics of the profession. The college or university must prepare its students to discharge all of the requirements of the profession, not just the ones the student interprets as personally acceptable to his or her beliefs. The college or university’s ability to establish and regulate its curriculum, and particularly to regulate the clinical internship in a professional preparation program, is critical to the mission of the program and the college or university.

252. Andy Hargreaves & Igor Goodson, *Teachers’ Professional Lives: Aspirations and Actualities*, in *TEACHERS’ PROFESSIONAL LIVES* 1, 20 (Ivor F. Goodson & Andy Hargreaves eds., 1996).

WHO IS THE UNIVERSITY? BIRNBAUM’S BLACK BOX AND TORT LIABILITY

NEIL JAMERSON*

I. INTRODUCTION	347
II. BACKGROUND ON THE LEGAL LANDSCAPE	351
A. <i>Beach v. University of Utah</i>	351
B. <i>Webb v. University of Utah</i>	353
C. Bickel and Lake’s <i>Furek</i> Model and Facilitator Model for University Liability	354
D. Dall’s Educational Mission Paradigm for University Liability	356
E. Peters’s Millennial Model for University Liability	357
III. THE BLACK BOX MODEL	358
IV. TORT LIABILITY, LOOSELY COUPLED SYSTEMS, AND STUDENT ACCESS	364
A. The Current Student Injury Universe Sheds Light on the Financial Impact of Expanded University Liability	365
B. Loosely Coupled Systems Hinder Effective Risk Management	368
C. If Risk Management Fails, how will Losses be Spread?.....	370
D. Loss Spreading Will do Harm to College Access, Which Benefits Individuals and Our Society	374
V. CONCLUSION	377

I. INTRODUCTION

From small, isolated campuses that made gentlemen out of society’s elite, higher education has grown to encompass a variety of institutions, students, and missions. During that time, higher education has developed into both a private and public good. From a private perspective, research shows that the collegiate experience has driven social mobility by increasing the lifetime earning capacity of individuals.¹ Furthermore, it has

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1. SANDY BAUM ET AL., COLLEGE BOARD, EDUCATION PAYS: THE BENEFITS OF

contributed to the moral, cognitive, and personal development of individuals.² In the public sphere, higher education has grown the wealth of our nation by providing an educated workforce to power a modern economy, increasing the wages of laborers across the board, and strengthening democracy through engaged citizenship.³ Higher education, to use an aphorism, truly has been the rising tide that lifted all boats.

Tides shift, however, and affordability concerns have created turbulent seas for higher education. With the onset of the American recession, the forecast looks dimmer still. Although American higher education has expanded since the seventeenth century, student growth has stagnated in recent years.⁴ The number of high school graduates who immediately enter college or university “has largely stalled at around 60 percent since the late 1990s.”⁵ This lack of growth erodes the United States’ international standing in degree attainment. President Obama cited the United States’ fall from first in the world in college and university graduation rates to twelfth during his speech at the University of Texas in August of 2010.⁶ Lagging degree attainment hinders the United States’ competitiveness in the global marketplace,⁷ and it stunts the beneficial development of its society.⁸ When looking at what factors stymie student access to higher education and the related statistic of degree attainment, researchers found decreased affordability played a central role.⁹ From 1982 to 2006, college and university tuition and fees mushroomed by 439% while the overall inflation rate increased by only 110%.¹⁰ In analyzing this growth, the Department of Education found legal regulation to be a “little-recognized

HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY 12 (2010).

2. See 2 ERNEST T. PASCARELLA & PATRICK T. TEREZINI, *HOW COLLEGE AFFECTS STUDENTS: A THIRD DECADE OF RESEARCH* (1st ed. 2005) (discussing psychosocial changes, moral development, and intellectual growth as a result of attending a college or university).

3. SANDY BAUM & JENNIFER MA, COLLEGE BOARD, *EDUCATION PAYS: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY 2* (2007). See also BAUM ET AL., *supra* note 1 (discussing the correlation between higher levels of education and increased salaries and civic participation).

4. NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., *MEASURING UP 2008: THE NATIONAL REPORT CARD ON HIGHER EDUCATION 5* (2008).

5. U.S. DEP’T OF EDUC., *A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION 8* (2006) (citation omitted).

6. President Barack Obama, Remarks by the President on Higher Education and the Economy at the University of Texas at Austin (Aug. 9, 2010).

7. U.S. DEP’T OF EDUC., *supra* note 5, at 7.

8. See BAUM ET AL., *supra* note 1.

9. *Id.* at 8. Accord NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 8.

10. NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 8. Cf. *Consumer Price Index: All Urban Consumers*, U.S. DEP’T OF LABOR, [ftp://ftp.bls.gov/pub/special.requests/cpi/cpi.ai.txt](http://ftp.bls.gov/pub/special.requests/cpi/cpi.ai.txt) (last visited Sept. 20, 2012) (reflecting 109% increase of average annual consumer price index from 1982 to 2006).

source of cost increases”¹¹; so too, it seems, is liability for student injuries. From 2003 to 2007, 50% of general liability insurance claims filed by colleges and universities related to student injuries.¹² While the law cannot solve all of the economic issues affecting college affordability, much can be done to resolve the uncertainty swirling around this particular issue.

Throwing open the gates to the ivory tower has changed the legal dynamic between colleges and universities and their students. Historically, courts had based the institution-student dynamic on the concept of *in loco parentis*; accordingly, courts compared an institution’s standard of care to what an actual parent owes a child and granted similar immunity to institutional decision-making.¹³ The student rights movement in the 1960s, however, ended the *in loco parentis* framework, and courts began treating the institution-student dynamic as a relationship between an institution and an adult.¹⁴ This resulted in courts finding that a college or university had no duty towards its students absent the finding of a special relationship.¹⁵ Courts were often reluctant to find such a relationship.¹⁶ By the 1980s, courts began shifting to a host of different theories on the university-student dynamic. Some found the college or university as a bystander unable to control the acts of students.¹⁷ Other courts based the duty requirement of colleges and universities in property law.¹⁸

11. U.S. DEP’T OF EDUC., *supra* note 5, at 11.

12. KAREN-ANN BROE, *THE BUCK STOPS WHERE? STUDENT ORGANIZATIONS—RISKS, LIABILITIES, AND FIRST AMENDMENT ISSUES I* (2009).

13. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION: STUDENT VERSION 16–17* (4th ed. 2007). *See also* ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* 7 (1999) (“It was a time of *insularity* from legal scrutiny, and like governments, charities and families of that era, the college was considered to be another institution outside the safety rules of the legal system, and in a sense above the law.”) (emphasis in original); Kristen Peters, *Protecting the Millennial College Student*, 16 S. CAL. REV. L. & SOC. JUST. 431, 435 (2007) (“Therefore, both courts and legal commentators have reached their viewpoints by misconstruing *in loco parentis* as a doctrine of duty. Rather, the doctrine did not impose any duty requiring colleges to protect students, but instead shielded colleges’ deliberate or intentional acts of discipline from legal scrutiny.”) (citation omitted).

14. Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University’s Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of In Loco Parentis and the Restatement (Second) of Torts*, 20 J.C. & U.L. 261, 270 (1994). *See also* KAPLIN & LEE, *supra* note 13, at 91.

15. Bickel & Lake, *supra* note 14, at 274.

16. *See, e.g.,* Geiersbach v. Frieje, 807 N.E.2d 114, 117 (Ind. Ct. App. 2004) (“[Geiersbach] admits that courts have been reluctant to characterize the basic student-college relationship as ‘special’ so as to invoke a duty on behalf of the college.”).

17. Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From “In Loco Parentis” to Bystander to Facilitator*, 23 J.C. & U.L. 755, 779 (1997). *See also* KAPLIN & LEE, *supra* note 13, at 91 (discussing the college or university as a bystander).

18. Bickel & Lake, *supra* note 17, at 761.

Legal theorists, in response, have attempted to unify courts by developing broadly-applicable tort standards for determining college and university liability. In developing their standards, theorists appear to have envisioned the college and university portion of the institution-student dynamic as a single actor with rational goals.¹⁹ Many proposed standards do provide courts with the flexibility to examine the circumstances of each case in light of the institution involved.²⁰ Marrying this flexibility, however, to the vision of a university as a single actor results in creating a monolithic reasonable man in higher education tort law, which this article titles a “Reasonable Institution” standard.

This article begins by tracing the evolution of the institution-student legal dynamic through two cases, both decided by the Supreme Court of Utah. The earlier, *Beach v. University of Utah*,²¹ is one of the most cited cases on special relationships in a higher education context.²² *Beach* rejected the notion that a professor’s actions created a duty for colleges and universities to protect a student from injury. The latter, *Webb v. University of Utah*,²³ represents the court’s updated stance on the faculty-student relationship that acknowledges that a college or university may have a duty to students based upon a professor’s acts in some circumstances.

Next, this article summarizes several Reasonable Institution standards that reject the ‘no duty’ rule in *Beach*.²⁴ It then challenges the reasonable institutional assumption, relying on organizational theory and higher education research by Richard Birnbaum, which envisions a college or university as a collection of systems with varied and often divergent interests.²⁵ Accordingly, this article proposes the “Black Box Model” as a new tort standard in higher education law. In addition to providing a truer vision of an actual college or university, the Black Box Model champions a more conservative expansion of a university’s standard of care in order to avoid the policy consequences that would result if Reasonable Institution standards were broadly adopted. Specifically, the standard of care attempts to balance recovery for injured students with safeguarding college and university access for all students. To do so, this article provides background on the spectrum of student injuries, analyzes the ability of

19. See, e.g. Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College Student Relationship*, 29 J.C. & U.L. 485, 519 (2003) (imposing a duty upon a college or university “when it has clear responsibilities stemming from its educational mission.”).

20. See, e.g., Bickel & Lake, *supra* note 17, at 788 (requiring a university, “given its particular circumstances, to use reasonable care to facilitate student education and growth.”).

21. *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986).

22. KAPLIN & LEE, *supra* note 13, at 92.

23. *Webb v. Univ. of Utah*, 125 P.3d 906 (Utah 2005).

24. Peters, *supra* note 13, at 448.

25. ROBERT BIRNBAUM, *HOW COLLEGES WORK: THE CYBERNETICS OF ACADEMIC ORGANIZATION AND LEADERSHIP* 11 (1988).

colleges and universities to manage risks so as to avoid such situations, and considers the ramifications of loss spreading when risk management fails.

II. BACKGROUND ON THE LEGAL LANDSCAPE

In 1986, the Supreme Court of Utah dealt with the institution-student legal dynamic through a special relationship framework in *Beach v. University of Utah*. Although not the first case of its kind—in fact, it built upon the holdings in *Bradshaw v. Rawlings*²⁶ and *Baldwin v. Zoradi*²⁷—it ranks among the most cited cases on the standard of care that colleges and universities owe to students.²⁸ In *Beach*, the court rejected the notion that a professor's actions created an affirmative duty on behalf of the college or university to protect a student from injury.²⁹

In 2005, the Supreme Court of Utah again took on the institution-student legal dynamic in *Webb v. University of Utah*. Though the court applied *Beach* in concluding that no special relationship existed, it stated that “[d]espite the result in *Beach*, we are persuaded that a college instructor who has no special relationship with her class members in a benign academic setting can create a special relationship by altering the academic environment.”³⁰ This dicta suggests a willingness to broaden the standard of care envisioned in *Beach*.

Based on the holdings in these and similar cases, a number of legal theorists championed rethinking the institution-student legal dynamic. Their works have attempted to move the legal analysis from the relationship that the injured party has with the college or university toward Reasonable Institution standards that would greatly expand a college or university's standard of care. A brief summary of these articles is provided to support this assertion.

A. *Beach v. University of Utah*

In *Beach*, Danna Beach enrolled in a field biology class taught by tenured professor Orlando Cuellar.³¹ During a required class trip, Beach consumed wine and fell asleep in the bushes; she later told Cuellar that “the incident was unusual.”³² During the final required trip, Beach again consumed alcohol.³³ Beach fell down a cliff face, and her injuries left her disabled.³⁴ Subsequently, Beach sued the University of Utah.³⁵ On appeal

26. *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

27. *Baldwin v. Zoradi*, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981).

28. KAPLIN & LEE, *supra* note 13, at 92.

29. *Beach v. Univ. of Utah*, 726 P.2d 413, 418 (Utah 1986).

30. *Webb v. Univ. of Utah*, 125 P.3d 906, 911 (Utah 2005).

31. *Beach*, 726 P.2d at 414.

32. *Id.*

33. *Id.* at 415.

34. *Id.*

from summary judgment, Beach asserted “a special relationship existed between the parties which gave rise to an affirmative duty on Cuellar’s part to supervise and protect her.”³⁶ Basing her claim on the earlier incident, Beach argued that Cuellar “knew or should have known of her propensity to become disoriented after drinking.”³⁷

The court acknowledged that no duty normally exists toward a person who becomes voluntarily intoxicated; consequently, it stated that the law would impose an affirmative duty to act only if a special relationship existed.³⁸ The court cited section 314(A) of the *Restatement (Second) of Torts*, stating that “[t]hese relationships generally arise when one assumes responsibility for another’s safety or deprives another of his or her normal opportunities for self-protection.”³⁹ Accordingly, the court held “as a matter of law that Beach’s situation was not distinguishable from that of the other students on the trip; therefore, no special relationship arose between the University and Beach.”⁴⁰

After dismissing Beach’s other arguments, the court considered whether Cuellar’s failure to enforce institutional rules and state laws regarding underage drinking created a special relationship that required Cuellar and the University of Utah to protect a student from “voluntary . . . intoxication during a field trip sponsored by the University.”⁴¹ Persuaded by the reasoning in *Bradshaw v. Rawlings*⁴² and *Baldwin v. Zoradi*⁴³ and the demise of *in loco parentis*, the court held that it did not create such a relationship.⁴⁴ Specifically, the court reasoned that students were empowered adults and that colleges and universities treated them accordingly, unlike the treatment of high school and elementary school students.⁴⁵ The court found that recognizing a custodial relationship between colleges and universities and their students would require institutions to babysit students at an exorbitant expense and that it would harm the maturation process at the heart of the institution-student educational relationship.⁴⁶ Accordingly, it held that “[i]f the duty is realistically incapable of performance or if it is fundamentally at odds with the nature of the parties’ relationship, we should be loath to term that

35. *Id.*

36. *Id.*

37. *Id.* at 416.

38. *Id.* at 415.

39. *Id.* (citation omitted).

40. *Id.* at 416.

41. *Id.* at 417 (citation omitted).

42. *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

43. *Baldwin v. Zoradi*, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981).

44. *Beach*, 726 P.2d at 418-419.

45. *Id.*

46. *Id.* at 419.

relationship ‘special’ and to impose a resulting ‘duty’”⁴⁷

B. *Webb v. University of Utah*

In *Webb*, James Webb fell while on a field trip to examine fault lines in the Salt Lake area when the professor in charge of the field trip had directed students to walk on icy and snowy sidewalks.⁴⁸ Webb filed suit against the University of Utah alleging negligence.⁴⁹ On appeal from summary judgment, the court of appeals found that the facts established a special relationship between the University and Webb.⁵⁰

Citing its decision in *Day v. State*,⁵¹ the Supreme Court of Utah said that public policy concerns normally shield governmental actors from liability for acts and omissions.⁵² The court said, however, that liability potentially arises if a special relationship can be identified.⁵³ For governmental actor lawsuits, the court may find the governmental actor liable if his negligence leads to “injury to persons who stand so far apart from the general public that we can describe them as having a special relationship to the governmental actor.”⁵⁴ Further, the court determined that a governmental actor can “create a special relationship, where one did not previously exist, by her acts.”⁵⁵

In the context of a public college or university and its students, the court stated that a “college [or university] instructor who has no special relationship with her class members in a benign academic setting can create a special relationship by altering the academic environment.”⁵⁶ This conclusion flowed “from the fundamental reality that despite the relative developmental maturity of a college [or university] student compared to, say, a pre-schooler, a college student will inevitably relinquish a measure of behavioral autonomy to an instructor out of deference to her superior knowledge, skill, and experience.”⁵⁷ In such a situation, the question becomes “how much loss of autonomy a student must sustain and how much peril must be present to establish a special relationship.”⁵⁸ To help answer this question, the court turned to its decision in *Day*.

In *Day*, the court held that a special relationship can be established in

47. *Id.* at 418.

48. *Webb v. Univ. of Utah*, 88 P.3d 364, 365 (Utah Ct. App. 2004).

49. *Id.* at 364.

50. *Id.* at 367 n.6.

51. *Day v. State*, 980 P.2d 1171 (Utah 1999).

52. *Webb*, 125 P.3d at 909.

53. *Id.*

54. *Id.*

55. *Id.* at 910.

56. *Id.* at 911.

57. *Id.* at 911–12.

58. *Id.* at 912.

several ways, including “by governmental actions that reasonably induce detrimental reliance by a member of the public”⁵⁹ Applying the holding in *Day to Webb*, the court stated that actions of professors could reasonably induce reliance because “[a] directive received in connection with a college course assignment is an act that would engage the attention of the prudent student.”⁶⁰ Furthermore, the court reasoned that a student could detrimentally rely on a professor’s actions due to the student’s desire to please the instructor, desire to succeed in her coursework, and faith in the professor’s expertise.⁶¹ The *Webb* court, however, determined that it was

not reasonable to believe that any student would understand that his academic success, measured either by the degree of knowledge acquired or by the positive impression made on the instructor, turned on whether they abandoned all internal signals of peril to take a particular potentially hazardous route to view fault lines.⁶²

Therefore, the court upheld the lower court’s granting of the university’s motion for summary judgment.⁶³

C. Bickel and Lake’s *Furek* Model and Facilitator Model for University Liability

In 1994, Robert Bickel and Peter Lake, two of the most prolific writers on the subject of university liability, published *Reconceptualizing the University’s Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of In Loco Parentis and the Restatement (Second) of Torts*.⁶⁴ In it, the authors traced the development of tort liability from *in loco parentis*, through the student rights revolution of the 1960s and cases like *Beach* that resulted, and up to the Supreme Court of Delaware’s decision in *Furek v. University of Delaware*.⁶⁵

59. *Id.* (citing *Day v. State*, 980 P.2d 1171, 1175 (Utah 1999)).

60. *Id.*

61. *Id.*

62. *Id.* at 912–13.

63. *Id.* at 906.

64. Bickel and Lake, *supra* note 14.

65. *Id.*; see also *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991). In *Furek*, a student pledged a fraternity and was injured when a member poured cleaner containing lye on the student’s back and neck during a hazing incident. Though the university argued that it had no duty to the injured student, the Supreme Court of Delaware disagreed and found that the university had undertaken a limited duty based on the university’s pervasive efforts to regulate hazing through policies and student-warnings. The court held that “[c]ertain established principles of tort law provide a sufficient basis for the imposition of a duty on the University to use reasonable care to protect resident students against the dangerous acts of third parties. . . . [W]here there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the university cannot abandon its residual duty of control.” *Id.* at 519–20.

The authors suggested that *Beach* and other courts had misinterpreted the changing role of *in loco parentis* and created

what amounts to an institutional immunity or set of immunities for the failure of an institution of higher learning to exercise reasonable care to secure the safety of its students. Courts commonly characterize these *de facto* immunities as ‘no duty’ rules—rules which ostensibly arise from the *lack* of a *custodial* and/or . . . a *special* relationship between an injured student and the institution.⁶⁶

The authors recognized that the reluctance of courts to adopt a duty rule often stemmed from public-policy concerns.⁶⁷ Accordingly, Bickel and Lake argued that courts should adopt the liability model found in *Furek*, which shifts a fact-finder’s inquiry from duty to foreseeability.⁶⁸ Under this model, a college or university would have a duty to “exercise reasonable care when it has actual or constructive knowledge of acts or behavior including the acts or behavior of students or student groups [such as fraternities], or of historical events or occurrences, which present a known or foreseeable, and unreasonable, risk to a foreseeable student or class of students.”⁶⁹ The imposition of liability would be based on the institution’s knowledge of the danger.⁷⁰

In 1997, Bickel and Lake again tackled the subject of college and university liability.⁷¹ Their analysis found that courts had demonstrated an increased willingness to hold colleges and universities responsible for torts arising from premises liability and college and university activities.⁷² However, the authors also found that courts continued to shield “universities from liability for student misconduct that injures other students by imagining the university as, in effect, a bystander in student life.”⁷³ In other words, the bystander model treated colleges and universities as unable to exert control over student behaviors.⁷⁴ Accordingly, Bickel and Lake expressly attacked *Beach*, stating, “[w]hat the *Beach* court overlooked is that the university’s legal responsibility arises in such a situation from *actual misconduct* (misfeasance, negative duty), not passive inaction (nonfeasance, affirmative duty).”⁷⁵

See also KAPLIN & LEE, *supra* note 13, at 100–01 (discussing the university’s duty in *Furek*).

66. Bickel and Lake, *supra* note 15, at 279.

67. *Id.* at 290.

68. *Id.* at 291.

69. *Id.* at 290.

70. *Id.* at 291.

71. Bickel and Lake, *supra* note 18.

72. *Id.* at 760–61.

73. *Id.* at 780.

74. *Id.*

75. *Id.* at 782.

Developing their *Furek* Model, the authors suggested courts adopt a college or university as facilitator standard of care. The Facilitator Model required a college or university, “given its particular circumstances, to use reasonable care to facilitate student education and growth.”⁷⁶ In analyzing an institution’s circumstances under this model, courts should consider: foreseeability of harm, the nature of the risk, relatedness between student misconduct and college or university activities, moral blameworthiness and responsibility, prevention of future harm, burden on college or university and the larger community, and insurance.⁷⁷ Although admitting that the Facilitator Model increased liability, the authors suggested that colleges or universities could mitigate costs by spreading the risk of loss.⁷⁸

D. Dall’s Educational Mission Paradigm for University Liability

In 2003, Jane Dall responded to Bickel and Lake’s work by proposing that college and university liability be tied to the educational mission of an institution.⁷⁹ Dall concurred with Bickel and Lake that policy considerations drove determinations of duty and lead to inconsistent outcomes.⁸⁰ In response, she championed the use of particular paradigms to “evaluate the policy considerations underlying the imposition of college tort liability.”⁸¹ Dall proposed courts use her Educational Mission Paradigm to weigh such policy issues as “plaintiff recovery, social responsibility, and the preservation of education resources.”⁸² The Educational Mission Paradigm is intended to “capture[] the college-student relationship *and* suggest[] criteria for the legal determination of duty.”⁸³ Courts would use that paradigm to compensate injured students, encourage safe practices by colleges and universities, capture the breadth of the institution-student relationship, provide flexibility for individual institutional analysis, and recognize the adult or semi-adult status of students.⁸⁴ Dall’s paradigm imposed a duty to protect students on college or university campuses “when it has clear responsibilities stemming from its educational mission.”⁸⁵ Dall acknowledged that her paradigm would potentially increase liability⁸⁶ and shift money from educational and co-curricular programs to litigation.⁸⁷ Dall suggested that colleges and

76. *Id.* at 788.

77. *Id.* at 789-92.

78. *Id.* at 792.

79. Dall, *supra* note 19, at 519.

80. *Id.* at 505.

81. *Id.* at 509.

82. *Id.* at 522.

83. *Id.* at 518 (emphasis in original).

84. *Id.* at 519-21.

85. *Id.* at 519.

86. *Id.* at 522-23.

87. *Id.* at 507-08.

universities could engage in risk management to offset the effects of increased liability if courts uniformly adopted a cognizable duty standard like the Educational Mission Paradigm.⁸⁸

E. Peters's Millennial Model for University Liability

In 2007, Kristen Peters focused on the student portion of the institution-student legal dynamic.⁸⁹ Peters found the current generation of students (commonly referred to as "Millennials") tended to be sheltered by parents in youth and through the college and university years.⁹⁰ Further, the expansion of college and university services⁹¹ and increased tuition prices⁹² led students and parents to expect colleges and universities to provide greater safety.⁹³ Consequently, Peters argued, the unique attributes of Millennials decreased their autonomy and thereby increased the need for institutional accountability.⁹⁴ Peters proposed classifying the institution-student dynamic as a per se special relationship using her Millennial Model.⁹⁵

Rejecting Bickel and Lake's Facilitator Model as too consumer-oriented and subjective,⁹⁶ Peters devised her Millennial Model on the court's reasoning in *Webb*. However, Peters expanded the court's focus on the professor's acts to encompass the entire institution-student dynamic.⁹⁷ Finding that the *Webb* court had identified "'detrimental reliance' as the primary factor in determining whether a college-student relationship may be deemed . . . special,"⁹⁸ the Millennial Model imposed "an affirmative duty to act based on a student's detrimental, *reasonable* reliance on a college's act that is tangentially related to the college's *overall* mission."⁹⁹ Consequently, colleges and universities would need to protect students from any foreseeable harm.¹⁰⁰ Offsetting this college and university duty is a student's duty to "act reasonably under the circumstances."¹⁰¹ Peters emphasized that the model's use of a reasonable student standard would

88. *Id.* at 522–23.

89. Peters, *supra* note 14.

90. *Id.* at 459.

91. *Id.* at 432.

92. *Id.* at 463.

93. *Id.*

94. *Id.* at 468.

95. *Id.* at 465.

96. *Id.* at 464–65.

97. *Id.* at 467 ("And, although the *Webb* court limited its analysis to the relationship between a college student and his instructor, today's college students relinquish the same control to the college itself.").

98. *Id.* at 466.

99. *Id.* at 467.

100. *Id.* at 467.

101. *Id.*

absolve colleges and universities from a duty to protect students "from danger or injuries resulting solely from acts that a college had no reason to know about, acts the college had no power to protect against, or from the student's own patently irresponsible behavior."¹⁰²

III. THE BLACK BOX MODEL

In *Beach*, the Supreme Court of Utah stated that the lack of a special relationship between a student and his or her college or university meant that the institution had no duty to take affirmative action to protect that student. In *Webb*, the court reaffirmed its holding in *Beach* but opened the door to recognizing a special relationship when a student detrimentally relies upon the actions of a professor. Lake and Bickel framed the academic arguments for expanding college and university liability by stating "the central theoretical problem in student/university case law is how to imagine the student-university relationship in legal terms."¹⁰³ Subsequently, academic theorists have envisioned the college or university as a cohesive actor with rational goals, which in essence created a reasonable college or university standard for analyzing the university-student legal dynamic.

Robert Birnbaum presented an entirely different picture of colleges and universities in his seminal work "How Colleges Work."¹⁰⁴ Using organizational theory, Birnbaum identified four major models of post-secondary institutions: collegial, political, bureaucratic, and anarchic.¹⁰⁵ He found several organizational dynamics helped understand these systems; notably, he discussed the issue of coupling.¹⁰⁶ Coupling describes how systems within a system are connected and interact. Birnbaum uses "black box" analogies to explain coupling concepts.¹⁰⁷ In the first analogy, a crank enters a black box and, through a series of gears that fit together tightly, connects to a rotor on the other side.¹⁰⁸ In this tightly coupled system, when a person turns the crank, the gears turn the rotor one revolution clockwise; every time the crank is turned, the rotor responds the

102. *Id.*

103. Bickel and Lake, *supra* note 17, at 784.

104. BIRNBAUM, *supra* note 25.

105. *Id.* at xvii. See also G. LESTER ANDERSON, *The Organizational Character of American Colleges and Universities*, in *THE STUDY OF ACADEMIC ADMINISTRATION I* (Terry F. Lunsford ed., 1963); MICHAEL D. COHEN & JAMES G. MARCH, *LEADERSHIP AND AMBIGUITY: THE AMERICAN COLLEGE PRESIDENT* (1974); HERBERT STROUP, *BUREAUCRACY IN HIGHER EDUCATION* (1966); and Gerald R. Salancik & Jeffrey Pfeffer, *The Bases and Use of Power in Organizational Decision Making: The Case of a University*, 19 *ADMIN. SCI. Q.*, 453 (1974).

106. BIRNBAUM, *supra* note 25, at 35.

107. *Id.* at 36-39.

108. *Id.* at 36.

same way.¹⁰⁹ In the second analogy, a crank enters a black box and is connected, through a series of gears that are not fit together tightly, to a rotor on the opposite side of the box.¹¹⁰ In this loosely coupled system, the first time the crank is turned once, the gears turn the rotor one revolution clockwise, but the second time the crank is turned the rotor turns counterclockwise, and the third time it is turned the rotor does not move at all.¹¹¹ Because the gears do not fit tightly, actions applied to the loosely coupled black box lead to unpredictable results.¹¹²

Birnbaum found that all four major models of post-secondary institutions operate like a loosely coupled black box.¹¹³ From the outside, a university looks like a single cohesive system. A peek inside, however, reveals a number of smaller systems, like gears. These systems—which include academic departments, faculty, administrators, college or university offices, government officials, and more—often have independent goals and visions for the institution that may or may not align with other systems.¹¹⁴ Faculty, for instance, are often divided into locals and cosmopolitans. The goals and commitments of locals often are aligned at the campus level, while the goals and commitments of cosmopolitans are often aligned at the research level.¹¹⁵ Cosmopolitan faculty members are divided into smaller, discipline-related systems that can have opposing goals.¹¹⁶ In addition to differing goals, college and university leaders exert varying amounts of

109. *Id.*

110. *Id.* at 37.

111. *Id.*

112. *Id.* at 38.

113. *Id.* at 98–99, 120–21, 144–45, 159–60.

114. *Id.* at 11 (“As colleges become more diverse, fragmented, specialized, and connected with other social systems, intuitional missions do not become clearer; rather they multiply and become sources of stress and conflict rather than integration. The problem is not that institutions cannot identify their goals but rather that they simultaneously embrace a large number of conflicting goals.”). See also COHEN & MARCH, *supra* note 104, at 33 (“Teachers decide if, when, and what to teach. Students decide if, when, and what to learn. Legislators and donors decide if, when, and what to support. Neither coordination (except the spontaneous mutual adaptation of decision) nor control are practiced. Resources are allocated by whatever process emerges but without explicit accommodation and without explicit reference to some superordinate goals. The ‘decisions’ of the system are a consequence produced by the system but intended by no one and decisively controlled by no one.”), and EDWARD GROSS & PAUL V. GRAMBISH, *CHANGES IN UNIVERSITY ORGANIZATION, 1964–1971*, 43–74 (1974) (discussing the many conflicting goals within colleges and universities, such as protecting academic freedom and cultivating students’ intellect).

115. BIRNBAUM, *supra* note 25, at 19. See also Alvin W. Gouldner, *Cosmopolitans and Locals: Toward an Analysis of Latent Social Roles*, 2 ADMIN. SCI. Q. 281 (1957).

116. BIRNBAUM, *supra* note 26, at 135 (“[F]aculty in different disciplines and departments are as much divided by their professionalism as united by it.”) (citation omitted). See also Burton R. Clark, *Faculty Organization and Authority*, in *THE STUDY OF ACADEMIC ADMINISTRATION* 37 (Terry F. Lunsford ed., 1963).

control over the institution's systems.¹¹⁷ For example, a college or university may have a low locus of control over a tenured faculty member but have a high locus of control over a residence hall director. In a college or university, legal pressure, presidential decisions, and similar forces operate like the turning of the black box's crank. Each applies a force to the institution's "gears," yet the reaction is unpredictable due to these differing goals and varying levels of control.¹¹⁸

Birnbaum's conception of a college or university as a loosely coupled system validates the notion that courts should analyze the institution-student dynamic through a relational lens. Doing so focuses the legal analysis within the black box at the gears level, while a court using a Reasonable Institution standard would concentrate its analysis on the outside of the black box, which assumes a false and predictable vision of a cohesive system.¹¹⁹

The *Webb* court provides a workable approach for focusing a court's analysis on the gears level of colleges and universities. *Webb* found that a special relationship, which would impose a duty on a college or university to protect a student, may arise when a student detrimentally relies on a directive from his professor that strongly relates to a class activity.¹²⁰ This holding focuses the analysis on a loosely coupled system, the faculty, when determining liability in the institution-student dynamic. Inspired by *Webb* and its relational analysis and Birnbaum's vision of colleges and universities, I developed my Black Box Model as a workable rule for courts to adopt in student-injury cases:

(1) Public and private universities are under no duty to protect students from injuries absent clear and convincing evidence showing an act, including a failure to act:

- a. was made by a member or division of the college or university occurring under the color of their authority;
- b. induced reasonable and detrimental reliance by the student;

117. BIRNBAUM, *supra* note 25, at 28. See also J. VICTOR BALDRIDGE ET AL., POLICY MAKING AND EFFECTIVE LEADERSHIP: A NATIONAL STUDY OF ACADEMIC MANAGEMENT 9 (1978):

[T]he organizational characteristics of academic institutions are so different from other institutions that traditional management theories do not apply to them. Their goals are more ambiguous and diverse. They serve clients instead of processing materials. Their key employees are highly professionalized. They have unclear technologies based more on professional skills than on standard operating procedures. They have 'fluid participation' with amateur decision makers who wander in and out of the decision process. As a result, traditional management theories cannot be applied to educational institutions without carefully considering whether they will work well in that unique academic setting.

118. BIRNBAUM, *supra* note 25, at 38.

119. *Id.* at 38-39.

120. *Webb v. Univ. of Utah*, 125 P.3d 906, 912 (Utah 2005).

- c. was foreseeable by the college or university;
- d. the college or university could have exerted control over the member or division to avoid such an act; and
- e. the college or university failed to undertake reasonable measures to exert such control.

The Black Box Model has four benefits. It provides courts with a truer vision of the university in the institution-student legal dynamic by incorporating Birnbaum's loosely coupled systems research into its elements along with the court's analysis in *Webb*. The model also expands the scope of *Webb* and incorporates elements from Reasonable Institution standards. Finally, the model limits the expansion of liability to balance competing policy concerns.

First, element (b) of the Black Box Model stems from *Webb* and requires a plaintiff to identify an act that so reduced her autonomy as to create the environment in which she relied on the member or division of the college or university to her detriment. As in *Webb*, the student's detrimental reliance must be reasonable. The final three elements of the Black Box Model specifically address loosely coupled systems. The model, therefore, goes beyond the analysis in *Webb*. It requires the plaintiff to show that the college or university could and should have stopped the act through its control of the actor before liability attaches to the college or university.¹²¹ To my knowledge, no other rule currently incorporates such an analysis.

Second, element (a) expands the dicta in *Webb* to encompass all systems within the institution-student dynamic by including acts by members or divisions of the institution. *Webb* only considered academic, faculty-led situations where special relationships might arise. However, injuries are just as likely to occur outside the classroom. Further, one may reasonably assume students would detrimentally rely—though, perhaps to a lesser degree—on acts by a residence hall director, coach, or orientation leader just as they would rely on a professor. All these groups are in positions of power, and a student could view them as experts, which was a central concern in *Webb*.

Next, acts must occur “under the color” of the member or division's authority. This requirement would include acts that either occur pursuant to an official capacity or could be perceived that way by students, which benefits plaintiffs. A student would not need to understand a university organizational chart. Rather, the student's perception would only need to be reasonable, which would satisfy element (b) of the rule. It also stops a university from making a “frolic and detour” style argument that might exist if the rule instead required acts to occur “within the scope” of

121. For a case where the Black Box Model could potentially be used in place of an employment law analysis, see *Whittington v. Sowela Technical Inst.*, 438 So. 2d 236, (La. Ct. App. 1983) (holding that a student driving a van on a field trip was a university agent).

authority.

Finally, *Webb* can be read to address only public institutions because its detrimental reliance analysis stemmed from special relationships created by governmental, not private, actors. The Black Box Model would apply to both private and public colleges and universities because Birnbaum does not differentiate between the two in his study of loosely coupled systems. Also supporting the expansion, the government immunity concept that undergirded the special relationship analysis in *Webb* has a charitable immunity counterpart for private institutions.¹²²

Third, the Black Box Model builds upon the work of legal theorists. It imposes a duty based upon foreseeable danger in element (c), similar to the *Furek* and Millennial models; however, it does not do so *carte blanche*. Elements (a) and (b) ensure that colleges and universities owe a duty to a student only when her injury stems from a specific act or failure to act that resulted in reasonable, detrimental reliance. Like the Facilitator Model, elements (d) and (e) of the Black Box Model allow courts to consider the particular circumstances of colleges and universities before assigning liability. Yet, it goes a step further and incorporates Birnbaum's research to focus the analysis on whether the institution could have exerted control over a system to protect against injury.¹²³

The Black Box Model also trims away nebulous analysis suggested by Reasonable Institution standards. Unlike the Facilitator Model, the Black Box Model does not require courts to delve into the educational benefits the institution conferred on students when determining the reasonableness of the standard of care.¹²⁴ The external management of educational efforts would consume a large amount of judicial resources and would require judges to familiarize themselves with theories on college and university student development and the best practices for teaching specific disciplines. Similarly, the Black Box Model differentiates itself from the Educational Mission Paradigm, which suggested a college's or university's duty should stem from its educational mission.¹²⁵ Within a loosely coupled system, the educational mission changes depending upon the person asked—be they professor, administrator, or state politician.¹²⁶ Finally, the Black Box Model avoids the need to develop a new rule for each generation of students while still addressing the Millennial Model's underlying concern about student autonomy. To do so, the Black Box Model ties autonomy concerns to causation in element (b).

122. KAPLIN & LEE, *supra* note 14, at 17.

123. See BIRNBAUM, *supra* note 25, at 28.

124. Bickel & Lake, *supra* note 17, at 788.

125. Dall, *supra* note 19, at 519.

126. See BIRNBAUM, *supra* note 25, at xiii, 11. See also COHEN AND MARCH, *supra* note 105, at 33–34, and GROSS & GRAMBSH, *supra* note 114, at 43–74 (discussing the many conflicting goals within colleges and universities, such as protecting academic freedom and cultivating students' intellect).

Fourth, the Black Box Model takes a conservative approach to the expansion of an institution's standard of care as compared to Reasonable Institution standards. When one takes into account Birnbaum's research, policy reasons—namely, student access to higher education—justify this approach. To accomplish it, the Black Box Model employs a high evidentiary standard, requires an overt act or omission before attaching duty, and asks courts to take into account loose coupling by analyzing the degree to which a college or university could have exerted control over the actor.

While the Black Box Model provides numerous advantages for addressing the institution-student legal dynamic, it does possess three potential drawbacks. First, critics may argue that loose coupling is an excuse to avoid institutional accountability. Birnbaum acknowledges that “[l]oose coupling has often been attacked as merely a slick way to describe waste, inefficiency, or indecisive leadership and as a convenient rationale for the crawling pace of organizational change.”¹²⁷ However, loose coupling can be essential to colleges and universities. It allows one subsystem to respond to the needs of students without marshaling all institutional resources.¹²⁸ Further, loose coupling contains failures within individual systems, thereby limiting negative consequences to the entire institution.¹²⁹ Finally, it allows college and university systems to accomplish incompatible but important goals. Colleges and universities have many demands placed upon them by students, governmental entities, research sponsors, citizens in the community, and more; “[l]oose coupling therefore can be considered not as evidence of organizational pathology or administrative failure to be identified and corrected but rather as an adaptive device essential to the survival of an open system.”¹³⁰

Second, insisting upon clear and convincing evidence could act as too high of a bar for injured students to overcome. Though student access to higher education is a policy consideration that justifies a conservative expansion of an institution's standard of care, courts must also consider the need to make injured parties whole. Consequently, the Black Box Model's evidentiary standard is not an absolute bar to recovery, unlike the 'no duty' rule of *Beach* and its progeny. By allowing recovery in cases where clear and convincing evidence exists, the model does attempt to balance competing policies.

Further, a Department of Education report on higher education stated that a “little-recognized source of cost increases is excessive state and federal regulation. . . . At their best, these regulations are a mechanism to

127. BIRNBAUM, *supra* note 25, at 39.

128. *Id.* at 40.

129. *Id.*

130. *Id.* at 41 (citation omitted). See also KARL E. WEICK, *THE SOCIAL PSYCHOLOGY OF ORGANIZING* 1979) (discussing loose coupling as an adaptive action).

support important human values on campuses. At worst, regulations can absorb huge amounts of time and waste scarce campus financial resources with little tangible benefit to anyone.”¹³¹ Similarly, a tort standard regulating an institution’s duty in the university-student legal dynamic should maximize human values and minimize resource costs. Many of the Reasonable Institution standards focus on the first half of the equation, maximizing human values, by protecting and compensating students. These proposals are an understandable reaction to a legal history of deferential college and university treatment at the expense of students. The Black Box Model’s evidentiary standard considers both human values and resource costs. It provides compensation for injured parties with strong claims while preserving institutional and judicial resources by eliminating weak claims.

Third, in his discussion of loss spreading, Guido Calabresi has argued that charities should not be immune from liability.¹³² If Calabresi is correct, then the governmental and charitable immunities that I mentioned earlier should not exist. In his argument against such immunity, Calabresi argues that charities could spread loss among people through insurance.¹³³ He also suggests that charities could spread loss over time by resource allocation.¹³⁴ A charity could accomplish this resource allocation, Calabresi argues, by charging those who can pay higher prices for services, demanding more of donors, and decreasing the amount of charity that people receive.¹³⁵ Finally, Calabresi argues that incorporating risk into the actual cost of the charitable services would allow economically rational donors and consumers to better evaluate charities.¹³⁶ Calabresi’s reasoning suggests that loss spreading justifies an expansion of institutional liability so long as colleges and universities can insure against loss, increase tuition, increase donations, and decrease the amount of educational benefits students receive. While colleges and universities can potentially do all of these things, some will harm students’ access to higher education. The conservative expansion of an institution’s standard of care, therefore, limits the need for loss spreading.

IV. TORT LIABILITY, LOOSELY COUPLED SYSTEMS, AND STUDENT ACCESS

As suggested above, student access to higher education is a policy consideration that courts should weigh when choosing the appropriate standard of care owed by colleges and universities to students. As an

131. U.S. DEP’T OF EDUC., *supra* note 5, at 11 (citation omitted).

132. Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 548 (1961).

133. *Id.*

134. *Id.* at 548–49.

135. *Id.* at 548.

136. *Id.* at 549.

institution's standard of care expands (and liability increases), loose coupling causes student access to decrease. To help understand why this is so, this section begins with describing the universe of student injury claims so that future conversations on the subject of college and university liability have context. This section then discusses why risk management will not ameliorate the financial impact that increased liability would have on colleges and universities, in contradiction to what many Reasonable Institution standards suggest. Finally, because risk management fails, this section analyzes the effect of loss spreading, another justification offered by many Reasonable Institution standards.

A. The Current Student Injury Universe Sheds Light on the Financial Impact of Expanded University Liability

In recent years, United Educators has seen student injuries become a "substantial and growing source of claims."¹³⁷ To give an idea of the size, from 2003 to 2007 the total costs of student claims filed with United Educators by member colleges and universities was approximately \$64 million, with average payouts of \$198,630, under United Educator's general and excess liability insurance policies.¹³⁸ As the largest insurer of college and universities, United Educators is a repository for data on the nature and cost of student injuries.¹³⁹ Of the 8,000 claims filed against colleges and universities insured by United Educators from 2004 to 2008, 38% came from students.¹⁴⁰ Of the general liability claims reported by colleges and universities, 29% related to slips and falls, 20% to assaults, 19% to vehicle and other accidents, 9% to athletics, 7% to property, 7% to mental or physical health, and 10% to a potpourri of "other claims" that included damaged reputations, invasions of privacy, civil rights deprivations, and pollution.¹⁴¹ The frequency of a particular injury did not forecast the most costly injury categories, however. Of the total, post-deductible dollars paid by United Educators and institutional members, 10% went to slip and falls, 14% to assaults, 18% to vehicular and other accidents, 11% to athletics, and 1% to property.¹⁴² On the other hand,

137. BROE, *supra* note 12, at 1.

138. *Id.* at 1–2.

