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ARTICLES

Assignment of Income at the Ivory Tower: Relaxing the Tax Treatment of Services Donated to Charities by their Employees

Mark J. Cowan

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When a faculty member donates time to a college or university by, for example, teaching a summer course for no compensation, the federal income tax treatment of the donation can take one of two forms. One possibility is that the donation will have no tax consequences. The faculty member realizes no income from the donation and gets no charitable deduction. A second possibility is that the faculty member will be required to recognize taxable income equal to the value of the services provided and then may (subject to certain limits) be allowed a charitable contribution deduction. In many cases, the income and deduction do not fully offset, resulting in negative tax consequences for the faculty member. This second possibility occurs when the faculty member directs where the funds saved by the donation are used within the institution. Since faculty members normally would prefer to control the specific use of the saved funds, many donations would result in negative tax consequences sufficient to stifle the donation in the first place. This article argues that the tax law should be clarified and relaxed to allow faculty members (and other employees of charitable organizations) to donate time to their employer institutions on a tax-free basis in more situations than is currently the case. Alternatively, the article suggests ways for charities to encourage donations of time by employees, even in the absence of a favorable law change.

Judicial Review of NCAA Eligibility Decisions: Evaluation of the Restitution Rule and a Call for Arbitration

Stephen F. Ross, Richard T. Karcher, S. Baker Kensinger

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Courts have held that the general principles of judicial non-interference with the internal decisions of private associations do not apply where a dominant organization's decisions effectively prevent individuals from participating in an important activity, including a profession or sport. Although the bylaws of the

National Collegiate Athletic Association (“NCAA”) give it unfettered power, it remains subject to judicial review when its decisions violate constitutional or statutory limits, or principles of contract law, or where they are inconsistent with the organization’s own rules. General principles of equity permit injunctive relief where an applicant can meet the appropriate standards. Similarly, courts have struck down or severely limited, on grounds of public policy, a sporting associations’ effort to entirely preclude judicial review by an express “waiver of recourse” clause, unless there exists an agreed upon alternative dispute resolution process that provides for independent impartial review consistent with the requirements of the Federal Arbitration Act (“FAA”). The NCAA, however, effectively precludes judicial review via Bylaw 19.7 (the “Restitution Rule”), which permits the NCAA to impose severe financial penalties on a member school that allows an athlete to participate pursuant to a court order, if an appellate court has overturned the initial court’s ruling. Further, the NCAA’s reinstatement process for resolving eligibility disputes lacks the independent impartial review necessary to insulate the process from judicial review under the FAA. This article analyzes these oft-distinct strands of private association law and the requirements of the FAA and concludes that the Restitution Rule constitutes an improper waiver of recourse. Finally, this article suggests that the NCAA can achieve its legitimate aim of quick and definitive resolution of eligibility disputes by affording student-athletes the right to submit the dispute to binding arbitration before a neutral, expert arbitrator (or panel of arbitrators) consistent with the requirements of the FAA.

Rescuing Academic Freedom from *Garcetti v. Ceballos*: An Evaluation of Current Case Law and a Proposal for the Protection of Core Academic, Administrative, and Advisory Speech

Bridget R. Nugent, Julee T. Flood 115

This article is inspired by the recent and leading case on free speech in the workplace, *Garcetti v. Ceballos*. In *Garcetti*, the Supreme Court held that the First Amendment does not protect the speech of government employees who speak out pursuant to job responsibilities. However, the Court stated in dicta that an academic freedom exception to this limit may exist, explaining that expression related to academic scholarship or classroom instruction implicates additional constitutional interests. In the seven years since the *Garcetti* decision, the Court has yet to provide any guidance for this hypothetical exception; moreover, few courts have recognized an academic freedom exception to First Amendment jurisprudence. Of those that have, even fewer

have attempted to define the boundaries for this exception, leading to an inconsistent interpretation of educators' constitutional rights. These jurisdictional discrepancies threaten to undermine the First Amendment freedom of speech by choking off an area of expression that actually turns on a lack of restriction for its value. In order to allow free academic speech to thrive in its fullest form, it is essential that the Supreme Court establish a clear academic freedom exception to First Amendment jurisprudence. This article's mission is two-fold: first, to illustrate trends across circuits in the treatment of academic speech following *Garcetti*, distinguishing the treatment of speech with enumerated roles that public college and university faculty assume; second, to argue for a distinction between the protection of speech related to the roles of teaching and researching and those related to the roles of administrator and advisor. This article offers two proposals for the protection of academic freedom, the first describing areas of speech that should be assured protection from courts, the other suggesting areas of speech for which academics themselves are the most appropriate guardians.

NOTE

Never Ascribe to Malice that which is Adequately Explained by Incompetence: A Failure to Protect Student Veterans

Mark Andrew Nelson 159

The Post-9/11 GI Bill and Title IV of the Higher Education Act are two significant vehicles by which the federal government directly subsidizes the cost of attending a college or university. This note analyzes the emergence and persistence of abusive practices employed by some proprietary institutions of higher education to unethically siphon federal educational funds by way of predation upon, and exploitation of, unwary student veterans. After reviewing the statutory and regulatory history of federal educational funding, the discussion will illuminate the ineffectual, contradictory, and myopic actions taken by Congress, the Department of Education, the United States Court of Appeals for the District of Columbia Circuit, and the White House to mitigate these abusive practices. While the reader will gain a familiarity with the current regulatory exigencies of college and university recruitment practices, the ultimate argument of this note is that the track record of failed attempts to curtail the predation of student veterans demonstrates the need for comprehensive reform of federal educational funding.

BOOK REVIEW

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ASSIGNMENT OF INCOME AT THE IVORY
TOWER:

RELAXING THE TAX TREATMENT OF SERVICES
DONATED TO CHARITIES BY THEIR
EMPLOYEES

MARK J. COWAN*

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*“University professors never think of themselves as employees; they think of themselves as the heart of the place, as the texture of the place, as the essence of the place. And they are right.”*¹