139. See KEVIN MAY, UNITED EDUCATORS, AN INSIDE LOOK AT UE'S STUDENT LIABILITY CLAIMS IN HIGHER EDUCATION (2010). (United Educators was willing to share its data as part of the background research for this paper; the information is included to give readers context to the scope and costs of student injuries. In their evaluation, readers should consider that an enterprise operating on behalf of colleges and universities to manage risks and reduce loss provided the data; however, they should note that I have no direct connection to United Educators and that the company did not contribute to my analysis beyond providing data.)

140. *Id.* at 1.

141. *Id.* at 2.

142. *Id.* at 4.

mental or physical health and the “other claims” category, which accounted for just 17% of reported claims, represented 46% of the dollars paid to plaintiffs.¹⁴³

For mental or physical health, the costliest category of injury, 80% of claims arose from self-inflicted injuries or suicide; the remaining 20% resulted from alleged negligence from medical and counseling treatment.¹⁴⁴ Examples of these injuries include the alleged negligence of a student nurse depriving a patient of oxygen, an alleged failure of health services to properly diagnose a student’s meningitis, and the alleged improper application of hot packs by an athletic trainer that burned a student’s legs.¹⁴⁵ Five claims in this category “exceeded over \$1 million in defense costs and payments to claimants, one of which totaled nearly \$20 million.”¹⁴⁶

The “other claims” category was the second costliest category. Two reputational harm claims led to the high costs. One claim, a multimillion dollar injury claim, was not resolved at the time United Educators published its data. According to the company, such claims “typically occur when one or more students are involved in a high-profile situation in which their names are made public. The students’ claims allege reputational damage that makes it difficult for them to continue their education at the institution.”¹⁴⁷

Seven accidents in the vehicular and other accident category resulted in losses of \$1 million or more, which made this category of injury the third most expensive.¹⁴⁸ Of the total accidents, 22% were vehicular and the rest fell into the other category, which included: a student’s death while unloading stage equipment, a student injury resulting from operating a saw in class, an explosion in an institution’s chemical engineering building that injured a student, and student horseplay that caused the injured student to hit his head on concrete.¹⁴⁹

The remaining injury categories account for a smaller amount of loss to United Educators and member institutions. These injuries arose in a variety of situations. Reported slip and falls occurred primarily on campus grounds, but also in campus buildings, residence halls, and off campus.¹⁵⁰ Twenty slip and falls resulted in six-figure or higher losses; a few examples include two students’ falling through a window during a dance rehearsal, a hole in the sidewalk causing a student to break her arm, and a fall in an icy

143. *Id.*

144. *Id.* at 3.

145. *Id.* at 3–4.

146. *Id.* at 3–4.

147. *Id.* at 6.

148. *Id.* at 5.

149. *Id.* at 3–5.

150. *Id.* at 3.

parking lot.¹⁵¹ Assaults also occurred across campus, but the majority occurred in residential buildings.¹⁵² Of reported assaults, 66% were sexual assaults; it should be noted, however, that 75% of losses resulted from non-sexual assaults that included physical violence, verbal abuse, stalking, and the like.¹⁵³ Alcohol played a part in approximately 29% of all reported assaults.¹⁵⁴ Next, 53% of athletic accidents arose from intramural and club sports and recreational athletics; the rest resulted from varsity athletics participation.¹⁵⁵ Lastly, most property claims were settled for small amounts or covered by the homeowner insurance of parents.¹⁵⁶

Moving from general liability, educators' legal liability constitutes a final form of student injuries. Injuries falling within this umbrella included discrimination (52% of the claims in this area), breach of contract (33%), and other wrongful acts (15%).¹⁵⁷ Discrimination claims resulted in nine six-figure losses, breach of contract claims resulted in an additional sixteen six-figure losses, and other wrongful acts contributed three six-figure losses.¹⁵⁸ Alleged situations giving rise to these claims included: failure of a program to gain accreditation prior to a student's graduation, failure to provide enough core courses for a timely degree completion, failure to follow due process in a student conduct hearing, failure to notify a student of an outstanding account balance, a multicultural affairs office's mistaken release of private student data, a university employee's false and defamatory statements to a student's potential employer, a tenured professor making offensive comments and touching a student inappropriately, and a professor's sexual harassment of a student whose personal information then appeared in school and local newspapers.¹⁵⁹

Understanding the current universe of student injuries demonstrates the potential explosion of costs that would arise if courts expanded the college or university's standard of care in the institution-student dynamic. Insurers view the underwriting process as an analysis of the risk—or, exposure—that institutions will face.¹⁶⁰ An expanded standard of care results in more claims being filed. More claims mean more monetary awards resulting from either settlements or court decisions. The increased risk of monetary awards factors into a college or university's premium calculation; consequently, colleges and universities could expect insurance rates to rise

151. *Id.* at 4–5.

152. *Id.* at 3.

153. *Id.* at 3–5.

154. *Id.* at 3.

155. *Id.* at 5.

156. *Id.*

157. *Id.* at 7.

158. *Id.* at 9.

159. *Id.* at 8–10.

160. Johanna F. Chanin et al., *Dances with Wolves: A Primer on Working with Insurers*, NACUA Annual Conference Outline (2001).

if their standard of care expanded. Further, the actual losses noted in United Educators' data would blossom. Even if payouts remained static, some juries might find that colleges and universities owed a duty where none previously existed; therefore, student claims might succeed at a higher rate. The risk of this could lead to more settlements. Even unsuccessful claims would incur more litigation expenses for colleges and universities, as claims survive that would have ended at the summary judgment stage under current rules. In short, an institution's operating costs inevitably increase as its standard of care expands.

B. Loosely Coupled Systems Hinder Effective Risk Management

Proponents of Reasonable Institution standards cite risk management and loss spreading as vehicles for reducing the costs associated with an expanded college and university standard of care. The risk management justification suggests that a unified duty rule would provide a better basis for colleges and universities to evaluate and manage the wide range of risks described above.¹⁶¹ In other areas of tort law, legal theorists have argued that justifying the expansion of duty based on risk management requires "appraisal of the actor's ability to systematically evaluate the risks of his activities and make sound cost-benefit decisions about the manner of operations as well as the level and location of the activity, safeguards, and alternatives."¹⁶² As discussed, Birnbaum's research into the effects of loosely coupled systems on college and university decision-making creates doubt as to whether colleges and universities can systematically evaluate risk and impose sound cost-benefit decisions.¹⁶³ If Birnbaum is correct, then risk management fails as a justification for expanding the college and university standard of care.

To briefly recap, traditional management theories and accountability techniques applied in business do not translate to higher education due to the unique nature of colleges and universities.¹⁶⁴ Unlike a corporation producing widgets, colleges and universities often do not have decision

161. Dall, *supra* note 19, at 522–23.

162. Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 352–53 (1996).

163. See BIRNBAUM, *supra* note 25, at 53–54:

The relationships between the environment and organizational subsystems, and between the subsystems themselves, are exceptionally complex. We usually cannot specify with assurance precisely what the relevant elements are or how they interact. For that reason, administrative actions may sometimes have a very dramatic and expected effect, but at other times identical actions may appear to have little or no effect (and occasionally may have an effect directly opposite to the one expected). . . . We may fail to get what we want not because we have not planned well enough but because many aspects of the system do not operate in a manner that conforms to conventional administrative rationality.

164. *Id.* at 28–29.

makers who can directly influence systematic risk management. Power in colleges and universities is diffused, as evidenced by the roles that state and federal government, boards of trustees, administrators, faculty, alumni, and students all play in institutional decision-making.¹⁶⁵ Further, these decision makers have independent goals that may or may not align. Unlike businesses, there is not a singular concept like “profits” that unite an institution.¹⁶⁶

Independent goals brought about by the diffusion of power create “system parts [that] are themselves systems; they constantly change as they interact with themselves and with the environment”¹⁶⁷ This results in loosely coupled subsystems, or “connections between organizational subsystems that may be infrequent, circumscribed, weak in their mutual effects, unimportant, or slow to respond.”¹⁶⁸ Loosely coupled subsystems lead to probabilistic cause-and-effect management within the organization rather than to a deterministic system of choices-and-outcomes.¹⁶⁹ A decision maker can say what outcomes are possible by undertaking risk management efforts but cannot predict the consequences with certainty.¹⁷⁰

A hypothetical example of loosely coupled systems may be helpful. Ms. Esquire in the Office of the General Counsel for Blackacre University writes a memo asking faculty to refrain from course activities that create potentially liability-supporting scenarios similar to the scenario in *Webb*. Dr. Tweed, a professor of earth sciences, ignores the memo and takes his class on a trip to view fault lines, believing that field work is the best way to teach the students. Clearly the goals of Ms. Esquire and Dr. Tweed differ. Further, each may feel that she is the proper person to make the ultimate decision. Consider the decision-making from the standpoint of academic freedom.¹⁷¹ Ms. Esquire could rely on court cases that say that academic freedom provides her client institution the right to determine its curriculum.¹⁷² These cases, however, have assumed that the institution is

165. *See id.*

166. *Id.* at 11.

167. *Id.* at 35.

168. *Id.* at 38 (citation omitted).

169. *Id.* at 35.

170. *Id.*

171. KAPLIN & LEE, *supra* note 13, at 258 (asserting that “there are now three sets of beneficiaries of academic freedom protections: faculty members, students, and individual higher educational institutions. Obviously the interests of these three groups are not always compatible with one another, therefore assuring that conflicts will arise among the various claimants of academic freedom.”).

172. *Id.* at 258. *See also* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) (distinguishing between an institution’s academic freedom and that of its professors and students), *and* Sweezy v. New Hampshire, 354 U.S. 235, 263 (1957) (outlining the four essential academic freedoms of a college or university to determine “who may teach, what may be taught, how it shall be taught, and who may be admitted to study”).

working in furtherance of the faculty.¹⁷³ Meanwhile, Dr. Tweed may rely on court cases that have held that “[i]t is ‘the traditional role of deans, provosts, department heads, and faculty [to make] academic decisions,’ and they make ‘discretionary choices . . . in the contexts of hiring, tenure, curriculum selection, grants, and salaries.’”¹⁷⁴ Further, Dr. Tweed could assert that custom has treated academic freedom as granting professors the ultimate decision making in teaching.¹⁷⁵

While Reasonable Institution standards wrestle with ways to envision the institution-student legal dynamic, the greater question is who constitutes the institution and, of those, who, if anyone, is in control? This example illustrates one potential way that loosely coupled systems can cause risk management efforts to fail as a method for controlling liability costs. The likelihood of loose coupling having such an effect contradicts the assumption offered by Reasonable Institution standards that financial gains from risk management justifies expanding an institution’s standard of care. Of course, the roles played in this example by Ms. Esquire and Dr. Tweed do not always have to be general counsel and professor. The statistics show that student injuries occur in a variety of campus settings, and Birnbaum’s loosely coupled systems approach applies to all areas of an institution. Consequently, the Black Box Model accounts for the breadth of student injuries in its expansion of *Webb* to all members and divisions of an institution.

C. If Risk Management Fails, how will Losses be Spread?

The failure of risk management means that the increased costs associated with increased liability must be paid, and this requires an examination of the second common justification found in reasonable college and university standards for expanding the institution’s standard of care: loss spreading. In discussing loss spreading, judge and professor Guido Calabresi states that “[t]he justification for allocation of losses on a nonfault basis which is found most often among legal writers is that if losses are broadly spread—among people and over time—they are least harmful.”¹⁷⁶ If Calabresi is correct, then loss spreading is a suitable justification for imposing greater standards of care on certain industries.¹⁷⁷ As noted earlier, Calabresi

173. KAPLIN AND LEE, *supra* note 13, at 258 (citation omitted).

174. *Id.* at 258 (quoting *Urofsky v. Gilmore*, 216 F.3d 401, 432–33 (4th Cir. 2000)).

175. *See* KAPLIN & LEE, *supra* note 13, at 260. *See also* AM. ASS’N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (10th ed. 2006).

176. Calabresi, *supra* note 132, at 517 (citation omitted).

177. *Id.* at 517–19. Calabresi compares the justification of spreading losses broadly among people to the economic theory of diminishing marginal utility of money. *Id.* In so doing, he says that some economists do not agree that small losses absorbed by a large group of people is less harmful than a large loss absorbed by a single person because studies showed that small price increases harmed people similarly to large

believes that loss spreading could be properly applied to charities because charities could spread loss via insurance and reallocation of resources.¹⁷⁸

The formation of United Educators demonstrates that colleges and universities can insure against losses. In this and other ways, the insurance portion of the Calabresi framework is satisfied. Insurance premiums, however, will go up in conjunction with increases in college and university liability. The more a tort model expands an institution's standard of care, the more an institution must reallocate resources to cover insurance. Consequently, before loss spreading can justify expanding an institution's standard of care under the Reasonable Institution standards, the effect of resource reallocation must be considered.

An analysis of resource allocation requires an understanding of college and university revenue streams. In 1995-1996, public and private colleges and universities received 38% of their revenue from student tuition and fees, 35% from local and state governments, 16% from the federal government, and 11% from additional sources, such as endowments, gifts, and private grants.¹⁷⁹ These sources of funding are in flux, with the two largest—tuition and state appropriations—experiencing dramatic change. A 2006 report by the Department of Education found that “[f]rom 1995 to 2005, average tuition and fees at private four-year colleges and universities rose 36 percent after adjusting for inflation. . . . [and] rose 51 percent at public four-year institutions and 30 percent at community colleges.”¹⁸⁰ Tuition increases coincided with a fall in state funding of higher education to a two-decade low.¹⁸¹ This trend can be partly attributed to the recognition by state politicians that higher education “has a revenue source (tuition and fees) in contrast to most other governmental services”¹⁸²

This trend has continued into the end of the decade. From 1999–2000 to 2009–2010, the Department of Education found that “prices for undergraduate tuition, room, and board at public institutions rose 37 percent, and prices at private institutions rose 25 percent, after adjustment for inflation.”¹⁸³ During that decade, the growth in published price of

price increases when the small price increase resulted in a loss of social status. *Id.* Calabresi, however, is unswayed by these studies. *Id.* He finds it unlikely that a situation would arise “where the extra \$1 charged to one thousand people would be one thousand straws which would break one thousand backs and ruin one thousand homes or businesses” *Id.* at 518. Similarly, Calabresi believes that spreading loss broadly over time would result in little to no danger to social status. *Id.*

178. *Id.* at 548–49.

179. Aims C. McGuinness, Jr., *The States and Higher Education*, in *AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES* 198, 201 (Philip G. Altbach et al. eds., 2005).

180. U.S. DEP’T OF EDUC., *supra* note 5, at 9 (citation omitted).

181. *Id.* (citation omitted).

182. McGuinness, *supra* note 180, at 202.

183. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., *DIGEST OF EDUC. STATISTICS 2010* (NCES 2011–015) 4 (2011).

tuition and fees increased 5.6% per year above inflation at public four-year institutions and 3.0% per year above inflation at private four-year institutions.¹⁸⁴ One of the sharpest spikes during the decade was in 2009–2010 during the recession, when published tuition and fees at public four-year institutions rose 9.3% beyond inflation in that year and growth at private institutions also spiked sharply.¹⁸⁵

As a result of the decline in appropriations, a 2002–2006 study by Delta Project found “students’ share of educational costs at public four-year institutions has gone from one third to nearly one half.”¹⁸⁶ Recession data points to a different cause, yet the result in increased cost to students remains the same. In 2004–2005, tuition and fees represented 16.4% of total revenue at public institutions and 29.5% of total revenue at private institutions.¹⁸⁷ In 2008–2009, those numbers grew to 19.4% and 77.8%, respectively.¹⁸⁸ State appropriations remained nearly constant from 2004–2009 for public institutions, growing from 23.6% of revenue to 24.5%.¹⁸⁹ Meanwhile, investment return dropped to -3.5% of total revenue for public institutions and -93.0% of total revenue for private institutions.¹⁹⁰

Revenue sources beyond tuition and fees are poor methods for reallocating resources due to their scope, reliability, and limitations. As noted above, investment income is one such source; however, it is not a highly dependable source due to market fluctuations and a limited number of colleges and universities with sizeable investments.¹⁹¹ Furthermore, 80% or more of public and private college and university endowments are

184. SANDY BAUM & JENNIFER MA, COLLEGE BOARD, TRENDS IN COLLEGE PRICING 13 (2010).

185. *Id.*

186. Kurt Brobeck, *Higher Education Tough Times Raise Tough Questions*, IDEAS IN ACTION, Summer 2009, at 8–9.

187. SUSAN AUD ET AL., NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., THE CONDITION OF EDUCATION 2011 (NCES 2011–033) 306 (2011).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 134 (explaining the decline in investment revenue for higher education institutions):

Historically, investment return has generally been among the largest revenue sources for private not-for-profit institutions. In contrast, private for-profit institutions typically receive little revenue from this source, while public institutions receive a moderate amount. Changes in the value of endowment funds from investments affect total revenue and can fluctuate from year to year. For example, in 2008–2009, private not-for-profit institutions saw a loss in investment return of \$64 billion, which decreased total revenue and caused other revenue sources to account for larger shares of the total. Investment income at public institutions was affected to a lesser degree (a loss of \$9 billion).

comprised of restricted gifts.¹⁹² Using those gifts for anything other than their intended purpose creates donor unrest and legal liability.¹⁹³ Similarly, research revenue is of limited use when reallocating resources. Normally, such revenue is restricted to the research purpose of the grant proposal that received the funds.¹⁹⁴ Moreover, research revenue is “highly concentrated on a relatively small number of institutions, most of them major research universities.”¹⁹⁵

By understanding colleges’ and universities’ revenue streams, one can analyze how resources will likely be reallocated. Calabresi’s framework justifies loss spreading in a non-profit college or university context when resource reallocation can be accomplished by increasing donations, decreasing educational quality, or increasing tuition to those who can pay.¹⁹⁶

For the first element, colleges and universities have undertaken efforts to develop charitable giving, research enterprise, and technology transfer revenue streams; so far, however, those efforts have proven insufficient to mitigate current costs.¹⁹⁷ Therefore, it is not clear whether increased donor support justifies the expansion of the college and university standard of care in the university-student dynamic.

For the second element, colleges and universities could decrease educational benefits to students. Those decreases could take the form of “cutting weaker programs or those with less societal impact, focusing on core areas of institutional distinction, conducting more rigorous assessments of student development and establishing output measures, and pursuing innovative degree and pricing strategies.”¹⁹⁸ Certainly, the feasibility of these suggestions should be explored. At first blush, however, it would seem that attempts to decrease educational quality would be as unpredictable as risk management due to loose coupling. Further, it would create more litigation concerns as both students, who feel they did not receive the education promised by the institution, and tenured faculty, who lose their jobs, file suit. Finally, graduating more poorly educated students has its own public policy concerns.

192. Karen W. Arenson, *When Strings Are Attached, Quirky Gifts Can Limit Universities*, N.Y. TIMES (Apr. 13, 2008), <http://www.nytimes.com/2008/04/13/education/13endow.html>.

193. See John Hechinger, *New Unrest on Campus as Donors Rebel*, WALL ST. J. (Apr. 23, 2009), <http://online.wsj.com/article/SB124043394794145007.html>.

194. See, e.g., Lawrence E. Gladieux et al., *The Federal Government and Higher Education*, in AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 163, 170–71 (Philip G. Altbach et al. eds., 2005) (discussing the U.S. federal government’s focus for the last fifty years on defense-related science and technology versus other research endeavors).

195. *Id.* at 170.

196. Calabresi, *supra* note 132, at 548–49.

197. Brobeck, *supra* note 186, at 10.

198. *Id.* at 11.

Despite the uncertainty of the first two elements in Calabresi's framework, it is clear that colleges and universities can increase prices. Tuition and fees have grown by 439% from 1982 to 2007, whereas healthcare costs increased by only 251% over the same period.¹⁹⁹ It is not clear, however, that tuition increases are charged only to those who can pay.²⁰⁰ To answer that question would require an analysis of whether scholarships for low-income individuals can offset the across-the-board hikes in tuition due to loss spreading. When calculating the total price of attendance minus grants and scholarships, research shows that "the net price of sending a student to a postsecondary institution was higher in 2007–08 than in 1999–2000 for families at all income levels. For low-income, middle-income and high-income families, the net price increased, respectively by \$1,400, \$2,200, and \$3,600."²⁰¹ Post-recession, increases in the Federal Pell Grants and Veterans Benefits in 2009–2010 actually decreased net price as compared to five years prior.²⁰² Net price was estimated to once again increase in four-year private, four-year public, and two-year public institutions in 2010–2011 based on past years and changes in financial aid, but data is still pending to confirm the increase.²⁰³ Without a new influx of federal funding, it seems likely that the cost of colleges and universities will continue to increase for all students and not just those who can pay.

The ability of colleges and universities to increase tuition, coupled with the potential to increase donor support and decrease educational benefits, may make loss spreading an appropriate justification for expanding an institution's standard of care. At this point, it becomes a question of policy: how much loss spreading is acceptable? Answering this question directly affects how aggressively courts should expand an institution's standard of care in the university-student legal dynamic.

D. Loss Spreading Will do Harm to College Access, Which Benefits Individuals and Our Society

As is true of colleges and universities, the aims of tort law are multiple and can be contradictory.²⁰⁴ On one hand, tort law seeks to provide justice; therefore, it compensates the injured by holding those who caused the injury liable.²⁰⁵ On the other hand, tort law must consider social policy and

199. NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 7.

200. *Id.* at 8 (noting that the burden of college tuition has increased all income levels, from low- to high-income families).

201. AUD ET AL., *supra* note 187, at 128.

202. BAUM & MA, *supra* note 184, at 15.

203. *Id.*

204. See DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 4 (5th ed. 2005).

205. *Id.* at 3.

“provide a system of rules that, overall, works toward the good of society.”²⁰⁶ Requiring colleges and universities to compensate students for injury creates the opportunity for such a contradiction. Through loss spreading, particularly tuition increases, colleges and universities have the ability to compensate students for injuries. Alternatively, colleges and universities provide an educational experience that is vital to personal and national well-being, and tuition costs directly affect a person’s ability to attend college.²⁰⁷ Consequently, courts must balance access to higher education as a public policy alongside justice to injured students when selecting an appropriate model for expanding the college and university standard of care.

Fifty-five percent of Americans consider higher education necessary to succeed, yet 69% also see access to higher education as a problem for many qualified students.²⁰⁸ Research concurs that the burden of paying for college and university attendance has been felt by all families; however, it has become particularly acute for “low- and middle-income families, even when scholarships and grants are taken into account.”²⁰⁹ Low- and middle-income students who choose to pursue higher education must take on more debt than ever before; student borrowing more than doubled from 1997 to 2007.²¹⁰ Flat or declining growth in family income over the past three decades exacerbated the impact of tuition increases.²¹¹

Affordability greatly impacts access to higher education.²¹² Given these facts, it is unsurprising that over the past decade, access to higher education experienced relatively flat growth.²¹³ Lack of growth precipitated the United States’ fall to seventh in the world in college and university enrollment for students between eighteen and twenty-four years of age.²¹⁴ Furthermore, the United States now ranks tenth in the world for the percentage of adults between twenty-four and thirty-four years old who hold an associate’s degree or higher—a sharp contrast to the United States’ rank of second place on the same list in the thirty-five- to sixty-four-year-old bracket.²¹⁵ With the country’s changing demographics, degree declines

206. *Id.*

207. U.S. DEP’T OF EDUC., *supra* note 5, at 8. *Accord* NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 8.

208. JOHN IMMERWAHR ET AL., PUB. AGENDA & NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., SQUEEZE PLAY 2010: CONTINUED PUBLIC ANXIETY ON COST, HARSHER JUDGMENTS ON HOW COLLEGES ARE RUN 10–11 (2010) (analyzing a study comprised of a national random sample of 1,031 adults aged eighteen and over in 2009).

209. NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 8.

210. *Id.* at 9.

211. *Id.* at 8.

212. U.S. DEP’T OF EDUC., *supra* note 5, at 8. *Accord* NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 8.

213. NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 5.

214. *Id.* at 6.

215. *Id.*

will likely continue due to the disproportionate impact of tuition increases on minority students.²¹⁶

Access to higher education serves both a private and public function. Privately, a person with a college degree will enjoy approximately 66% more lifetime earnings than peers with only a high school diploma.²¹⁷ In 2008, individuals with a bachelor's degree averaged \$55,700 annually in earnings, whereas similar individuals with a high school diploma earned \$33,800.²¹⁸ Historically, this effect on private earning makes higher education the engine that powers social mobility; it is a "prerequisite for employment that supports a middle-class life."²¹⁹ Just as important, research shows a college education positively influences the cognitive, moral, and identity development of individuals.²²⁰ Some might argue that the salary commensurate with a college degree justifies burdening all students with tuition increases as opposed to burdening a single, injured student. As Calabresi acknowledges, however, when it comes to loss spreading a small burden to a large group of people is just as significant as a large burden to a single person if both affect social status.²²¹

From a public perspective, seventy-eight million Americans are about to retire; this constitutes the "best-educated generation in the United States—both currently and historically."²²² Meanwhile, the majority of our nation's fastest growing jobs require post-secondary education.²²³ To compete globally, the United States will need a college- and university-educated workforce capable of filling the gaps on the labor line.²²⁴ As Patrick M. Callan puts it in *Measuring Up*, "[t]he relative erosion of our national 'education capital' has occurred at a time when we need more people to be college educated and trained because of Baby Boomer retirements and rising skill requirements for new and existing jobs."²²⁵ Another societal benefit of college- and university-educated workers is their impact on coworkers. College and university degrees act as a rising tide that lifts the earnings of the entire workforce no matter the education level.²²⁶ Beyond labor benefits, a college or university education correlates to higher levels of civic engagement, which invigorates the democratic process.²²⁷ It

216. See, e.g., U.S. DEP'T OF EDUC., *supra* note 5, at 9.

217. BAUM ET AL., *supra* note 1, at 12.

218. *Id.* at 11.

219. NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 7.

220. See PASCARELLA & TERENCEZINI, *supra* note 2.

221. Calabresi, *supra* note 132, at 518.

222. NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 7.

223. U.S. DEP'T OF EDUC., *supra* note 5, at 7.

224. NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 9.

225. *Id.*

226. BAUM & MA, *supra* note 3, at 8 (discussing positive impacts of higher education on society, including widespread productivity of coworkers).

227. BAUM ET AL., *supra* note 1, at 33 (discussing the high correlation of college

provides society with volunteers.²²⁸ Finally, citizens with college or university educations rely less often on social welfare programs due to lower incidents of unemployment and poverty and better overall health.²²⁹

Loss spreading through tuition would detrimentally affect college and university affordability for a large number of students and, by extension, their access to higher education. Therefore, from a policy standpoint, loss spreading is justified only if it balances the right of an injured student to recover with the desirability of making a college or university education widely accessible. The Black Box Model provides proper balance: it places a high evidentiary burden on students, yet it allows injured students to recover in clear and convincing cases of college or university fault. The Black Box Model requires reasonable, detrimental reliance by a student based on the act of a college or university member or division. Finally, it accounts for the impact that loosely coupled systems have on the ability of the institution to exert control over those acts, providing a more accurate approach to assessing college and university fault. Models that treat institutions as reasonable actors instead of loosely coupled systems, models focusing primarily on the injured student's right to recovery, and models that aggressively expand the college or university standard of care without a thorough analysis of the feasibility or desirability of offsetting costs through risk management and loss spreading all fail to strike a proper balance.

V. CONCLUSION

As higher education has evolved in the United States, so too has the institution-student legal dynamic. While institutions began with a parental standard of care and enjoyed similar immunity, they now face a myriad of possible standards.²³⁰ *Beach* and *Webb*, two decisions by the Supreme Court of Utah regarding the University of Utah's duty to protect its students from injury, held that institutions did not owe a duty to adult students absent the existence of a special relationship.²³¹ *Webb*, however, allowed for the possibility of recovery when a student could show a reasonable, detrimental reliance on course-related instructions from a professor.²³² Legal theorists have pushed for a more aggressive expansion of the college and university standard of care in relation to students.²³³

education to voting participation).

228. *Id.* at 32.

229. *Id.* at 4–5.

230. KAPLIN & LEE, *supra* note 14, at 16–17.

231. *See* *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986); *Webb v. Univ. of Utah*, 125 P.3d 906, 912–13 (Utah 2005).

232. *Webb*, 125 P.3d at 912.

233. *See* Bickel & Lake, *supra* note 14; Dall, *supra* note 19; and Peters, *supra* note 13.

Two preeminent theorists, Bickel and Lake, identified the challenge of establishing a university standard of care as how to envision the institution-student relationship.²³⁴ In recent years, numerous articles have attempted to define the institution-student relationship and impose an applicable tort standard of care. An unaddressed assumption in many of these articles is that the institutional portion of the university-student dynamic behaves as a single actor with rational, unified goals.²³⁵ This school of thought leads to a monolithic reasonable man inhabiting the role of institutions in the institution-student legal dynamic. Organizational theory research into higher education by Robert Birnbaum challenges this vision.²³⁶

Birnbaum found that colleges and universities are composed of loosely coupled systems.²³⁷ Loosely coupled systems have weak, circumscribed connections to each other.²³⁸ In the case of colleges and universities, these systems include students, faculty, academic departments, administrators, administrative offices, donors, boards of trustees, politicians, and more. Loose coupling allows these systems to have different and contradictory goals.²³⁹ Further, loose coupling reduces the ability to predict the effects of actions applied to the systems.²⁴⁰ Decision making in colleges and universities is more probabilistic than deterministic, which Birnbaum contrasts using two black boxes as analogies.²⁴¹ In a tightly coupled, deterministic black box, when a crank on one side of the box is turned, the gears inside the box always turn the rotor on the other side one revolution clockwise.²⁴² In a loosely coupled, probabilistic black box, when a crank is turned the gears inside may turn the rotor one revolution clockwise, one revolution counter-clockwise, or not at all.²⁴³ Similarly, when college or university presidents enact new policies, the effects of the policies are often unknowable.

Envisioning colleges and universities as a composite of loosely coupled systems should influence how courts and theorists define the institution's standard of care in the institution-student legal dynamic. For example, theorists using Reasonable Institution standards often propose an aggressive expansion of institutions' standard of care in order to better

234. Bickel & Lake, *supra* note 14, at 784.

235. *See, e.g.*, Bickel and Lake, *supra* note 14, at 788 (requiring a university "given its particular circumstances, to use reasonable care to facilitate student education and growth").

236. *See* BIRNBAUM, *supra* note 25.

237. *Id.* at 37-38.

238. *Id.*

239. *Id.* at 11.

240. *Id.* at 38.

241. *Id.* at 37-38.

242. *Id.* at 36.

243. *Id.* at 37-38.

protect students from injury.²⁴⁴ They acknowledge that such an expansion would increase college and university costs, but they cite risk management and loss spreading as methods for ameliorating this consequence.²⁴⁵ If, however, colleges and universities are treated as made up of many loosely coupled systems, then the ability of risk management to offset costs becomes less clear. A college or university president, for example, may try to put in place policies to manage risk, but she cannot guarantee that the implementation of the policies will result in the desired outcomes.

The potential ineffectiveness of risk management will likely result in colleges and universities relying more on loss spreading to recoup costs associated with an expanded duty of care. Guido Calabresi argues that loss spreading is appropriate when a charity—such as a college or university—can insure against loss and reallocate resources by increasing prices to those who can pay, increasing donor support, and decreasing the amount of charity given to individuals.²⁴⁶ Colleges and universities can insure against loss; they already do so as demonstrated by the work of United Educators.²⁴⁷ It is less clear whether institutions can increase donor support and decrease educational benefits to absorb loss. What colleges and universities can do—and have been doing over the last three decades to make up for reduced state appropriations, higher operating costs, more students, and market fluctuations—is increase tuition prices.²⁴⁸

Whether loss spreading justifies an expansion of an institution's standard of care depends upon the policy choices supporting increased liability. As stated, theorists using Reasonable Institution standards support an expansion to better protect students from injury and provide recovery for those who are injured. This is an understandable reaction given the historical deference shown to colleges and universities in student injury lawsuits. College and university access, however, is another important policy, and it favors a conservative expansion of a university's standard of care. College and university access correlates to college and university affordability; as prices go up due to loss spreading, fewer students will be able to attend.²⁴⁹ The populations most sensitive to decreases in college and university affordability are historically underrepresented students and students from poor or middle-class backgrounds.²⁵⁰ From a policy perspective, access to higher education has both private and public benefits.

244. See, e.g., Peters, *supra* note 13, at 468 (arguing that decreased autonomy in the Millennial generation of college and university students required an increased university standard of care).

245. See, e.g., Dall, *supra* note 19, at 522–23.

246. Calabresi, *supra* note 132, at 548–49.

247. Broe, *supra* note 12, at 1.

248. See U.S. DEP'T OF EDUC., *supra* note 5, at 10.

249. *Id.* at 8; accord NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 8.

250. NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., *supra* note 4, at 8.

For the individual, college or university attendance has historically powered social mobility within the United States.²⁵¹ Consequently, loss spreading would significantly harm the social standing of numerous individuals and put the American promise of a better life further out of their reach. Further, college or university attendance contributes to an individual's moral, cognitive, and identity development.²⁵² Publicly, reduced college and university attendance due to loss spreading would detrimentally impact the United States' labor market, its ability to compete in the global marketplace, and the development of its society.²⁵³

To introduce the concept of colleges and universities as a grouping of loosely coupled systems into the discussion of an institution's standard of care, I developed the Black Box Model starting with the court's analysis in *Webb* and Birnbaum's organizational theory research. If courts choose to apply the Black Box Model, an injured student would need to demonstrate that an act by a member or division of the college or university caused the student's reasonable and detrimental reliance and a college or university foreseeing the act could and should have stopped the act by exerting control over the system in question. Consequently, the Black Box Model provides a truer understanding of institutions by accounting for loosely coupled systems. It has several other benefits as well. It applies to any type of institution, encompasses all systems within a college or university, creates the opportunity for injured students to recover, and synthesizes several legal theories to fully develop a new understanding of the institution-student legal dynamic. Furthermore, by understanding that loosely coupled systems affect risk management and loss spreading, the Black Box Model uses a clear and convincing evidentiary standard and a prerequisite act to conservatively expand an institution's standard of care. Doing so balances student recovery and protection with concerns about college and university access.

Potential drawbacks exist with any revision of the institution-student legal dynamic, and the Black Box Model is no exception. Critics may argue that loose coupling is an excuse to avoid accountability, that the clear and convincing evidentiary standard is too high a bar, and that loss spreading justifies a more aggressive expansion of the standard of care. First, loose coupling is a necessary evil in that it allows colleges and universities to respond to needs without mobilizing the entire institution, contains failures to one system, and allows colleges and universities to achieve important yet incompatible goals.²⁵⁴ Second, the evidentiary standard is not a complete bar to recovery, unlike other standards applied by courts, and it is used by the Black Box Model to balance recovery with

251. *Id.* at 7.

252. *See generally* PASCARELLA & TEREZINI, *supra* note 2.

253. *See generally* BAUM ET AL., *supra* note 1.

254. BIRNBAUM, *supra* note 25, at 39–41.

student access to colleges and universities. Third, the model will lead to loss spreading, but it understands that loss spreading will increase tuition and decrease college and university attendance. It limits liability to reduce costs and minimize loss spreading to avoid the policy consequences of decreased access to higher education.

POURING NEW WINE INTO OLD WINESKINS: WHY “ON PREMISE” SOFTWARE SOURCE CODE ESCROW ARRANGEMENTS ARE ILL- SUITED FOR REMOTELY HOSTED “OFF PREMISE” SOFTWARE AS A SERVICE LICENSE AGREEMENTS

KINGSLEY OSEI*

I. INTRODUCTION	384
II. OLD WINESKINS	386
A. On Premise Software Escrow Arrangements	386
B. The Utility of Source Code Escrow Arrangements	387
C. Are Source Code Escrow Arrangements Worth The Trouble?.....	388
III. SAAS LICENSES AND UNIQUE ISSUES PERTAINING TO THEIR ESCROW	390
A. Evolution of SaaS Licenses	390
B. SaaS Licensing and Pricing Models	392
C. Disruptive Risks Inherent In SaaS Licensing	392
D. Special Bankruptcy Considerations	393
1. SaaS Licensing Agreements as Executory Contracts	393
2. Section 365(n) to the Rescue?	396
IV. NEW WINESKINS.....	397
A. SaaS Escrow Arrangements.....	397
1. Appropriate Escrow Release Triggers for SaaS Licenses ...	397
2. Addressing Licensing and Subscription Issues.....	398
3. Dealing with Licensor’s Bankruptcy	398
B. Alternatives to Escrow Arrangements.....	400
1. Service Level Agreements and Failover Guarantees.....	400
2. Disaster Recovery Plans	401
3. SaaS Application Interoperability and Portability	402
V. CONCLUSION.....	402

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I. INTRODUCTION

Many colleges and universities are adopting the “Software as a Service” (“SaaS”) licensing model, a variant of cloud computing,¹ to reduce their information technology (“IT”) acquisition costs and to create efficient on-demand IT systems that are delivered as a service rather than as a product.²

1. Cloud computing is defined by the National Institute of Standards as “[A] model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.” See Peter Mell & Tim Grance, *The NIST Definition of Cloud Computing*, Special Publication 800-145, NAT’L INSTIT. OF STANDS. AND TECH., 2 (Sept. 2011), <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>.

Cloud computing exists in different iterations such as: Platform as a Service (“PaaS”), Infrastructure as a Service (“IaaS”), and Software as a Service (“SaaS”). See ORACLE, *Achieving the Cloud Computing Vision*, 5 (Oct. 2010), <http://www.oracle.com/technetwork/topics/entarch/architectural-strategies-for-cloud—128191.pdf>.

In PaaS, the provider allows the consumer to deploy the consumer’s own or acquired software applications using programming tools supported by the provider into the provider’s cloud infrastructure. *Id.* The consumer does not control the underlying cloud infrastructure including the network, servers, etc., but has control over its deployed applications. Examples of this model are Amazon’s “Elastic Compute Cloud” or “EC2 Utility Cloud Platform” and Google’s “App Engine.” *Id.*

In IaaS, the consumer is allowed to deploy into the cloud infrastructure using the provider’s processing, storage, networks, and other fundamental computing resources and is able to deploy and run arbitrary software, which can include operating systems and applications. *Id.* The consumer does not manage or control the underlying cloud infrastructure but has control over operating systems, storage, and deployed applications, etc. *Id.*

In SaaS, the licensee or subscriber uses the provider’s applications running on a cloud infrastructure. *Id.* The applications are accessible from various client devices through the internet. *Id.* The licensee or subscriber does not manage or control the underlying cloud infrastructure including networks, servers, operating systems, storage, etc. *Id.*

2. Notwithstanding the widely held notion of software as a commodity, such categorization is still contentious, given the ramification of the application of UCC warranties. In *Triangle Underwriters, Inc. v. Honeywell, Inc.*, a contract for the development of a computer system with custom-designed software, installation, training, and maintenance was considered a sale of a “good.” 457 F.Supp. 765, 769 (E.D.N.Y. 1978), *aff’d in part, rev’d in part and remanded on other grounds*, 604 F.2d 737 (2d Cir. 1979). See also *Confer Plastics, Inc. v. Hunkar Lab., Inc.*, 964 F. Supp. 73, 77 (W.D.N.Y. 1997) (“Under the law of New York, the transaction at issue constitutes a sale of goods.” The court rationalized that the sale of computer software, though an intangible item, was more readily characterized as “goods” than “services.”); *Architectronics, Inc. v. Control Sys., Inc.*, 935 F.Supp. 425, 432 (S.D.N.Y. 1996).

In *Communications Group, Inc. v. Warner Communications, Inc.*, software was considered a good even though a finished software product may reflect a substantial investment of programming services. 527 N.Y.S.2d 341 (N.Y. Civ. Ct. 1988).

A computer software package agreement including a license for limited use of copyrightable information, installation, and a warranty service package was an agreement for the sale of goods under the New York UCC. *Id.* Similarly, a contract to

SaaS licensing offers enormous benefits to colleges and universities. Some of the benefits include: (1) ubiquity of access from fixed or mobile devices; and (2) “pay as you go” expense payments without massive upfront hardware and software installation costs. SaaS also enables licensees to leverage the flexibility and scalability of the internet.³ A recent survey⁴ found that about thirty-four percent of colleges and universities in the United States have, or are in the process of implementing, a SaaS or cloud computing solution.⁵ Another report by an on-demand financial management, human capital management, and cloud computing software vendor lists Brown, Cornell, Carnegie Mellon, and Georgetown as major clients that are migrating their human resources, payroll, financial, and other administrative IT systems from locally run computing resources to the cloud.⁶ A less obvious, but equally significant trend is the ongoing migration by many colleges and universities of their student email, calendaring and social networking applications to Yahoo, Google, and Microsoft, among many others.⁷ “Google Apps for Education” and

develop specifications for the delivery, modification, installation, testing, licensing, and implementation of a computer software system for international bank management was a “good” under New York law. See *Schroders, Inc. v. Hogan Sys., Inc.*, 522 N.Y.S.2d 404 (N.Y. Sup. Ct. 1987). See also RIVERBED, *Data Storage in the Cloud: Can You Not Afford It?*, http://docs.media.bitpipe.com/io_10x/io_100958/item_431220/Data%20Storage%20in%20the%20Cloud_Can%20you%20afford%20WW%20ROI%20Whitepaper.pdf.

3. Mell & Grance, *supra* note 1; see also Gianpaolo Carraro & Fred Chong, *Software as a Service (SaaS): An Enterprise Perspective* (Oct. 2006), <http://msdn.microsoft.com/en-us/library/aa905332.aspx> (last visited Feb. 11, 2013).

4. CDW-G is a subsidiary of CDW Corp., a reseller of hardware, software, and supplies that is devoted to government clients in the United States.

5. See David Nagel, *Campus IT Plans for Increased Cloud Adoption* (Oct. 26, 2011), <http://campustechnology.com/articles/2011/05/26/campus-it-plans-for-increased-cloud-adoption.aspx> (last visited Feb. 11, 2013).

6. See Workday and Brown University, *A Unified Approach Brings New Insight*, WORKDAY, <http://www.workday.com/Documents/pdf/case-studies/workday-brown-university-case-study.pdf>; Workday and Cornell University, *Efficiency Meets Individuality*, WORKDAY, <http://www.workday.com/Documents/pdf/case-studies/workday-cornell-case-study.pdf>; Workday and Carnegie Mellon University, *Customer Profile*, WORKDAY, http://www.workday.com/customers/by_industry/education_and_government/carnegie_mellon_university.php; Workday and Georgetown University, *Unified Administrative Operations*, WORKDAY, <http://www.workday.com/Documents/pdf/customer-profiles/customer-profile-georgetown-university.pdf>.

7. Also known by various monikers such as “Cloud-sourcing, Outsourcing, Consortial sourcing, Institutional sourcing, Collaborative sourcing . . . technologies and IT services are being delivered to colleges and universities in a myriad of ways. Whereas in the past the role of the IT organization was to provide IT services to the campus community—known (now) as insourcing—over time that role has subtly but concretely changed. IT leaders today must not only provide but also decide: which tools and services should they continue to supply, which are better delivered by others, and perhaps most critically, which methods from among the bewildering array of alternative sourcing strategies will best serve their faculty, staff, and students.” Edward

“Microsoft Live@EDU” rebranded as “Microsoft Office 365 for Education” are online hosted, co-branded communication and collaboration services designed for students, faculty, and alumni to provide cloud based email, document sharing and storage, as well as enterprise class tools.⁸

This article examines the inadequacies of the on premise/product oriented software escrow protections frequently relied upon by colleges and universities in their SaaS acquisitions when a software licensor or SaaS provider files for bankruptcy, ceases to support or maintain the software application, or experiences a disruptive application access event that prevents the licensee’s use of the licensed software.⁹ Significantly, this article will offer alternative considerations that SaaS licensees may take into account to optimally address an application access disruption event, including, but not limited to, portability and disaster recovery issues.

II. OLD WINESKINS

A. On Premise Software Escrow Arrangements

On premise software, as distinguished from SaaS, is software licensed by physical delivery and installation on the servers or computer systems at a licensee’s place of business.¹⁰ In this model, the licensor is often required to deposit its proprietary source code and related documentation with a neutral third party or escrow agent for the benefit of the licensee, should the licensor file for bankruptcy, fail to support the software, or cease to do business, among other release events.¹¹ This corollary escrow deposit arrangement offers the licensee a secure, confidential, and dependable mechanism to access the licensed software source code.¹² From a

Mahon et al., *Alternative IT Sourcing Strategies: Six Views*, 15 (2011), <http://net.educause.edu/ir/library/pdf/ERM1140.pdf>.

8. Microsoft in Education, *Microsoft Live@edu*, MICROSOFT, <http://www.microsoft.com/education/en-us/solutions/Pages/liveedu.aspx> (last visited Feb. 11, 2013).

9. See RICHARD RAYSMAN & PETER BROWN, *COMPUTER LAW: DRAFTING AND NEGOTIATING FORMS AND AGREEMENTS* 7-58 (Release 54, 2012). See also Mary A. Moy, *The Intellectual Property Bankruptcy Protection Act: An Unbalanced Solution to the International Software Licensing Dilemma*, 11 U. PA. J. INT’L BUS. L. 151, 172 (1989).

10. H. WARD CLASSEN, *A PRACTICAL GUIDE FOR SOFTWARE LICENSES FOR LICENSORS AND LICENSEES* 143 (3d ed. 2008).

11. See RAYSMAN & BROWN, *supra* note 9, at 7-58; see also Periklis A. Pappous, *The Software Escrow: The Court Favorite and Bankruptcy Law*, 1 SANTA CLARA COMPUTER & HIGH TECH. L.J. 309, 309 (1985).

12. A “source code is the set of instructions as written by the computer programmer in the appropriate programming (computer) language. . . . which are used to direct computer functions.” RAYSMAN & BROWN, *supra* note 9, at 1-18.

See also MTH 568 - Computational Science, *Source Code, Compiling, and Executable Code*, UNIVERSITY AT BUFFALO, http://www.nsm.buffalo.edu/courses/mth568/www/intro_to_c.html (last visited Feb. 11, 2013) (“[The program] that is

licensee's perspective, a good source code escrow deposit arrangement should be accompanied by documentation that describes the source code's structure or dataflow to enable the programmer to decipher, enhance, or modify the software program to ensure its continuous use by the licensee.¹³ An effective escrow deposit arrangement should also incorporate a verification mechanism that will enable the licensee to periodically verify that the materials on deposit are completed, contain updated versions of the software, and capable of being compiled into an object code version of that software.¹⁴ The source code or software license agreement should also have appropriate release events¹⁵ suited to the business or operational objectives for which the software was licensed.¹⁶

B. The Utility of Source Code Escrow Arrangements

As the foregoing clarifies, source code arrangements offer continuity of access to the licensee should any of the above listed release events occur.¹⁷ The scope of the licensor's duties and licensee's rights for the release of the code is often encapsulated in licensing or escrow agreements. Essentially, a software source code deposit arrangement is a risk aversion and business continuity mechanism that permits a licensee to survive disruptions in use of the software if the licensor cannot provide, maintain, and update the software in accordance with the terms of the licensing agreement.¹⁸

written by a human using a text editor . . . This code is easily written and read by humans and can be translated into a code that can be executed by a computer. Source code is converted to *executable code* (which is useful to the computer) by a process called *compiling*. . . The source code can be transformed into executable code by using the GNU C compiler (gcc). The executable or machine code produced is named whatever you wish using the '-o' flag of the gcc compiler. For convenience, the executable is usually named the same name as the source code (without the '.c' suffix). The executable code can then be run on the machine by typing ./ (to tell the shell that the program is located in the current directory) followed by the name of the executable code").

13. RAYSMAN & BROWN, *supra* note 9, at 7-58.

14. *Id.*

15. Pappous, *supra* note 11, at 309; *see also* Shawn Helms & Alfred Cheng, *Source Code Escrow: Are You Just Following the Herd?* (Feb. 25, 2008), http://www.jonesday.com/files/Publication/09e73d7d-7240-450f-ae18-07970d03977f/Presentation/PublicationAttachment/7cbcbfeb-8cf4-4056-9c89-11c07b903a73/JD_Source%20Code%20Escrow.pdf.

16. *See* RAYSMAN & BROWN, *supra* note 9, at 7-58.

17. *Id.*

18. *Id.* *See also* John Boruka, *Trust But Verify: How Verification Services Can Put Teeth in Your Technology Escrow Agreement*, IRON MOUNTAIN, <https://secured.ironmountain.com/Knowledge-Center/Reference-Library/View-by-Documents/White-Papers-Briefs/Sponsored/Trust-But-Verify.aspx> (last visited Feb. 11, 2013).

C. Are Source Code Escrow Arrangements Worth The Trouble?

Despite its enormous benefits, anecdotal evidence indicates that software escrow arrangements are often fraught with problems and unmet expectations. Even though most software source codes are annotated¹⁹ to enable a programmer to “decipher” and make the software useful for the licensee, licensees often run into the arduous reality that “decoding” reams of computer programming language and documentation written by others and further, to compile and transform executable source code into machine readable object code, is not always easy.²⁰ Often times, source code release event(s) stipulated in licensing agreements do not correlate with the objectives of the parties in “escrowing” the source code. Though a licensee’s objective in escrowing a source code may be to ensure the software’s continued maintenance, it is not uncommon to find deposit provisions that are devoid of such provisions, but replete with other needless release events such as bankruptcy, ceasing to do business, etc.²¹ For instance, if a licensee’s objective in escrowing the source code is not ongoing maintenance of the software because of its in-house capabilities, it will be foolhardy to premise the release of the source code on the licensor’s failure to maintain the software.²² Further, incorporating a release event such as “ceasing to do business” may be moot since the licensor may technically have “ceased to do business” and there may be a continuity of software maintenance undertaken by an acquiring company.²³ Other practical considerations may make the release of the software irrelevant. A licensor in the last throes of shutting down its business or on the verge of bankruptcy may not have updated the source code in escrow due to staffing issues. It may not have fixed bugs to ensure compatibility with other system upgrades or added functionalities required for the licensee’s evolving or changing business needs.²⁴

19. Annotation of software is mainly used for expanding code documentation and offering commentary on how the software code is written. “The source code will incorporate the programmer’s comments to provide a guide as to the specific function being performed by the program at its various steps. These [source code] comments can be read by a programmer literate in the particular computer language to understand the program and the techniques used by the original programmer in solving the particular problem.” See RAYSMAN & BROWN, *supra* note 9, at 1-19.

20. J.T. Westermeier, *Strategies Relating to the U.S. Bankruptcy Laws and Information Technology*, FINNEGAN HENDERSON FARABOW GARRETT & DUNNER LLP (Jan. 2010), <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=6db94cca-c0d5-47e3-8a72-01d660722f74>.

21. See Linda Markus Daniels, *Does Your Source Code Escrow Agreement Achieve Its Objectives?*, http://www.innovasafe.com/pdf/Does%20Your%20Source%20Code%20Escrow%20Agreement%20Achieve%20Its%20Objectives_Linda%20Markus%20Daniels.pdf.

22. *Id.*

23. *Id.*

24. See RAYSMAN & BROWN, *supra* note 9, at 7-62 & 7-63.

It is no wonder that statistically, only a small percentage of software source code escrows are ever released.²⁵ According to Iron Mountain,²⁶ a provider of information storage and management solutions, between 1990 and 1999, only ninety-six escrow accounts out of more than forty-five thousand escrowed software accounts with the company were released.²⁷ This low release rate perhaps reflects the rarity of the occurrence of release events. This may then beg the question whether the return on the expense of putting escrow arrangements in place is matched by perceived or anticipated risks that escrow arrangements seeks to insure. Also, it is not uncommon to find escrowed source codes to be outdated, defective, or failing to meet ongoing requirements. Again, according to Iron Mountain, 97.4% of all analyzed escrow material deposits are incomplete and 74% have required additional input from developers in order to be compiled. Even if the software is updated, the question remains whether a licensee has in-house resources or capability to utilize the code upon release.²⁸ This situation is often complicated by prohibitions against soliciting licensor's employees upon termination of the licensing agreement, cutting off a valuable use and continuity resource necessary to maintain and support the software.

Even though an escrow agreement may provide clear triggering events for the release of source code,²⁹ a licensor may still have the ability to block release to the licensee if the agreement provides for licensor's consent or fiat to release the source code. A delay in release of the software source code at the behest of an economically challenged licensor may further prevent requisite updates to the software.³⁰

Furthermore, as will be discussed later in this article, if bankruptcy is the major and sometimes only, triggering condition authorizing release of the source code from escrow, the bankruptcy court's broad powers over the vendor-debtor estate makes removal from escrow after bankruptcy a risky proposition.³¹ The vendor trustee may be able to reject such a contract as "executory" and obtain a court order to remove the source code copy from escrow leaving the user without the anticipated access to source code.³²

25. See Jonathan L. Mezrich, *Source Code Escrow: An Exercise in Futility*, 5 MARQ. INTELL. PROP. L. REV. 117, 121–22 (2001). See also Helms & Cheng, *supra* note 15.

26. Boston, Massachusetts based information destruction and data backup services reputed to be the largest provider of source code escrow services in the United States.

27. See Helms & Cheng, *supra* note 15.

28. *Id.*

29. *Id.*

30. *Id.*

31. See RAYSMAN & BROWN, *supra* note 9, at 7-29 to -32.3.

32. *Id.*

III. SAAS LICENSES AND UNIQUE ISSUES PERTAINING TO THEIR ESCROW

A. Evolution of SaaS Licenses

As described above, SaaS is computer software deployed offsite and predominantly licensed as a service over the internet.³³ SaaS was first defined by an article titled, “Strategic Backgrounder: Software as a Service,” published by the Software and Information Industry Association (SIIA) e-Business Division.³⁴ The intent of this article was to dispel confusion between SaaS and similar licensing models:

In the software as a service model, the application, or service, is deployed from a centralized data center across a network—Internet, Intranet, LAN, or VPN—providing access and use on a recurring fee basis. Users “rent,” “subscribe to,” “are assigned,” or “are granted access to” the applications from a central provider. Business models vary according to the level to which the software is streamlined, to lower price and increase efficiency, or value-added through customization to further improves digitized business processes.³⁵

Historically, the SaaS licensing model is the progeny of earlier client server legacy applications³⁶ marketed by Application Service Providers (ASPs) in the 1980s.³⁷ This ASP application model, which was billed as an alternative to on-premise software,³⁸ did not live up to expectations because it was in the most part, cumbersome to use legacy applications not designed to leverage the scalability of the internet.³⁹ As the number of ASPs

33. See *supra* note 1 and accompanying text.

34. “The Software & Information Industry Association is the principal trade association for the software and digital content industry. SIIA provides global services in government relations, business development, corporate education and intellectual property protection to the leading companies that are setting the pace for the digital age.” SOFTWARE & INFORMATION INDUSTRY ASSOCIATION, <http://www.sii.net> (last visited Feb. 11, 2013).

35. Fred Hoch et al., *Software as a Service: Strategic Backgrounder*, SOFTWARE & INFORMATION INDUSTRY ASSOCIATION, 4 (Feb. 2001), <http://www.sii.net/estore/ssb-01.pdf>.

36. A legacy application is “[a]n application that was written for an earlier operating system or hardware platform. For example, mainframe applications were legacy apps when the world embraced client/server networks. Windows 3.1 applications were legacy apps when Windows 95 was introduced. . . . Any business software that is not Internet enabled in some form is sometimes considered a legacy application.” *PC Magazine Encyclopedia: legacy application*, PC MAGAZINE, http://www.pcmag.com/encyclopedia_term/0,2542,t=legacy+application&i=46019,00.asp#fbid=MEKI50BJ2vY (last visited Feb. 11, 2013).

37. See Service-now.com, *A Brief history of SaaS: Modernizing Enterprise Software*, 3–4, <http://www.computerworld.com/pdfs/Service-Now-BriefhistoryofSaaS.pdf> (last visited Feb. 13, 2013).

38. See CLASSEN, *supra* note 10, at 143.

39. See THINKstrategies, Inc., *A Whitepaper for SaaS Customers and Vendors*:

proliferated, the cost and challenge of delivering these client server applications became cumbersome, time consuming, and expensive. These inherent limitations and failure to deliver the promised efficiencies and comparative cost advantage to on-premise software led to the demise of these earlier client server legacy models.⁴⁰

The advent of the internet saw the revival of on-demand software licensing and other externally delivered IT platform or infrastructural services. According to a recent study conducted by International Data Corporation (“IDC”),⁴¹ a provider of market intelligence and advisory services to information technology and telecommunications companies, SaaS had worldwide sales of \$13.1 billion in 2009 and forecasts that sales of SaaS could reach \$40.5 billion by 2014.⁴² IDC further predicts that by 2014, about 34% of all new business software licenses will be SaaS models, and SaaS delivery will constitute about 14.5% of worldwide software sales.⁴³ Put succinctly by the Vice President for SaaS and Cloud Services Research at IDC:⁴⁴

“[E]nterprise IT plans are rapidly shifting to accommodate the growing choices for sourcing most or all IT software functions, from business applications to software development and testing, to service and desktop management, as SaaS services become available from established vendors and new models for accessing functionality in the cloud creates lower-cost options and more tailored models for consuming IT services.”⁴⁵

As pointed out earlier, SaaS models seek to save the licensee the up-front installation and maintenance costs⁴⁶ associated with on-premise software licensing whilst allowing the licensee “to take advantage of the benefits of centralization through a single-instance, multi-tenant architecture, and to provide a feature-rich experience competitive with

Leveraging Escrow Agreements to Safeguard Your Business from the Risks Associated with Software-as-a-Service, IRON MOUNTAIN, 5 (2007), <http://ironmountain.com/resources/services/doc/us-tes-wp-leveraging-escrow-saas-think.pdf>.

40. *Id.* at 4.

41. See INTERNATIONAL DATA CORPORATION, <http://www.idc.com> (last visited Feb. 11, 2013).

42. *SaaS Revenue to Grow Five Times Faster than Traditional Packaged Software Through 2014, IDC Finds*, BUSINESS WIRE (July 26, 2010), <http://www.businesswire.com/news/home/20100726005135/en/SaaS-Revenue-Grow-Times-Faster-Traditional-Packaged>.

43. *Id.* Another study by Gartner predicts worldwide revenue for SaaS delivery to grow from 2008 to 2013 by 19.4% overall. See Alexander Benlian et al., *The Risks of Sourcing Software as a Service—An Empirical Analysis of Adopters and Non Adopters*, INSTIT. FOR INFO. SYS., 2, <http://is2.lse.ac.uk/asp/aspecis/20100026.pdf>.

44. See Analyst Profile: Robert P. Mahowald, INT’L DATA CORP., <http://www.idc.com/getdoc.jsp?containerId=PRF000230> (last visited Feb. 11, 2013).

45. BUSINESS WIRE, *supra* note 42.

46. See Carraro & Chong, *supra* note 3.

comparable on-premise applications.”⁴⁷

B. SaaS Licensing and Pricing Models

Whether offered directly by a vendor or through an aggregator,⁴⁸ SaaS applications are often sold or licensed by subscription, with licensee, or customers paying as they use the software.⁴⁹ It is noteworthy that within the SaaS subscription-based licensing genre, there are sub-licensing categories including: (a) pure subscriptions-based models, where a monthly payment is calculated on the software actually used, considering the actual number of users; (b) usage-based models, where payment is determined by application usage and is typically related to peak or near peak levels of usage; (c) transaction-based models, where the licensor or provider sometimes charges customers for each business transaction; and (d) value-based or shared risk or revenue models, which are based on the provision of whatever software is needed to achieve business goals, and payment linked to the achievement of those goals.⁵⁰ The latter is a fixed-fee model where “users generally pay a predetermined monthly fee based on number of users supported, which application modules are rented and service and support levels specified by the customer.”⁵¹

C. Disruptive Risks Inherent In SaaS Licensing

Because they are mainly licensed by subscription, hosted offsite, and delivered through the internet, the crucial risk factors inherent in SaaS licensing are material application access interruptions, telecommunication and power outages, or considerable downtimes due to technical

47. *Id.* It is also instructive to note that whilst multi-tenancy is the norm in most SaaS offerings, a new generation of SaaS licensing, which offers “single tenancy” architecture, is being explored. The “[n]ext generation SaaS providers are delivering single-tenant SaaS while keeping costs low through data center automation and virtualization. Each customer receives a unique instance of the application and database. Single-tenant SaaS applications are fully supported by the application experts—the software vendor. Fully automated upgrades are scheduled throughout the year and remain invisible to the end user. Single-tenancy also gives the customer additional opportunity for extensive customization, data security compliance peace of mind, more deployment options, and preserved customizations through upgrades while providing the same user benefits that are driving the popularity of SaaS.” *See Service-now.com, supra* note 37, at 4.

48. An aggregator is a software intermediary that bundles offerings from different vendors and offers them as part of a unified application platform. *See Carraro & Chong, supra* note 3.

49. *See CLASSEN, supra* note 10, at 143; *see also* Tommy van de Zande & Slinger Jansen, *Business Continuity Solutions for SaaS Customers*, UTRECHT UNIVERSITY DEPARTMENT OF INFORMATION AND COMPUTING SCIENCES, http://slingerjansen.files.wordpress.com/2009/04/businesscontinuitysolutions_2-1.pdf.

50. *See* Hoch, *supra* note 35, at 11.

51. *Id.*

difficulties.⁵² A recent example of such an incident occurred on April 21, 2011, when Amazon's Elastic Compute Cloud ("Amazon EC2"), which is the online retailer's utility computing platform and also, a significant cloud services provider, suffered an outage that wiped out some customer application data. Without the escrow of the data and back-up, some developers who hosted their application software on Amazon EC2 irrecoverably lost data and were not able to restart their applications when the system was restored on April 23, 2011.⁵³

Because in SaaS licensing the computer hardware, servers, storage devices, and cloud infrastructure belong to the licensor and licensee data may be hosted offsite, structuring an escrow arrangement merely to access source code to recreate the functionality of the software may be of limited practical utility to a licensee.⁵⁴ Moreover, SaaS solutions may have a multi-tenant infrastructure serving more than one licensee or subscriber at the same time.⁵⁵ This creates unique back-up and data recovery challenges if a release condition should occur.⁵⁶ SaaS licensing therefore presents unique business continuity and operational challenges for which the adoption of an escrow model, which is best suited for on-premise and product oriented licensing application and merely allows the licensee to access and restore the functioning of proprietary software, may not be appropriate for the significant purposes it is designed to serve for the licensee.⁵⁷

D. Special Bankruptcy Considerations

1. SaaS Licensing Agreements as Executory Contracts

Aside from the disruptive operational considerations discussed above, the bankruptcy of the licensor may also present special continuity of access and intellectual property matters worth mentioning. Prior to the addition of section 365(n) to the United States Bankruptcy Code,⁵⁸ a Chapter 11 bankruptcy trustee⁵⁹ for a licensor ("licensor"), as a debtor in possession,⁶⁰

52. See van de Zande & Jansen, *supra* note 49.

53. See Rich Miller, *Amazon EC2 Outage Wipes Out Data*, DATA CENTER KNOWLEDGE (Oct. 2, 2007), <http://www.datacenterknowledge.com/archives/2007/10/02/amazon-ec2-outage-wipes-out-data> (last visited Feb. 11, 2013).

54. See Rebecca Anderson, *Key Issues in SaaS Contracts*, KEMP LITTLE, LLP (June 2010), <http://www.kemplittle.com/Publications/item.aspx?ListName=Short%20Lines&ID=52#.URnRX1qb-4Q>; see also *Summary of the Amazon EC2 and Amazon RDS Service Disruption in the US East Region*, AMAZON WEB SERVICES (April 29, 2011), <http://aws.amazon.com/message/65648>.

55. See ORACLE, *supra* note 1.

56. THINKstrategies, Inc., *supra* note 39, at 7.

57. See van de Zande & Jansen, *supra* note 49, at 10.

58. 11 U.S.C.A. § 365 (West 2012).

59. ADMIN. OFF. OF THE US COURTS, *The U.S. trustee or bankruptcy*

administrator, Reorganization Under the Bankruptcy Code, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter11.aspx> (last visited Feb. 11, 2013) (citations omitted).

The U.S. trustee plays a major role in monitoring the progress of a chapter 11 case and supervising its administration. The U.S. trustee is responsible for monitoring the debtor in possession's operation of the business and the submission of operating reports and fees. Additionally, the U.S. trustee monitors applications for compensation and reimbursement by professionals, plans and disclosure statements filed with the court, and creditors' committees. The U.S. trustee conducts a meeting of the creditors, often referred to as the "section 341 meeting," in a chapter 11 case. The U.S. trustee and creditors may question the debtor under oath at the section 341 meeting concerning the debtor's acts, conduct, property, and the administration of the case.

The U.S. trustee also imposes certain requirements on the debtor in possession concerning matters such as reporting its monthly income and operating expenses, establishing new bank accounts, and paying current employee withholding and other taxes. By law, the debtor in possession must pay a quarterly fee to the U.S. trustee for each quarter of a year until the case is converted or dismissed. The amount of the fee, which may range from \$250 to \$10,000, depends on the amount of the debtor's disbursements during each quarter. Should a debtor in possession fail to comply with the reporting requirements of the U.S. trustee or orders of the bankruptcy court, or fail to take the appropriate steps to bring the case to confirmation, the U.S. trustee may file a motion with the court to have the debtor's chapter 11 case converted to another chapter of the Bankruptcy Code or to have the case dismissed.

60. ADMIN. OFF. OF THE US COURTS, *The Chapter 11 Debtor in Possession, Reorganization under the Bankruptcy Code*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter11.aspx> (last visited Feb. 11, 2013) (citations omitted).

Chapter 11 is typically used to reorganize a business, which may be a corporation, sole proprietorship, or partnership. A corporation exists separate and apart from its owners, the stockholders. The chapter 11 bankruptcy case of a corporation (corporation as debtor) does not put the personal assets of the stockholders at risk other than the value of their investment in the company's stock. A sole proprietorship (owner as debtor), on the other hand, does not have an identity separate and distinct from its owner(s). Accordingly, a bankruptcy case involving a sole proprietorship includes both the business and personal assets of the owners-debtors. Like a corporation, a partnership exists separate and apart from its partners. In a partnership bankruptcy case (partnership as debtor), however, the partners' personal assets may, in some cases, be used to pay creditors in the bankruptcy case or the partners, themselves, may be forced to file for bankruptcy protection.

Section 1107 of the Bankruptcy Code places the debtor in possession in the position of a fiduciary, with the rights and powers of a chapter 11 trustee, and it requires the debtor to perform of all but the investigative functions and duties of a trustee. These duties, set forth in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, include accounting for property, examining and objecting to claims, and filing informational reports as required by the court and the U.S. trustee or bankruptcy administrator (discussed below), such as monthly operating reports. The debtor in

could pursuant to section 365(a) assume or reject⁶¹ a software licensing agreement with a licensee as an executory contract.⁶² If with the bankruptcy court's approval, the licensor rejected the contract, the licensee was deemed to be in breach of the contract. The licensee's substantive relief was to seek damages as an unsecured creditor of the licensor and is entitled to damages for a pre-petition claim in bankruptcy payable at whatever fractional rate the court determines for such a claim.⁶³ If the licensed software had a source code in escrow, the licensee's ability to access the source code was curtailed by its inability to sue for access because the Bankruptcy Code barred the specific performance of a rejected executory intellectual property agreement.⁶⁴

possession also has many of the other powers and duties of a trustee, including the right, with the court's approval, to employ attorneys, accountants, appraisers, auctioneers, or other professional persons to assist the debtor during its bankruptcy case. Other responsibilities include filing tax returns and reports which are either necessary or ordered by the court after confirmation, such as a final accounting. The U.S. trustee is responsible for monitoring the compliance of the debtor in possession with the reporting requirements.

Railroad reorganizations have specific requirements under subsection IV of chapter 11, which will not be addressed here. In addition, stock and commodity brokers are prohibited from filing under chapter 11 and are restricted to chapter 7.

61. 11 U.S.C.A. § 365(a) (West 2012).

62. "Executory contract" is not defined in the Bankruptcy Code, but the most widely accepted definition, which was also adopted in *Lubrizol Enters. Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), is the one postulated by Professor Vern Countryman: that "under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other." (quoting Vern Countryman, *Executory Contracts in Bankruptcy*, 57 MINN. L. REV. 439, 460 (1973)). See also *Gloria Mfg. Corp. v. Int'l Ladies Garment Workers Union*, 734 F.2d 1020, 1022 (4th Cir. 1984); *Fenia Cattle Co. v. Silver*, 625 F.2d 290, 292 (9th Cir. 1980).

63. The 4th Circuit in the seminal case of *Lubrizol Enters. Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985), said in dicta that "[u]nder 11 U.S.C. § 365(g), Lubrizol would be entitled to treat rejection as a breach and seek a money damages remedy; however, it could not seek to retain its contract rights in the technology by specific performance even if that remedy would ordinarily be available upon breach of this type of contract." *Id.* at 1048. See also Jennifer S. Bisk, *Software Licenses Through the Bankruptcy Looking Glass: Drafting Individually Negotiated Software Licenses that Protect the Client's Interests in Bankruptcy*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 611, 630 (2006); Daniel T. Brooks, *Intellectual Property Bankruptcy Protection Act of 1988*, 272 PLI/Pat 575, 607 (1989).

64. 11 U.S.C.A. § 365(n) (West 2012); See also Moy, *supra* note 9, at 169; 11 U.S.C.A. § 542(a) (West 2012) ("Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.").

2. Section 365(n) to the Rescue?

The affirmation of the above inequities of section 365(a) wrought on the licensee by the Fourth Circuit in *Lubrizol v. Richmond Metal Finishers*⁶⁵ and the refusal of the Supreme Court to grant certiorari led Congress to pass section 365(n), to strike a balance between licensor rehabilitation in bankruptcy and the need to preserve a licensee's contractual rights to the software or other "qualified intellectual property."⁶⁶

Section 365(n) provides in relevant part that:

(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—(A) to treat such contract as terminated. . . (B) to retain its rights . . . to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable non-bankruptcy law).⁶⁷

For the purposes section 365(n), the subcategories of intellectual property are: trade secrets; inventions, processes, design, or plants protected under Title 35 (the U.S. Patent Act); patent application; plant variety; work of authorship protected under Title 17 (the U.S. Copyright Act); or mask work protected under Chapter 9 of Title 17 to the extent protected by applicable non-bankruptcy law.⁶⁸ For the purposes of section 365(n), a trademark is not delineated as a category of intellectual property for which a licensee can have recourse.⁶⁹ Since on-premise software is protected intellectual property under copyright law,⁷⁰ it is undeniable that it will be accorded protection under section 365(n).⁷¹ The same cannot be

65. 756 F.2d 1043 (4th Cir. 1985).

66. The subcategories of intellectual property that are protected under section 365(n) are: trade secrets; inventions, processes, design, or plant protected under title 35 (the US Patent Act); patent application; plant variety; work of authorship protected under title 17 (the US Copyright Act) or mask work protected under chapter 9 of Title 17 to the extent protected by applicable non-bankruptcy law. Clearly excluded as an "intellectual property" under section 365(n) is trademarks.

67. 11 U.S.C.A. § 365(n) (West 2012).

68. 11 U.S.C.A. § 101(35A) (West 2012).

69. In a note in the legislative history, Congress said, "[T]he bill does not address the rejection of executory trademark, trade name or service mark licenses by debtors-licensors . . . such contracts raise issues beyond the scope of this legislation. In particular, trademark, trade name and service mark licensing relationships depend to a large extent on control of the quality of the products or services sold by the licensee. Since these matters could not be addressed without more extensive study, it was determined to postpone congressional action in this area to allow the development of equitable treatment of this situation by bankruptcy courts." See S. REP. NO. 100-505, at 6 (1988).

70. 17 U.S.C.A § 102(a) (West 2012).

71. See 17 U.S.C.A §§ 101, 102, 117 (West 2012). See also *Apple Computer, Inc. v. Formula Int'l, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984); *Moy, supra* note 9, at 163; *Schlumberger Res. Mgmt. Data Serv. v. Cellnet Data Sys., Inc.*, 327 F.3d 242 (3d

unequivocally said of a SaaS licensee. The confluence of remote delivery, pay-as-you-go pricing structure, and orientation as a service as opposed to a product,⁷² arguably, confer inferior proprietary status to SaaS licenses from a licensee's perspective. Unsurprisingly, it has been argued that SaaS should be considered a service and thus outside the purview of section 365(n).⁷³ If the licensing agreement grants access to the software by means of a service contract, the customer will not necessarily receive a license to the underlying intellectual property, and will lack the right to retain its use of the software.⁷⁴ It has also been argued that because SaaS licenses are mainly structured as service contracts, and "the license to access and use the application is plainly secondary, a court very well may consider the license to be *de minimus* to the overall agreement and characterize the . . . agreement as something other than an intellectual property license."⁷⁵ It therefore stands to reason that "a licensor in bankruptcy or its trustee could reject the . . . agreement and the licensee would have no protection under §365(n)."⁷⁶ A licensee is however, not without recourse. As will be suggested below, there are creative ways of circumventing such limitations, and a licensee can take other protective steps, such as structuring SaaS licensing and escrow arrangements to provide continued rights to use the software.

IV. NEW WINESKINS

A. SaaS Escrow Arrangements

If the parties agree to place the SaaS source code into escrow with a third party vendor, the licensee should consider the following steps to optimize its utilization if the need should arise.

1. Appropriate Escrow Release Triggers for SaaS Licenses

The typical source code release triggers such as bankruptcy, ceasing to do business, failing to support the software that are common in on-premise software escrow arrangements, and which enable the licensee to recreate the software application within its own computer system, may not sufficiently address the crucial risk factors that are inextricably inherent in

Cir. 2003).

72. See THINKstrategies, Inc., *supra* note 39, at 5.

73. See CLASSEN *supra* note 10, at 143.

74. *Id.*

75. Elaine M. Laflamme & Noel D. Humphreys, *Protecting Against Bankruptcy of an ASP*, N.Y. L. J. (Feb. 26, 2002) (emphasis added). See also Richard M. Cieri & Michelle M. Morgan, *Licensing Intellectual Property and Technology from the Financially-Troubled or Startup Company: Pre-bankruptcy Strategies to Minimize the Risk in a Licensee's Intellectual Property and Technology Investment*, 55 BUS. LAW. 1649, 1685 (1999–2000).

76. *Id.* (footnote omitted).

the utilization of a SaaS infrastructure.⁷⁷ Such significant risk factors include, but are not limited to: (1) unexpected service interruptions; (2) downtime due to power outages; or (3) loss of functionality of a remotely hosted application.⁷⁸ Aside from the loss of access, there is the concomitant loss of proprietary data hosted offsite on licensor's servers or storage devices.⁷⁹ It is therefore crucial that in addition to specifying typical release events suited to on-premise software licenses such as bankruptcy, ceasing to do business, failing to maintain software, etc., the SaaS license or source code agreement additionally should include these SaaS operational downtime related release events that will enable the licensee to access the source code and stored proprietary data.⁸⁰

2. Addressing Licensing and Subscription Issues

The licensee may also insist on contractual provisions that separate its subscription of SaaS services from the licensing of the underlying software. Such separation, whilst assuring the licensee the operational and economic advantages of a "pay as you go" model, will also ensure that the licensee's rights to the software as an intellectual property inure to its benefit under section 365(n), if the licensor should file for bankruptcy.⁸¹

3. Dealing with Licensor's Bankruptcy

The SaaS licensing agreement and attendant escrow agreement must affirmatively characterize SaaS software as "intellectual property" subject to section 365(n) to enable the licensee to definitively exercise its rights under section 365(n). Such contractual affirmation may circumvent or ameliorate any industry or customary precept that seeks to characterize SaaS license as a mere accessory to the provision of a service and therefore not an intellectual property right within the purview or protection of section 365(n).⁸²

Also, since the licensee may be obligated to make royalty payments under the contract if the licensor should file for bankruptcy, it may be useful to include contractual terms which separate the SaaS licensing fees from payments for the licensors affirmative obligations under the agreement such as maintenance, support, consultation, further development, indemnification, etc.⁸³ In other words, "a licensee would be well advised to have the license agreement clearly delineate any royalties or license fees that are payable with respect to the licensed intellectual

77. See van de Zande & Jansen, *supra* note 49.

78. *Id.*

79. *Id.*

80. See generally THINKSTRATEGIES, INC., *supra* note 39.

81. See Laflamme & Humphreys, *supra* note 75.

82. See CLASSEN *supra* note 10, at 146.

83. See Westermeier, *supra* note 20, at 5.

property from other fees that the licensee may be required to pay for maintenance, training or other services. Without this delineation, the licensee may be required to pay amounts for services that it will no longer be entitled to receive from the licensor . . .”⁸⁴ because it cannot be compelled to provide such services if it rejects under section 365(n). On the other hand, if the licensor accepts the license agreement in bankruptcy, the

[l]icense agreements need to contemplate specifically the post-bankruptcy rights that the licensee may retain. The continuing obligations of the licensee that survive the licensor’s bankruptcy rights need to be detailed. For example, it may be appropriate to adjust the payment terms to reflect the responsibilities of the parties in the event that the licensee elects to retain the licensed software and related source code. Typically, license fees, renewal fees, maintenance fees, and so forth implicitly include royalties for the use of the licensed intellectual property, but the royalties are not expressly denominated as such. Licensors need to ensure a continuing revenue stream from the retaining licensee. It is recommended that license agreements reflect the royalty payments that the licensee has to pay the licensor in such a situation in which the licensee is granted the right to retain the licensed software albeit without any licensor support. This is because, if the licensor is not providing maintenance, then there would probably be no continuing obligation to pay the licensor for the retained use of the software and related source code if the licensee’s only existing obligation, for example, was to pay maintenance fees.⁸⁵

84. See Michael R. Egger, *A Practitioner’s Guide to Section 365(n) of the U.S. Bankruptcy Code*, FENWICK WEST LLP (Apr. 29, 2003), http://www.martindale.com/intellectual-property-law/article_fenwick-west-llp_2520.htm.

85. See Westermeier, *supra* note 20, at 3. An example of licensing terms that may achieve that objective:

If the Licensor rejects the License Agreement under Section 365(n) of the Bankruptcy Code, the Licensee may elect to (i) treat the Agreement as terminated pursuant to Section XXX (Termination) of this License Agreement or (ii) retain Licensee’s rights under the License Agreement, including, without limitation, the right and license to use, adapt and modify the Licensed Software and related Source Code for the full term of the License Agreement and obtain a complete and current copy of the source code corresponding to the licensed software used by Licensee from the Source Code Escrow Agent or, in the event a complete and current copy of the Source Code is not provided to the Source Code Escrow Agent, then directly from Licensor.

In consideration of obtaining a copy of the Source Code under the provisions of this Agreement, Licensee agrees to pay Licensor, in lieu of any other fees, an annual royalty in the amount of \$_____ commencing upon Licensor’s receipt of the Source Code and continually thereafter on the

In light of the foreclosure of licensor's obligation to affirmatively provide services related to the software upon licensor's rejection of the licensing agreement in a Chapter 11 bankruptcy proceeding, and because the licensees retain only rights that exist at the time of licensor's bankruptcy, the licensee can optimize the residual utility of the software it inherits from the bankrupt licensor by requiring the licensor to maintain, support and update both the software in escrow or in possession of the licensor throughout the term of the agreement. In this regard, the licensee should ensure that the license agreement expressly includes ongoing source code and maintenance rights and obligations.⁸⁶

It is also instructive to note that the statutory protections accorded to the licensee by section 365(n) are meaningless if upon rejection of the license agreement by the licensor's trustee, the licensee does not take affirmative steps to exercise its retention rights under section 365(n). Failing to take such affirmative steps may result in the relegation of its claims to a mere pre-petition status as an unsecured creditor.⁸⁷ The licensee may however avoid this, if it is affirmatively provided in the licensing agreement that its failure to assert its rights of retention should not be construed by the courts as termination of contract pursuant to section 365(n)(1)(A).⁸⁸

B. Alternatives to Escrow Arrangements

In lieu of or in addition to escrow arrangements, the parties may consider service level agreements, incorporate disaster recovery plans, or SaaS portability or failover provisions to assure continue access to the SaaS application in the SaaS license agreement.

1. Service Level Agreements and Failover Guarantees

Service Level Agreements ("SLAs") set measurable network availability or uptime commitments of a SaaS system.⁸⁹ The SLA sets contractual

anniversary of such receipt for as long as Licensee continues to use the Licensed Software, or any derivative thereof. *Id.*

86. See Ron Meisler et al., *Rejection of Intellectual Property License Agreements Under Section 365(n) of the Bankruptcy Code: Still Hazy After All These Years*, 19 NORTON J. OF BANKR. L. & PRAC. 163, 170–71 (2010).

87. See *In re EI Int'l*, 123 B.R. 64, 68 (Bankr. D. Idaho 1991) (where the licensor contracted to supply customized software to the licensee, but after the licensor filed for bankruptcy, the licensee elected to retain its rights after the licensor rejected the contract under section 365 of the bankruptcy code. The license claim for \$3,631,533 in contract damages was rejected by the court, which ruled that if the licensee was entitled to damages; it would be what it was entitled to as a unsecured prepetition claim for breach of contract by the licensor.).

88. See Alan S. Wernick, *The Software Bankruptcy Trap*, COMPUTER LAW STRATEGIST 3 (April 1991), <http://www.innovasafe.com/pdf/wernick%20bankruptcy.pdf>. See also *In re EI Int'l*, 123 B.R. at 66.

89. See Pankesh Patel et al., *Service Level Agreement in Cloud Computing*, http://knoesis.wright.edu/library/download/OOPSLA_cloud_wsla_v3.pdf.

expectations between the SaaS service provider and a licensee and specifies in measurable terms, what services and guarantees the cloud provider will provide.⁹⁰ In SLAs, particularly, the uptime commitment refers to the obligation of the licensor to use commercially reasonable efforts to ensure that its hosted system or application is available to the licensee a certain percentage of the time. It is not uncommon to find service level or uptime commitment (excluding scheduled maintenance) of 99.9% of network availability in licensing agreements.⁹¹ To be meaningful to the licensee, an SLA should require the licensor to use commercially reasonable efforts to correct any material problems in the services, including any failure to satisfy the uptime commitment.⁹² If the licensor fails to satisfy the uptime commitment for a given month, the licensee should be entitled specific service credit equal to pre-set percentages of the monthly fees for the services for stated uptimes. The SLA should also require the licensor to proactively manage and monitor the application server hardware devices and software to ensure optimal performance and reliability as well as to detect abnormal events or exceeded utilization or performance thresholds. The licensor should also be required to operate, monitor, and administer all servers, applications, and networks supporting the services. Maintenance for scheduled outages, if necessary, should be conducted at a time and in a manner that minimizes adverse impacts on SaaS access.

2. Disaster Recovery Plans

Another viable alternative or complementary arrangement to escrowing SaaS applications is a disaster recovery plan. Disaster Recovery Plans (“DRP”):

[Apply] to major, usually physical disruptions to service that deny access to the primary facility infrastructure for an extended period. A DRP is an information system-focused plan designed to restore operability of the target system, application, or computer facility infrastructure at an alternate site after an emergency. The DRP may be supported by multiple information system contingency plans to address recovery of impacted individual systems once the alternate facility has been established. A DRP may support a [Business Continuity Plan (“BCP”)] or [Continuity of Operations Plan (“COOP”)] by

90. Lee Badger et al., *US Government Cloud Computing Technology Roadmap Volume I Release 1.0 (Draft)*, Special Publication 500-293 (Draft), NAT’L INSTIT. OF STANDS. AND TECH., 17 (Nov. 2011).

91. *99.9% Uptime SLA*, BLACKBOARD, <http://www.blackboard.com/Services/Managed-Hosting/99-9-Uptime-SLA.aspx> (last visited Feb. 11, 2013).

92. See Wayne Jansen & Timothy Grance, *Guidelines on Security and Privacy in Public Cloud Computing*, Special Publication 800-144, NAT’L INSTIT. OF STANDS. AND TECH., 7–8 (Dec. 2011), <http://csrc.nist.gov/publications/nistpubs/800-144/SP800-144.pdf>.

recovering supporting systems for mission/business processes or mission essential functions at an alternate location. The DRP only addresses information system disruptions that require relocation.⁹³

Relocation should be from the supplier's primary facility to a standby facility, which is geographically remote from that of its primary facility. The supplier should be required to test at least annually the resilience of the back-up and data return arrangements put in place under this plan, and the customer should request to see the results of those tests.⁹⁴

3. SaaS Application Interoperability and Portability

SaaS portability refers to the ability to move SaaS applications between vendors with minimal integration issues.

Data portability is the ability of cloud consumers to copy data objects into or out of a cloud or to use a disk for bulk data transfer. Service interoperability is the ability of cloud consumers to use their data and services across multiple cloud providers with a unified management interface. System portability allows the migration of a fully-stopped virtual machine instance or a machine image from one provider to another provider, or migrate applications and services and their contents from one service provider to another.⁹⁵

With the consequences of losing access to a business critical application magnified if it occurs in conjunction with the loss of remotely hosted data, it is imperative that in addition to or in lieu of requiring the escrow of licensor's proprietary software, the licensee may require the licensor to provide the ability to either extract and migrate data and application to either the licensee on a on premise software solution or to a new vendor or the licensor's backup infrastructure to enable the licensee to resume vital operations.

V. CONCLUSION

The technological transformation of software licensing from on-premise to externally hosted models has taken a big leap ahead of settled legal principles that govern licensees' access to escrowed source code should access disruptions occur.⁹⁶ The natural considerations that underlie the

93. Marianne Swanson et al., *Contingency Planning Guide for Federal Information Systems*, Special Publication 800-34 Rev. 1, NAT'L INSTIT. OF STANDS. AND TECH., 11 (May 2010), http://csrc.nist.gov/publications/nistpubs/800-34-rev1/sp800-34-rev1_errata-Nov11-2010.pdf.

94. *Id.*

95. Fang Liu et al., *NIST Cloud Computing Reference Architecture*, Special Publication 500-292, NAT'L INSTIT. OF STANDS. AND TECH., 15 (Sept. 2011).

96. See CLASSEN, *supra* note 10, at 146.

structuring of an on-premise software source code agreement that enables a licensor to access source code to recreate the functionality of software on licensee computer systems are inadequate to address the disruptive risks attendant to the licensing of SaaS licenses.⁹⁷ Though source code release events such as bankruptcy, failure to maintain, ceasing to do business, etc., are still relevant to licensing, its remote delivery and offsite storage of licensee data requires consideration of other release factors in escrow arrangements. Colleges and universities must consider other critical release factors such as prolonged power outages, system failure, or downtimes as additional triggers for the release of the source code and related documentation to enable them to recreate the functionality of an externally hosted system. The SaaS licensing agreement and escrow agreement should also consider the escrow of licensee data that will be stored on the licensor's externally situated servers and devices to enable the licensee to access these expeditiously in conjunction with the source code.⁹⁸ It is also clear that because SaaS software may not be deemed to be intellectual property, it is prudent to provide contractual provisions and language that affirmatively characterize SaaS as intellectual property in order to enable the licensee to unequivocally rely on the useful, but somewhat limited protections accorded to a licensee if the licensor in bankruptcy should terminate the licensing agreement. Colleges and universities that license SaaS should proactively consider the practical steps outlined in this article to fully exploit the benefits of their SaaS acquisitions. "Neither do men put new wine into old bottles: else the bottles break, and the wine runneth out, and the bottles perish: but they put new wine into new bottles, and both are preserved."⁹⁹

97. See van de Zande & Jansen, *supra* note 49.

98. *Id.*

99. *Matthew* 9:17 (King James).

THE ENDANGERED CITIZEN SERVANT: *GARCETTI* VERSUS THE PUBLIC INTEREST AND ACADEMIC FREEDOM

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I. INTRODUCTION	406
II. <i>GARCETTI</i> VERSUS THE PUBLIC INTEREST	410
A. Evolution of the <i>Pickering/Connick</i> Test.....	410
B. The <i>Garcetti</i> Rationales	412
1. A Relevant Analogue.....	412
2. Government as Employer	415
3. Government Commissioned Speech.....	418
4. Federalism and Separation of Powers.....	421
C. The Per Se Rule Harms the Public Interest	422
III. <i>GARCETTI</i> VERSUS ACADEMIC FREEDOM	428
A. A Special Concern of the First Amendment	429
B. The Constitutional Contours of Academic Freedom.....	431
C. The Post- <i>Garcetti</i> Cases.....	434
1. Extramural Speech.....	435
2. Core Academic Speech.....	437
(a) Teaching	437
(b) Scholarship.....	442
IV. FIXING THE <i>GARCETTI</i> PROBLEM	448
A. Recent Supreme Court Cases.....	449
B. A Modified Approach	451
V. FIXING THE ACADEMIC SPEECH PROBLEM	455
A. Government as Educator.....	456
B. The Faculty Member as Expert	457
C. Deference to the Community of Scholars	459
1. Extramural Speech.....	459
2. Core Academic Speech.....	460
VI. CONCLUSION.....	464

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I. INTRODUCTION

The image of the “citizen servant,” sacrificing self-interest for the public good, has endured since the dawn of the nation, inspired by George Washington himself. Yet for much of our history, government employees surrendered their constitutional rights at the front door. This policy was best explained by Oliver Wendell Holmes, Jr. when he was a member of the Massachusetts Supreme Judicial Court:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.

For many years the “Holmes’ Epigram” expressed the law of the U.S. Supreme Court.¹

In the 1950s, the Court began to recognize some constitutional protection for public employees when the government attempted to suppress their rights to participate in public affairs.² The reason for First Amendment protection is “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”³ Speech on matters of public concern occupies the “highest rung of the hierarchy of First Amendment values.”⁴

The Court’s efforts to strike a balance between an employee’s right to speak as a citizen and the government employer’s need to protect its interests culminated in the *Pickering/Connick*⁵ two-prong test. The first prong asked “whether the employee spoke as a citizen on a matter of public concern.”⁶ Relevance to the public interest was the touchstone of constitutional protection. If the speech satisfied the first prong, the reviewing court balanced the “employee’s interest in expressing herself” against the employer’s interest in “promoting the efficiency of public services it performs through its employees.”⁷

1. See *Connick v. Myers*, 461 U.S. 138, 143–44 (1983) (“The unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.”). The epigram appeared in *McAuliffe v. City of New Bedford*, 29 N.E. 517 (Mass 1892) (Holmes, J., dissenting).

2. *Id.* at 144–45.

3. *Id.* at 145 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

4. *Id.* (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

5. *Connick*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

6. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

7. *Waters v. Churchill*, 511 U.S. 661, 668 (1994) (quoting *Connick*, 461 U.S. at 142).

For twenty years, the *Pickering/Connick* test was used by courts to determine if public employee speech was worthy of protection. Then, seven years ago, in *Garcetti v. Ceballos*,⁸ the Court divided the first prong into two parts, establishing a new threshold inquiry, a per se rule, which asks if the speech was made by the employee “as a citizen.”⁹ If so, the court asks whether the speech relates to a matter of public concern. Little harm would be done if the Court stopped there, since it simply split the two elements of the first prong into separate steps.

The Court did not stop there. It further held that speech made by a public employee “pursuant to official duties” is not made “as a citizen.”¹⁰ The role of the speaker is now the crucible. Public interest is relegated to second class status. The decision has no shortage of critics.¹¹ And for good reason: it directly clashes with two constitutional principles.

The first, a foundational pillar of First Amendment protection for public employee speech, is “the importance of promoting the public’s interest in receiving the well-informed views of government employees engaging in civic discussion.”¹² Without First Amendment protection the “community would be deprived of informed opinions on important public issues.”¹³ A modern version of the ancient battlefield custom of granting sanctuary to the bearer of a white flag, it is a recognition that to receive the message it is necessary to protect the messenger. Though *Garcetti*’s majority conceded that “[t]he interest at stake is as much the public’s interest in receiving informed opinion as it is the employee’s own right to disseminate it,”¹⁴ the

8. 547 U.S. 410 (2006).

9. *Id.* at 421.

10. *Id.*

11. See Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 946 (2009) (“[T]he Court has not developed a coherent theory to guide constitutional protection of academic freedom, and recently, in *Garcetti v. Ceballos*, it placed the protection, itself, in doubt.”). See also Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1464 (2007) (“In viscerating the free speech rights of public employees when they speak in the course of doing their jobs, *Garcetti* gets it wrong.”). But see Kraig P. Grahmann, *Respect for Authority: Translating Enduring Principles into Modern Law*, 36 OHIO N.U. L. REV. 523 (2010). Grahmann argues “that critics’ fears that *Garcetti* would significantly strip away First Amendment rights of government employees did not come true and that lower courts in all eleven United States judicial circuits have exercised considerable restraint when applying the case, generally interpreting it very narrowly.” *Id.* at 524. He also argues that “[w]hether a government employee is complaining to a supervisor, acting on a general job duty, speaking to the media, or even suing his own employer, he still has significant First Amendment protection.” *Id.* at 551. See *infra* Part III. C. for a discussion of lower court cases applying *Garcetti* to faculty speech with little concern about the impact on academic freedom or the public interest.

12. *Garcetti*, 547 U.S. at 419.

13. *Id.* at 420.

14. *Id.*

per se rule established a new categorical exclusion for speech, leaving unprotected even the most important speech if the speaker happened to be speaking pursuant to “official” job duties.

The second constitutional principle is the Court’s recognition of academic freedom as a “special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”¹⁵ Justice Souter observed in his *Garcetti* dissent that the majority’s ruling was “spacious enough to include even the teaching of a public university professor.”¹⁶ He expressed hope that the majority “does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to . . . official duties.’”¹⁷

Justice Kennedy, in his majority opinion, acknowledged the Court’s ruling “may have important ramifications for academic freedom, at least as a constitutional value.”¹⁸ His next two sentences (referred to hereafter as the “Caveat”)¹⁹ have been the source of academic and judicial debate and confusion:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.²⁰

What is the legal effect of the Caveat? Was it intended to explain that the new per se rule applies to all public employee speech, noting in dicta that someday the Court might carve out an exception for academic speech? Or did the Court hold as a matter of law that academic speech is exempt from the per se rule?

Lower courts have struggled to decipher the Caveat with predictably uneven results, some applying the per se rule to academic speech with little or no analysis. Justice Kennedy’s comments in *Garcetti* indicate that the Court may well search for ways to honor its commitment to academic freedom. Thus far it has not done so, but it has not been for a lack of opportunity.²¹

15. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

16. *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting).

17. *Id.*

18. *Id.* at 425.

19. *See Adams v. Univ. of N.C. Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011) (describing Justice Kennedy’s statement as a “caveat”).

20. *Garcetti*, 547 U.S. at 425.

21. *See Lee v. York Cnty. Sch. Div.*, 484 F.3d 687 (4th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007), *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007), *cert. denied*, 552 U.S. 823 (2007), and *Abcarian v. McDonald*, 617 F.3d 931

The thesis of this article is that the *Garcetti* per se rule damages the public interest in several respects. First, it leaves unprotected the “citizen servant . . . whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract.”²² Second, it imposes a categorical exclusion for speech, precluding any evaluation of the value of the speech to the public if made pursuant to official duties. Finally, it threatens academic speech in colleges and universities.

Optimally, the Court should overturn *Garcetti*, throw out the per se rule, and return to the *Pickering/Connick* test. Recognizing that such a result is unlikely, this article proposes a modified approach for public employee speech, one which eliminates the per se rule and accounts for the Court’s legitimate concerns, yet permits courts to consider the relative value of the speech to the public interest.

The article then takes up the impact of *Garcetti* on academic speech. The vital role of colleges and universities in the democracy compels a different analysis for speech relating to teaching and scholarship, as well as shared governance activities. This article argues that fixing the *Garcetti* problem for public employees generally is critical and important for faculty speech as well, but does not resolve the ongoing problem that the public employee speech doctrine analysis simply does not fit academic speech.

The Court should answer the question posed by the Caveat and exempt academic speech from the public employee speech analysis. In its place, the Court should rely upon its existing policy of deference to both the institution and the community of scholars. Finally, the Court should include speech relating to faculty governance activities to provide a counterweight to the autonomy given to the institution.

Part II explores the inherent contradiction in *Garcetti* that one of the most important constitutional principles underlying the recognition of protection for public employee speech—the public interest—is undermined by the per se rule. Section A traces the evolution of the *Pickering/Connick* test. Section B examines the Court’s purported rationales for the *Garcetti* holding, explaining that each rationale was fully accounted for by the *Pickering/Connick* test. The per se rule was unnecessary. Section C shows that the per se rule harms the public interest by censoring the informed opinions of public employees on a technicality.

Part III explores *Garcetti*’s impact on academic freedom. Section A provides an overview of the Court’s tradition of treating academic freedom as a special concern of the First Amendment. Section B summarizes the scholarly debate about the constitutional contours of academic freedom. Section C presents representative cases decided after *Garcetti* to show the contradictory readings of the Caveat and to demonstrate the harm to

(7th Cir. 2010), *cert. denied*, 131 S. Ct. 1685 (2011).

22. *Garcetti*, 547 U.S. at 432 (Souter, J., dissenting).

academic freedom.

Part IV urges the Court to overturn *Garcetti* and return to the *Pickering/Connick* test for public employee speech. Section A discusses post-*Garcetti* cases which send mixed signals about the likelihood of such a result. Section B sets out my proposal for a modified approach to *Garcetti* in the event the Court is not willing to go that far.

Part V addresses the separate problem of academic speech. Returning to *Pickering/Connick* would mitigate the harm to academic freedom caused by *Garcetti*, but not completely. Speech by faculty members within their academic disciplines is made in their professional roles as experts, not as citizens. A different approach is needed. The Court should at a minimum exempt academic speech from the public employee speech analysis, and in its place reinforce its tradition of judicial deference to the community of scholars for academic decisions.

II. *GARCETTI* VERSUS THE PUBLIC INTEREST

A. Evolution of the *Pickering/Connick* Test

As the majority acknowledged in *Garcetti*, “for many years ‘the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.’”²³ Yet long ago the Court “made clear that public employees do not surrender all their First Amendment rights by reason of their employment.”²⁴ In some circumstances, a public employee has First Amendment protection “to speak as a citizen addressing matters of public concern.”²⁵ The purpose of this protection is to promote more than the rights of the individual:²⁶ “[T]he First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public’s interest in receiving the well-informed views of government employees engaging in civic discussion.”²⁷ The Court added that its ruling in *Garcetti* was “consistent with our precedents’ attention to the potential societal value of employee speech.”²⁸ To explain why this is so the court cited *Pickering v. Board of Education*.²⁹

Marvin Pickering, a high school teacher, was dismissed after sending a letter to a newspaper criticizing the school board’s handling of bond proposals and allocation of resources between sports and educational

23. *Id.* at 417.

24. *Id.*

25. *Id.*

26. *Id.* at 420.

27. *Id.* at 419.

28. *Id.* at 422.

29. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

programs.³⁰ The board alleged some of his statements were false and constituted an unjust attack on its integrity.³¹ The Supreme Court held that Pickering's letter was protected by the First Amendment.³² The idea that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest" had been rejected in prior decisions.³³ Yet a government employer has interests in regulating employee speech different from what it may do to regulate speech by non-employee citizens.³⁴ The balancing test adopted in *Pickering* compelled a reviewing court to weigh the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.³⁵ The Court declined to impose a general standard "against which all such statements may be judged,"³⁶ choosing instead to provide general guidance.³⁷

Pickering spoke on matters of public record, something any citizen could do.³⁸ His erroneous statements did not impact his daily duties in the classroom nor interfere with regular operations of the school.³⁹ The letter addressed issues of public concern. A core value of the First Amendment is in "having free and unhindered debate on matters of public importance."⁴⁰ As a high school teacher he was more familiar with the effects of the school board's funding decisions than an ordinary citizen because "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent."⁴¹ Consequently, "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."⁴²

Fifteen years later, in *Connick v. Myers*,⁴³ the Court added a threshold requirement to the *Pickering* balancing test. Sheila Myers was an Assistant District Attorney in New Orleans.⁴⁴ After learning she would be

30. *Id.* at 566–67.

31. *Id.*

32. *Id.* at 574.

33. *Id.* at 568.

34. *Id.*

35. *Id.*

36. *Id.* at 569.

37. *Id.*

38. *Id.* at 572.

39. *Id.* at 572–73.

40. *Id.* at 573.

41. *Id.* at 572.

42. *Id.*

43. 461 U.S. 138 (1983).

44. *Id.* at 140.

transferred within the department, Myers objected to her supervisors, expressing several concerns about office matters.⁴⁵ She also circulated a questionnaire to co-workers which her superiors believed to be a “mini-insurrection,” was terminated, and filed suit, alleging her speech was protected by the First Amendment.⁴⁶

The district court agreed and the Fifth Circuit affirmed.⁴⁷ The Supreme Court reversed,⁴⁸ adopting a new threshold inquiry that requires the lower court to first ascertain whether the employee spoke as a citizen on a matter of public concern.⁴⁹ Content, form, and context of the speech are to be considered.⁵⁰ The “manner, time, and place” of the speech is also relevant.⁵¹ The *Pickering/Connick* test was in force for more than twenty years. Then came *Garcetti*. Content has taken a back seat to context. The role of the speaker is now the litmus test.

B. The *Garcetti* Rationales

Four distinct rationales were given by the *Garcetti* majority to justify its ruling. Each will be analyzed in the subsections below. The concerns expressed by the Court, though legitimate, are fully accounted for by the *Pickering/Connick* two-prong test. The *Garcetti* per se rule is unnecessary, but far worse, jeopardizes the public interest.

1. A Relevant Analogue

In *Garcetti*, the Court held that government “employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government.”⁵² Stated another way, when a government employee speaks pursuant to job duties there is no relevant analogue to speech by non-government employees.⁵³ The examples provided by the Court for a “relevant analogue” were Pickering’s letter and Ardith McPherson’s statement to a co-worker,⁵⁴ at work, after learning that President Reagan had been shot, that “if they go for him again, I hope they get him.”⁵⁵

How does one distinguish a relevant analogue from an irrelevant

45. *Id.* at 140–41.

46. *Id.* at 141.

47. *Id.* at 141–42.

48. *Id.* at 154.

49. *Id.* at 147.

50. *Id.* at 147–48.

51. *Id.* at 152.

52. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

53. *Id.* at 424.

54. *Id.*

55. *Rankin v. McPherson*, 483 U.S. 378, 381 (1987).

analogue? That Ceballos expressed his views within the office “is not dispositive,” the Court stated.⁵⁶ Expressions made at work may receive First Amendment protection because “[m]any citizens do much of their talking inside” the workplace, and “it would not serve the goal of treating public employees like ‘any member of the general public’” to hold that all speech is excluded from protection.⁵⁷

*Garcetti*⁵⁸ cited as support *Givhan v. Western Line Consolidated School District*.⁵⁹ In *Givhan*, District Superintendent Morris dismissed Bessie Givhan, a junior high school teacher.⁶⁰ Givhan alleged retaliation due to her criticism of school district policies with respect to racial practices.⁶¹ She did not go to the media. Her “requests” were made in writing to her principal:⁶²

She “requested,” among other things: (1) that black people be placed in the cafeteria to take up tickets, jobs Givhan considered “choice”; (2) that the administrative staff be better integrated; and (3) that black Neighborhood Youth Corps (“NYC”) workers be assigned semi-clerical office tasks instead of only janitorial-type work.⁶³

In *Connick*, the Court noted that Givhan’s “right to protest racial discrimination—a matter inherently of public concern—is not forfeited by her choice of a private forum.”⁶⁴

Justice Souter pointed out in his *Garcetti* dissent that Givhan’s complaints were not part of her official duties, yet a “school personnel officer” would not be protected for the same statements because hiring is part of his duties.⁶⁵ He added there is no “adequate justification” for drawing such a line, arguing the *Pickering/Connick* test was still viable.⁶⁶

That Ceballos’s memo concerned the “subject matter” of his employment “is nondispositive” because the “First Amendment protects some expressions related to the speaker’s job.”⁶⁷ *Pickering* was cited for the proposition that teachers are the most informed about school funding, and it is essential that they can speak out without fear of retaliatory

56. *Garcetti*, 547 U.S. at 420.

57. *Id.* at 420–21 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968)).

58. *Id.* at 421.

59. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979).

60. *Id.* at 411.

61. *Id.* at 413.

62. *Ayers v. W. Line Consol. Sch. Dist.*, 555 F.2d 1309, 1313 (5th Cir. 1977), *rev’d sub nom. Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979).

63. *Ayers*, 555 F.2d at 1313 (footnote omitted).

64. *Connick v. Myers*, 461 U.S. 138, 148 n.8 (1983) (citing *Givhan*, 439 U.S. at 415–16).

65. *Garcetti v. Ceballos*, 547 U.S. 410, 430 (2006) (Souter, J., dissenting).

66. *See id.*

67. *Id.* at 421.

dismissal.⁶⁸

The mandate to lower courts is to determine if the speech could have been made by a citizen outside of public employment. The logical fallacy of this rationale can be seen in *Morris v. Philadelphia Housing Authority*.⁶⁹ An assistant to the executive director of the Philadelphia Housing Authority (“PHA”) alleged retaliation due to his complaints about being forced to lobby for PHA, objecting to a lawsuit by PHA against the United States Department of Housing and Urban Development, and reporting co-worker embezzlement.⁷⁰ Dutifully applying the *Garcetti* test, the Third Circuit noted that it had “consistently held that complaints up the chain of command” about work duties, even “possible safety issues or misconduct by other employees,” are within the scope of official duties and not protected.⁷¹

The court contrasted its earlier decision in *Reilly v. City of Atlantic City*,⁷² which had extended protection to “truthful in-court testimony arising out of an employee’s official job responsibilities,”⁷³ reasoning that, “[t]estimony in court is distinguishable from internal reporting because it is part of the official adjudication process. Thus, there is a ‘relevant analogue to speech by citizens who are not government employees.’”⁷⁴

The logic goes something like this: if a public employee expresses legitimate concerns about government improprieties to superiors there is no relevant analogue because an ordinary citizen could not know about, much less report, improprieties inside the agency. Yet if that same employee expresses the same concerns in court testimony, the speech is protected because an ordinary citizen could testify in court. Hence, there is a relevant analogue.

Justice Kennedy made a similar point in *Garcetti*, observing that the ruling would not prevent employees from “participating in public debate.”⁷⁵ Presumably he meant employees, shielded by the Constitution, could go directly to the media. Helen Norton responds to this curious bit of reasoning by pointing out that a “rule that requires employees to raise their concerns to an entity other than their employer is both unrealistic and perverse.”⁷⁶

68. *Id.* (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968)).

69. *Morris v. Phila. Hous. Auth.*, No. 11-3334, 2012 WL 2626991 (3d Cir. July 6, 2012).

70. *Id.* at *1.

71. *Id.* at *2.

72. *Reilly v. City of Atl. City*, 532 F.3d 216 (3d Cir. 2008).

73. *Morris*, 2012 WL 2626991, at *3 (citing *Reilly*, 532 F.3d at 231).

74. *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006)).

75. *Garcetti*, 547 U.S. at 422.

76. Helen Norton, *Constraining Public Employee Speech: Government’s Control of Its Workers’ Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 40 (2009) (citation omitted).

The relevant analogue rationale is particularly troublesome for academic speech. In *Gadling-Cole v. West Chester University*,⁷⁷ a visiting adjunct professor alleged retaliation due to internal complaints about religious and racial discrimination.⁷⁸ Her complaints were made to the department chair and the university's social equity department, and the court held they were "in essence employment grievances," reasoning that "they were not made outside the course of the Plaintiff's employment and instead related only to her own workplace interests."⁷⁹ The court buttressed this conclusion by noting that the plaintiff had "followed the internal employee grievance procedure to address her concerns and did not assert her statements in a public forum."⁸⁰

Whether the substance of a faculty grievance involves purely personnel matters or rises to the level of substantial interest to the public can only be determined by individualized fact finding. The *Pickering/Connick* test allowed for that. The *Garcetti* test does not.

2. Government as Employer

Justice White pointed out in *Connick*⁸¹ that one hundred years before, in *Ex parte Curtis*, the "Court noted the government's legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service.'"⁸² The government "as an employer, must have wide discretion and control over the management of its personnel and internal affairs,"⁸³ and this "includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch."⁸⁴

In *Waters v. Churchill*,⁸⁵ the plurality opinion asked rhetorically: "What is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?"⁸⁶ Noting that it had never "explicitly answered" that question, the Court observed that it had nevertheless "always assumed that its premise is correct—that the government as employer indeed has far broader powers than does the government as sovereign."⁸⁷ The Court

77. *Gadling-Cole v. W. Chester Univ.*, Civil No. 11-0796 (JBS), 2012 WL 1075809 (E.D. Pa. Mar. 30, 2012).

78. *See id.* at *1–*3.

79. *Id.* at *9.

80. *Id.*

81. *Connick v. Myers*, 461 U.S. 138, 151 (1983).

82. *Id.* at 150–51 (citing *Ex parte Curtis*, 106 U.S. 371, 373 (1882)).

83. *Id.* at 151 (quoting Justice Powell's separate opinion in *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974)).

84. *Id.*

85. *Waters v. Churchill*, 511 U.S. 661 (1994).

86. *Id.* at 671.

87. *Id.* (citations omitted).

added that this assumption was “amply borne out by considering the practical realities of government employment,”⁸⁸ identifying two bases for granting more authority to the government as employer: (a) the importance of efficiency in operations; and (b) the nature of the government’s mission as employer.⁸⁹

(a) *Efficiency of Operations*

In *Pickering*, the Court held that the teacher’s letter did not jeopardize efficiency of employer operations.⁹⁰ The letter was not directed at anyone in the school district with whom Pickering had daily contact.⁹¹ No discipline by supervisors was involved nor any issue of co-worker harmony.⁹² Evidence was lacking to show or even presume that the letter “impeded the teacher’s proper performance of his daily duties in the classroom or to have interfered with the regular operations of the schools generally.”⁹³

The Court explained the *Pickering* balancing test in *Connick* by observing that it “reflects both the historical evolvment of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter.”⁹⁴ Though the Court reiterated the importance of not depriving a citizen of constitutional protection simply by virtue of taking on government employment, “this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state.”⁹⁵

Lawrence Rosenthal defends *Garcetti* on the grounds that it promotes managerial “prerogative of public employers to regulate duty-related speech of public employees in order to ensure that these officials are accountable. . . .”⁹⁶ Helen Norton makes precisely the opposite point—that *Garcetti* undermines accountability by allowing government employers to “punish, and thus deter, whistleblowing and other valuable on-the-job speech that would otherwise facilitate the public’s ability to hold the government politically accountable for its choices.”⁹⁷

The second prong of the *Pickering/Connick* test compelled a reviewing court to balance the employee’s right to speak as a citizen on a matter of public concern with the employer’s interests in maintaining efficiency of

88. *Id.* at 672.

89. *See id.* at 674.

90. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 565 (1968).

91. *Id.* at 569–70.

92. *Id.* at 570.

93. *Id.* at 572–73 (footnote omitted).

94. *Connick v. Myers*, 461 U.S. 138, 143 (1983).

95. *Id.* at 147.

96. Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 38 (2008).

97. Norton, *supra* note 76, at 2.

operations.⁹⁸ To invoke efficiency of operations to justify a categorical exclusion of speech when a balancing test already existed that accounted for the employer's efficiency of operations is simply baffling.

(b) *Mission of the Government*

Waters also made clear that restrictions on public employee speech are permitted “not just because the speech interferes with the government's operation,” since “[s]peech by private people can do the same. . . .”⁹⁹ Instead, the “extra power the government has in this area comes from the nature of the government's mission as employer.”¹⁰⁰ Government agencies are required by law to do particular tasks and hire people to carry out these tasks efficiently and effectively.¹⁰¹ When the government employee veers from the task the agency must have “some power to restrain her.”¹⁰²

The problem with a one-size-fits-all rule is that government entities have very different missions. Ceballos worked as an attorney in a county prosecutor's office,¹⁰³ as did Sheila Myers in *Connick*.¹⁰⁴ The aggrieved employee in *Waters* was a nurse.¹⁰⁵

Contrast the mission of colleges and universities. They issue no regulations for the general citizenry. Students compete for admission and pay substantial tuitions. Many are private institutions and state funding for public institutions is shrinking. A university's mission is to educate but not pursuant to a narrowly prescribed message.

Historian Henry Steele Commager traced the “four major functions” of a university over the centuries, concluding that the first three had developed in Europe.¹⁰⁶ These first three functions were to prepare young people for their professions: to train them in intellectual discipline and character; to communicate the heritage of the past; and to “carry on research [sic] to expand the boundaries of knowledge.”¹⁰⁷ The fourth function is the American experience, “to do all of the things that other universities have done and all the other things anyone can possibly think of; that is, to combine teaching, character development, professional training, and service to the community.”¹⁰⁸

This aspiration was best explained by the “most influential expression of

98. See *Pickering*, 391 U.S. at 565; *Connick*, 461 U.S. at 143–51.

99. *Waters v. Churchill*, 511 U.S. 661, 674 (1994).

100. *Id.*

101. *Id.* at 674–75.

102. *Id.* at 675.

103. *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

104. *Connick v. Myers*, 461 U.S. 138, 140 (1983).

105. *Waters*, 511 U.S. at 664.

106. Henry Steele Commager, *The University and Freedom*, 34 J. HIGHER EDUCATION, 361, 361 (1963).

107. *Id.*

108. *Id.*

academic freedom principles found anywhere in the extensive literature on American higher education,”¹⁰⁹ the American Association of University Professors’ (AAUP) 1940 Statement of Principles on Academic Freedom and Tenure:

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition. Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.¹¹⁰

The Court’s academic freedom decisions are replete with noble statements about the critical role of colleges and universities. Chief Justice Earl Warren wrote in one of the leading U.S. Supreme Court cases on academic freedom that¹¹¹ “[N]o one should underestimate the vital role in a democracy that is played by those who guide and train our youth.”¹¹² To impede this contribution to society because of a mechanical test based on internal administrative factors contradicts the public policy behind academic freedom.

The *Pickering/Connick* test allowed for the employer’s mission to be taken into account when balancing the employer’s interests with the employee’s rights. *Garcetti*’s per se rule was not necessary, and effectively prevents a court from taking into account the specific mission of the government employer.

3. Government Commissioned Speech

Government employees “often occupy trusted positions in society,”¹¹³ and as a result, they can “express views that contravene governmental policies or impair the proper performance of governmental functions.”¹¹⁴ Therefore, reasoned the Court, no liberties are infringed from restricting speech “that owes its existence to a public employee’s professional responsibilities,” because that “simply reflects the exercise of employer

109. Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 802 (2010).

110. *Id.* (quoting AM. ASS’N OF UNIV. PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure with Interpretative Comments*, in AAUP POLICY DOCUMENTS & REPORTS 3–11, n. 6 (10th ed. 2006)).

111. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

112. *Id.* at 250.

113. *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

114. *Id.*

control over what the employer itself has commissioned or created.”¹¹⁵

For support, the Court cited¹¹⁶ *Rosenberger v. Rector & Visitors of University of Virginia*,¹¹⁷ which held that, “when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”¹¹⁸ *Rosenberger* involved the denial of a student organization fee request because the university deemed it to be a religious activity.¹¹⁹ In ruling the university had improperly engaged in viewpoint discrimination, the Court reiterated its precedents that a university has the right, in making academic judgments, to decide how to allocate resources.¹²⁰ The Court reasoned that this:

[W]as but a proper recognition of the principle that when the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.¹²¹

This ruling was in line with *Rust v. Sullivan*,¹²² holding that the government’s prohibition on abortion-related advice was not unconstitutional because “when the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”¹²³

Five years after *Rosenberger* the Court decided *Board of Regents of the University of Wisconsin System v. Southworth*,¹²⁴ another student speech case, emphasizing that its decision:

[O]ught not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different.¹²⁵

115. *Id.* at 421–22.

116. *Id.* at 422.

117. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

118. *Garcetti*, 547 U.S. at 422 (quoting *Rosenberger*, 515 U.S. at 833).

119. *Rosenberger*, 515 U.S. at 827.

120. *Id.* at 833 (citing *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)).

121. *Id.*

122. *Rust v. Sullivan*, 500 U.S. 173 (1991).

123. *Rosenberger*, 515 U.S. at 833.

124. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

125. *Id.* at 234–35.

The Court added that when the government speaks to promote its own policies it is accountable to the electorate,¹²⁶ contrasting student speech from “speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered.”¹²⁷

The Court seems to be saying that faculty speech is government commissioned speech, precisely the type of speech the *Garcetti* majority believed to be unworthy of protection. Why should that be a problem? Once again, Justice Souter provided an eloquent explanation in his *Garcetti* dissent:

The key to understanding the difference between this case and *Rust* lies in the terms of the respective employees’ jobs and, in particular, the extent to which those terms require espousal of a substantive position prescribed by the government in advance. Some public employees are hired to “promote a particular policy” by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto. See *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001). There is no claim or indication that Ceballos was hired to perform such a speaking assignment. He was paid to enforce the law by constitutional action: to exercise the county government’s prosecutorial power by acting honestly, competently, and constitutionally. The only sense in which his position apparently required him to hew a substantive message was at the relatively abstract point of favoring respect for law and its evenhanded enforcement, subjects that are not at the level of controversy in this case and were not in *Rust*.¹²⁸

Justice Souter’s reference to *Legal Services Corporation v. Velazquez*¹²⁹ is apt.

Velazquez held that a statutory condition imposed by Congress in a funding scheme under the Legal Services Corporation Act¹³⁰ violated the First Amendment rights of those who receive funds.¹³¹ The restriction prohibited lawyers working for fund recipients from providing legal representation to clients who endeavored to amend or challenge welfare law.¹³² The majority decision, written by Justice Kennedy, pointed out that

126. *Id.* at 235.

127. *Id.*

128. *Garcetti v. Ceballos*, 547 U.S. 410, 437 (2006) (Souter, J., dissenting) (citation omitted).

129. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

130. 42 U.S.C. § 2996 (2006).

131. *Velazquez*, 531 U.S. at 537.

132. *Id.* at 537–38.

the Court had previously said that viewpoint-based funding decisions are constitutional when the government is the speaker.¹³³

*Rosenberger*¹³⁴ was cited for its holding that when the government funds private entities “to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”¹³⁵ The Court contrasted a situation where the government “does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”¹³⁶ Agreeing the program in *Velazquez* differed from the student activity program in *Rosenberger*, the Court reasoned that because the legal services program was “designed to facilitate private speech, not to promote a governmental message, it is intended to provide representation to indigent clients, and the lawyers are speaking on behalf of the clients, not the government.”¹³⁷

An important factor noted in *Velazquez* was that the lawyers were not acting “under color of state law” when representing indigent clients, in part because they are working under professional canons for the legal profession, which require them to exercise independent judgment.¹³⁸

Like lawyers, professors are not hired to act under color of state law and speak a prescribed message. A university is a “marketplace of ideas,”¹³⁹ but as will be explained in Part V, the ideas expressed by faculty must be competent. The professor’s “message” is not dictated by administrators. It is vetted by academic peers, both within the university and in the academic discipline.

4. Federalism and Separation of Powers

The majority in *Garcetti* was concerned that if no per se rule were adopted state and federal courts would be thrust into a “new, permanent, and intrusive role”¹⁴⁰ of judicial oversight of government employee communications. More than a matter of resources, this approach would “demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.”¹⁴¹

This brief statement, without elaboration, has been largely overlooked. It raises two separate issues—federalism, which evokes the constitutional

133. *Id.* at 541.

134. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

135. *Velazquez*, 531 U.S. at 541 (citing *Rosenberger*, 515 U.S. at 833).

136. *Id.* at 542 (citing *Rosenberger*, 515 U.S. at 834).

137. *Id.*

138. *Id.* See discussion *infra* in Part V.B.

139. *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957).

140. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006).

141. *Id.*

doctrines of reserved and enumerated powers—and separation of powers, which refers to the Court’s reluctance to intrude into executive branch agencies. The Court’s reluctance to tread lightly in the management of executive agencies is curious. Most public employee speech cases are brought under Section 1983,¹⁴² the 1871 statute which provides a civil cause of action to vindicate constitutional rights. There is nothing novel about a public employee utilizing Section 1983. Why the sudden pangs of conscience about separation of powers? The Court did not elaborate.

The second concern—federalism—is equally puzzling. The federal courts were created to enforce federal law and no federal law is more essential to the public than the First Amendment. A cryptic comment about federalism seems an odd way to justify a new categorical exclusion for speech.

Something else must be lurking. A telling comment can be found in the procedural history of the majority opinion. The Court seemed to be concerned that too many personnel matters were being litigated because lower courts were not applying the first prong of the *Pickering/Connick* correctly.¹⁴³ If the Court’s real reason for adopting the per se rule was to reduce the number of federal lawsuits its chosen remedy is futile—as even a quick search of post-*Garcetti* cases reveals. More to the point, the Court could simply admonish lower courts to do their jobs; that is, to consider both elements of the first prong of *Pickering/Connick* test. The harm to the public interest is disproportionate to the modest, and speculative, benefits of court administration.

C. The Per Se Rule Harms the Public Interest

Why has the Court tipped the scales so heavily in favor of the government employer? Why does it put such emphasis on the role of the speaker? Justice Souter wondered the same thing, pointing out that:

[T]he very idea of categorically separating the citizen’s interest from the employee’s interest ignores the fact that the ranks of public service include those who share the poet’s “object . . . to

142. 42 U.S.C. § 1983 (2006) (providing in relevant part: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .”).

143. See Areen, *supra* note 11, at 976 (“The Court in *Garcetti* explained that it wanted to avoid having too many disputes about the work of public employees litigated in federal court as First Amendment cases.”); see also Elizabeth M. Ellis, Note, *Garcetti v. Ceballos: Public Employees Left to Decide “Your Conscience or Your Job”*, 41 IND. L. REV. 187, 208 (2008) (pointing out that the *Garcetti* majority “sought to avoid continued judicial involvement in a vast majority of the constitutional claims brought by public employees”).

unite [m]y avocation and my vocation,” these *citizen servants* are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract.¹⁴⁴

The public interest does not evaporate because the speakers are acting according to core job duties.¹⁴⁵ Observing that the Court had reiterated the public nature of Pickering’s speech only two years before in *San Diego v. Roe*,¹⁴⁶ Justice Souter wrote that the policy recognizing that the public interest is just as important as the citizen’s right:

[I]s not a whit less true when an employee’s job duties require him to speak about such things: when, for example, a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or when a law enforcement officer expressly balks at a superior’s order to violate constitutional rights he is sworn to protect. (The majority, however, places all these speakers beyond the reach of First Amendment protection against retaliation.)¹⁴⁷

Recently the Court again stressed the importance of the informed views of government employees. In *Borough of Duryea v. Guarnieri*,¹⁴⁸ the issue was whether the *Garcetti* analysis should apply to cases arising under the First Amendment petition clause.¹⁴⁹ The Court quoted *Pickering* in stressing that public employees are the community citizens “most likely to have informed and definite opinions’ about a wide range of matters related, directly or indirectly, to their employment.”¹⁵⁰ The Court added that “[j]ust as the public has a right to hear the views of public employees, the public has a right to the benefit of those employees’ participation in petitioning activity.”¹⁵¹ Yet while the Court pays lip service to the ideal of the citizen servant, and the need to protect the messenger for the public good, the *per se* rule endangers the citizen servant and thwarts the public interest.

This contradiction is best illustrated by the threat to whistleblowers. The Ninth Circuit, in *Ceballos v. Garcetti*,¹⁵² noted that the defendants had

144. *Garcetti*, 547 U.S. at 432 (quoting Robert Frost, “*Two Tramps in Mud Time*,” in COLLECTED POEMS, PROSE, & PLAYS 251, 252 (R. Poirier & M. Richardson eds. 1995)) (emphasis added).

145. *Id.* at 433.

146. *San Diego v. Roe*, 543 U.S. 77 (2004).

147. *Garcetti*, 547 U.S. at 433.

148. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011).

149. *Id.* at 2492 (holding that petition cases should be analyzed the same as cases arising under the speech clause.)

150. *Id.* at 2500 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968)).

151. *Id.*

152. 361 F.3d 1168 (9th Cir. 2004).

conceded that Ceballos' allegations constituted whistleblowing.¹⁵³ They simply argued his statements lacked protection solely because "he included them in a memorandum to his supervisors that he prepared in fulfillment of an employment responsibility."¹⁵⁴ The court found this argument unavailing because:

The proposed per se rule would be particularly detrimental to whistle-blowers, such as Ceballos, who report official misconduct up the chain of command, because all public employees have a duty to notify their supervisors about any wrongful conduct of which they become aware. To deprive public employees of constitutional protection when they fulfill this employment obligation, while affording them protection if they bypass their supervisors and take their tales, for profit or otherwise, directly to a scandal sheet or to an internet political smut purveyor defies sound reason.¹⁵⁵

The Ninth Circuit reasoned that "[w]hether a job duty is routine or non-routine is a far less important factor for purposes of First Amendment analysis than the content of the public employee's speech."¹⁵⁶

Justice Kennedy did acknowledge in *Garcetti* that exposing inefficiency and misconduct in the government is a "matter of considerable significance," but he tossed that concern aside.¹⁵⁷ He reasoned that whistleblowers are already protected by "the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing."¹⁵⁸ As support, he cited a federal statute,¹⁵⁹ California law,¹⁶⁰ and professional rules of conduct for attorneys:¹⁶¹

These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions. We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing

153. *Id.* at 1174.

154. *Id.*

155. *Id.* at 1176.

156. *Id.* at 1177.

157. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

158. *Id.*

159. 5 U.S.C. § 2302(b)(8)(2005).

160. CAL. Gov't. CODE § 8547.8 (West 2005).

161. *Garcetti*, 547 U.S. at 425.

his or her job.¹⁶²

No one has argued that a “constitutional cause of action” is behind *every* statement made by a public employee. The issue is whether there should be constitutional protection for *some* statements made pursuant to job duties in *some* cases because they further the public interest.

Justice Souter pointed out that “statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief.”¹⁶³ The disparate nature of state statutes are hardly adequate to fill the gap, with some covering all government workers, including municipal employees, while others cover only state workers.¹⁶⁴ As one commentator put it, the “scope of the First Amendment should not be limited merely because some state and federal statutes—subject to repeal or amendment—may afford similar protection.”¹⁶⁵ Most bizarrely, Justice Souter noted, is that the federal whistleblower statutes have left federal employees “unprotected for statements made in connection with normal employment duties,” which the majority deemed to be protected by the “the powerful network of legislative enactments . . . available to those who seek to expose wrongdoing.”¹⁶⁶

Nothing illustrates the power of Justice Souter’s argument better than *Matthews v. Lynch*.¹⁶⁷ Matthews was employed as an internal affairs officer for the Connecticut State Police (“CSP”), investigating alleged misconduct by CSP officers.¹⁶⁸ He discovered a “pattern and practice of covering up misconduct” by police officers, including the misuse of state funds.¹⁶⁹ Matthews went outside the chain of command to report this information because of a history of favoritism within the CSP, disclosing it to both the Connecticut Attorney General’s Office and the New York State Police (“NYSP”), which had been asked to investigate.¹⁷⁰ He also sought the protection of the Attorney General’s office as a whistleblower under Connecticut’s whistleblower statute.¹⁷¹

Matthews informed the Attorney General’s Office that he had been moved to CSP headquarters in retaliation for providing information, because some of the officers who were targets of his investigation wanted

162. *Id.* at 425–26.

163. *Id.* at 440.

164. *Id.*

165. Charles W. “Rocky” Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1190 (April 2007).

166. *Garcetti*, 547 U.S. at 441.

167. No. 3:07-cv-739 (WWE), 2011 WL 1363783 (D. Conn. Apr. 11, 2011), *aff’d*, No. 11-1734-cv, 2012 WL 1873657 (2d Cir. May 24, 2012).

168. *Id.* at *1.

169. *Id.*

170. *Id.*

171. *Id.*

to monitor his activities.¹⁷² He filed a complaint with the State's Commission on Human Rights and Opportunities, alleging retaliation, and his union complained to CSP officials that it feared for Matthews' physical safety.¹⁷³ In response, those officials initiated an investigation of Matthews.

Matthews filed suit alleging a violation of his First Amendment rights.¹⁷⁴ The district court granted summary judgment to the defendants on the grounds that Matthews' disclosures of CSP misconduct were made "pursuant to his professional duties, and, therefore, his speech was not protected by the First Amendment under *Garcetti*."¹⁷⁵ The district court was unmoved by Matthews' argument that his speech was not made pursuant to his official duties because he was granted whistleblower status under Connecticut law, reasoning that investigating and reporting crime was part of his job.¹⁷⁶ The court rejected the notion that all citizens have a duty to report misconduct, an allusion to the "relevant analogue" statement in *Garcetti*, stating that this path to speaking as a citizen only applies if the reporting is outside of one's job responsibilities.¹⁷⁷

Adding insult to injury, the court accused Matthews of raising "form over substance," because the:

[C]ase law under *Garcetti* suggests that an employee's professional duties and responsibilities are to be interpreted broadly. It is therefore not appropriate to look only to the form of plaintiff's actions. His actions in informing authorities about misconduct within the CSP, however laudatory, was done in accordance with his professional duties and responsibilities as a state trooper. As such, they are not protected by the First Amendment.¹⁷⁸

Despite his good faith in reporting misconduct by the state police and his vindication by the NYSP report,¹⁷⁹ *Garcetti's* per se rule left Matthews unprotected.

In *Vila v. Padrón*¹⁸⁰ the plaintiff was the Vice President of External Affairs for Miami-Dade Community College.¹⁸¹ An attorney, Vila's duties included supervising grants, governmental affairs, legal affairs, and "high-

172. *Id.*

173. *Id.* at *2.

174. *Id.* at *1.

175. *Id.* at *4.

176. *Id.*

177. *Id.*

178. *Id.* at *5.

179. *See id.* at *2 (explaining that the NYSP issued a report that the CSP "had a pattern and practice of tolerating unethical and unlawful acts of its troopers").

180. 484 F.3d 1334 (11th Cir. 2007).

181. *Id.* at 1335.

level strategic planning.”¹⁸² She alleged that her contract was not renewed in retaliation for complaints she made about university actions which she deemed to be illegal or unethical.¹⁸³ She informed the provost an advertising contract violated Florida law because it was not let out for bid.¹⁸⁴ She informed college officials that the purchase of a building amounted to a kick-back arrangement, and the hiring of a consultant was a conflict of interest.¹⁸⁵ Finally, she objected to using college funds to pay for the illustration of a book by the daughter of a college trustee.¹⁸⁶ All but one of her complaints was made to university officials, and the Eleventh Circuit had little trouble holding that they were made pursuant to her official duties and unprotected under *Garcetti*.¹⁸⁷ The one statement made outside of the university was to a former trustee, in private, for guidance, in part because he was also a lawyer, and the court concluded that it too was made pursuant to official duties and unprotected.¹⁸⁸

Not all scholars worry about *Garcetti*'s impact on whistleblowers. Kermit Roosevelt III enthusiastically defends *Garcetti*.¹⁸⁹ Agreeing that retaliation against public employees for “inconvenient truths” is a bad thing, he argues the solution is not to require judges to decide which employees deserve protection.¹⁹⁰ He prefers to leave that to the government employer itself (the same employer allegedly committing improprieties), because it is after all “interested in improving the operations of their agency and will do a good job of deciding which complaints are worth acting on [and] which should be ignored.”¹⁹¹ He reasons that for every “good employee reporting real problems” there is a “flaky or disgruntled employee who presents baseless or trumped-up complaints.”¹⁹² A model of consequentialist reasoning, Roosevelt's argument is intriguing, but seems to miss the essential point. The public interest is paramount. It is not about keeping score. Tolerating five “flaky” employees for every “good” employee who reports actual corruption by a government agency is well worth the cost.

Garcetti took away all discretion, categorically excluding all speech made pursuant to official duties. The value of the speech to the public is

182. *Id.* at 1336

183. *Id.*

184. *Id.*

185. *Id.* at 1337.

186. *Id.*

187. *Id.* at 1339.

188. *Id.* at 1340.

189. Kermit Roosevelt III, *Not As Bad As You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U. PA. J. CONST. L. 631 (2012). Roosevelt argues that academic scholarship should be deemed unprotected as well. *Id.* at 658.

190. *Id.* at 651.

191. *Id.*

192. *Id.*

irrelevant, a point emphatically made by the district court in *Gentilello v. Rege*, a case involving the demotion of a professor:¹⁹³

Plaintiff argues that the seriousness of the “concrete violations” he witnessed firsthand distinguishes his case from the investigation into potential violations undertaken in *Garcetti*. The court finds, however, that Plaintiff confuses the content of the speech with the role of the speaker. The seriousness or veracity of the violations complained of does not affect the role occupied by the speaker in voicing his complaints. “Even if the speech is of great public importance, it is not protected by the First Amendment so long as it was made pursuant to the worker’s official duties.”¹⁹⁴

This is what *Garcetti* has wrought. Content is irrelevant. Context—the role of the speaker—is the only thing that matters.

III. GARCETTI VERSUS ACADEMIC FREEDOM

Academic speech is special and deserves separate judicial attention, not because faculty members as individuals are special. When speaking on matters outside of their academic disciplines they should be treated, constitutionally, like any other public employee. But when expression is within the realm of their academic disciplines they are speaking as experts, furthering the public interest.

That is precisely why Justice Souter expressed concern about the impact of the *Garcetti* per se rule on academic freedom.¹⁹⁵ It is the reason Justice Kennedy acknowledged the possibility of different constitutional treatment for speech related to “academic scholarship or classroom instruction.”¹⁹⁶

Unfortunately, the Caveat has led to confusion. Some lower courts have applied the per se rule in the academic setting with little or no analysis. Others have read it as carving out an exception for speech relating to teaching and scholarship. Still others read it as an open question.¹⁹⁷

Academic speech is generally divided into three categories. “Extramural Speech”¹⁹⁸ involves “public pronouncements as citizens about matters that

193. No. 3:07-cv-1564-L, 2008 WL 2627685 (N.D. Tex. June 30, 2008).

194. *Id.* at *4. See also *Hrapkiewicz v. Bd. of Governors of Wayne State Univ.*, No. 11-13418, 2012 WL 393133, at *8 (E.D. Mich. Feb. 6, 2012) (holding that because the faculty member was fulfilling job responsibilities, “[t]hat the matters are also a concern to the public does not change this fact and this fact results in her speech being afforded no First Amendment protection”)

195. *Garcetti v. Ceballos*, 547 U.S. 410, 438 (2006) (Souter, J., dissenting).

196. *Id.* at 425.

197. See *infra* Part III.C.

198. See generally Walter P. Metzger, *The 1940 Statement of Principles of Academic Freedom and Tenure*, 53 LAW & CONTEMP. PROBS. 3, 53 (1990).

are unrelated” to the faculty member’s expertise.¹⁹⁹ Speech related to scholarship and teaching, or “Core Academic Speech,” is made “within the professor’s sphere of expertise.”²⁰⁰ Most problematic is “Intramural Speech,”²⁰¹ which relates to the faculty member’s service obligations, the “capacity of faculty to discuss the internal governance of universities.”²⁰² Intramural Speech is part and parcel of contractual duties yet, as will be seen by the review of cases below, most courts do not consider it worthy of protection.

Section A explains the Supreme Court’s 60-year tradition of extolling academic freedom. Section B summarizes the scholarly debate about the constitutional contours of academic freedom. Representative examples of cases decided after *Garcetti*, involving all three categories of academic speech, are discussed in Section C.

A. A Special Concern of the First Amendment

Commentators have written extensively about the history of academic freedom, encompassing both its professional tradition (“Professional Academic Freedom”),²⁰³ and as a constitutional doctrine (“Constitutional Academic Freedom”).²⁰⁴ While the constitutional contours are in dispute,²⁰⁵ the Supreme Court has consistently extolled the importance of academic freedom to society.

One of the earliest references to academic freedom was by Justice Felix Frankfurter in his concurring opinion in *Wieman v. Updegraff*,²⁰⁶ one of the loyalty oath cases during the McCarthy era.²⁰⁷ Justice Frankfurter referred to teachers, from “the primary grades to the university,” as “priests of our

199. Robert Post, *Discipline and Freedom in the Academy*, 65 ARK. L. REV. 203, 204 (2012).

200. Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 115–16 (2007).

201. See Ailsa W. Chang, Note, *Resuscitating the Constitutional “Theory” of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, 53 STAN. L. REV. 915, 945 (2001); MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 1324 (2009).

202. Post, *supra* note 199, at 205.

203. See, e.g., Spurgeon, *supra* note 200, at 117; Areen, *supra* note 11, at 949.

204. See Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, TEX. L. REV. 1265, 1266 (1988), for an excellent overview of both the professional and constitutional aspects of academic freedom. See also, e.g., J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79 (2004); Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 J.C. & U.L. 145 (2009).

205. See discussion *infra* Part III.B.

206. 344 U.S. 183 (1952).

207. *Id.* at 184.

democracy.”²⁰⁸ He stressed that teachers “must be exemplars of open-mindedness and free inquiry” and “must have the freedom of responsible inquiry, by thought and action.”²⁰⁹

Justice Frankfurter is better known in academic freedom lore for describing the “Four Essential Freedoms” of a university in *Sweezy v. New Hampshire*,²¹⁰ taken from a conference in South Africa. These freedoms are for the university to “determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”²¹¹ Once again he took up the importance of academic freedom in a concurrence:

For society’s good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people’s well-being, except for reasons that are exigent and obviously compelling.

These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.²¹²

Chief Justice Earl Warren was equally eloquent in his *Sweezy* plurality opinion:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.²¹³

The most important academic freedom case to date is *Keyishian v. Board*

208. *Id.* at 196.

209. *Id.*

210. 354 U.S. 234 (1957).

211. *Id.* at 263.

212. *Id.* at 262.

213. *Id.* at 250.

of *Regents*,²¹⁴ providing one of the most cherished statements about academic freedom, from the pen of Justice Brennan:

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. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” The classroom is peculiarly the “marketplace of ideas.” The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, [rather] than through any kind of authoritative selection.”²¹⁵

This principle is not intended to provide absolute license to the academic community. Rather it seeks to promote a robust debate and freedom of inquiry for the benefit of citizens.

The most recent discussion of the importance of academic freedom came in *Grutter v. Bollinger*,²¹⁶ an affirmative action case arising out of admissions to the University of Michigan’s law school.²¹⁷ Justice O’Connor, writing for the majority, explained the Court had “long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”²¹⁸

The public policy for academic freedom as special concern of the First Amendment is strong and clear. The nature of the constitutional right, if any, is not.

B. The Constitutional Contours of Academic Freedom

Scholars have long debated whether the Court has recognized a distinct constitutional right of academic freedom for the individual, for the institution, or both. J. Peter Byrne is the leading proponent for the view that Constitutional Academic Freedom “protects primarily the university as an institution from government interference with core academic functions.”²¹⁹ He argues that, in *Grutter*, the Court clarified that

214. 385 U.S. 589 (1967).

215. *Id.* at 603 (citation omitted).

216. 539 U.S. 306 (2003).

217. *Id.* at 311.

218. *Id.* at 329.

219. J. Peter Byrne, *Book Review: Neo-Orthodoxy in Academic Freedom*, 88 TEX. L. REV. 143, 167 (2009).

Constitutional Academic Freedom is a right.²²⁰ This right should be limited to “core academic areas,” however, because “university scholarship and teaching uniquely advance the search for truth and model a fruitful discourse based on freedom, rigor, and accountability.”²²¹ Frederick Schauer wrote that the institutional right “is best understood as a right of academic institutions against their political and bureaucratic and administrative supervisors, whether those supervisors be elected legislators or appointed administrators.”²²²

David Rabban disagrees, arguing that while the right does inure to the university, the courts “have also recognized that the first amendment [sic] protects individual academic freedom.”²²³ Most scholars today believe the Court has recognized some type of constitutional protection for institutions, but over the years “courts and commentators have cast doubt on an individual First Amendment right of academic freedom.”²²⁴ Byrne believes that academic freedom for the individual is primarily connected to the non-legal tradition of autonomy for the individual professor, but that “constitutional academic freedom should primarily insulate the university in core academic affairs from interference by the state.”²²⁵

To some the erosion of an individual right is ultimately for the betterment of academic freedom,²²⁶ because deference to colleges or universities, private or public, is due to a desire to “protect ongoing collective application of professional norms within the institutional setting of the university.”²²⁷ In a recent book, noted academic freedom scholars Matthew Finkin and Robert C. Post wrote that the “traditional idea of

220. J. Peter Byrne, *Constitutional Academic Freedom After Grutter: Getting Real About the “Four Freedoms” of a University*, 77 U. COLO. L. REV. 929 (2006). *But see* Hutchens, *supra* note 204, at 154 (stating that while Grutter recognizes “constitutional protection for some type of academic freedom, important questions regarding the contours of First Amendment protection for academic freedom remain unanswered”).

221. Byrne, *supra* note 220, at 930.

222. Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 921 (2006).

223. David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 230 (1990).

224. Aziz Huq, *Easterbrook on Academic Freedom*, 77 U. CHI. L. REV. 1055 (2010). *See* Schauer, *supra* note 222, at 908–09 (“[I]t is doubtful that, except in a surprisingly small number of instances, the Supreme Court’s references to academic freedom were intended to recognize, or had the effect of recognizing, a genuinely distinct individual academic freedom right, as opposed to simply pointing out an important but undifferentiated instantiation of a more general individual right to freedom of speech.”).

225. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 YALE L.J. 251, 255 (1989).

226. Huq, *supra* note 224, at 1062 (arguing that the academic freedom opinions by Judge Frank Easterbrook of the Seventh Circuit have “rejected individual claims by professors and students in order to preserve academic freedom”).

227. *Id.* at 1065.

academic freedom,” based upon its commitment to research and scholarly standards, would be harmed if an individual right insulated scholars from “professional regulation.”²²⁸

While no doubt the college’s or university’s interests in academic matters are a special concern of the First Amendment it seems a non-starter to argue that a corporeal entity has an affirmative right. Suppose, for example, a state legislature enacted a statute mandating that all public educational institutions must teach intelligent design in science classes. Might a college or university bring a Section 1983 lawsuit on the grounds that it infringes the college or university’s First Amendment right of academic freedom?

*University of Pennsylvania v. EEOC*²²⁹ is one of the few instances of a college or university asserting academic freedom directly, and even there it was raised as a shield, not as a cause of action. The EEOC subpoenaed tenure documents after an associate professor was denied tenure and claimed sexual harassment.²³⁰ The university urged the Supreme Court to recognize a qualified common-law privilege for peer review documents, asserting a “First Amendment right of ‘academic freedom’ against wholesale disclosure of the contested documents.”²³¹

The Court acknowledged that it had described academic freedom as a “special concern of the First Amendment”²³² but found the university’s reliance on academic freedom “somewhat misplaced,” because the subpoenas were not attempting to direct the content of what is taught.²³³ The Court distinguished previous academic freedom cases where the government attempted to direct the content of speech, and where “complicated First Amendment issues are presented because government is simultaneously both speaker and regulator.”²³⁴ The Court added that it had cautioned judges that in reviewing academic decisions they should “show great respect for the faculty’s professional judgment.”²³⁵ The Court stressed that nothing in its decision should be a “retreat from this principle of respect for legitimate academic decisionmaking.”²³⁶

Erica Goldberg and Kelly Sarabyn point out that after *Grutter* courts must address the question of whether the institutional right of academic freedom “can be invoked by the university against state action, or whether

228. FINKIN & POST, *supra* note 201, at 43.

229. 493 U.S. 182 (1990).

230. *Id.* at 185–86.

231. *Id.* at 188.

232. *Id.* at 195 (quoting *Keyishian v. Bd. of Regents of Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967)).

233. *Id.* at 197–98.

234. *Id.* at 198.

235. *Id.* at 199 (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)).

236. *Id.*

it can be invoked only as part of the balancing test when a public university asserts an interest in overriding another party's constitutional right."²³⁷ The Court's statements should be read instead to mean that the Court has expressed a policy of deference to the community of scholars—and not the corporate entity.

Despite disagreements on specifics, the Court has unquestionably placed the issue of academic freedom in the constitutional realm. That constitutional principle clashes with the *Garcetti* per se rule. Matthew Finkin observed that the chilling effect of *Garcetti* is particularly egregious to academic speech because if “before speaking, the professor must first question the capacity in which the speech is uttered” she will “tend to steer clear of the forbidden zone.”²³⁸

When constitutional doctrines collide something must give. Academic freedom has the better case because of its importance to society. The Court's support of academic freedom and its policy of deference to the college and university community form the backdrop for understanding the legal effect of the Caveat and its contradictory and confusing reading by lower courts in higher education cases.

C. The Post-*Garcetti* Cases

The Caveat has been interpreted in several ways. Some commentators and courts believe the *Garcetti* majority reserved the question of whether the per se rule applies to teaching and scholarship.²³⁹ That reading is understandable, but what is its legal effect? To reserve the question for

237. Erica Goldberg and Kelly Sarabyn, *Measuring a “Degree of Deference”:* *Institutional Academic Freedom in a Post-Grutter World*, 51 SANTA CLARA L. REV. 217, 220 (2011).

238. Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1342–43 (1988).

239. See Areen, *supra* note 11, at 946–47 (“[T]he majority agreed to leave undecided for now whether *Garcetti* signals the end of constitutional protection for academic freedom.”); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1500 (2007) (“[T]he Court’s apparent unwillingness to extend the rule in that case to the academic context signals a continuing recognition that something about universities demands a different approach to otherwise generally applicable First Amendment principles.”). See also *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011) (“The plain language of *Garcetti* thus explicitly left open the question of whether its principles apply in the academic genre where issues of ‘scholarship or teaching’ are in play.”); *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 343 (6th Cir. 2010) (noting that “*Garcetti*’s caveat” did not aid the plaintiff because she was not a teacher at a public college or university, concluding that the *Garcetti* “majority disclaimed any intent to resolve the point.”); *Panse v. Eastwood*, 3030 F.App’x 933, 934 (2d Cir. 2008) (“It is an open question in this Circuit whether *Garcetti* applies to classroom instruction.”); *Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 171 n.13 (3rd Cir. 2008) (“After reaching its conclusion, the Court expressly stated that it left the determination of whether this analysis would apply in the educational context for another day.”).

another day can only mean one of two things, legally: either the per se rule applies to academic speech as a matter of law now and someday the Court might carve out an exception, or the Court imposed a moratorium on the application of the per se rule to academic speech until it has the opportunity to fully analyze the question.

Dicta is defined as statements not necessary to the holding,²⁴⁰ and “anything in a judicial opinion that is not the holding.”²⁴¹ For the Caveat to be dicta, by definition, means that it is not necessary for the holding and the per se rule was intended to apply to academic speech. The Caveat would therefore be mere comfort to the academic community that the Court is sympathetic to concerns about academic freedom. If the Caveat is not dicta, logically the Court must have ruled that academic speech is exempt from the per se rule.

This article posits that the per se rule does apply to academic speech until further notice for two reasons. First, if the Court intended to carve out an exception for academic speech it would do so expressly and clearly. The statement, “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests,”²⁴² is hardly a clear expression of a legal carve-out from a per se rule. Rather, it is an acknowledgement that Justice Souter had raised a valid concern which merits consideration in the future.

Second, the statement “[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner”²⁴³ is a classic formulation of dictum. The holding was sweeping – when a public employee speaks pursuant to official duties her speech is not protected. Putting off the question does not mean there is a moratorium on academic speech or that an exception has already been recognized. It means that someday the Court will consider whether an exception should be made.

A comprehensive survey of post-*Garcetti* cases in higher education is beyond the scope of this article. This section presents representative examples of cases concerning Extramural Speech, Core Academic Speech, and Intramural Speech.

1. Extramural Speech

In *Dixon v. University of Toledo*,²⁴⁴ the plaintiff was an interim Associate Vice President for Human Resources.²⁴⁵ Her problems began

240. Marc McAllister, *Dicta Redefined*, 47 WILLAMETTE L. REV. 161, 166 (2011).

241. Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 223 (2010).

242. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

243. *Id.*

244. 842 F. Supp. 2d 1044 (N.D. Ohio 2012).

245. *Id.* at 1046.

when she wrote a letter to the newspaper taking exception to an opinion piece comparing the struggle for homosexual rights to the African-American experience.²⁴⁶ She identified herself as an alumnus of the university, but did not mention her job title or duties.²⁴⁷ Negative response to her letter led to her being placed on leave and the university president wrote his own op-ed piece in the newspaper, repudiating Dixon's opinion on behalf of the university and explaining the university policy on diversity.²⁴⁸ Eventually Dixon was terminated and she filed suit.²⁴⁹ The district court concluded the university had not presented any job duty that Dixon was trying to satisfy in writing the letter; accordingly, the speech was not made pursuant to official duties. That conclusion did not help Dixon, however, since the court also found that because of her position in human resources her statements could do serious damage to the university and disrupt the human resources department, thus holding that Dixon failed to pass the *Pickering* balancing test.²⁵⁰

In *van Heerden v. Louisiana State University*,²⁵¹ an associate professor of research and deputy director of the LSU Hurricane Center was selected by the Louisiana Department of Transportation to head "Team Louisiana," a group of scientists asked to determine the cause of flooding in New Orleans after Hurricane Katrina.²⁵² Before and after his appointment van Heerden was outspoken in his criticism of the U.S. Army Corps of Engineers.²⁵³ LSU administrators feared losing federal funds and ordered him to stop making public statements and testifying about the levee failures.²⁵⁴ Undeterred, he continued to make public statements and testified before the Louisiana Legislature and the United States Congress, even writing a book called "The Storm," which amplified his opinions.²⁵⁵ He was stripped of his teaching duties and his contract was not renewed.²⁵⁶ Opining that the Caveat indicated that the U.S. Supreme Court "reserved the question" whether *Garcetti* would apply to scholarship or teaching,²⁵⁷ Judge Brady wrote that he "shares Justice Souter's concern that wholesale application of *Garcetti* analysis to the type of facts presented here could lead to a whittling-away of academics' ability to delve into issues or

246. *Id.* at 1047.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 1054.

251. 2011 WL 5008410 (M.D. La. 2011).

252. *Id.* at 1.

253. *Id.* at 4.

254. *Id.* at 1.

255. *Id.*

256. *Id.* at 1.

257. *Id.* at 3.

express opinions that are unpopular, uncomfortable or unorthodox.”²⁵⁸

He concluded that “although it is a close question, van Heerden was not acting within his official job duties.”²⁵⁹ LSU’s administration changed his job description “to focus solely on research” rather than through the press or government agencies.²⁶⁰ These actions reflected an attempt by LSU to “disavow itself of van Heerden’s statements regarding the cause of levee failure.”²⁶¹ As a result, van Heerden’s statements survived for another day.²⁶²

One of the ramifications of *Garcetti*’s inverted logic is that now an aggrieved faculty member is forced to go to great lengths to portray the speech as being as far away from classroom and research duties as possible, while administrators go to just as much trouble to squeeze the speech into official duties.²⁶³

2. Core Academic Speech

The language of the Caveat covers “academic scholarship and classroom instruction.”²⁶⁴ Both fall under Core Academic Speech, though there are important differences. Each area is discussed in the following.

(a) Teaching

A literature teacher is lecturing on “*Ulysses*” by James Joyce. Her professional obligation is to teach literature and *Ulysses* heads many lists of great novels.²⁶⁵ A student who happens to be the child of a major donor to the college complains to administrators about the sexual content in the novel. It was, after all, banned in the United States initially.²⁶⁶ Pressure is brought to bear and the teacher is told not to use the book again. Is the speech protected by the First Amendment? It involves public concern in a general sense of course, but if *Garcetti* is applied the speech is unprotected

258. *Id.* at 5.

259. *Id.* at 4.

260. *Id.* at 5.

261. *Id.* at 5.

262. *Id.* (“Based on the facts presented here, the Court finds that, even applying the *Garcetti* test to van Heerden, he was not acting within his official job duties for the speech at issue here, which precludes summary judgment for defendants.”).

263. *Id.* at 3. *See also* *Casey v. West Las Vegas Ind. Sch. Dist.*, 473 F.3d 1323, 1330 (10th Cir. 2007) (noting that after the *Garcetti* decision “the parties seemed to swap positions to meet their respective litigation objectives”).

264. *Garcetti*, 547 U.S. 410, 425 (2006).

265. *See, e.g., Modern Library’s Choices, a list of the greatest novels of the 20th century*, N.Y. TIMES, <http://www.nytimes.com/library/books/072098best-novels-list.html> (last visited Sep. 20, 2011) (ranking *Ulysses* as number one).

266. *See United States v. One Book Called “Ulysses”*, 5 F. Supp. 182, 183 and 185 (S.D.N.Y. 1933) (rejecting the argument that the book was pornographic and permitting its entry into the U.S.).

because the teacher was “speaking” pursuant to her official duties.” This hypothetical is all too realistic in a post-*Garcetti* world.

Contrast a literature teacher expressing her opinion in class about abortion laws. She is speaking as a citizen, not as an expert. Many citizens express opinions about abortion laws, yet there is not a relevant analogue in the sense that most citizens cannot do so in a college classroom to a captive audience. May the college prohibit this speech?

For primary and secondary schools the answer is clear. Judge Frank Easterbrook has written several interesting opinions on academic freedom.²⁶⁷ *Mayer v. Monroe County Community School Corporation*²⁶⁸ is one of them. He explained that primary and secondary school teachers do not have a constitutional right to introduce their own views, but “must stick to the prescribed curriculum—not only the prescribed subject matter, but also the prescribed perspective on that subject matter.”²⁶⁹ This is so, he wrote, because:

[T]he school system does not “regulate” teachers’ speech as much as it *hires* that speech. Expression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary. A teacher hired to lead a social-studies class can’t use it as a platform for a revisionist perspective that Benedict Arnold wasn’t really a traitor, when the approved programs calls him one; a high-school teacher hired to explicate *Moby Dick* in a literature class can’t use *Cry, The Beloved Country* instead, even if Paton’s book better suits the instructor’s style and point of view; a math teacher can’t decide that calculus is more important than trigonometry and decide to let Hipparchus and Ptolemy slide in favor of Newton and Leibniz.²⁷⁰

He stressed that K-12 education is compulsory and students should not be “subject to teachers’ idiosyncratic perspectives.”²⁷¹ Majority rule about viewpoints may lead to indoctrination, but “if indoctrination is likely, the power should be reposed in someone the people can vote out of office, rather than tenured teachers.”²⁷² This evokes the government mission rationale in *Garcetti*.

267. See Huq, *supra* note 224, for a thorough analysis of Judge Easterbrook’s opinions.

268. 474 F.3d 477 (7th Cir. 2007), *cert denied*, 552 U.S. 823 (2007).

269. *Id.* at 479.

270. *Id.* (emphasis in original).

271. *Id.*

272. *Id.* at 479–80. See also *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 343 (6th Cir. 2010), *cert. denied*, 131 S.Ct. 3068 (2011) (Justice Souter’s concern did not help the plaintiff teacher because in his dissent he was talking about higher education, and the plaintiff was a high school teacher. The court noted that both culturally and legally academic freedom arises out of colleges and universities.).

The courts do seem to be making a distinction for college and university speech to some extent, because the education is not compulsory.²⁷³ Yet *Piggee v. Carl Sandburg College*,²⁷⁴ also from the Seventh Circuit, extended the reasoning to a college. Piggee was a part-time cosmetology instructor at a community college.²⁷⁵ She placed religious pamphlets in a smock of a student she believed to be gay.²⁷⁶ The student was offended and complained to the director of the cosmetology program.²⁷⁷ The college concluded that the teacher's conduct constituted sexual harassment.²⁷⁸ Piggee's contract was not renewed and she filed suit, alleging infringement of her right of speech.²⁷⁹

The Seventh Circuit referred to its precedents that academic freedom has two aspects, the first being the right of faculty members to engage in academic debate and inquiry.²⁸⁰ The second is the right of the college or university to establish curriculum.²⁸¹ Curiously, the court stated that *Garcetti* "is not directly relevant to our problem,"²⁸² without further elaboration, adding that "[c]lassroom or instructional speech, in short, is inevitably speech that is part of the instructor's official duties."²⁸³ The court noted almost in passing that Piggee's speech "was not related to her job of instructing students in cosmetology,"²⁸⁴ and if anything, the speech undermined her relationship with students who disagreed with her.²⁸⁵ Ultimately, the court's holding is based on a narrow issue, that it could "see no reason why a college or university cannot direct its instructors to keep personal discussions about sexual orientation or religion out of a cosmetology class or clinic."²⁸⁶

*Nichols v. University of Southern Mississippi*²⁸⁷ involved a non-tenured faculty member who alleged his contract was not renewed in retaliation for

273. See *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011), cert denied, 132 S.Ct. 1807 (2012) (holding the academic "carve-out" in *Garcetti* applies only to colleges and universities); and *Evans-Marshall*, 624 F.3d at 343 ("Garcetti's caveat offers no refuge to Evans-Marshall. She is not a teacher at a 'public college[]' or 'universit[y]'" and thus falls outside of the group the dissent wished to protect.").

274. 464 F.3d 667 (7th Cir. 2006).

275. *Id.* at 668.

276. *Id.* at 669.

277. *Id.* at 668–69.

278. *Id.* at 669.

279. *Id.* at 669–70.

280. *Id.* at 671.

281. *Id.*

282. *Id.* at 672.

283. *Id.* at 671.

284. *Id.* at 672.

285. *Id.*

286. *Id.* at 673.

287. 669 F.Supp.2d 684 (S.D. Miss. 2009).

comments to a student after a voice lesson, while still in the classroom, about homosexuality.²⁸⁸ Applying *Garcetti*, the district court held that the conversation was not protected,²⁸⁹ finding the “speaking as a citizen” element a more difficult task than determining whether the subject matter was a public concern:

On one hand, Dr. Nichols’s duties as a University employee included giving voice lessons, not giving moral, sexual, or religious advice to his students, so his statements were not made pursuant to his official duties. Therefore, the content of the conversations with Lunsford, although tangentially related to the challenges of New York City’s entertainment industry, are best characterized as speech unrelated to Dr. Nichols’s official duties. However, the context and form of the statements lead to a contrary conclusion. The statements were made in the classroom setting by a professor to a student, and the courts have consistently taken a broad view of what constitutes classroom speech that is not afforded protection under the First Amendment.²⁹⁰

The court ruled the speech was best characterized as made in his “official capacity and was not afforded First Amendment protection.”²⁹¹ Using this line of reasoning, anything said by a faculty member in or around the classroom is unprotected.

Other courts have been more reluctant to apply *Garcetti*. In *Sheldon v. Dhillon*²⁹² the contract for an adjunct biology instructor was not renewed after a student complained about offensive statements the instructor made in response to a question in the classroom.²⁹³ The subject matter was the genetic basis of homosexuality and the course did, to some extent, relate to that subject.²⁹⁴ The college relied on *Garcetti*, arguing that classroom instruction is not protected speech.²⁹⁵ The district court disagreed, stating that the majority in *Garcetti* “expressly reserved the question of whether its holding extends to scholarship or teaching-related speech.”²⁹⁶ The court read the Caveat as an indication of the Court’s “reluctance to apply its public-employee speech rule in the context of academic instruction,” and chose to apply the previous Ninth Circuit framework.²⁹⁷

288. *Id.* at 689.

289. *Id.* at 699.

290. *Id.* at 698.

291. *Id.* at 699.

292. 2009 WL 4282086 (N.D. Cal. 2009).

293. *Id.* at 2.

294. *Id.* at 1.

295. *Id.* at 3.

296. *Id.*

297. *Id.* at 4.

In *Kerr v. Hurd*²⁹⁸ an OB/GYN physician and assistant professor alleged retaliation because of his teaching about the importance of “vaginal delivery over unnecessary cesarian procedures,” and for lecturing residents on the proper use of forceps.²⁹⁹ Defendant Hurd, the department chair, argued that because these teaching methods were within Kerr’s official duties as an employee of the university, the speech was barred by the *Garcetti* per se rule.³⁰⁰ The district court acknowledged that “Dr. Kerr’s speech as to vaginal deliveries was within his ‘hired’ speech as a teacher of obstetrics,”³⁰¹ but concluded that the Supreme Court left undecided the application of the per se rule in an “academic setting.”³⁰² Judge Merz provided, in dicta, a compelling argument for academic freedom:

Even without the binding precedent, this Court would find an academic exception to *Garcetti*. Recognizing an academic freedom exception to the *Garcetti* analysis is important to protecting First Amendment values. Universities should be the active trading floors in the marketplace of ideas. Public universities should be no different from private universities in that respect. At least where, as here, the expressed views are well within the range of accepted medical opinion, they should certainly receive First Amendment protection, particularly at the university level. See Justice Souter’s dissent in *Garcetti*, citing *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967). The disastrous impact on Soviet agriculture from Stalin’s enforcement of Lysenko biology orthodoxy stand as a strong counter example to those who would discipline university professors for not following the “party line.”³⁰³

Judge Merz rejected an argument by the defendants that the academic freedom “exception” be limited to “classroom teaching,”³⁰⁴ noting there was no indication in the motion papers that “Dr. Kerr’s advocacy for forceps deliveries was outside either the classroom or the clinical context in which medical professors are expected to teach.”³⁰⁵

These cases, no matter how sincerely decided, are sometimes result-oriented. How can they be otherwise, given the confused state of academic speech after *Garcetti*, not to mention the uncertain landscape of constitutional law for academic freedom itself?

298. 694 F.Supp.2d 817, 828 (S.D. Oh. 2010).

299. *Id.* at 834.

300. *Id.* at 843.

301. *Id.*

302. *Id.*

303. *Id.* at 843–44 (footnote omitted) (citations omitted).

304. *Id.* at 844.

305. *Id.*

(b) Scholarship

In *Adams v. Trustees of the University of North Carolina-Wilmington*,³⁰⁶ a tenured assistant professor of criminology applied for promotion to full professor.³⁰⁷ To support his research credentials Adams listed non-refereed books and articles, as well as media appearances and speeches.³⁰⁸ He had become a very public commentator on religious and conservative political topics.³⁰⁹ A committee of senior faculty voted seven to two to oppose his promotion.³¹⁰ Adams brought a Section 1983 and Title VII action alleging several constitutional deprivations.³¹¹ The district court granted summary judgment to the university defendants and the Fourth Circuit affirmed in part and reversed in part.³¹² The court referred to the Supreme Court's "directive" that 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."³¹³

The Court held that the district court misread *Garcetti* and that its opinion rested upon several "fundamental errors."³¹⁴ Foremost among those errors was that the district court had applied *Garcetti* "without acknowledging, let alone addressing, the clear language in that opinion that casts doubt on whether the *Garcetti* analysis applies in the academic context of a public university."³¹⁵ Judge Agee, writing for a unanimous panel, said the "plain language of *Garcetti* thus explicitly left open the question of whether its principles apply in the academic genre where issues of 'scholarship or teaching' are in play."³¹⁶ *Lee v. York County School*

306. 640 F.3d. 550 (4th Cir. 2011).

307. *Id.* at 553.

308. *Id.* at 554–55.

309. *Id.* at 554–55.

310. *Id.* at 555.

311. *Id.* at 556.

312. *Id.*

313. *Id.* at 557 (alteration in original).. This statement, without citation, refers to *Keyishian v. Bd. of Regents of the Univ. of the State of N. Y.*, 385 U.S. 589, 603 (1967) where the Court stated:

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.

That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

314. *Adams*, 640 F.3d at 561. One of the significant issues in the case was that the district court had concluded that Adams' speech, which even the university defendants conceded was protected when given, because it had nothing to do with his teaching and scholarship, was converted to unprotected speech because he later referred to it in his application for promotion. Thus, the Fourth Circuit held that the district court had failed to take into account Adams' role as a speaker at the time the speech was made. *Id.* at 561–62.

315. *Id.* at 561 (citing *Garcetti*, 547 U.S. at 425 (2006)).

316. *Id.* at 563.

*Division*³¹⁷ was cited for the principle that the Supreme Court “explicitly did not decide” whether the *Garcetti* ruling would apply to a case involving speech relating to teaching.³¹⁸

The Fourth Circuit provided a detailed review of the *Garcetti* problem in academic speech:

There may be instances in which a public university faculty member’s assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching. In that circumstance, *Garcetti* may apply to the specific instances of the faculty member’s speech carrying out those duties. However, that is clearly not the circumstance in the case at bar. Defendants agree Adams’ speech involves scholarship and teaching. . . . But the scholarship and teaching in this case, Adams’ speech, was intended for and directed at a national or international audience on issues of public importance unrelated to any of Adams’ assigned teaching duties at UNC.³¹⁹

The court was concerned that applying *Garcetti* to the “academic work of a public university faculty member” under these facts could preclude many forms of public speech or service a professor engages in,³²⁰ a result which does not appear to be what *Garcetti* intended. Thus, the court did not apply the per se rule to the facts before it.³²¹

The Seventh Circuit has no hesitation in applying the per se rule to higher education. In *Renken v. Gregory*,³²² a tenured professor accused administrators of imposing improper conditions on the university’s matching of funds for a NSF grant.³²³ He complained to a university committee and to the Board of Regents about harassment and discrimination by the dean’s office.³²⁴ Unable to work out a compromise with Renken the university returned the grant money.³²⁵ Renken sued, alleging reduction in pay and retaliation for exercising his speech rights.³²⁶ Applying *Garcetti*’s per se rule, the Seventh Circuit held that his complaints about the grant conditions were made pursuant to his official job duties and therefore not protected.³²⁷ In fulfilling his research responsibilities Renken had applied for the grant and he admitted it was

317. 484 F.3d 687, 694 (4th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007).

318. *Adams*, 640 F.3d at 563 (quoting *Lee*, 484 F.3d at 694).

319. *Id.* at 563–64.

320. *Id.* at 564.

321. *Id.*

322. 541 F.3d 769 (7th Cir. 2008).

323. *Id.* at 771–72.

324. *Id.*

325. *Id.* at 773.

326. *Id.*

327. *Id.* at 775.

“an education grant for the benefit of students.”³²⁸ In addition, the grant entitled him to a reduction in teaching load.³²⁹ The court emphatically applied the per se rule with no reference to the Caveat.

3. *Intramural Speech*

A proper exploration of the role of faculty governance is outside the scope of this article. To provide context, however, it is helpful to begin with judicial support of the importance of university governance. In *NLRB v. Yeshiva University*³³⁰ the legal issue was whether full-time faculty fall within the exclusion under the National Labor Relations Act for supervisors and managerial employees.³³¹ The schools within the university were “substantially autonomous,” with faculty committees “concerned with special areas of educational policy.”³³² Faculty recommendations for “faculty hiring, tenure, sabbaticals, termination and promotion” carried great weight with the administrators.³³³ Justice Powell wrote that the “business” of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally implemented by faculty governance decisions.³³⁴

One of the best judicial discussions of the importance of faculty governance is found in Judge Edwards’ concurring opinion in *Emergency Coalition to Defend Educational Travel v. U.S. Department of Treasury*.³³⁵ An association of professors challenged federal regulations regarding the Cuba trade embargo,³³⁶ alleging the regulations violated academic freedom by restricting what they could teach.³³⁷ The majority opinion observed that any “substantive governmental restriction” on lectures would “obviously violate the First Amendment,”³³⁸ yet concluded these regulations were content neutral and did not violate the First Amendment.³³⁹ Judge Edwards agreed with the result and accordingly believed it was unnecessary for the court to “parse the many difficult issues” regarding the scope of academic freedom, including the Caveat, and whether it is a constitutional right at all.³⁴⁰ Citing Professor Areen’s article on governance,³⁴¹ he referred to the Supreme Court’s decisions which expressed reluctance to second guess

328. *Id.* at 773.

329. *Id.* at 774.

330. 444 U.S. 672 (1980).

331. *Id.* at 674.

332. *Id.* at 676.

333. *Id.* at 677.

334. *Id.* at 688.

335. 545 F.3d 4 (D.C. Cir. 2008).

336. *Id.* at 6.

337. *Id.* at 12.

338. *Id.*

339. *Id.* at 12–13.

340. *Id.* at 15.

341. *Id.* See also Areen, *supra* note 11.

college and university actions, and observed that the “four essential freedoms” from Justice Frankfurter in the *Sweezy* case,³⁴² have come to “include notions of shared governance.”³⁴³

Despite the recognition that governance is important, lower courts routinely reject arguments that Intramural Speech is worthy of constitutional protection. *Gorum v. Sessoms*,³⁴⁴ involved a tenured professor who was dismissed after being accused of changing student grades without instructor approval.³⁴⁵ Gorum argued that his dismissal was in retaliation for opposition to the university president’s hiring, cancellation of an invitation to the president for a university breakfast, and advising a star football player.³⁴⁶ The district court granted summary judgment to defendants and Gorum appealed.³⁴⁷ The Third Circuit concluded the speech was made pursuant to his official duties and therefore was not protected.³⁴⁸

The court held that Gorum was unable to prove either that his speech was made as a citizen or that its content was a matter of public concern.³⁴⁹ Student advising came within the scope of official duties because it related to the professor’s knowledge and experience with the university’s disciplinary code.³⁵⁰ Revocation of the speaking invitation to a fraternity’s Martin Luther King, Jr. breakfast was pursuant to his official duties because the Faculty Senate Bylaws include responsibilities to aid student organizations and clubs as mentors and advisors.³⁵¹ The court acknowledged the “Supreme Court did not answer in *Garcetti* whether the ‘official duty’ analysis ‘would apply in the same manner to a case involving speech related to scholarship or teaching.’”³⁵² Nevertheless, the court applied the *Garcetti* per se rule because “Gorum’s actions so clearly were not ‘speech related to scholarship or teaching,’ . . . and because we believe that such a determination here does not ‘imperil First Amendment protection of academic freedom in public colleges and universities.’”³⁵³ In a footnote, the Third Circuit explained that the “full implications” of *Garcetti* on scholarship and teaching are not clear, and consequently the

342. *Emergency Coal. to Defend Educ. Travel v. Dep’t of Treasury*, 545 F.3d 4, 15–16 (D.C. Cir. 2008).

343. *Id.* at 16.

344. 561 F.3d 179 (3rd Cir. 2009).

345. *Id.* at 182.

346. *Id.* at 182–83.

347. *Id.* at 184.

348. *Id.* at 185–86.

349. *Id.* at 185.

350. *Id.* at 185–86.

351. *Id.* at 186.

352. *Id.*

353. *Id.*

circuits differ about its application to academic instructors.³⁵⁴

In *Abcarian v. McDonald*,³⁵⁵ the head of the Department of Surgery at the University of Illinois College of Medicine at Chicago argued that his speech, including complaints about “risk management, faculty recruitment, compensation and fringe benefits . . . and medical malpractice premiums,”³⁵⁶ was protected because it was exempted by *Garcetti* due to the Caveat.³⁵⁷ The court rejected this “unsupported assertion” because his speech “involved administrative policies that were much more prosaic than would be covered by principles of academic freedom.”³⁵⁸

In *Hong v. Grant*³⁵⁹ a chemistry professor raised concerns about a potential conflict of interest during a mid-tenure review.³⁶⁰ He complained that too many department courses were taught by lecturers.³⁶¹ He opposed a colleague’s merit pay increase and the handling of a faculty appointment.³⁶² After being denied a merit increase, Hong alleged retaliation.³⁶³ The district court granted summary judgment to the defendants.³⁶⁴ The court noted that in the University of California’s system, a “faculty member’s official duties are not limited to classroom instruction and professional research,” but rather includes a “wide range of academic, administrative and personnel functions in accordance with UCI’s self-governance principle.”³⁶⁵ Consequently, Hong has a “professional responsibility to offer feedback, advice and criticism about his department’s administration and operation from his perspective as a tenured, experienced professor.”³⁶⁶ No mention was made of the Caveat.

*Miller v. University of South Alabama*³⁶⁷ held that comments by a tenure track assistant professor at a faculty meeting discussing candidates for the English Department were not protected.³⁶⁸ Miller was not reappointed, allegedly due to her lack of collegiality, weak scholarly record, and average

354. *Id.* at 186 n.6 (comparing *Renken v. Gregory*, 541 F.3d 769, 773–75 (7th Cir. 2008), with *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 695 (4th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007)).

355. 617 F.3d 931 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1685 (2011).

356. *Id.* at 933.

357. *See Garcetti*, 547 U.S. at 425 (2006).

358. *Id.* at 938 n.5.

359. 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *aff’d. on other grounds*, 403 Fed. App’x. 236 (9th Cir. 2010).

360. *Id.* at 1162.

361. *Id.* at 1162–63.

362. *Id.* at 1163.

363. *Id.* at 1164.

364. *Id.* at 1170.

365. *Id.* at 1166.

366. *Id.* at 1167.

367. 2010 WL 1994910 (S.D. Ala. 2010).

368. *Id.* at *11.

teaching evaluations.³⁶⁹ She believed it was because of statements she had made expressing concern about the lack of diversity among faculty candidates.³⁷⁰ The district court reasoned that because Miller was attending a faculty meeting to discuss applicants for department positions she was speaking as part of her job duties and not as a private citizen.³⁷¹

*Demers v. Austin*³⁷² involved allegations arising out of both scholarship and governance. An associate professor at Washington State University alleged retaliation in response to his expression about changes to the communication program, including a decreased emphasis in theoretical research, but also for a book he wrote while on sabbatical criticizing university bureaucracies.³⁷³ The district court held that all of the instances of speech were made pursuant to his official duties and therefore unprotected, finding that the book “does not represent speech made by a private citizen.”³⁷⁴

In *Cunningham v. Louisiana State University*³⁷⁵ an assistant professor alleged retaliation for reporting two students for plagiarism.³⁷⁶ The district court held that the speech was not protected because all of it was made in connection with his work as a professor.³⁷⁷ Nothing is more important in an academic setting than disciplining students for academic misconduct, yet the First Amendment did not afford Cunningham any cover.

The speech by the tenured professor in *Capeheart v. Hahs*³⁷⁸ included advocacy on behalf of student protesters who were members of student organizations she had advised.³⁷⁹ She criticized campus police for arresting some of the students at a peaceful protest, and criticized the university for failing to attract more Latino students.³⁸⁰ The court applied the per se rule to find that the speech was unprotected because it was made pursuant to her duties.³⁸¹

A case involving Idaho State University involved a controversy about the use of a university mass-mail email service.³⁸² The university president had established a “provisional faculty senate” and instructed it to develop a

369. *Id.* at *5.

370. *Id.* at *3.

371. *Id.* at *11.

372. 2011 WL 2182100 (E.D. Wa. 2011).

373. *Id.* at *1.

374. *Id.* at *3, *4.

375. 2008 WL 4346422 (M.D. La. 2008).

376. *Id.* at *5–6.

377. *Id.* at *6.

378. 2011 WL 657848 (N.D. Ill. 2011).

379. *Id.* at *1, *2.

380. *Id.*

381. *Id.* at *4.

382. *Idaho State Univ. Faculty Ass’n for the Pres. of the First Amendment v. Idaho State Univ.*, 2012 WL 1313304 (D. Id. 2012).

new constitution and bylaws for a “full faculty senate” to be approved by the president and the State Board of Education.³⁸³ When the vice chair of the provisional faculty senate tried to send the draft constitution to the entire faculty for an upcoming vote, through the “Faculty memos” email service, the Vice President of Academic Affairs objected.³⁸⁴ She wanted faculty to have more time to review and discuss the draft and disagreed with some of the provisions.³⁸⁵ She argued that the official faculty email service should not be used because “it would give the mistaken impression that the poll was sanctioned by the Administration.”³⁸⁶ The faculty employees conceded they were not speaking as citizens in this process, but rather as employees.³⁸⁷ Accordingly, the district court concluded that *Garcetti’s* per se rule precluded protection.³⁸⁸

The governance activities of faculty members in hiring, tenure review, promotion, and curriculum are unique not only to public employment, but are unlike any other business. Intramural Speech is essential to achieve the mission of the college or university, going hand in hand with Core Academic Speech. The beat goes on and on.³⁸⁹ Intramural Speech is not being protected. It is smashed from two directions. It is part of the faculty member’s professional duties yet is outside of the “academic scholarship or classroom instruction” umbrella raised in the Caveat. A new analytical framework is needed. Part V will discuss how that might be accomplished.

IV. FIXING THE *GARCETTI* PROBLEM

The experiment has failed. Collateral damage from the per se rule to the public interest is disproportionate to any perceived benefits. For most public employees the optimal solution is for the Court to overturn *Garcetti* and return to the *Pickering/Connick* test. For college and university faculty, the elimination of the per se rule is a vital first step, but as explained in Part V, a separate approach is needed to protect academic freedom.

How realistic is a reversal of *Garcetti*? Section A discusses some recent Supreme Court decisions which send mixed signals. The Court seems to have reinforced autonomy for the government as employer. Yet it has also demonstrated a desire to expand First Amendment speech rights generally,

383. *Id.* at *1.

384. *Id.* at *1, *2.

385. *Id.* at *2.

386. *Id.*

387. *Id.* at *7.

388. *Id.*

389. *See* *Flyr v. City Univ. of N.Y.*, 2011 WL 1675997, 3 (S.D.N.Y. Apr. 25, 2011) (holding that plaintiff’s stance on a departmental chair election and his involvement with grant writing was both pursuant to his official duties and outside of *Garcetti’s* academic speech exception).

in particular showing a disdain for recognizing new categorical exclusions for speech. Perhaps it will acknowledge that the establishment of the categorical exclusion in *Garcetti* was ill-advised.

Recognizing that a complete reversal of *Garcetti* is unlikely, a modified approach is needed, one that dispenses with the per se rule and permits the reviewing court to consider the relative value of the speech to the public interest. Section B sets out my suggestion for that modified approach.

A. Recent Supreme Court Cases

The Court doubled down on autonomy for the government as employer in *Borough of Duryea v. Guarnieri*.³⁹⁰ A police chief filed a Section 1983 lawsuit, alleging that his union grievance was protected by the Petition Clause of the First Amendment.³⁹¹ A jury found in his favor and the Third Circuit affirmed, except for the punitive damage award.³⁹² The Supreme Court vacated and remanded, holding that Petition Clause cases should be subject to the public concern test.³⁹³ The Court began with an homage to the doctrine that accepting public employment is not a waiver of constitutional protection; stating “[t]here are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment. Our responsibility is to ensure that citizens are not deprived of [these] fundamental rights by virtue of working for the government.”³⁹⁴

Still, a citizen who accepts public employment must also accept “certain limitations on his or her freedom.”³⁹⁵ The justification for these restraints is due to the “consensual nature of the employment relationship” and the “unique nature of the government’s interests.”³⁹⁶ As in *Garcetti*, the Court relied upon the rationale that the “government has a substantial interest in ensuring that all of its operations are efficient and effective.”³⁹⁷

The Court reasoned that the “substantial government interests that justify a cautious and restrained approach” for public employee speech is just as relevant when public employees raise Petition Clause claims.³⁹⁸ Ruling against the police chief, the Court emphasized that the “government’s interest in managing its internal affairs requires proper restraints on the

390. 131 S. Ct. 2488 (2011).

391. *Id.*

392. *Id.* at 2492–93.

393. *Id.* at 2491, 2497.

394. *Id.* at 2493–94. (quoting *Connick v. Myers*, 461 U.S.138, 147 (1983)); *See also* *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 605–606 (1967).

395. *Id.* at 2494 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)).

396. *Id.*

397. *Id.*

398. *Id.* at 2495.

invocation of rights by employees” when the “government employer’s responsibilities may be affected.”³⁹⁹

For public speech generally the Court’s decisions have been supportive of broad protection. The most controversial, *Snyder v. Phelps*,⁴⁰⁰ involved public picketing by members of the Westboro Baptist Church near a funeral for Marine Lance Corporal Matthew Snyder.⁴⁰¹ In an 8 to 1 decision the Court affirmed the Third Circuit ruling⁴⁰² that had overturned a judgment for Matthew’s father for intentional infliction of emotional distress.⁴⁰³

The protestors were located 200 to 300 feet from the funeral procession,⁴⁰⁴ holding signs with statements such as “God Hates the USA/Thank God for 9/11,” “Thank God for IEDs,” “God Hates Fags,” and “Thank God for Dead Soldiers.”⁴⁰⁵ The Court stated that whether the lower court judgment would be supported turned on whether the speech was of public or private concern, the “heart of the First Amendment’s protection.”⁴⁰⁶ The Court defined matters of public concern to “any matter of political, social, or other concern to the community,”⁴⁰⁷ or things of “legitimate news interest; that is, a subject of general interest and of value and concern to the public.”⁴⁰⁸ Courts are to make an independent examination of the entire record to ensure there is no intrusion on free expression.⁴⁰⁹

*U.S. v. Stevens*⁴¹⁰ struck down a federal statute criminalizing the creation, sale, or possession of certain depictions of animal cruelty.⁴¹¹ *Brown v. Entertainment Merchants Association*⁴¹² invalidated a California video game law.⁴¹³ In each case the Court was asked to recognize a new category of unprotected speech, and in both cases it declined to do so.

In *Stevens*, the defendant was convicted and sentenced to prison.⁴¹⁴ The *en banc* Third Circuit vacated the conviction on the grounds the statute was facially unconstitutional.⁴¹⁵ The Government argued on appeal to the

399. *Id.* at 2497.

400. 131 S. Ct. 1207 (2011).

401. *Id.* at 1213.

402. *Id.* 1207 .

403. *Id.* at 1215, 1221; *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009).

404. *Snyder*, 131 S. Ct. at 1213.

405. *Id.*

406. *Id.* at 1215 (quoting *First Nat’l. Bank of Boston v. Bellotti*, 435 U.S. 765, 766 (1978)).

407. *Id.* at 1216 (quoting *Connick*, 461 U.S. 138, 146 (1983)).

408. *Id.* (quoting *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)).

409. *Id.*

410. 130 S. Ct. 1577 (2010).

411. *Id.* at 1586.

412. 131 S. Ct. 2729 (2011).

413. *Id.* at 2734.

414. *United States v. Stevens*, 130 S. Ct. 1577, 1583(2010).

415. *Stevens*, 130 S. Ct. at 1580; *United States v. Stevens*, 533 F.3d 218 (2008).

Supreme Court that depictions of animal cruelty should be added to the list of historical categories of unprotected speech, proposing a balancing test that weighs the “value of the speech against its societal costs.”⁴¹⁶ The Court explained that since 1791 it had recognized a very limited group of categorically unprotected areas of speech, namely obscenity, defamation, fraud, incitement, and speech integral to criminal conduct,⁴¹⁷ adding:

The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document “prescribing limits, and declaring that those limits may be passed at pleasure.”⁴¹⁸

The principle elucidated by the Court is that rarely should a categorical exclusion for speech be adopted. Declining to recognize a new categorical exclusion in *Stevens*,⁴¹⁹ the Court explained:

As the Government correctly notes, this Court has often described historically unprotected categories of speech as being “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” [citation omitted] In *New York v. Ferber*. . . we noted that within these categories of unprotected speech, “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required,” because “the balance of competing interests is clearly struck.”⁴²⁰

Did the Court conclude in *Garcetti* that the “evil” of permitting a government employee to claim First Amendment protection in *some* instances when speaking pursuant to job duties, “overwhelmingly outweighs” the benefit to the public of receiving information from informed citizen servants? The more likely explanation is that the Court did not fully appreciate that it was effectively establishing a categorical exclusion in *Garcetti*, an unfortunate and harmful oversight.

B. A Modified Approach

In the event the Court chooses not to overturn *Garcetti*, an alternative

416. *Stevens*, 130 S. Ct. at 1585 (quoting Brief for United States at 8).

417. *Id.* at 1584.

418. *Id.* at 1585 (quoting *Marbury v. Madison*, 5 U.S. 137, 178 (1803)).

419. *Id.* at 1586.

420. *Id.* at 1585–86 (citations omitted).

approach is needed. How can the *Garcetti* test be calibrated to return the public interest to center stage while addressing the Court's concerns? The starting point is a return to the Court's justification for adopting the "public concern" threshold in *Connick*:⁴²¹

[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.⁴²²

Two phrases merit attention. The first is the reference to an employee speaking on "matters only of personal interest." If the statement is *only* of personal interest—having no connection to the public interest—it should not be protected. The threshold prong established in *Connick* was intended to screen public employee speech cases so that only those which related to public concerns would be eligible for the *Pickering* balancing test.

The second statement is that federal courts should not be available to public employees in speech cases "absent the most unusual circumstances." Would it not be a matter of "unusual circumstances" for a government employee to be threatened with retaliation when he reports to a supervisor that the government agency is jeopardizing public health?

In the spirit of *Connick's* principles, I propose a modified approach that trusts lower courts to assess the relative value of the speech to society and afford protection if of substantial interest to the public. As the Court observed in *Garcetti*, the *Pickering* approach

[A]cknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed. The Court's more recent cases have expressed similar concerns. See, e.g., *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (citation omitted)); cf. *Treasury Employees*, 513 U.S., at 470 ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said.").⁴²³

421. *Connick v. Myers*, 461 U.S. 138 (1983).

422. *Id.* at 147.

423. *Garcetti v. Ceballos*, 547 U.S. 410, 419–20 (2006) See, e.g., *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam) ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed

Well stated. If a public employee's speech is primarily related to internal administrative matters or personnel issues, with little or no connection to the public interest, it is not worthy of protection. No harm to the public exists. At the other end of the spectrum, if leaving public employee speech unprotected harms the public interest, the courts must be able to shield the messenger.⁴²⁴

The modified approach would consist of an initial question about whether the public employee was speaking on a subject related to job duties. The answer to that question would determine which of two tests should be applied.

For speech unrelated to the employee's job duties, the court would apply the second and third prongs of the *Garcetti* test - the original two prongs of *Pickering/Connick*, just as it does under *Garcetti*. If the speech relates to job duties, however, the court would proceed to make a qualitative evaluation of the content of the speech by asking if, reviewing the record as a whole, it appears that leaving the speech unprotected would deprive the public of information which is of substantial interest. If the answer to that question is "no", the analysis ends. The speech is unprotected. This approach adheres to the Court's stated concern for the autonomy of the government as employer, while permitting the judicial gatekeeper to protect the citizen servant when the message is important to the public interest.

If the court concludes that the content of the speech is of substantial interest to the public, it would move directly to the *Pickering* balancing test to weigh the employee's rights against the employer's interests. This revised approach would eliminate the per se rule, the most onerous aspect of *Garcetti's* legacy. It is a qualitative approach and inevitably a difficult one, analogous to the "clear and convincing" evidentiary standard in civil cases—an "intermediate standard" which lies "between a preponderance of the evidence and proof beyond a reasonable doubt."⁴²⁵

It may seem foolhardy to urge the Supreme Court to throw out the per se rule, but there is recent precedent for doing so. In *Leegin Creative Leather*

opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (citation omitted); cf. *Treasury Employees*, 513 U.S., at 470 ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said.").

424. See, Steven J. Stafstrom, Jr., Note, *Government Employee, Are You a "Citizen"?: Garcetti v. Ceballos and the "Citizenship" Prong to the Pickering/Connick Protected Speech Test*, 52 ST. LOUIS U. L.J. 589, 603 (2008) ("[W]ell informed views of government employees provide an overall benefit to society by perpetuating civil discourse, a necessity in a democratic society.")

425. *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)).

Products, Inc. v. PSKS, Inc.,⁴²⁶ the Court overturned a per se rule, established in 1911, which made it automatically illegal for a manufacturer and retailer to set a minimum retail price.⁴²⁷ In most antitrust cases the “rule of reason” is applied, enabling the fact finder to weigh “all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”⁴²⁸

By contrast, the per se rule treats certain types of restraints on competition as “necessarily illegal” by eliminating the “need to study the reasonableness of an individual restraint in light of the real market forces at work.”⁴²⁹ The per se rule “can give clear guidance” and is used in cases involving competition restraints that would “always or almost always tend to restrict competition and decrease output.”⁴³⁰ However, the adoption of a per se rule is “appropriate only after courts have had considerable experience with the type of restraint at issue” and even then, “only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason.”⁴³¹

Concluding that the risks of unlawful conduct in resale price maintenance agreements “cannot be stated with any degree of confidence” to restrict competition, the Court overturned a 96-year old precedent and held the rule of reason would thereafter be applied.⁴³² This conclusion was based upon persuasive economic scholarship.⁴³³ Though acknowledging that “[p]er se rules may decrease administrative costs,” the Court observed that they can also be counterproductive by “prohibiting procompetitive conduct the antitrust laws should encourage.”⁴³⁴

The same reasoning applies here. A per se rule for public employee speech, especially one based on technical job duties, is counterproductive. It silences some speech of importance to the public in the name of administrative efficiency. If the Court is willing to overturn a per se rule with a 100 year track record as settled law involving a statute, it should be even more willing to do so for a recent per se rule involving the First Amendment. The Court was willing to do so in *Leegin* because it had moved away from the precedent’s “doctrinal underpinnings.”⁴³⁵ The Court should move away from *Garcetti*’s doctrinal underpinnings, revise the

426. 551 U.S. 877 (2007).

427. *Id.* at 881 (citing *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)).

428. *Id.* at 885.

429. *Id.* at 886.

430. *Id.* (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988)).

431. *Id.* at 886–87.

432. *Id.* at 894.

433. *Id.* at 889.

434. *Id.* at 895.

435. *Id.* at 900.

three-prong *Garcetti* test and rectify the harm caused by the per se rule to the public interest.

V. FIXING THE ACADEMIC SPEECH PROBLEM

Overturing *Garcetti* and returning to the *Pickering/Connick* test, or adopting the modified approach proposed in Part IV, would mitigate the damage to academic speech to a significant extent. Yet *Garcetti* is not the whole story. The original *Pickering/Connick* test rendered academic speech vulnerable, as acknowledged by Justice Kennedy in the Caveat when he wrote that there are “constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”⁴³⁶ He was referring to the public employee speech doctrine itself, not just the *Garcetti* holding.

Pickering/Connick was designed for typical government agencies, and public colleges and universities are anything but typical. That test does not measure the accuracy of the statement or the quality of the opinion. Nothing demonstrates this point more than the Court’s ruling in *Rankin v. McPherson*,⁴³⁷ that the employee’s statement at work expressing a death wish for President Reagan was protected speech.⁴³⁸

Academic freedom was intended to shield scholars from undue influences, to encourage innovation and discovery. Standing by a lectern in a lecture hall is not the same thing as standing on a soapbox on a street corner. And this is where many in academia have it wrong. Academic freedom does not shield all expression within the walls of the classroom. It is not so much the location of the speech as it is the subject matter.

A faculty member’s expression within her academic discipline fulfills duties not only to a college or university contract but to the academic discipline itself. It is a privilege to teach and research but one that carries with it the responsibility to be accurate, to be competent. Paradoxically, that means that the college or university must be able to evaluate the speech, as explained by Robert C. Post:

Although the First Amendment would prohibit government from regulating the *New York Times* if the newspaper were inclined to editorialize that the moon is made of green cheese, no astronomy department could survive if it were prevented from denying tenure to a young scholar who was similarly convinced. Academic freedom thus depends upon a double recognition: that knowledge cannot be advanced “in the absence of free inquiry,” and that “the right question to ask about a teacher is whether he is

436. *Garcetti v. Ceballos*, 547 U.S. 410, 425.

437. *Rankin v. McPherson*, 483 U.S. 378 (1987).

438. *Id.* at 381.

competent.”⁴³⁹

As Judge Frank Easterbrook wrote in *Feldman v. Ho*,⁴⁴⁰ the government “as an abstraction could not penalize any citizen for misunderstanding the views of Karl Marx or misrepresenting the political philosophy of James Madison, but a Department of Political Science can and should show such a person the door.”⁴⁴¹ He explained that to transfer an academic decision to a jury undermines the university’s mission by committing it to amateurs.⁴⁴²

The challenge is to develop a framework which defers to the college or university for speech relating to the professor’s expertise, yet provides constitutional protection to the professor when the college or university abuses that autonomy. Section A summarizes a recent proposal by Judith Areen for a doctrinal approach to this problem. Section B discusses the work of Robert C. Post addressing the distinction between public discourse and expert speech. Section C presents my suggested framework for resolving the question raised by the Caveat and for judicial review of academic speech.

A. Government as Educator

Professor Judith Areen has made an original and important argument to protect academic speech.⁴⁴³ In responding to the Court’s “invitation in *Garcetti* to identify constitutional interests that support academic freedom”⁴⁴⁴ her focus is not limited to the *Garcetti* problem. Her thesis is that the Court should recognize a third role of government, beyond its roles as sovereign and employer—the role of government-as-educator.⁴⁴⁵ Merely carving out an exception from *Garcetti* for academic speech is hard to defend for three reasons: first, the Court has been reluctant to make distinctions for institutions, second, academic freedom was never intended to benefit the faculty, but rather “for its value to the First Amendment and to the nation,” and third, because it would not resolve the “deeper problems” of trying to apply the public employee speech doctrine to academia.⁴⁴⁶

Recognizing a separate role of the government-as-educator would not focus on the “delivery of services to the general public,” but on research and teaching.⁴⁴⁷ Moreover, the kind of debate that would be deemed disruptive in most government agencies would be an “accepted, and even

439. ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM 67 (2012).

440. 171 F.3d 494 (7th Cir. 1999), *cert denied.*, 528 U.S. 928 (1999).

441. *Id.* at 496.

442. *Id.* at 497.

443. Areen, *supra* note 11.

444. *Id.* at 947.

445. *Id.* at 948–49.

446. *Id.* at 988–89.

447. *Id.* at 990.

necessary, part of the production of new knowledge” in this new role.⁴⁴⁸

A separate but related issue, addressed by Areen, is that the “constitutional understanding of academic freedom has been compromised by its failure to encompass governance as being at the heart of the ideal.”⁴⁴⁹ Tracing the evolution of governance from the 1915 Declaration of General Principles on Academic Freedom and Academic Tenure by the AAUP (1915 Declaration), she argues that it has received too little attention from legal scholars,⁴⁵⁰ and deserves protection along with teaching and scholarship. She provides an excellent analysis of the tradition of governance and how vital it is to the mission of the university.⁴⁵¹

Urging the Court to recognize the special role of “government-as-educator” is an admirable goal, though an uphill climb. Government as employer doctrine is nearly 130 years old,⁴⁵² and as the majority in *Garcetti* noted, the government has “broader discretion to restrict speech when it acts as employer,”⁴⁵³ than when it acts as a sovereign. Moreover, the reason the Court adopted the government-as-employer concept was to provide *more* discretion to the employer, and thus *less* constitutional protection to the employee.

Areen is correct that shared governance is essential to promote “[g]enuine boldness and thoroughness of inquiry” in the college or university, quoting the 1915 Declaration.⁴⁵⁴ After all, what makes a university unique is the collective faculty vetting, sometimes hotly contested, but always informed, in matters of curriculum, hiring, promotion, and tenure in the great tradition of Professional Academic Freedom. Professor Areen’s approach should receive serious consideration by the Court. Many hurdles must be overcome, however, not least of which, as Areen acknowledged, is that the Court held in *Minnesota State Board for Community Colleges v. Knight*⁴⁵⁵ that faculty members do not have a constitutional right to participate in academic governance.⁴⁵⁶

B. The Faculty Member as Expert

When a scholar conceives a new idea it is often met with skepticism, even scorn. The castle walls of orthodoxy are not easily scaled, but that is a good thing. The idea must run through the academic gauntlet to be worthy of joining the pantheon and this can only be accomplished if both

448. *Id.*

449. *Id.* at 948.

450. *Id.* at 947–48.

451. *Id.* 953–66.

452. *Ex Parte Curtis*, 106 U.S. 371, 373 (1882).

453. *Garcetti*, 547 U.S. at 418.

454. Areen, *supra* note 11, at 958.

455. 465 U.S. 271 (1984).

456. *Id.* at 273.

the creator of the idea and her academic peers have the freedom to express their respective professional opinions without fear of retribution, the essence of academic freedom as it was originally conceived.

Robert C. Post has written an important book on the distinction between expression in public discourse and in the role as an expert.⁴⁵⁷ He observed that “three major purposes for the First Amendment” have been put forward over the years:

The first, embodied in the marketplace of ideas theory, is cognitive; the purpose of First Amendment protections for speech is said to be “advancing knowledge and discovering truth.” The second is ethical; the purpose of the First Amendment is said to be “assuring individual self-fulfillment” so that every person can realize his or her “character and potentialities as a human being.” And the third is political; the purpose of the First Amendment is said to be facilitating the communicative processes necessary for successful democratic self-governance.⁴⁵⁸

He refers to the latter purpose as “democratic legitimation,” reflecting the hope that personal views might lead to a belief that citizens are the “potential authors of the laws that bind them.”⁴⁵⁹ The doctrine of content neutrality for public discourse furthers democratic legitimation by “ensuring that public opinion remains open to the subjective engagement of all, even of the idiosyncratic and eccentric.”⁴⁶⁰

Yet as Post observes, “expert knowledge, by contrast, is not to be determined by the indiscriminate engagement of all.”⁴⁶¹ Expert knowledge is often not protected, nor should it be.⁴⁶² Post uses the examples of a doctor who provides bad advice to a patient and a lawyer who gives incompetent legal advice to a client, neither form of expression being shielded by the First Amendment.⁴⁶³ He refers to the first purpose of the First Amendment, to advance knowledge, as “democratic competence,”⁴⁶⁴ which “requires that speech be subject to a disciplinary authority that distinguishes good ideas from bad ones.”⁴⁶⁵ He elaborated on this concept in a lecture at the University of Arkansas:

Put bluntly, if the marketplace of ideas requires that there be no such thing as a false idea, then the marketplace of ideas cannot ever acknowledge any such thing as a true idea. The marketplace

457. POST, *supra* note 439 .

458. *Id.* at 6.

459. *Id.* at 27–28.

460. *Id.* at 28.

461. *Id.* at 29.

462. *Id.* at 45.

463. *Id.*

464. *Id.* at 33.

465. *Id.* at 34.

of ideas requires an equality of status in the field of ideas, but the advancement of knowledge by contrast requires precisely that we distinguish better ideas from worse ideas. In the context of knowledge, especially in the context of the complex forms of expertise that are taught in universities, we require disciplinary norms to distinguish good ideas from bad ideas.⁴⁶⁶

How can courts balance the university's need to evaluate the competency of faculty speech while ensuring that the faculty member is not discouraged from staking out new ground? This delicate balance is critical to academic freedom, yet is rarely discussed and more rarely understood.

The answer must lie in a new framework for academic freedom. Post believes that academic freedom is an "obvious candidate" for the doctrine of "extending First Amendment coverage" to the "creation of expert knowledge."⁴⁶⁷

C. Deference to the Community of Scholars

The road to academic freedom is paved with good intentions, but the Court's academic freedom jurisprudence is in a "state of shocking disarray and incoherence."⁴⁶⁸ Suggestions for clarification and reform come in many forms and from many directions. The Supreme Court expresses a policy of deference to colleges and universities for the Four Essential Freedoms, yet slammed the door on First Amendment protection through a categorical exclusion designed for traditional government agencies.

The starting point for reform is for the Supreme Court to hold that academic speech is exempted from *Garcetti* and the public employee speech analysis. Yet that is only the first step. A new approach is needed, one that is realistic, simple to apply, and furthers the goals of academic freedom. Further, it must account for the differences between the three types of faculty speech.

1. Extramural Speech

Extramural Speech correctly defined covers anything a college or university faculty member expresses outside her academic discipline. The speaker may well be speaking as a citizen about a matter of public concern. If so, the court should apply the public employee speech analysis. The notion that speech within the classroom may not be worthy of the same level of protection as speech made outside the classroom may be shocking to some, but that is because of the Court's failure to clarify both the Caveat and the constitutional basis of academic freedom.

466. POST, *supra* note 439, at 211.

467. *Id.* at 61.

468. *Id.* at 62.

In *Heublein v. Wefald*⁴⁶⁹ a tenured math professor brought a Section 1983 action alleging infringement of his First Amendment speech rights.⁴⁷⁰ The statements were made both inside and outside of the classroom, much of it stemming from allegations of demeaning comments to students over many years.⁴⁷¹ The district court chose to apply a Tenth Circuit test established in 1991,⁴⁷² thus avoiding the per se rule, but noted that even if *Garcetti* was applied “the result would be no different” because the professor had not “alleged that any of his speech related to a matter of public concern.”⁴⁷³ The district court was correct. Making demeaning comments to students inside the classroom or elsewhere should not be protected under any test. The court reasoned that whatever academic freedom might be “it is evident that the freedom is intended only to prevent government action that ‘cast[s] a pall of orthodoxy over the classroom.’”⁴⁷⁴

Expression outside of one’s academic discipline is essential to the public discourse, but no more valid, nor entitled to greater constitutional treatment, than the personal views of any other public employee or citizen.

2. Core Academic Speech

Applying the *Garcetti* per se rule to colleges and universities leads to a surprising result. Core Academic Speech—long believed by faculty to be the most sacred of cows—is the most vulnerable. Robert M. O’Neil explains this bizarre result:

Professors would, in effect be able to speak freely only about matters that are remote from their academic disciplines and expertise, while being denied such protection when speaking or writing within that realm . . . Such a perverse application of *Garcetti*’s notion of “official duties” would effectively deprive the larger community, as well as the academic world, of that information and expertise which university professors are best equipped to derive from their scholarship and research within their academic disciplines.⁴⁷⁵

Curiously, the “public concern” aspect of *Pickering/Connick* does not square well with academic speech. On the one hand, the Supreme Court could well hold that anything relating to teaching and scholarship—at least that which relates to the professor’s discipline—is a matter of public concern because of the importance of colleges and universities to our

469. 784 F. Supp. 2d 1186 (D. Kan. 2011).

470. *Id.* at 1189.

471. *Id.* at 1189–90.

472. *Miles v. Denver Pub. Schools*, 944 F.2d 773 (10th Cir. 1991).

473. *Heublein v. Wefald*, 784 F.Supp. 2d at 1197, n.34.

474. *Id.* at 1199 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

475. Robert M. O’Neil, *Academic Speech in the Post-Garcetti Environment*, 7 FIRST AMEND. L. REV. 1, 20 (Fall 2008).

democracy. Yet “public concern” does not quite capture the principles of academic freedom:

Because the criterion of “public concern” is about reconciling the value of democratic legitimization with the value of organizational effectiveness, it should have nothing to do with triggering First Amendment coverage in matters of academic freedom. The “public concern” test is entirely misplaced in an academic freedom inquiry. First Amendment coverage should be triggered whenever the freedom of the scholarly profession to engage in research and publication is potentially compromised.⁴⁷⁶

Freedom of expression is vital for all Americans but no one “needs it more than the teacher.”⁴⁷⁷ The great paradox is that the teacher when speaking as an expert cannot have unfettered discretion in what is said—the college or university must be able to take adverse action when the speech is incompetent.

Furthermore, too much attention has been paid to the location of the speech rather than the subject matter. When a teacher speaks as an expert, whether in the classroom, in a scholarly journal, at a conference, or giving an interview to the press, she is a representative not only of the college or university, but also of her academic discipline. The speech is worthy of protection for the good of the public as well as the teacher.

For Core Academic Speech there should be a judicial presumption of deference to the college or university for academic decision making. The Court has a solid foundation for deference, beginning with Justice Frankfurter’s statement about the Four Essential Freedoms of “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁴⁷⁸ As Paul Horwitz observed, in *Grutter v. Bollinger*⁴⁷⁹ Justice O’Connor reasoned that due to the “complex educational judgments” in admissions decisions, the Court has a “tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”⁴⁸⁰ Horwitz argues that courts seek a “set of rules by which the law of the First Amendment can be understood as a purely, formally legal phenomenon, untainted by the brute contingencies of the actual world.”⁴⁸¹ In other words, the courts seek acontextuality—a desire to squeeze all speakers, involving all factual scenarios, into one slot.⁴⁸²

476. POST, *supra* note 437, at 84.

477. *Adler v. Bd. of Educ.*, 342 U.S. 485, 508 (1952).

478. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957).

479. 539 U.S. 306 (2003).

480. Horwitz, *supra* note 238, at 1501 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003)).

481. *Id.* at 1504.

482. *Id.* at 1504–05.

Horwitz believes the Court should move towards giving certain institutions a measure of autonomy for self-governance.⁴⁸³ And why should colleges and universities receive this special treatment?

Universities, at their best, are places of discovery, innovation, and heterodoxy. They provide knowledge, debate, and a meaningful foundation to the intellectual, professional, and civic life of students; resources, collegial support, and a haven for the free and unfettered work for scholars; and direct and indirect collateral benefits for the broader society.⁴⁸⁴

Most recently, the Court reiterated its policy of deference in *Christian Legal Society v. Martinez*.⁴⁸⁵ Though speaking in the context of the college or university's right to impose restrictions on student organizations, the principle is the same:

This Court is the final arbiter of the question whether a public university has exceeded constitutional constraints, and we owe no deference to universities when we consider that question. Cognizant that judges lack the on-the-ground expertise and experience of school administrators, however, we have cautioned courts in various contexts to resist "substitut[ing] their own notions of sound educational policy for those of the school authorities which they review."⁴⁸⁶

As Judge Easterbrook succinctly stated that "the only way to preserve academic freedom is to keep claims of academic error out of the legal maw."⁴⁸⁷

Deference does not mean absolute immunity for all college and university decisions. It would be a qualified immunity, a presumption of judicial deference to academic decisions, not a complete delegation of authority. The presumption can be rebutted. Justice Souter in *Board of Regents of the Univ. of Wisconsin v. Southworth*,⁴⁸⁸ a student speech case, explained an analogous situation. The university did not argue that the speech was its own—it was not government commissioned speech.⁴⁸⁹ The Court distinguished student speech from "speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered."⁴⁹⁰ In a concurring opinion, Justice Souter wrote:

483. *Id.* at 1511.

484. *Id.* at 1514.

485. 130 S. Ct. 2971 (2010).

486. *Id.* at 2988 (internal citations omitted).

487. *Feldman v. Ho*, 171 F.3d 494, 497 (7th Cir. 1999), *cert. denied*, 528 U.S. 928 (1999).

488. 529 U.S. 217 (2000).

489. *Id.* at 229.

490. *Id.* at 235.

While we have spoken in terms of a wide protection for the academic freedom and autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching (as the majority recognizes . . .), we have never held that universities lie entirely beyond the reach of students' First Amendment rights. Thus our prior cases do not go so far as to control the result in this one, and going beyond those cases would be out of order, simply because the University has not litigated on grounds of academic freedom. As to that freedom and university autonomy, then, it is enough to say that protecting a university's discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees.⁴⁹¹

Using the same reasoning, colleges and universities would not lie beyond the reach of faculty speech. The presumption of deference can be overcome when a faculty member shows that the institution has infringed her First Amendment rights for reasons other than legitimate academic reasons. The reviewing court must have the discretion to intercede to ensure that the institution is not abusing its qualified immunity.

3. *Intramural Speech*

Intramural Speech is the outlier. Courts rarely give it much attention, let alone deem it worthy of First Amendment protection for several reasons. First, it is difficult for anyone outside the ivied walls to appreciate the autonomy faculty have in academic decisions, not because of formal lines of authority so much as because of the tradition of Professional Academic Freedom. Second, governance activities must appear to outsiders like mundane administrative matters, with endless committees, subcommittees, and ad hoc task forces. What could that possibly have to do with scientific discovery? Finally, the Caveat itself made no mention of college or university service or governance. Perhaps it was an oversight, but I doubt it.

The weakness of deference is that while it is necessary for democratic competence, it potentially grants too much authority to institutional bureaucracy and politics. Constitutional protection of college and university governance activities introduces an antidote. Protecting the speech of a faculty member who serves on a tenure committee, as one example, discourages improper motives for tenure decisions by raising the specter that outside light may be shined upon the process. To disallow protection would have the opposite effect.

In *University of Pennsylvania v. EEOC*⁴⁹² the university argued that

491. *Id.* at 238–39.

492. 493 U.S. 182 (1990).

forcing it to turn over tenure review files would create a chilling effect in the review process, making it less likely that the committee members would make candid evaluations.⁴⁹³ The Court rejected this argument, in part because the subpoena by the EEOC did not affect the Four Essential Freedoms.⁴⁹⁴ Declining to define the “precise contours of any academic-freedom right,”⁴⁹⁵ the Court noted that when the “government attempts to direct the content of speech at public educational institutions, complicated First Amendment issues are presented because government is simultaneously both speaker and regulator.”⁴⁹⁶ Ironically, the Court refused the university’s request for an “*expanded* right of academic freedom to protect confidential peer review materials from disclosure.”⁴⁹⁷

What I am suggesting is that the Court should include Intramural Speech—governance activities related to the Four Essential Freedoms—within the ambit of protected academic speech, to make sure that the governance process is not tainted. In short, including Intramural Speech in the protected zone of academic freedom helps to provide the counterweight to deference. Deference is essential for the development of knowledge for the highest quality of scholarship. However, without protecting Intramural Speech, the constitution cannot touch the internal governance processes constructed over time to guarantee academic excellence.

VI. CONCLUSION

Garcetti is an enigma. It clashes with two constitutional principles. The first is the harm to the public interest by endangering the citizen servant, those who serve with the best of civic intentions, combining their avocations with vocations, as Justice Souter noted.⁴⁹⁸ The second is the threat to academic freedom.

The Court should overturn *Garcetti*, eliminate the per se rule, and at a minimum, return to the original *Pickering/Connick* test. Short of that, the Court should adopt the modified approach proposed in this article. By making the initial inquiry turn on whether the subject matter of the speech relates to job duties, the Court can focus attention on the importance of the government’s role as employer. Speech outside of job duties would be subjected to the same standard in use for more than forty years.

If the speech relates to job duties, the reviewing court would determine the relative value of the speech. If it were of substantial interest to the public, the court would apply the *Pickering* balance test. This approach ensures that the public interest is not relegated to second class status, but

493. *Id.* at 196–97.

494. *Id.* at 198.

495. *Id.*

496. *Id.* at n.6.

497. *Id.* at 199.

498. *Garcetti v. Ceballos*, 547 U.S. 410, 432.

rather to its rightful place.

Though fixing the *Garcetti* problem for public employee speech mitigates the harm to academic freedom, it does not address the fundamental problem that speech in the public arena is very different from academic speech. Therefore, the Court should exempt academic speech from the public employee speech doctrine once and for all, clarifying the Caveat. In addition, the Court should apply its tradition of deference to the college or university, not as a corporeal entity, but to the community of scholars, for expression by faculty within their academic disciplines. To ensure the autonomy granted to college or universities is not abused, the Court should also grant constitutional protection to the shared governance activities of faculty.

“IT GOT TOO TOUGH TO NOT BE ME”¹: ACCOMMODATING TRANSGENDER ATHLETES IN SPORT

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I. INTRODUCTION	468
II. RECENT EXAMPLES OF TRANSGENDER OR INTERSEXED ATHLETES.....	471
III. DO TRANSGENDER ATHLETES HAVE AN ADVANTAGE IN COMPETITION?	474
IV. CURRENT REGULATIONS	476
A. Olympic and Professional Levels	476
B. Intercollegiate Level.....	483
C. Interscholastic Level	487
D. Additional Guidance from the ON THE TEAM Report	490
V. LEGAL IMPLICATIONS FOR TRANSGENDER INDIVIDUALS.....	495
A. Title VII of the Civil Rights Act of 1964.....	495
B. Title IX of the Education Amendments of 1972	499
C. Equal Protection Clause	500
D. State Statutes and Case Law	501
E. Compliance with Federal and State Antidiscrimination Laws ...	503

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1. *Got Too Tough to Not Be Me*, ESPN (Nov. 3, 2010), <http://sports.espn.go.com/ncw/news/story?id=5761244> (quoting Kye Allums, a transgender athlete on George Washington University’s women’s basketball team, referring to the difficult decision to start identifying himself as a male in order to match his internal sense of gender identity).

VI. PROPOSED SOLUTIONS.....	505
A. Interscholastic Level.....	505
B. Intercollegiate Level.....	507
VII. CONCLUSION	508

I. INTRODUCTION

Starting in elementary school, most children are separated into male and female teams for purposes of organized sport competition.² For most participants, this is a perfectly logical division and one that does not even cross their minds. A male plays on the boys' team; a female plays on the girls' team. But for some athletes, such a division is an agonizing process. Athletes who are transgender³ have an internal sense of gender identity⁴ different from their gender assigned at birth.⁵ These athletes are forced to choose between what gender their biological anatomy says they are versus what their heart and mind say they are when deciding whether to play on a men's or a women's athletics team. Sometimes, these athletes do not even have a choice: they must play on the team of their biological sex, which can lead to extreme discomfort and psychological pain for the athlete.

2. There are, of course, exceptions. Physical education programs in many states are co-educational due to a lack in funding for separate teachers or facilities. Furthermore, when very young children begin playing a sport, they may be on mixed-sex teams for a few years. Finally, there are a few sports that are not separated into co-ed teams, such as archery, equestrian and shooting. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, CURRENT NCAA POSITION REGARDING TRANSGENDER STUDENT ATHLETE PARTICIPATION AND RESOURCE LIST 7 (July 30, 2009), *available at* www.transgenderlaw.org/resources/NCAA_Policy.pdf (hereinafter "2009 NCAA POSITION").

3. The term "transsexual" is not in use anymore. This term is viewed as outdated and was used in the past to describe a person who "underwent a 'sex change' operation." Transgender athletes may or may not have undergone a sex change operation. BRENDA WAGMAN, INCLUDING TRANSITIONING & TRANSITIONED ATHLETES IN SPORT: ISSUES, FACTS & PERSPECTIVES 5 (Feb. 12, 2009). Furthermore, it should be noted that the concept of "sexual orientation" is a completely different concept from being transgender and "refers to a person's attraction to a sexual partner of the opposite physical sex (heterosexual) or same physical sex (homosexual) or both sexes (bisexual)." *Id.* at 6. Since it is a completely separate issue, it has no bearing on the concept of being transgender and will not be addressed in this Article.

4. "Gender identity" is "a person's own internal sense of being female or male, or in between, regardless of his or her physical sex characteristics." *Id.* at 5 *citing* KEVIN B. WAMSLEY, SPORT AND TRANSITIONING/TRANSITIONED ATHLETES: A REVIEW OF THE SOCIAL SCIENCE LITERATURE 3 (Feb. 2008), *available at* [www.caaws.ca/e/resources/pdfs/Wamsley_lit_review\(2\).pdf](http://www.caaws.ca/e/resources/pdfs/Wamsley_lit_review(2).pdf).

5. DR. PAT GRIFFIN & HELEN J. CARROLL, ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES 6, app. A (Oct. 4, 2010). "Transgender" can also "be used as an 'umbrella term' to describe anyone whose identity or behavior falls outside of stereotypical gender norms." *Id.* at app. A.

The idea that gender identity is a fluid concept is different from many people's perception that gender is fixed at birth by one's biological sex. Gender is a core part of our identity, but it "is more complex than our society generally acknowledges."⁶ Further complicating the ideas of "gender" and "gender identity" is the fact that people can be "intersexed," meaning they have anatomical characteristics of both men and women.⁷ Sex "is determined by the physical presence of particular external genitalia, chromosome structures and hormones."⁸ A person's sex can either match their concept of their own gender identity or run counter to their self-perceived gender identity. When a person is intersexed, his or her parents sometimes try to determine the child's gender identity at birth. As the intersexed child grows and matures, he or she can either agree with the chosen gender identity or internally identify with a different gender. The person might not be able to play on a sports team with others of their internally-identified gender, however, because the person possesses the biological characteristics of a different sex.

There is currently a need for standards governing the inclusion of transgender athletes. High school and college are formative years in a young person's life, and the time during which some may begin to question their own concepts of their gender identity. For student-athletes, implementation of such policies will give those questioning their gender identity the opportunity to do so in a safe space. Furthermore, ignoring the issue can have significant legal consequences. Most professional sports leagues and school athletic programs have no policy governing the inclusion of transgender athletes.⁹ The National Collegiate Athletic Association ("NCAA") took a major step forward in September of 2011, when it announced its formal policy on the issue.¹⁰ However, there is still a great need for standards and policies at the interscholastic level, and the NCAA needs to work hard to implement its new policy. It is important to strive for these goals as a young athlete may begin to question their own

6. *Id.* at 11.

7. WAGMAN, *supra* note 3, at 4. The term "intersexed" has replaced the term "hermaphrodite," which was commonly used in the past and is used to refer to a variety of biological conditions. *Id.* One example of such a condition is "Androgen Insensitivity Syndrome." People with this abnormality have sex organs that appear to be "female" at birth and early in life, but "develop into male genitalia during puberty." *Id.* at 5. Thus, they appear to have XX chromosomes at birth, but really have XY chromosomes, which does not become apparent until many years later. *Id.* This can obviously be a very traumatic discovery for both the individual and the family.

8. *Id.* at 4.

9. GRIFFIN & CARROLL, *supra* note 5, at 7.

10. National Collegiate Athletic Association, *Transgender policy approved*, Marta Lawrence (Sept. 13, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/September/Transgender+policy+approved> (hereinafter CURRENT NCAA POSITION.)

concept of their gender identity during the formative years they spend participating in athletics at the intercollegiate level. Implementation of the policy will give those questioning their gender identity the opportunity to do so in a safe space. Furthermore, ignoring the issue and not working toward the inclusion of transgender athletes in sports participation may have significant legal consequences.

This Article will argue that there is a need for standards to ensure that the transgender student-athlete does not encounter problems with participation due to inconsistent rules for state eligibility, conference and tournament eligibility, and national competitive tournaments.¹¹ Furthermore, inclusion,¹² equal opportunity, and acceptance should be the goals¹³ when establishing such standards. It was not too long ago that African Americans were not allowed to compete with whites in sports, and women were not allowed to compete in sports at all. Just as there was a fundamental moral argument and movement to allow different groups of people to compete, it should be the same for transgender athletes.¹⁴ Finally, such standards should be the goal because of the numerous positive effects of athletic participation, including, physical, social and emotional well-

11. GRIFFIN & CARROLL, *supra* note 5, at 7, 22.

12. While it is important to be inclusive in sports in order to have a level playing field, sports must be *exclusive* in some aspects as well in order to have level playing fields. Weight classes, age categories and qualifying trials are all exclusive criteria that “are integral to an equitable system for judging ability in the realm of sport.” WAGMAN, *supra* note 3, at 7. The key is to strike the delicate balance between the exclusive factors that equalize the playing field and the inclusive factors that also lead to equality of participation for all.

13. GRIFFIN & CARROLL, *supra* note 5, at 10; WAGMAN, *supra* note 3, at 6. Many entities have recognized these goals. The Canadian Sport Policy “upholds the principle that ‘[s]port is welcoming and inclusive offering an opportunity to participate without regard to age, gender, race, language, sexual orientation, disability, geography, or economic circumstances.’” WAGMAN, *supra* note 3, at 6 *citing* Sport Canada, “*The Canadian Sport Policy*,” Sport Canada (May 24, 2002) available at <http://www.pch.gc.ca/pgm/sc/pol/pcs-csp/2003/polsport-eng.pdf>. The International Olympic Committee states in reference to the harassment and discrimination that occurs in regards to transgender athletes that “[e]veryone in sport shares the responsibility to identify and prevent sexual harassment and abuse and to develop a culture of dignity, respect and safety in sport.” INTERNATIONAL OLYMPIC COMMITTEE, IOC ADOPTS CONSENSUS STATEMENT ON SEXUAL HARASSMENT AND ABUSE IN SPORT (Feb. 8, 2007), available at http://multimedia.olympic.org/pdf/en_report_1125.pdf (hereinafter IOC CONSENSUS STATEMENT). Finally, the NCAA has stated that the “NCAA core values include a commitment to creating and supporting an inclusive culture that fosters equitable participation for student athletes [sic] and career opportunities for coaches and administrators from diverse backgrounds.” 2009 NCAA POSITION, *supra* note 2, at 1.

14. See generally Donna Ross, *Transsexual Athletes Treated Unfairly*, CNN Opinion (Oct. 20, 2010), <http://www.cnn.com/2010/OPINION/10/18/rose.transsexuals.sports/index.html?iref=allsearch>.

being, self-discipline, teamwork, and learning how to deal with success and failure.¹⁵

In arguing for such inclusive standards, Part III will answer the question of whether transgender athletes truly have an advantage in competition or whether this is an outdated stereotype by reviewing scientific evidence. Part IV will examine the regulations currently in place in different levels of sport: the professional and Olympic levels, the intercollegiate level, and the high-school, or interscholastic, level. In addition, guidance from a report co-sponsored by the National Center for Lesbian Rights, the Women's Sports Foundation, and It Takes a Team! will be examined.¹⁶ Part V will discuss the current legal protections available to transgender individuals under Title VII of the Civil Rights Act, the Equal Protection Clause of the United States Constitution, Title IX of the Education Amendments of 1972, and applicable state statutes. Finally, in Part VI, a "best practice" solution based on these different models and statutes will be proposed for the interscholastic and intercollegiate levels, which, as previously stated, are crucial times during which young people may begin to question their gender identity. Transgender athletes should be able to see exactly how they will be supported in their athletic endeavors during these times.

II. RECENT EXAMPLES OF TRANSGENDER OR INTERSEXED ATHLETES

Several examples of transgender or intersexed athletes have become prominent in the national news media. In 2009, Caster Semenya of South Africa won the 800 meter race at the Track and Field World Championships through a stunning performance where she took the lead halfway through the race, never relinquished it, and won by 2.45 seconds.¹⁷ The World Track and Field Federation subsequently requested a gender test, requiring a "physical medical evaluation, and . . . reports from a gynecologist, endocrinologist, psychologist, an internal medicine specialist and an expert on gender."¹⁸

More recently, Fallon Fox, a mixed martial arts ("MMA") fighter revealed that she was born a male and had undergone a sex change surgery in 2006.¹⁹ Fox now competes against other females in MMA. Of her

15. GRIFFIN & CARROLL, *supra* note 5, at 6.

16. *See generally* GRIFFIN & CARROLL, *supra* note 5.

17. ESPN.com news services, *Semenya wins 800 meters*, ESPN OLYMPIC SPORTS (Aug. 20, 2009), <http://sports.espn.go.com/oly/news/story?id=4409318>.

18. *Id.* The results of the test eventually cleared Semenya to compete as a woman, nearly a year after her win in the 800 meters at the World Championships. Aina Hunter, *Caster Semenya Can Run With the Women; It's Official*, CBS NEWS HEALTH WATCH (July 6, 2010), http://www.cbsnews.com/8301-504763_162-20009781-10391704.html.

19. *How Fallon Fox became the first known transgender athlete in MMA*, SPORTS ILLUSTRATED (March 7, 2013), <http://sportsillustrated.cn..com/mma/news/20130307/fallon-fox-profile/>.

difficult decision to reveal her sex-change surgery Fox has said, “This wasn’t something that I wanted to come out It’s not something I like to discuss with people, but I’ve been bracing for this for years, thinking when was the phone call going to come?”²⁰ In 2012, the Association of Boxing Commissions adopted a policy on transgender fighters,²¹ however Fox is currently battling licensure issues in Florida and California unrelated to her failure to identify herself as a transsexual prior to her MMA fights.²²

Lana Lawless is an example of a transgender athlete in professional sports, namely the Ladies Professional Golf Association (“LPGA”). Lana is a transgender athlete who had sex-reassignment surgery and is “legally, socially [and] physically . . . female.”²³ However, the LPGA passed a bylaw that required that participants be “female-born” to compete.²⁴ Lawless sued the LPGA over the bylaw, claiming it violated California state civil rights laws.²⁵ As a result of the suit, the LPGA players voted to allow transgender players to compete.²⁶

Keelin Godsey is an example of a transgender athlete in the NCAA realm. Keelin was a member of the Bates College women’s track team and threw the hammer, weight, and discus.²⁷ Keelin, who graduated in 2006,

20. *Id.*

21. *See* The ABC Medical Committee’s Suggested Guidelines to Commissioners Concerning the Health and Safety of Combat Sports Participants, July 2012, at <http://www.mixedmartialarts.com/files/transgen.pdf> (the “ABC Guidelines”). The ABC Guidelines state that “individuals undergoing sex reassignment from male to female prior to puberty” should be regarded as female. *Id.* However, “individuals undergoing sex reassignment from male to female after puberty” are eligible to participate as females after sex reassignment surgery has been completed, including “external genitalia and gonadectomy,” and the fighter has received hormone therapy for a minimum of two years after the surgery. *Id.* Individuals having sex reassignment surgery from female to male after puberty are eligible to participate in MMA fights as males after they have received “hormone therapy appropriate for the assigned sex.” *Id.* The ABC Guidelines do not apply a specific time period for such hormone therapy for female-to-male transsexuals.

22. *How Fallon Fox became the first known transgender athlete in MMA*, SPORTS ILLUSTRATED (March 7, 2013), <http://sportsillustrated.cn.com/mma/news/20130307/fallon-fox-profile/>.

23. Ross, *supra* note 14.

24. *Id.*

25. Associated Press, *Suit challenges “female at birth” rule*, ESPN (Oct. 13, 2010), <http://sports.espn.go.com/golf/news/story?id=5682065>. Lawless said in a statement, “I am, in all respects, legally, and physically female. The state of California recognizes me as such and the LPGA should not be permitted to come into California and blatantly violate my rights. I just want to have the same opportunity to play professional golf as any other woman.” *Id.*

26. Associated Press, *LPGA scraps “female at birth” policy*, ESPN (Dec. 1, 2010), <http://sports.espn.go.com/golf/news/story?id=5869693>.

27. *Transgender Athletes, College Teams*, INSIDE HIGHER ED (Oct. 5, 2010), <http://www.insidehighered.com/news/2010/10/05/trans>.

identifies as a man.²⁸ Keelin wanted to transition from a woman to a man, but did not want to let down his team.²⁹ During his senior year, however, he made the decision to start identifying as a man, changed his first name, and started having others (including his teammates) refer to him with male pronouns.³⁰ He did not take medications to aid in his transition or have surgery and thus, continued to compete for the women's team.³¹

Similarly, Kye Allums, a former member of George Washington University's women's basketball team, was born a female, but identifies as a male.³² Kye could not have surgery or start taking testosterone as long as he wanted to play on the women's team. However, he started taking steps to change his name and have people refer to him using male pronouns during his playing career at George Washington University.³³ Kye has been referred to as the "first publicly transgender person" to play NCAA Division I college basketball.³⁴ Kye wanted to finish his basketball career before he came out as a transgender athlete, but explained, "It got too tough. It got too tough to not be me. People would call me a girl and say, 'she' and refer to me as someone I knew I wasn't."³⁵ During his time at George Washington University, Kye said he found a lot of support from his coach and teammates.³⁶ This is, however, not always the case; athletes can struggle for years with whether to come out as transgender or whether to continue to silently suffer.

Why is this issue such a point of contention? First, many contend that allowing a biological male who identifies as a female or a biological female who is taking hormonal medications to transition to a male to participate on a women's team affords an unfair competitive advantage. The question

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Associated Press, *supra* note 1. Kye says, "I didn't choose to be born in this body and feel the way I do. I decided to transition . . . I am trying to help myself and others to be who they are." Associated Press, *Transgender Kye Allums to play for GW*, ESPN (Nov. 5, 2010), <http://sports.espn.go.com/ncw/news/story?id=5758450>.

33. Associated Press, *supra* note 1.

34. *Id.*

35. *Id.* During high school, Kye thought perhaps he was a lesbian, but during an argument when his mother texted him the message: "Who do you think you are, young lady?" Kye thought that "[m]aybe . . . he wasn't a young lady after all." *Id.*

36. *Id.* Kye's coach, Mike Bozeman, says, "My initial reaction was that I support Kye to make that decision. I'm a basketball coach, that's what I do. My players are a basketball family, and I just immediately felt I needed to support Kye in any way possible—as I would any other student athlete [sic] under my watch." *Id.* In regards to the support Kye has received, he states, "[George Washington University] has been supportive during this transition. This means a lot." Associated Press, *Transgender Kye Allums to play for GW*, ESPN (Nov. 5, 2010), <http://sports.espn.go.com/new/news/story?id=5758450>.

becomes: at what point should a transitioning or transitioned athlete be allowed to compete on the team with which they identify?

III. DO TRANSGENDER ATHLETES HAVE AN ADVANTAGE IN COMPETITION?

There have long been stereotypes that men are bigger, faster, and stronger than women. Beyond what can be seen with the naked eye, is this assumption supported by scientific evidence? Answering this question is key when determining how to best accommodate transgender athletes.

A biological male athlete who identifies as a woman and wants to play on a women's team may have a competitive advantage over her fellow female competitors due to her naturally higher levels of testosterone. Some critics also argue that some men may pretend to be transgendered just to gain a competitive advantage in sport. Further, at what point should a biological male who is actively medically transitioning to become a female be allowed to compete on women's teams? Similarly, at what point must a biological female who is transitioning to become a male be forced to leave the women's team he has been competing on, for perhaps years, and compete on the men's team?³⁷ Some may argue that a woman who is transitioning to become a man and is taking testosterone may have a competitive advantage due to the fact that he will have higher levels of testosterone than naturally-born males. Finally, what happens when an intersexed athlete who identifies as a female has higher levels of testosterone than biological females due to a biological abnormality?³⁸

Differences in testosterone and estrogen levels lead to men outperforming women in athletic events by approximately eleven to eighteen percent.³⁹ Men are taller, have greater muscle mass, less body fat, greater aerobic and anaerobic capacity, greater lung capacity, and greater strength than women.⁴⁰ However, even though some of the stereotypes are

37. This was the issue faced by Keelin Godsey and Kye Allums who postponed taking hormones and beginning medical transition to become males in order to continue to compete on their respective women's teams.

38. This was the issue in the case of Caster Semenya who was eventually cleared to continue competing as a woman. *See supra* note 18.

39. MICHAELA C. DEVRIES, PHD, DO TRANSITIONED ATHLETES COMPETE AT AN ADVANTAGE OR DISADVANTAGE AS COMPARED WITH PHYSICALLY BORN MEN AND WOMEN: A REVIEW OF THE SCIENTIFIC LITERATURE 4–7 (May 18, 2008) available at [www.caaws.ca/e/resources/pdfs/Devries_lit_review\(2\).pdf](http://www.caaws.ca/e/resources/pdfs/Devries_lit_review(2).pdf) citing Combon, 1996.

40. *Id.* Not all physiological factors favor men. Some favor women or are neutral. Women benefit from a better ability to fuel moderate or high intensity exercise for longer periods of time because they use less carbohydrate stores and more fat due to the fact that they have more fat stores and intramyocellular lipids, which are a more readily available energy source stored within muscle. Cardiac output is a neutral factor as it is similar for men and women. WAGMAN, *supra* note 3, at 13.

confirmed, given the fact that “there is a vast range of . . . physiological variation”⁴¹ between all people, should society be all that concerned when looking at the human population as a whole and comparing the sexes? The answer is yes. In 2008, there was a 17.2% difference between the world records⁴² for men and women in the high jump, a 22.6% difference in the pole vault, and a 37.4% difference in the javelin.⁴³

Most of the general public is aware that one of the main differences between men and women is the difference in hormones between the sexes. While both sexes have *some* levels of testosterone and estrogen, men have much higher levels of testosterone while women have much higher levels of estrogen.⁴⁴ Testosterone regulates muscle mass, and “testosterone supplementation can increase strength by [approximately five to twenty percent].”⁴⁵ Thus, biological males who identify as female, biological females who are taking hormone therapies but still competing with other females, or intersexed athletes who identify as female but have higher levels of testosterone than biological females may have competitive advantages over other biological females. Similarly, biological females who are taking testosterone may have higher levels of the hormone than biological males and, thus, may have a competitive advantage over biological males.

If a transgender athlete takes hormones, or if the athlete is intersexed and naturally has higher levels of one hormone, does this give him or her an extreme competitive advantage compared to naturally-born males and females? Perhaps surprisingly, the evidence shows that male-to-female transitioned women have similar levels of testosterone and estrogen as biological women have.⁴⁶ Thus, once a male-to-female transgender athlete has fully transitioned, there should not be much concern over any perceived competitive advantages. Female-to-male transitioned males have higher testosterone *and* estrogen levels as compared to naturally-born men.⁴⁷ The proposed solution of some experts and physicians is to use long-acting testosterone to prevent the “peaks and troughs” of testosterone in the body normally associated with testosterone injections.⁴⁸ This would help level out the “advantage” transitioned males would have and would help them pass drug tests.⁴⁹

However, even though there is evidence of varying levels of hormones

41. WAGMAN, *supra* note 3, at 13.

42. World records are as of May 18, 2008.

43. DEVRIES, *supra* note 39, at 4.

44. *Id.* at 7.

45. *Id.* at 8.

46. *Id.* at 10.

47. *Id.*

48. *Id.*

49. *Id.* at 11.

in transitioned individuals, there is a total lack of scientific data concerning whether transitioned athletes actually *outperform* naturally-born men and women on the playing field.⁵⁰ The prevailing scientific view is that “fewer than [two] years may be required to minimize the effects of sex hormone exposure prior to transition on sport performance.”⁵¹ Thus, the concerns about competitive performance advantages may be overblown, but more data needs to be compiled before this can be stated with certainty.

IV. CURRENT REGULATIONS

Current regulations vary widely across different levels of sport. The International Olympic Committee, for example, has a different policy from that of the United States Golf Association, from that of the NCAA, and from that of the Washington Interscholastic Activities Association. Each policy takes into account different values, goals and considerations. This part of the Article will detail the differing policies and will end with “best practice” suggestions from a professional think-tank.

A. Olympic and Professional Levels

The International Olympic Committee’s (“IOC”) policy is still developing,⁵² but the IOC has a rich, albeit perhaps denigrating and humiliating, history in this area. In the 1960s, the IOC implemented sex-verification testing, focusing on female sports since the prevailing belief at the time was that the competitive “advantage went in one direction—there could only be an athletic advantage for males competing as females, and not the reverse.”⁵³ The verification initially consisted of a “humiliating visual examination of female athletes’ genitals.”⁵⁴ In 1968, chromosome testing was introduced, but it was replaced by DNA-based testing in 1992.⁵⁵ Due perhaps partially to the fact that sex-verification testing “has been a harmful, damaging, humiliating process fueled by inaccurate scientific assumptions and tests which do not accommodate the continuum that exists between maleness and femaleness,”⁵⁶ the IOC has not used any sex-verification testing from the year 2000 onwards, but has reserved the

50. *Id.* at 11–15.

51. *Id.* at 15.

52. Anna Peterson, Comment, *But She Doesn't Run Like a Girl . . . : The Ethic of Fair Play and the Flexibility of the Binary Conception of Sex*, 19 TUL. J. INT'L & COMP. L. 315, 331–32 (2010) (discussing how the IOC policy related to intersexed and transgendered athletes is still developing and will probably depend largely on whether the athlete has undergone any medical treatment).

53. WAGMAN, *supra* note 3, at 9.

54. *Id.*

55. *Id.*

56. *Id.* at 10.

right to use the test if considered necessary.⁵⁷

In 2003, the IOC Medical Commission met in Stockholm “to discuss and issue recommendations on the participation of individuals who have undergone sex reassignment . . . in sport.”⁵⁸ The Commission concluded that, to participate with the gender he or she currently identifies with, an athlete must have undergone sex reassignment surgery prior to puberty *or* must meet the following conditions: (1) the athlete must have had sex reassignment surgery⁵⁹ at least two years prior to the competition; (2) the athlete must be legally recognized by the appropriate authorities as a member of the athlete’s new sex; and (3) cross-sex hormones must have been administered in a verifiable manner and for a sufficient length of time to minimize any associated advantages in sport competitions as determined on a case-by-case basis.⁶⁰ The Commission also concluded that the medical delegate has the authority to take “all appropriate measures for the determination of the gender of a competitor.”⁶¹ This is a very vague standard and is perhaps reminiscent of the extreme sex verification procedures that were used in years prior. Furthermore, this policy noticeably does not cover athletes who are currently undergoing hormone therapies but have not had or completed sex reassignment surgery.

Even if a transgender athlete meets IOC guidelines still must comply with the World Anti-Doping Code (“the Code”), which applies to athletes competing at certain levels of sport, including the national and international levels.⁶² An athlete has committed a violation of the Code if there is a valid detection of a prohibited substance in the athlete’s sample.⁶³ Prohibited substances include testosterone and estrogen that originate from a source outside the body.⁶⁴ If, however, there is a pre-existing and medically valid reason for the use of the prohibited substance *and* a valid therapeutic use exemption (“TUE”) has been granted in advance, there is no violation.⁶⁵ Thus, transitioning and fully-transitioned transgender athletes must submit for a TUE “to use testosterone or estrogen supplementation prior to

57. *Id.* at 9.

58. IOC MEDICAL COMMISSION, STATEMENT OF THE STOCKHOLM CONSENSUS ON SEX REASSIGNMENT IN SPORTS (Oct. 28, 2003), *available at* http://multimedia.olympic.org/pdf/en_report_905.pdf (hereinafter “STOCKHOLM CONSENSUS”).

59. Sex reassignment surgery must include the completion of surgical anatomical changes, including external genitalia changes and a gonadectomy. *Id.* A “gonadectomy” is the physical removal of ovaries or testes. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 977 (3d ed. 1986).

60. STOCKHOLM CONSENSUS, *supra* note 58.

61. *Id.*

62. WAGMAN, *supra* note 3, at 18.

63. *Id.*

64. *Id.*

65. *Id.*

participation in any sport activity subject to doping control.”⁶⁶ A panel of independent physicians decides whether to grant a TUE using four criteria:

- (1) whether the athlete would experience a significant impairment to health if the prohibited substance or method were to be withheld in the course of treating an acute or chronic medical condition;
- (2) whether the therapeutic use of the substance would produce no additional enhancement of performance other than that which might be anticipated by a return to a state of normal health following the treatment of a legitimate medical condition;
- (3) whether there is no reasonable therapeutic alternative to the use of the otherwise prohibited substance or method; and
- (4) whether the necessity for the use of the otherwise prohibited substance or prohibited method is a consequence, wholly or in part, of the prior use, without a TUE, of a substance or method which was prohibited at the time of use.⁶⁷

The athlete can appeal the decision, or the World Anti-Doping Agency, “on its own initiative or upon request, can review and can reverse the granting or denial of any TUE.”⁶⁸ Finally, any decision regarding a TUE made by the World Anti-Doping Agency can be appealed to the Court of Arbitration for Sport, whose ruling is final.⁶⁹

In 2007, the IOC issued a Consensus Statement on Sexual Harassment and Abuse in Sport (“IOC Consensus Statement”) with the aims of improving the health and protection of athletes through the promotion of effective preventive policy, and increasing awareness of these problems among the people in the entourage of athletes.⁷⁰ The IOC Consensus Statement mentions research which “indicates that sexual harassment and abuse happen in all sports and at all levels, with a greater prevalence in

66. *Id.* at 19.

67. WORLD ANTI-DOPING AGENCY, THE WORLD ANTI-DOPING CODE INTERNATIONAL STANDARD THERAPEUTIC USE EXEMPTIONS clause 4.1(Nov. 3, 2009), available at http://www.wada-ama.org/documents/world_anti-doping_program/wadp-is-tue/2011/wada_istue_2011_en.pdf. It has been advised that the panel should use these guidelines in its entirety and “not merely judge aspects of an application in isolation.” WAGMAN, *supra* note 3, at 19. However, the decisions “are discretionary and entirely fact dependent. *Id.* One major consideration is “whether the sex hormone supplementation would result in testosterone and estrogen levels within the normal range for [the athlete’s] new sex.” *Id.*

68. WAGMAN, *supra* note 3, at 20.

69. *Id.*

70. IOC CONSENSUS STATEMENT, *supra* note 13, at 1.

elite sport [with] [m]embers of the athlete's entourage who are in positions of power and authority" being the primary perpetrators.⁷¹ The IOC felt compelled to issue a statement due to the fact that sexual harassment and abuse can "seriously and negatively impact . . . [the] physical and psychological health," of athletes as well as their drop-out rate.⁷²

The IOC's focus on sexual harassment relates to transgender athletes because "gender harassment, hazing and homophobia are all aspects of the sexual harassment and abuse continuum in sport."⁷³ Gender harassment is defined as "derogatory treatment of one gender or another which is systematic and repeated but not necessarily sexual," while homophobia is defined as "a form of prejudice and discrimination ranging from passive resentment to active victimization of lesbian, gay, bisexual and transgendered people."⁷⁴

The IOC Consensus Statement recommends that every sport organization should have a policy that states its intent to create a safe and mutually respectful environment that allows it to "generate prompt, impartial and fair action when a complaint or allegation is made . . . [and] allows it to take disciplinary, penal and other measures, as appropriate."⁷⁵ Furthermore, the organization should establish a code that "describe[s] acceptable standards of behavior," and it should implement a policy that sets "clear benchmark[s] for what is acceptable and unacceptable."⁷⁶ Finally, the IOC Consensus Statement recommends analyzing the "impact of these policies in identifying and reducing sexual harassment and abuse."⁷⁷

To (perhaps) further complicate matters, the IOC is seen as the "supreme authority" of the Olympic Movement, which also includes International Sport Federations ("IFs"), National Olympic Committees, and Organizing Committees of the Olympic Games.⁷⁸ The relationship between the four groups is described as "symbiotic [because] [t]he constituent organizations retain their autonomy while participating in a mutually reinforcing process."⁷⁹ The thirty-five IFs correspond to a different sport and have the authority to govern their individual sport as long as they conform to the

71. *Id.* at 1, 4. It should be noted that the "research" the IOC mentions is not supported by any hard evidence in the IOC Consensus Statement.

72. *Id.* at 1.

73. *Id.* at 3.

74. *Id.*

75. *Id.* at 4.

76. *Id.* at 5. The IOC contends that doing so will "help minimize opportunities for sexual harassment and abuse and unfounded allegations." *Id.*

77. *Id.*

78. Peterson, *supra* note 52, at 324–25.

79. *Id.* quoting James A.R. Nafziger, *International Sports Law* 18–19 (2d ed. 2004).

Olympic Charter.⁸⁰

Not every IF has a gender verification policy, but the International Association of Athletics Federation (“IAAF”), which governs track and field, does.⁸¹ According to that policy, there is no compulsory standard or regular gender verification during championships.⁸² If an athlete’s gender is “challenged” (most likely by a competitor), then the athlete will be subjected to a medical exam.⁸³ The determination is not based solely on lab-based sex determination, but includes input from a panel comprised of a gynecologist, an endocrinologist, a psychologist, an internal medicine specialist, and an expert on gender/transgender issues, with an “initial check” being done by a medical delegate.⁸⁴

The policy goes on to state that if surgery and hormone therapy have occurred *before puberty*, a male-to-female athlete can compete as a female.⁸⁵ If surgery and hormone therapy have occurred *after puberty*, the athlete must wait two years after a gonadectomy before she is allowed to undergo a physical and endocrinological exam.⁸⁶ The IAAF policy states that it is mainly concerned that an athlete should not be enjoying the benefits of natural testosterone predominance that is normally seen in a biologically-born male.⁸⁷

Some biological conditions *are* allowed in a male-to-female athlete under the IAAF policy, including those conditions that accord *no advantage* over other females such as androgen insensitivity syndrome,⁸⁸ or gonadal dysgenesis,⁸⁹ which is another name for Turner’s syndrome.⁹⁰

80. Peterson, *supra* note 52, at 325.

81. *See generally* INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS, IAAF POLICY ON GENDER VERIFICATION (2006) *available at* <http://www.iaaf.org/mm/document/imported/36983.pdf> (*hereinafter* IAAF POLICY).

82. *Id.* at 2.

83. *Id.*

84. *Id.*

85. *Id.* Notice that the policy does not even consider female-to-male transsexuals who may have undergone surgery and hormone therapy before puberty. It also leaves some questions unanswered. For example, can it be medically and precisely determined when a particular person goes through puberty? In addition, does the surgery and hormone therapy have to take place before puberty begins or before puberty is completed?

86. IAAF POLICY, *supra* note 81, at 2.

87. *Id.*

88. Androgen Insensitivity Syndrome is “when a person who is genetically male (has one X and one Y chromosome) is resistant to male hormones called androgens. As a result, the person has some or all of the physical characteristics of a woman, despite having the genetic makeup of a man.” NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, ANDROGEN INSENSITIVITY SYNDROME (last reviewed Aug. 31, 2010), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002163/>.

89. Gonadal dysgenesis is a synonym for Turner’s Syndrome. NATIONAL CENTER

Other conditions that *may* accord *some advantages* but are nevertheless acceptable are: congenital adrenal hyperplasia,⁹¹ androgen producing tumors,⁹² and anovulatory androgen excess (commonly referred to as polycystic ovary syndrome).⁹³

The IAAF has a detailed policy for the “process for handling cases of gender ambiguity.”⁹⁴ After a challenge to an athlete’s gender has been brought to the attention of the IAAF, the appropriate authority decides if there is indeed a case to investigate.⁹⁵ If there is a case, the appropriate authority decides who will investigate the matter. The athlete is then referred to the investigating authority, all the while keeping the matter in strict confidence.⁹⁶ The verdict of the investigating authority is given to the national federation with recommendations for further action, including the possibility that the athlete must withdraw from competition until the issue can be “definitively resolved through appropriate medical and surgical measures.”⁹⁷ Finally, after such medical and surgical measures have taken place, there is an “[e]valuation of the effects of such measures to determine if and when the athlete can return to competition as per the IOC consensus

FOR BIOTECHNOLOGY INFORMATION, TURNER’S SYNDROME (last reviewed Oct. 14, 2009), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001417/>.

90. IAAF POLICY, *supra* note 81, at 2. Turner’s Syndrome is “a genetic condition in which a female does not have the usual pair of two X chromosomes.” NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, TURNER’S SYNDROME (last reviewed Oct. 14, 2009), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001417/>.

91. Congenital adrenal hyperplasia “refers to a group of inherited disorders of the adrenal gland,” which cause the body to produce more androgen, a type of male sex hormone. “This causes male characteristics to appear early [in males] (or inappropriately) [in females].” NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, CONGENITAL ADRENAL HYPERPLASIA (last reviewed Jan. 21, 2010), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001448/>.

92. Androgen is a male sex hormone, the overproduction of which can cause early-onset of male characteristics in males and inappropriate male characteristics in females. NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, *supra* note 88.

93. IAAF POLICY, *supra* note 81, at 2. Polycystic ovary syndrome (“PCOS”) is a “condition in which there is an imbalance of a woman’s female sex hormones. This hormone imbalance may cause changes in the menstrual cycle, skin changes, small cysts in the ovaries, trouble getting pregnant, and other problems. Female sex hormones include estrogen and progesterone, as well as hormones called androgens. Androgens, often called “male hormones,” are also present in women, but in different amounts. Hormones help regulate the normal development of eggs in the ovaries during each menstrual cycle. Polycystic ovary syndrome is related to an imbalance in these female sex hormones. Too much androgen hormone is made, along with changes in other hormone levels.” NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION, POLYCYSTIC OVARY SYNDROME (last reviewed Mar. 31, 2010), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001408/>.

94. IAAF POLICY, *supra* note 81, at 3.

95. *Id.*

96. *Id.*

97. *Id.*

on this matter.”⁹⁸

Other professional associations have also weighed in on the matter and established policies for gender verification. To highlight one in particular, the United States Golf Association (“USGA”) adopted a policy in 2005 with the purpose of “seek[ing] to assure fair competition for all entrants in a USGA championship.”⁹⁹ Transgender athletes are eligible to compete in USGA events two years after having a gonadectomy, subject to certain proof of gender guidelines.¹⁰⁰ In any USGA Championship that requires the player to be a specific gender, the “player must identify himself or herself during the entry application process as a person of that particular gender.”¹⁰¹ When an athlete is transgender, failure to provide proof of gender and to comply with the verification process of that gender may result in disqualification.¹⁰² If gender reassignment has happened after puberty, the player must provide certain documentation to the USGA, but gender reassignment prior to puberty is not subject to these requirements.¹⁰³ First time applicants to USGA Championships must provide documentation including:

- (i) the identification of a physician who conducted pre-operative psychiatric evaluation, including name, address and phone number;
- (ii) hospital records confirming completed surgical gonadectomy;
- (iii) all office records documenting related follow-up treatment; and
- (iv) [an] executed waiver allowing members of [the] USGA medical panel to contact all treating physicians if deemed necessary.¹⁰⁴

Applicants who have previously been approved under this policy do not have to provide additional documentation.¹⁰⁵

If there is a challenge to the athlete’s gender, the player may be contacted by the USGA to verify his or her gender within seven days by providing documentation in accordance with the above policy.¹⁰⁶ Notice that the USGA policy does not require independent medical examinations by a medical team of the USGA’s choosing as some other policies require; the onus is on the athlete to provide the necessary documentation. The athlete is apparently accepted at his or her word and no further investigation is performed by the USGA.

98. *Id.*

99. UNITED STATES GOLF ASSOCIATION, GENDER POLICY FOR THE UNITED STATES GOLF ASSOCIATION (Mar. 2005), <http://www.usga.org/Content.aspx?id=24234>.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

B. Intercollegiate Level

Despite the presence of transgender athletes such as Keelin Godsey and Kye Allums in intercollegiate competition in recent years, the NCAA did not have a formal policy governing transgender athletes before August 2011. Prior to this time, the NCAA did not compile statistics on the number of transgender student-athletes competing in the NCAA. Gender was “calculated based on the data supplied by NCAA member institutions.”¹⁰⁷ The only guidance that *was* available stated that transgender student-athletes “must compete in the gender classification that matches their state classification, *as determined by their institution.*”¹⁰⁸ Thus, prior to August 2011, the NCAA left the decision up to the member institution to determine a student-athlete’s gender using documents provided by the state, such as driver’s licenses, taxes, voter registration cards, and the like.¹⁰⁹

This prior “policy” of the NCAA could have been problematic each year, as “championship-access rules [could] be impacted by the institution’s [gender] certification decision.”¹¹⁰ For example, an institution that had a male who participated on a women’s team would have had a “mixed team,” thus rendering the team ineligible for women’s championships but still eligible for men’s championships.¹¹¹ Conversely, a female participating on a men’s team “still count[ed] toward the mixed/men’s numbers,” and the team remained eligible for participation in men’s championships.¹¹² Furthermore, “[o]nce a team [was] classified as a mixed team, it . . . [retained] that status through the remainder of the academic year without exception.”¹¹³ Thus, when the NCAA left the gender-classification decision up to the individual member institutions, it gave the member institutions some control with regard to championships.

To fill this void, the NCAA Executive Committee approved a new policy at its August 2011 meeting, which “clarif[ied] opportunities for participation [in NCAA athletics] by transgender student-athletes.”¹¹⁴ The new policy aims to “allow[] the student-athlete to participate in competition in accordance with their [sic] gender identity while maintaining the relative balance of competitive equity among sports teams.”¹¹⁵ To participate with the gender of one’s choice, the NCAA requires that any use of hormone

107. 2009 NCAA POSITION, *supra* note 2.

108. *Id.* (emphasis added).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. CURRENT NCAA POSITION, *supra* note 10.

115. *Id.*

therapy be consistent with NCAA policies and with current medical standards.¹¹⁶ The current NCAA policies state:

A trans male (female to male) student-athlete who has received a medical exception for treatment with testosterone for gender transition may compete on a men's team but is no longer eligible to compete on a women's team without changing the team status to a mixed team. A mixed team is only eligible for men's championships.

A trans female (male to female) student-athlete being treated with testosterone suppression medication for gender transition may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of documented testosterone-suppression treatment.¹¹⁷

Following the release of this new policy, the NCAA provided a resource book to its members titled "NCAA Inclusion of Transgender Student-Athletes."¹¹⁸ The resource book is intended to provide "best practice and policy recommendations for intercollegiate athletic programs to provide transgender student-athletes with fair and equal opportunities to participate," and "to provide guidance to NCAA athletic programs about how to ensure transgender student-athletes fair, respectful, and legal access to collegiate sports teams based on current medical and legal knowledge."¹¹⁹

The resource book begins by explaining to the NCAA membership the meaning of the term "transgender" and providing an entire appendix of definitions and terms relating to transgender persons in order to educate and help the membership understand the terminology.¹²⁰ This is an important section of the resource book since many terms are easily confused with the word "transgender," and many biases and stereotypes are evoked by its use.¹²¹ In addition, the introductory section provides an invaluable overview to NCAA member institutions that may either have never approached the topic of transgender athletes or who are preparing to include a transgender athlete in their intercollegiate athletics programs.

116. *Id.*

117. *Id.*

118. NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT ATHLETES (August 2011) (hereinafter "NCAA RESOURCE BOOK").

119. *Id.* at 2.

120. *Id.* at 3 and Appendix A.

121. *See* discussion, *supra* at Introduction.

Part One of the resource book sets out a “policy statement” of sorts for the NCAA. This part answers the question of “Why?” the issue of transgender athletes must even be addressed at all. The NCAA stresses the core values of equal opportunity and inclusion of diverse populations in participation in intercollegiate athletics, underscoring issues of basic fairness and equity.¹²² Furthermore, the NCAA is encouraging its membership to take a proactive approach in “adopting policies that are consistent with school non-discrimination policies and state and federal laws prohibiting discrimination based on gender identity or expression.”¹²³ Perhaps the most telling answer to the “Why?” question is in the NCAA’s statement that “in the spirit of encouraging sports participation for all, it is the right thing to do.”¹²⁴

Part One also addresses certain stereotypes that are often implicated in objections to the competitive equity opportunities of transgender athletes, especially in the context of male-to-female transgender athletes.¹²⁵ First, the NCAA addresses the fear that men may pretend to be transgender in order to compete against women and gain a competitive advantage.¹²⁶ The resource book addresses this assumption by saying that “the decision to transition from one gender to the other . . . is a deeply significant and difficult choice that is made only after careful consideration and for the most compelling of reasons.”¹²⁷ Further, the NCAA points out that “in the entire [forty] year history of ‘sex verification’ procedures in international sport competitions, no instances of such ‘fraud’ have been revealed.”¹²⁸ In this way, the NCAA seeks to dispel, as “a myth,” the concern that men may try to exploit an opportunity to compete against women by pretending to be transgender.

Second, the NCAA addresses the concern that male-to-female transgender athletes have a competitive advantage over naturally-born females due to the higher levels of testosterone that naturally occur in men as opposed to women.¹²⁹ To quell this fear, the NCAA first states that male-to-female transgender persons who transition before puberty do not have the higher levels of testosterone found in naturally-born men.¹³⁰ However, it is rare that such a drastic decision to fully transition is made before puberty. For that reason, the better argument the NCAA makes is in regards to the “great deal of physical variation” in transgender women,

122. NCAA RESOURCE BOOK, *supra* note 118, at 5.

123. *Id.*

124. *Id.*

125. *Id.* at 7.

126. *Id.*

127. *Id.*

128. *Id.* at 8.

129. NCAA RESOURCE BOOK, *supra* note 118, at 7.

130. *Id.*

“just as there is a great deal of natural variation in physical size and ability among non-transgender women and men.”¹³¹ Finally, the best argument the NCAA raises acknowledges that “any strength and endurance advantages a transgender woman arguably may have as a result of her prior testosterone levels dissipate after about one year of estrogen or testosterone-suppression therapy.”¹³²

Part Two of the resource book details recommendations and guiding principles for the inclusion of transgender student-athletes in NCAA member institutions’ athletic programs. It also details the new NCAA Policy regarding the participation of transgender student-athletes in intercollegiate sports as identified above.¹³³ This section of the resource book fleshes out the participation guidelines for transgender athletes by clarifying NCAA rules regarding transgender student-athletes who are not undergoing hormone therapies. Female-to-male student-athletes who are not taking testosterone are able to participate on a men’s or a women’s team.¹³⁴ However, male-to-female student-athletes who are not taking hormones may only compete on men’s teams.¹³⁵ This requirement addresses the imbalance in testosterone occurring between naturally-born men and naturally-born women. As stated above, male-to-female student-athletes can compete on a women’s team once they have undergone one year of testosterone-suppression therapy.¹³⁶

Part Two ends with recommendations that can guide student-athletes and member institutions in their respective responsibilities. Student-athletes should be responsible for: (1) alerting the director of athletics if they have completed, plan to begin, or are in the process of hormone therapy; and (2) submitting records from personal physicians documenting the intention to transition, the progress of the transition and/or treatment plans regarding hormone therapies.¹³⁷ The director of athletics should be responsible for: (1) meeting with the student-athlete to “review eligibility requirements” and the “procedure for approval of transgender participation;” and (2) notifying the NCAA of a medical exception request on behalf of the student-athlete if hormone treatment will be used.¹³⁸ Finally, the institution should be responsible for: (1) establishing a Transgender Participation Committee to develop institutional policy and educate all constituencies on campus; and (2) assuring that “all discussions among involved parties and

131. *Id.*

132. *Id.* at 8.

133. *Id.* at 13.

134. *Id.*

135. *Id.*

136. *Supra* at note 113.

137. NCAA RESOURCE BOOK, *supra* note 118, at 14.

138. *Id.*

required written supporting documentation . . . [are] kept confidential.”¹³⁹

Part Three of the NCAA resource book provides lists of “Best Practices” for different constituency groups to follow in helping to integrate transgender student-athletes in intercollegiate athletic programs. This part provides “Overall Best Practices,” “Best Practices for Athletics Administrators,” “Best Practices for Coaches,” “Best Practices for Student-Athletes,” “Best Practices for Athletics Staff Interacting With Media About Transgender Student-Athlete Issues,” and “Additional Guidelines for Transgender Student-Athlete Inclusion.”¹⁴⁰ These sections of the resource book are important because they provide concrete, explicit suggestions for each group to follow that can help the various members of collegiate athletic departments begin to implement policies and practices regarding transgender student-athletes. This can be especially helpful for the various constituencies of NCAA member institutions that are at a loss regarding where to begin in the inclusion of transgender athletes in its intercollegiate athletic programs.

It was an important development for the NCAA to adopt a formal policy in regards to transgender athletes in the summer of 2011. Stating an explicit policy clarified NCAA rules by setting out one standard for all instead of leaving gender classifications up to each individual member institution and varying state laws. Furthermore, the “best practices” contained in the resource book are invaluable to the NCAA membership as they serve as a starting point for implementation and continuing guidance in the years to come.

C. Interscholastic Level

The only statement that can be made with any certainty regarding the regulation of transgender athletes at the interscholastic level is that there is great variation among state policies, with the vast majority of states having no policy at all. This is important since many transgender athletes begin to have feelings that their gender identity does not match their biological sex in middle school or high school. The fact that there are virtually no policies concerning how to help young athletes transition and still gain all the benefits derived from participating in athletics is disturbing.

One of the few states that does have a formal policy is the state of Washington,¹⁴¹ with a policy developed from a philosophy of “allow[ing] participation for all students regardless of their gender identity or

139. *Id.*

140. *Id.* at 15–20.

141. GRIFFIN & CARROLL, *supra* note 5, at 26; WOMEN’S SPORTS FOUNDATION, WASHINGTON STATE SUPPORT POLICY FOR PARTICIPATION OF TRANSGENDER ATHLETES (Oct. 3, 2008), available at <http://www.womenssportsfoundation.org/Content/Articles/Issues/Homophobia/W/WIAA-Policy.aspx> (*hereinafter* WASHINGTON STATE POLICY).

expression in a safe, competitive and friendly environment, free of discrimination.”¹⁴² The Washington State policy does a good job of defining key terms in an attempt to minimize confusion. For example, the policy defines “transgender person,”¹⁴³ “intersex person,”¹⁴⁴ “gender identity,”¹⁴⁵ and “gender expression.”¹⁴⁶

The Washington State Policy states that students should participate on the sports team “that is consistent with their gender identity, irrespective of the gender listed on a student’s records.”¹⁴⁷ This puts the power of the decision solely with the individual student-athlete, regardless of the student-athlete’s biological sex at birth. This can help alleviate the agonizing tension that transgendered student-athletes feel when they are forced to play on one sports team or another. The state of Washington bases its policy on certain core values such as:

Recognizing the value of extra-curricular athletics for all students;

Emphasizing that participation in extra-curricular athletics is not just allowed, but encouraged for all students;

Creating a level playing field for all students;

Providing a space for intersex and transgender students

142. WASHINGTON STATE POLICY, *supra* note 141.

143. A “transgender person” is “[a] person whose gender identity does not match the sex assigned to him or her at birth. This cross gender identification is often referred to as gender dysphoria. When the gender dysphoria causes clinically significant distress or impairment, it is sometimes classified as Gender Identity Disorder. A transgender person who is born female-bodied but identifies as male is referred to as a transgender man or a female-to-male transsexual. A transgender person who is born male-bodied but identifies as female is referred to as a transgender woman or a male-to-female transsexual.” *Id.* Notice, though, that the definition uses the out-dated term of “transsexual.”

144. An “intersex person” is “a general term used to indicate a person born with a reproductive or sexual anatomy and/or chromosome pattern that [does not] seem to fit the typical definitions of female or male. This may be the result of several different medical conditions involving chromosomal variations, hormonal variations, ambiguous genitalia, and/or an anatomy that includes both male and female characteristics. The medical term for this condition is a Disorder of Sexual Development o[r] ‘DSD.’ ‘Intersex’ is not the same as ‘transgender,’ although some people identify as both intersex and transgender. However, the two groups may face similar situations in needing to change gender designations for the purposes of participation in school activities.” *Id.*

145. “Gender Identity” is “[a] person’s deeply-felt internal sense of being male or female.” *Id.*

146. “Gender Expression” is “[a] person’s external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, mannerisms, speech patterns and social interactions.” *Id.*

147. *Id.*

to exist and thrive; and

Reducing bullying and harassment of students.¹⁴⁸

If there is a question as to “whether a student’s request to participate in a sex-segregated activity consistent with his or her gender identity is bona fide, a student may seek review of his or her eligibility for participation . . .” through a procedure stated in the policy.¹⁴⁹ In order to be granted permission to compete on a team consistent with one’s gender identity, or if it is questioned whether the student’s request is bona fide, the student or the student’s parents must contact the school, “indicating that the student has a consistent gender identity different than [sic] the gender listed on the student’s school registration records, and that the student desires to participate in activities in a manner consistent with [his or her] gender identity.”¹⁵⁰ Next, the school notifies the Washington Interscholastic Activities Association (“WIAA”) in order to get an assigned facilitator to assist in the WIAA Gender Identity Eligibility Appeal Process.¹⁵¹ The appeal will be heard by the Gender Identity Eligibility Committee (“the Committee”), which is comprised of a minimum of three of the following, one of whom *must* be from the physician or mental health profession category:

Physician with experience in gender identity health care and the World Professional Association for Transgender Health Standards of Care;

Psychiatrist, psychologist or licensed mental health professional familiar with the World Professional Association for Transgender Health Standards of Care;

School administrator from a non-appealing school;

WIAA staff member; and

Advocate familiar with Gender Identity and Expression issues.¹⁵²

Furthermore, the student should provide the Committee with the following documentation:

Current transcript and school registration information;

Documentation of student’s consistent gender identification (e.g., affirmed written statements from student and/or parent/guardian and/or health care

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* While the Washington State Policy does a fine job of defining certain important terms such as “Transgender person” and “Intersex person,” it does not do an adequate job of defining who an “Advocate familiar with Gender Identity and Expression issues” would be.

provider); and

Any other pertinent documentation or information.¹⁵³

If the Committee renders a decision unfavorable to the student-athlete, the student-athlete may appeal to the WIAA Executive Director within ten business days of the Committee's decision.¹⁵⁴ If it is confirmed that the student-athlete may participate on the team with which the student-athlete identifies, the "WIAA will facilitate the provision of resources and training for a member school seeking assistance regarding gender identity."¹⁵⁵ Once eligibility to compete on a certain sports team has been granted, it does not need to be renewed every year, as the determination is valid for the duration of the student-athlete's high school participation.¹⁵⁶ Finally, the discussion and documentation from the proceedings are sealed and kept confidential, "unless the student and [the student's] family make a specific request."¹⁵⁷

D. Additional Guidance from the ON THE TEAM Report

On the Team: Equal Opportunity For Transgender Student Athletes (the "*OTT Report*") is a "think tank report [that] includes best practice and policy recommendations for high school and collegiate athletic programs about providing transgender student athletes [sic] with equal opportunities to participate in school-based sports programs."¹⁵⁸ The *OTT Report* follows Washington's policy by recommending that high school transgender student-athletes be permitted to compete on the team "in accordance with his or her gender identity irrespective of the gender listed on the student's birth certificate or other student records"¹⁵⁹

However, the *OTT Report* goes on to say that this permission should be granted "regardless of whether the student has undergone any medical treatment."¹⁶⁰ Thus, the policy makes the radical departure from other similar policies by stating that a student-athlete should be able to compete on the team of his or her choosing, even if the student-athlete is currently undergoing hormone therapy treatments. Furthermore, the *OTT Report* recommends that policies "shall not prevent a transgender student athlete [sic] from electing to participate in a sports activity according to his or her

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. GRIFFIN & CARROLL, *supra* note 5, at 2.

159. *Id.* at 24.

160. *Id.*

assigned birth gender.”¹⁶¹ Thus, a student-athlete could be taking hormone treatments, and the choice is solely the student-athlete’s as to whether to compete on the team of his or her assigned birth gender or on the team of the opposite gender. This is exactly what some critics fear: that a transgender athlete will gain a competitive advantage by taking hormones and using whatever advantage those hormones confer to choose which team to play on.

The *OTT Report* contends that different policies should apply to high school student-athletes for several reasons including: “The fact that students are guaranteed the availability of a high school education and a corresponding opportunity to participate equally in all high school programs and activities.”¹⁶²

The reality is that intercollegiate sports are governed differently from high school sports. Intercollegiate athletics are regulated nationally by governing bodies that sponsor national competitions and oversee such functions as the random testing of student-athletes for the use of banned substances thought to enhance athletic performance. Testosterone is a banned substance under the current rules for intercollegiate competition, so the inclusion of transgender student-athletes in college sports must be consistent with those rules. Further, high school student-athletes are still growing and developing physically, cognitively and emotionally.

Additionally, high school-aged and younger transgender students are subject to medical protocols that are different from those available to adults because of their age and physical and psychological development. For children and youth, gender-identity transition typically consists entirely of permitting the child to dress, live, and function socially consistently with the child’s gender identity. For youth who are approaching puberty, hormone blockers may be prescribed to delay puberty in order to prevent the youth from going through the traumatic experience of acquiring secondary sex characteristics that conflict with his or her core gender identity. For older youth, cross-gender hormones or even some sex-reassignment surgeries may be prescribed.¹⁶³

The *OTT Report* takes a view more radical than that espoused by either the IAAF or the NCAA because it views policies requiring genital reconstructive surgery for high school-aged athletes as too stringent, arguing that such surgery lacks a well-founded medical or policy basis.¹⁶⁴ Furthermore, most transgender athletes do not even end up getting this

161. *Id.*

162. *Id.* In contrast, not every student in college is afforded the opportunity to be an athlete, and of course not every person is able to compete in professional athletics.

163. *Id.* at 13–14.

164. *Id.* at 12.

surgery.¹⁶⁵ Finally, the *OTT Report* contends that the surgery does not have any bearing on athletic ability.¹⁶⁶

Recommended implementation procedures begin with the parents or student giving notice to the school of the intent to compete on a team consistent with the student-athlete's gender identity, but inconsistent with the student's biological identity, similar to the policy of the state of Washington.¹⁶⁷ The athletic director should then give notice to the State Interscholastic Athletic Association ("SIAA").¹⁶⁸ While the athletic director gives notice to the SIAA, he or she is the one couched with the authority to make the eligibility determination. Once eligibility to participate on a particular sports team is granted, it should be granted for the remainder of the student's eligibility and should not be revisited every year.¹⁶⁹ Again, this is similar to the policy of the state of Washington. Of course, any discussion should be kept confidential (especially those concerning medical records) and sealed unless the student-athlete or his or her family makes the records available.¹⁷⁰

Should there be any question about whether a student-athlete's request to participate on a certain sports team consistent with their gender identity is bona fide, there shall be a set procedure for the student to "seek review of his or her eligibility for participation."¹⁷¹ The *OTT Report* suggests a first level of appeal before an SIAA committee "specifically established to hear gender identity appeals."¹⁷² The committee will be comprised of at least three of the following, with at least one being from the physician or mental health professional categories:

Physician with experience in transgender health care and the World Professional Association for Transgender Health Standards of Care;

Psychiatrist, psychologist, or licensed mental health professional familiar with the World Professional Association for Transgender Health Standards of Care;

School administrator from a non-appealing school;

SIAA staff member; and

An advocate familiar with issues of gender identity and

165. *Id.*

166. *Id.*

167. *Id.* at 24.

168. *Id.*

169. *Id.*

170. *Id.* at 24–25.

171. *Id.* at 25.

172. *Id.*

expression.¹⁷³

Furthermore, the student-athlete should provide the committee with the following documentation and information:

Current transcript and school registration information;

Documentation of the student's consistent gender identification (e.g., written statements from the student and/or parent/guardian and/or health care provider); and

Any other pertinent documentation or information.¹⁷⁴

If the first level appeal is denied, the student can appeal to the Executive Director of the SIAA within ten school business days of receiving written notice of the decision.¹⁷⁵ If after a hearing before this official there is "confirmation of a student's consistent gender identity, the . . . SIAA Executive Director will affirm the student's eligibility to participate in SIAA activities consistent with the student's gender identification."¹⁷⁶

The *OTT Report* takes a different stance with regard to intercollegiate student-athletes than it does vis-à-vis other students. In this case, the policy differs based on whether the student-athlete is undergoing hormone therapy or not.¹⁷⁷ If the transgender student-athlete is transitioning from male-to-female and is taking a medically prescribed hormone treatment, the student-athlete "may participate on a men's team at any time, but must complete one year of hormone treatment related to gender transition before competing on a women's team."¹⁷⁸ Contrary to many governing bodies' thoughts that transgender athletes who have taken hormones need to have had treatment at least two years prior, the *OTT Report* suggests that "[r]ecent research indicates that most salient physical changes likely to affect athletic performance occur during the *first* year of hormone treatment making a longer waiting period unnecessary."¹⁷⁹ Finally, the student-athlete's eligibility should be extended to accommodate for the one-year transition period at the end of that period upon approval by the National Governing Body ("NGB").¹⁸⁰

The recommendations are slightly different for female-to-male transgender student-athletes from those that apply to male-to-female

173. *Id.* This committee strongly resembles that of the committee in the state of Washington.

174. *Id.* This documentation is identical to that recommended in the state of Washington's policy.

175. *Id.*

176. *Id.* at 26.

177. *See generally id.* at 28–31.

178. *Id.* at 28.

179. *Id.* at 28, n.20 (citing Goorin, Louis, and Mathijs Bunck, *Transsexuals and Competitive Sports*, 151 *EUROPEAN JOURNAL OF ENDOCRINOLOGY* 425–29 (2004)) (emphasis added).

180. *Id.* at 31.

transgender student-athletes. For these student-athletes, the *OTT Report* suggests that if these individuals are taking medically prescribed testosterone related to gender transition, they “may not participate on a women’s team after beginning hormone treatment, and must request a medical exception from the NGB prior to competing on a men’s team because testosterone is a banned substance.”¹⁸¹ Even though the female-to-male transgender student-athlete must request a medical exception from the NGB prior to competing on a men’s team, he may still compete on a men’s team at any time, and the exception request is necessary only to avoid being suspended for using a banned substance.

The *OTT Report* puts responsibility on the student-athlete to ensure that the individual is eligible to compete in intercollegiate athletics. The transgender student-athlete “who has completed, plans to initiate, or is in the process of taking hormones as part of a gender transition shall submit the request to participate on a sports team in writing to the athletic director upon matriculation or when the decision to undergo hormonal treatment is made.”¹⁸² The request should include a letter from a doctor “documenting the student athlete’s [sic] intention to transition or the student’s transition status if the process has already been initiated . . . [and] shall identify the prescribed hormonal treatment for the student’s gender transition and documentation of the student’s testosterone levels, if relevant.”¹⁸³

The athletic director’s responsibilities are to meet with the student-athlete to review eligibility and the procedure for approval of participation. The athletic director should also notify the NGB of the student’s request to participate.¹⁸⁴ If the athletic director denies the transgender student-athlete’s request, the decision should be automatically reviewed by a committee including:

a health care professional, e.g. physician, psychiatrist, psychologist or other licensed health professional with experience in transgender health care and the World Professional Association for Transgender Health Standards of Care;¹⁸⁵

a faculty athletic representative; and

a representative assigned by the institution’s president with expertise in institutional anti-discrimination policy, such as someone from the institution’s human resources, ombuds office,

181. *Id.* at 28.

182. *Id.* at 30.

183. *Id.*

184. *Id.*

185. The *OTT Report* suggests that the student-athlete’s physician can serve in this health care professional role.

or Americans with Disabilities compliance office.¹⁸⁶

V. LEGAL IMPLICATIONS FOR TRANSGENDER INDIVIDUALS

Case law analyzing the legal rights of those who identify as transgender or transsexual is relatively new and nuanced. The foundational case for nondiscrimination based on gender identity is *Price Waterhouse v. Hopkins*.¹⁸⁷ In *Price Waterhouse*, the Supreme Court recognized that employees are protected from discrimination for their failure to conform to gender stereotypes under Title VII of the Civil Rights Act of 1964 (“Title VII”).¹⁸⁸ The plain language of Title VII prohibits discrimination because of race, color, religion, *sex*, or national origin.¹⁸⁹ Thus the critical question for courts has been: What does discrimination based on “sex” mean? While the plaintiff in *Price Waterhouse* was not transgender, the decision to define “sex stereotyping”¹⁹⁰ as a type of sex discrimination was important. It arguably created the basis for liability for sex discrimination based on gender identity or failure to conform to prevailing stereotypes regarding male and female behavior. Federal courts do not universally adopt this view, however, and since the ruling in *Price Waterhouse*, courts have debated the extent of antidiscrimination rights for those who identify as transgender.¹⁹¹

Transgender and transsexual individuals also face discrimination outside of the employment context. In those cases, other federal, state, and local laws may provide protection against that discrimination. Some transgender individuals have used the Equal Protection Clause to argue for protected status. New interpretations of Title IX of the Education Amendments of 1972 (“Title IX”) might also support federal protection for transgender students. States have also joined the battle to protect transgender individuals from discrimination based on gender identity. This section will analyze various federal and state laws affecting transgender individuals, and will also discuss what types of issues transgender student-athletes might face in light of current laws and policies.

A. Title VII of the Civil Rights Act of 1964

Title VII¹⁹² provides employees with protection against discrimination

186. GRIFFIN & CARROLL, *supra* note 5, at 30.

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

188. *Id.*

189. Title VII of Civil Rights Act of 1964, 42 USC § 2000e-2 (2006).

190. *Price Waterhouse*, 490 U.S. at 250.

191. *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1296 (N.D. Ga. 2010) *aff’d* 663 F.3d 1312 (11th Cir. 2011)(outlining federal case law regarding the gender identity claims and Title VII).

192. 42 USCA § 2000e.

based on their race, color, religion, sex or national origin.¹⁹³ Recently, some transgendered individuals have used Title VII to protect against discrimination based on sexual orientation and gender identity. Several federal circuit and district courts have adopted the view that the law does protect transgender individuals,¹⁹⁴ although the legal reasoning supporting such views varies.¹⁹⁵ Other circuit courts have not yet had the chance to rule on the issues, and some do not recognize transgender individuals as a protected class under Title VII.¹⁹⁶

In 2009, the Ninth Circuit addressed the issue in *Kastl v. Maricopa County Community College*. A male-to-female transgender plaintiff sought protection under Title VII for discrimination based on her failure to conform to gender norms.¹⁹⁷ Specifically, Kastl, a student and teacher at the community college, sought legal recourse when the college banned her from using female restroom facilities until she underwent sex reassignment surgery.¹⁹⁸ The court held that, after the Supreme Court ruling in *Price Waterhouse*,¹⁹⁹ “. . . it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer’s expectations for men or women.”²⁰⁰ The Ninth Circuit decision represents a growing majority viewpoint on the issue—a viewpoint that agrees that Title VII protects transgender individuals against violation of their rights.

The Sixth Circuit addressed the nuanced question of sex discrimination based on gender identity as well. In *Smith v. City of Salem*, a biological male Lieutenant in the Salem Fire Department began to express feminine characteristics after being diagnosed with Gender Identity Disorder.²⁰¹ He then sued his employer, as he believed he was suspended for being transsexual.²⁰² In its ruling, the Sixth Circuit relied on *Price Waterhouse* to

193. *Id.*

194. *See* *Kastl v. Maricopa Co. Cmty. Coll. Dist.* 325 Fed. Appx. 492 (9th Cir. 2009); *Lopez v. River Oaks Imaging & Diagnostic Group*, 542 F. Supp. 2d 653, 658 (S.D. Tex. 2008); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004); *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1296 (N.D. Ga. 2010).

195. *See* *Etsitty v. Union Transit Auth.*, 502 F.3d 1215, 1222 n.2 (10th Cir. 2007); *Schroer v. Billington*, 525 F. Supp. 2d 58, 63 (D.C. Cir. 2007).

196. *See* *Oiler v. Winn-Dixie La., Inc.*, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002). The Court found that Congress’ thirty-one failed attempts to pass legislation that clarified the textual meaning of “sex” in Title VII was evidence that Title VII does not encompass gender identity. *Id.* at *21-23.

197. *Kastl v. Maricopa Co. Cmty. Coll. Dist.* 325 Fed. Appx. 492 (9th Cir. 2009).

198. *Id.* at 493.

199. *Id.*

200. *Id.*

201. *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004).

202. *Id.* at 568–70.

support the proposition that transgender and transsexual individuals are a protected class under Title VII. Specifically, the court acknowledged that, while previous interpretations of Title VII limited sex protection to “anatomical and biological characteristics,”²⁰³ *Price Waterhouse* “eviscerated” that line of legal reasoning.²⁰⁴ The court further stated that the motivation behind a person’s choice to avoid conforming to gender norms was irrelevant, as “sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior.”²⁰⁵

A Fifth Circuit district court also upheld the rights of transgender individuals in the context of Title VII. In *Lopez v. River Oaks Imaging*, the court acknowledged that “litigants have seized upon the seemingly broad language of *Price Waterhouse* to argue that Title VII protects transgender individuals, who, it is argued, by dressing and behaving as a member of the opposite sex, merely fail to conform to other’s views of how men and women should look and act.”²⁰⁶ In *Lopez*, a plaintiff, who identified as female, was denied a position at a mental health facility after her background check revealed that she was legally born a male.²⁰⁷ The court adopted the view that transgender individuals are covered by the decision in *Price Waterhouse*, saying,

The Court cannot ignore the plain language of Title VII and *Price Waterhouse*, which do not make any distinction between a transgender litigant who fails to conform to traditional gender stereotypes and an “effeminate” male or “macho” female who, while not necessarily believing himself or herself to be of the opposite gender, nonetheless is perceived by others to be in nonconformity with traditional gender stereotypes.²⁰⁸

In contrast, the Tenth Circuit in *Etsitty v. Utah Transit Authority*, did not explicitly hold that transsexuals are covered under Title VII.²⁰⁹ In *Etsitty*, the plaintiff argued two separate legal theories for sex discrimination—that discrimination based on transsexuality is indeed a form of sex stereotyping and, alternatively, that it is a form of gender stereotyping.²¹⁰ The court first

203. *Id.* at 572–73.

204. *Id.* at 572 (“[T]he Supreme Court established that Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.”)

205. *Id.* at 575.

206. *Lopez v. River Oaks Imaging & Diagnostic Group*, 542 F. Supp. 2d 653, 658 (S.D. Tex. 2008).

207. *Id.* at 655–56.

208. *Id.*

209. *Etsitty v. Union Transit Auth.*, 502 F.3d 1215, 1222 n.2 (10th Cir. 2007).

210. Plaintiff “argue[d] discrimination based on an individual’s identity as a

dismissed the notion that discrimination against transsexuals is, on its face, prohibited sex discrimination. In reaching its conclusion, the court said that it would rely on the “plain language of the statute and not the primary intent of Congress,” to determine protective status.²¹¹ Accordingly, the “binary conception of sex” did not leave room for transsexuals to be considered a protected class.²¹² However, the court cautioned that “[t]he conclusion that transsexuals are not protected under Title VII as transsexuals should not be read to allow employers to deny transsexual employees the legal protection other employees enjoy merely by labeling them as transsexuals.”²¹³ Next, the court discussed the theory of protection for transsexuals under the *Price Waterhouse* theory of gender stereotyping. While the court acknowledged that several circuits have upheld protection for transsexuals under a theory of gender stereotyping,²¹⁴ it declined to answer the question in this case because it believed that the plaintiff did not present a genuine issue of material fact as to the employer’s pretext claim.²¹⁵

In *Schroer v. Billington*, the D.C. Circuit court stated that merely being transsexual is not enough to support a claim for discrimination under Title VII:

[A] *Price Waterhouse*-type claim could not be supported by facts showing that Schroer’s non-selection resulted solely from her disclosure of her gender dysphoria and her intention to present herself as a woman . . . This is so because protection from sex stereotyping is different, not in degree, but in kind, from protecting transsexuals as transsexuals.²¹⁶

It can be argued that these cases do little to help the legal protection of transgender student-athletes at the college level, as student-athletes are not employees of the universities for which they play.²¹⁷ However, such cases might prove analogous when litigating the scope of protected parties in discrimination cases under Title IX, as Title IX directly applies to students

transsexual is literally discrimination because of sex and that transsexuals are therefore a protected class under Title VII as transsexuals. Alternatively, she argues that even if Title VII does not prohibit discrimination on the basis of a person’s transsexuality, she is nevertheless entitled to protection under Title VII because she was discriminated against for failing to conform to sex stereotypes.” *Id.* at 1221.

211. *Id.*

212. *Id.* at 1222.

213. *Id.* at 1222 n.2.

214. *Id.* at 1223–24.

215. *Id.*

216. *Schroer v. Billington*, 525 F. Supp. 2d 58, 63 (D.C. Cir. 2007).

217. *Why Student Athletes Are not Paid to Play*, NCAA <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Why+student+athletes+are+not+paid+to+play> (last visited March 1, 2012).

in most colleges and universities and provides for protection against sex discrimination similar to Title VII.

B. Title IX of the Education Amendments of 1972

Title IX forbids discrimination on the basis of sex in public and private colleges and universities that receive federal funding.²¹⁸ In the athletic context, the statute has been read as mandating equity in athletic programs for men and women in secondary schools and postsecondary educational institutions.²¹⁹ However, the United States Department of Education Office for Civil Rights (“OCR”) maintains that the statute also imposes liability for educational institutions that discriminate against students on the basis of gender identity.²²⁰ In a 2010 Dear Colleague letter, the OCR clarified its position by stating:

Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also . . . be subjected to forms of sex discrimination prohibited under Title IX.²²¹

The Department of Justice’s Title IX Legal Manual supports the implication that case law under Title VII can be used to support the inclusion of transgender students as a protected class under Title IX. The manual states:

Since Title VII legal theories are often used by courts to evaluate Title IX claims, sex stereotyping may violate the Title IX prohibition of discrimination on the basis of sex. The fact that the harassment was based on the perception that the individual was not properly ‘manly’ or ‘feminine’ may, in appropriate circumstances, be the basis for a sex stereotyping claim filed under Title IX.²²²

218. 20 U.S.C. § 1681(a) (2006) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”).

219. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52872 (2010).

220. United States Department of Education, Dear Colleague Letter, Oct. 2010.

221. *Id.*

222. *Title IX Legal Manual*, IV (D)(2)(a)(2)(c), Department of Justice, available at <http://www.justice.gov/>. See also Jennifer Sinisi, *Gender Non-Conformity as a Foundation for Sex Discrimination: Why Title IX May be an Appropriate Remedy for the NCAA’s Transgender Student Athletes*, 19 VILL. SPORTS & ENT. L.J. 343, 361 (stating that the Supreme Court first relied on Title VII cases to inform Title IX cases in *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74 (1992) (*citing* *Meritor Sav.*

Further, under certain circumstances, transgender students may have a right of action against educational institutions when teachers,²²³ coaches,²²⁴ and other students (or teammates)²²⁵ harass²²⁶ a student based on his or her gender identity.

C. Equal Protection Clause

Both students and employees may also use the Equal Protection Clause to seek redress for discrimination based on gender identity and sexual orientation in schools²²⁷. To allege a violation of the Equal Protection Clause of the Fourteenth Amendment, a plaintiff “must allege that the plaintiff is a member of an identifiable group, was subjected to differential treatment from others similarly situated, and the difference in treatment was based on his or her membership in that group.”²²⁸ The court, in its Equal Protection analysis in *Glenn v. Brumby*, acknowledged that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”²²⁹

The Ninth Circuit has also used the Equal Protection Clause to provide protection for lesbian, gay, bisexual, and transgender students. In *Flores v. Morgan Hill Unified School District*, students in a public school district brought suit against their school district, administrators, and school board under the Equal Protection Clause for the defendants’ failure to adequately address peer anti-homosexual harassment.²³⁰ According to the court, the students were entitled to protection if they could “show that the defendants, acting under color of state law, discriminated against them *as members of an identifiable class* and that the discrimination was intentional.”²³¹ The court relied on previous Ninth Circuit case law,²³² holding that those

Bank, *FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

223. *Title IX Legal Manual*, *supra* note 222 at IV (D)(2)(a)(1).

224. *Id.*

225. *Id.* at IV (D)(2)(a)(2).

226. *Id.* IV(D)(1). “The protection against sexual harassment derives from the general prohibitions against sex discrimination contained in the Title IX common rule . . .” *Id.* Of course, a suit will only be successful in these cases if institutions meet the familiar requirements of actual knowledge and deliberate indifference, and the student-athlete proves causation. *Id.*

227. 42 U.S.C. § 1983 (2006).

228. *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1296 (N.D. Ga. 2010).

229. *Id.* at 1300.

230. *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1132 (9th Cir. 2003).

231. *Id.* at 1134 (emphasis added).

232. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 570–71 (9th Cir. 1990).

discriminated against because of sexual orientation are members of an identifiable class for equal protection purposes.²³³ The court held that the school's failure to enforce school anti-harassment and anti-discrimination policies violated the equal protection rights of the students.²³⁴

This case is particularly informative as to the current legal protection available to transgender student-athletes. *Flores* shows that public school administrators, who are state actors, may be liable for Equal Protection Clause violations against protected classes not specifically enumerated in federal and state statutes so long as there is case law finding that the group has been labeled an identifiable class.²³⁵

Thus it appears that the Equal Protection Clause may provide some protection for transgender students who are the victims of harassment in an education context. However, current case law is not well-developed, and there are no pending cases regarding the rights of transgender athletes in education. Undoubtedly, more cases will be litigated under the Equal Protection Clause in the future given the fact that being openly transgender is becoming more accepted and thus, more prevalent.

D. State Statutes and Case Law

States have taken up the legal question of protection for transgender individuals by enacting laws and developing case law to protect transgender individuals. States' willingness to protect transgender students is making slow progress, with less than half of states enacting laws that protect against discrimination based on gender identity.²³⁶ While some states specifically prohibit discrimination based on sexual orientation, only a few state statutes contain language that specifically prohibits discrimination based on gender identity.²³⁷

One example of a state that prohibits gender identity discrimination is California. The California Student Safety and Violence Prevention Act of 2000²³⁸ amends several parts of the California Education Code to prohibit

233. *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1135 (9th Cir. 2003).

234. *Id.*

235. *Id.* at 1136–1138 (9th Cir. 2003).

236. NCAA Resource Book, *supra* note 118. States include California, Colorado, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *Id.*

237. *Id.* at 28. According to the NCAA, 13 states and the District of Columbia “have enacted non-discrimination laws prohibiting discrimination on the basis of sexual orientation and gender identity or expression while eight more have laws that protect against discrimination based on only on sexual orientation.”

238. See *California Student Safety and Violence Prevention*, California Department of Education, <http://www.cde.ca.gov/re/lr/sv/> (last visited April 2, 2013). See also CAL. PENAL CODE §422.56 (West 2002 & Supp. 2013) (amended by SB 1234 to define “gender” for purposes of identifying hate crimes and eliminating unlawful discrimination in public schools.”). *Id.*

discrimination against students based on “gender, or sexual orientation, or because he or she perceives that the other person has one or more of those characteristics.”²³⁹ Additionally, several organizations have formed the California State Schools Coalition, “a statewide partnership of organizations and individuals dedicated to eliminating discrimination and harassment on the basis of actual or perceived sexual orientation and gender identity in California schools,” to hold the state accountable for enforcement of the statute.²⁴⁰

Other states, including, Iowa,²⁴¹ Maine,²⁴² Maryland,²⁴³ Minnesota,²⁴⁴ New Jersey,²⁴⁵ and Oregon,²⁴⁶ also prohibit gender identity discrimination in public schools. In late January 2012, Massachusetts joined the trend when Governor Deval Patrick ceremonially signed H.B. 3810, An Act Relative to Gender Identity, into law.²⁴⁷ The bill amends the current Massachusetts Code to include a definition of “gender identity,” and inserts the definition into several sections of the current Code.²⁴⁸ Massachusetts’s courts also protect transgender school students under a unique theory—freedom of speech protection. In *Doe v. Yunitis*, a state court upheld a student’s request for an injunction after his school refused to allow him to wear female clothing and accessories.²⁴⁹ The court found that the school’s policies regarding his choice of clothing represented “direct suppression of speech” and, thus, violated his First Amendment rights.²⁵⁰

In New York, a 1970s Supreme Court case discussed the rights of transgender athletes under the Fourteenth Amendment.²⁵¹ In *Richards v. United States Tennis Association*, the plaintiff sued the tennis association for its failure to allow her to compete in a women’s tournament after she had undergone gender re-assignment surgery to become a woman.²⁵² In this

239. *Id.*

240. *About Us*, California Safe Schools Coalition, <http://www.casafeschools.org/aboutus.html#mission> (last visited February 29, 2012).

241. IOWA CODE § 280.28 (West 2011 & Supp. 2013).

242. ME. REV. STAT. ANN. tit. 5 § 4553 (West 2013).

243. MD CODE ANN., EDUC., § 7-424.1 (West 2012).

244. MINN. STAT. ANN § 363A.03 (West 2012).

245. N.J. STAT ANN. §18A: 37-13 (West 1999 & Supp. 2012).

246. OR. ADMIN. R. §581-021-0045 (2013).

247. Jorge Rivas, *Massachusetts Gov. Patrick Signs Transgender Equality Bill into Law*, COLOR LINES, Jan. 19, 2012, available at http://colorlines.com/archives/2012/01/massachusetts_gov_patrick_signs_transgender_equality_bill_into_law.html. This bill was formally signed into law in late 2011.

248. H.R. 3810, 187 Gen. Ct. (Mass. 2011).

249. *Doe v. Yunitis*, 2000 Mass. Super. LEXIS 491, *12 (Mass. 2000).

250. *Id.*

251. *Richards v. United States Tennis Assoc.*, 93 Misc. 2d 713 (N.Y. 1977).

252. *Id.*

court's view, "the requirement of defendants that this plaintiff pass the Barr body test in order to be eligible to participate in the women's singles of the United States Open is grossly unfair, discriminatory and inequitable, and violative of her rights under the Human Rights Law of this State."²⁵³ While the situation faced by the plaintiff in this case is instructive, it is not directly on point with the current situation faced by student-athletes—*Richards* involved a private tennis association and an athlete who had already undergone sex reassignment surgery in her 40s.

The variation in types of protection afforded by the states undoubtedly implicates what some might perceive as unfairness, because the ability of a student to bring a claim could hinge on whether or not the student goes to a public or private college or university or where the student lives. A few members of Congress believe that the country would be well served by a comprehensive federal statute banning discrimination against students on the basis of sexual orientation or gender identity. As recently as March 2011, Representative Jared Polis (D-Colo.) and Senator Al Franken (D-Minn.) reintroduced the Student Non-Discrimination Act to provide protection for LGBT students.²⁵⁴ According to the American Civil Liberties Union, which supports the bill:

The Student Non-Discrimination Act will help to ensure that discrimination against lesbian, gay, bisexual and transgender students has no place in our country's public schools. The legislation builds on existing protections for students based on their race, color, sex, religion, disability or national origin, and will provide LGBT students and their families with legal recourse against discriminatory treatment.²⁵⁵

E. Compliance with Federal and State Antidiscrimination Laws

The impact of federal and state antidiscrimination laws on transgender athletes is yet to be realized. Based on the research presented, it is clear that there are federal statutory implications, state statutory implications, and NCAA policy implications, which have the potential to impact colleges and universities throughout the country. Relying on precedent among federal circuit and state courts, it appears that transgender individuals arguably have a legal cause of action for discrimination based on their gender identity under both the Fourteenth Amendment and Title IX. This legal right is grounded in the *Price Waterhouse* analysis that states that

253. *Id.* at 721.

254. Chris Johnson, *Polis reintroduces Student Non-Discrimination Act*, WASHINGTON BLADE, March 19, 2011, available at <http://www.washingtonblade.com/2011/03/10/polis-reintroduces-student-non-discrimination-act/>.

255. *Protect LGBT Students from Harassment and Discrimination*, American Civil Liberties Union, <https://secure.aclu.org/site/Advocacy/> (last visited Jan. 30, 2012).

discrimination against transgender students is a form of sex stereotyping and, thus, constitutes sex discrimination.

Colleges and universities should be on notice that discrimination based on gender identity, while not explicitly addressed by federal law, might still be impliedly unlawful based on several federal court cases that include transgender individuals as a protected class. Even before the NCAA policy was enacted, several colleges and universities already recognized the need for clear policies protecting the rights of transgender students. According to the Transgender Law and Policy Institute, 420 colleges and universities currently have nondiscrimination policies that explicitly include transgender or gender identity provisions, or both.²⁵⁶

One potential legal issue arising out of the NCAA policy is the availability of gender-neutral bathrooms and locker rooms for transgender student-athletes. The regulations that implement Title IX provide that, “[a] recipient may provide separate toilet, locker room, and shower facilities on the basis of sex.”²⁵⁷ Some universities already recognize the need for such facilities, and have implemented policies that support transgender students by creating gender-neutral bathrooms.²⁵⁸ Indeed, the NCAA supports the creation of gender-neutral facilities for students who request them.²⁵⁹ Schools with transgender athletes should consider providing such facilities for their student-athletes in the interest of nondiscrimination.

Moreover, adoption of the new NCAA policy can have real repercussions for schools with respect to tournament eligibility,²⁶⁰ which has the potential to create backlash from students, coaches and fans. Colleges and universities must be mindful of the actions of their students and staff, as these institutions could be liable for any harassment or discrimination perpetrated against transgender student-athletes that arises from implementation of the policy.²⁶¹ Further, failure to enforce existing anti-discrimination school policies with respect to transgender student-athletes potentially creates Equal Protection Clause violations. Unfortunately for transgender student-athletes, while the NCAA Policy

256. Transgender Law and Policy Institute, Colleges/Universities, www.transgenderlaw.org/college/index.htm (last visited Jan. 23, 2012).

257. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52871 (2010).

258. Brett Beemyn et al. *Transgender Issues on College Campuses*, 111 NEW DIRECTIONS FOR STUDENT SERVICES 55 (2005) (stating that San Diego State University created “safe bathrooms” and University of Chicago and Beloit University established “gender-neutral bathrooms.”)

259. NCAA Resource Book, *supra* note 118, at 20.

260. NCAA Bylaw 18.02.2.

261. United States Department of Education, Dear Colleague Letter, Oct. 2010, *supra* note 220.

does directly impact some of the NCAA's operating bylaws, it has not been adopted into the NCAA bylaws and, thus, is not binding on the NCAA member institutions.

In summary, the fact that a transgender student-athlete has yet to challenge a higher-educational institution's policy dealing with transgender students should not give colleges or universities comfort. State and local policies, in addition to Title IX and, for public institutions the Equal Protection Clause, may allow transgender student-athletes to play on sports teams regardless of whether their gender identity conforms to their biological sex.

VI. PROPOSED SOLUTIONS

Where do governing bodies go from here? Two things are clear. First, there needs to be concrete regulation for interscholastic and intercollegiate athletics on the topic of transgender and transitioning athletes. It is an issue that cannot be ignored at these levels due to the facts that: (1) many transgender people will start to question their biologically-assigned genders with their internal sense of gender identity during these periods in their lives; and (2) courts are increasingly willing to accept discrimination claims based on gender identity. Second, the standards for interscholastic and intercollegiate athletics need to be different because there are marked differences in maturity at these times of students' lives and because there are different governing bodies for the differing levels of sport.

A. Interscholastic Level

At the interscholastic level of competition, governing bodies need to be more flexible with children, pre-teens, and teens since many of them experiencing gender identity issues will be very confused about the thoughts running through their minds. Unfortunately, since there is no national governing body at this level and no current federal legislation, it will be up to each state to determine its own policy. It is imperative that the states try to keep some type of consistency between the policies, as a transgender athlete eligible to compete in one state may not be eligible to compete if the student's family moves to another state. Perhaps one way to encourage this consistency is to promote a Uniform Interscholastic Transgender Athlete Policy. At best, however, it could only be hoped that most states would follow or adopt it.

Due to the age of athletic participants at the interscholastic level, it is unrealistic to follow some of the policies that require sex reassignment surgery before puberty to compete on the team with which the athlete identifies. Surgery is an extreme step, and one that is very rarely taken

before puberty, if even at all.²⁶² Student-athletes at this level of sport should be allowed to compete on the team they identify with, as per the philosophies of the *OTT Report* and the state of Washington. However, this competition should be better regulated using different pieces from different policies outlined above.

First, to avoid challenges later on down the line that an athlete's request to play on a different-gendered team is not bona fide, an in-depth psychiatric evaluation should be done when the student-athlete requests to play on a team different from his or her biological gender. At this young age, it would probably be very difficult for a child or young adult to conceal his or her true motives from a highly-trained psychiatric professional if the child was not being sincere about transgender feelings and thoughts. The psychiatrist could also help the young athlete make sense of personal feelings, provide guidance and encouragement, and become a source of support during what is normally a very difficult time. Again, if there was a challenge later by a competitor or a fellow athlete that such a request was not bona fide, the psychiatrist's evaluation would be available.

Second, most child, pre-teen, or teenage transgender athletes only go through the steps of socially identifying as a different gender. Some may worry that this may give males who want to compete on a female team an edge, and this is a legitimate concern. However, physical differences between the sexes are least pronounced during these early years, and females may in fact outperform males in many athletic aspects. This will likely do little to assuage the fears of critics, but the psychiatric evaluation should at least assure them that any particular transgender athlete's motives are pure.

If the young transgender athlete decides to use hormones (or even hormone blockers to prevent the onset of puberty), there should be some formalized process in place to grant an exception from rules that ban these substances. Such a process would again legitimize the decision and help to quiet critics' fears that an athlete's request to play on a different gender's team is not bona fide. Again, at this stage, it would be prudent for another psychiatric evaluation to take place to make sure that young transgender athletes (and their parents) understand the consequences of such drastic measures at such a young age.

If the extreme action of surgery is undertaken, most policies (including the IOC, IAAF, and USGA policies) suggest making the athlete wait two years before competing on the team with athletes of the new gender. As explained above, making an athlete sit out for two years during high school when physical differences between the sexes are not as pronounced as they

262. GRIFFIN & CARROLL, *supra* note 5, at 12.

will be later in life would have more negative consequences than positive. Athletes would get out of shape in their sport, miss the chance to develop their skills, and might be passed over for intercollegiate athletic scholarships. An athlete who undergoes surgery should be allowed to participate immediately with the athlete's new gender at the interscholastic level, especially in light of the scientific evidence that suggests that transitioned athletes do not have the competitive advantages previously feared.²⁶³

B. Intercollegiate Level

It is an extremely positive step that the NCAA and its member institutions have recognized that a formal policy regarding transgender athletes was needed. Leaving this crucial decision up to individual institutions with little to no guidance only left the door open for scandal with no recourse from the NCAA.²⁶⁴ However, the NCAA policy should be revisited and tweaked throughout the years as member institutions gain experience in helping transgender athletes and as more scientific research becomes available regarding the use of hormones in transitioning and transitioned persons.

At the collegiate level, it is still unrealistic to assume that most transgender athletes have had surgery before puberty. If they have, then the issue will be moot, and the athlete should be able to participate immediately on the team of the new gender. However, many transgender athletes are still just coming to grips with how they feel about their gender identity during their late teenage years and early-twenties. Many of them may not be able to speak out about these feelings during these years.

Those who do come out and express their transgender identity should not be limited to expressing it socially.²⁶⁵ The new NCAA policy is a big step forward when it comes to including transgender athletes in

263. See generally DEVRIES, *supra* note 39.

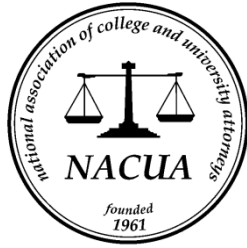
264. This is the exact position the NCAA found itself in when Heisman Trophy Winner and National Champion Cam Newton's father was shopping his athletic services around to the highest bidder, even though no money eventually changed hands. Unfortunately, the NCAA had no rule that prevented a parent from doing so. "It's wrong for parents to sell the athletics services of their student athletes [sic] to a university, and we need to make sure we have rules to stop that problem. And today, we don't," [NCAA President] Emmert said. "We have to fix that." Steve Wieberg, *NCAA President Emmert sets no nonsense tone in address*, USA Today (Jan. 14, 2011) available at http://www.usatoday.com/sports/college/2011-01-13-ncaa-emmert_N.htm. The NCAA was caught off-guard in the Cam Newton situation and should not be caught so off-guard again the number of openly transgender athletes will likely rise as more and more identify themselves as transgender.

265. This was the case for Keelin Godsey and Kye Allums, discussed in the Introduction, who only changed their identities socially in order to continue competing in intercollegiate athletics on their current women's teams.

intercollegiate athletic participation, but it does not go far enough. Student-athletes are probably mature enough at this point to make the decision to begin physical transitioning through the use of hormone replacement therapies and the contemplation of gender reassignment surgery. Thus, the NCAA should have *specific* steps in place that help athletes actively transition if they so choose. Further, the NCAA policy should be officially adopted into the organization's bylaws, so as to make schools subject to the NCAA enforcement process for failure to comply with the policy of inclusion.

VII. CONCLUSION

How one feels regarding one's own gender is not a decision that requires much thought for many people who are athletes. However, some athletes *do* question their internal sense of gender identity. Due to the publicity surrounding certain athletes who have had the courage to come out and discuss the situations and challenges they face being a transgender athlete, it is probably safe to presume that more and more athletes who have transgender thoughts will have the desire to compete on the team of the gender with which they identify. Sport governing bodies need to get in front of this issue and not be caught trying to implement policies after scandals, problems, and perhaps even tragedies, have occurred. Foremost in all minds should be a spirit of inclusion and opportunity of participation for all, no matter how it is to be achieved, while balancing the delicate considerations of fairness of competition for all who compete.



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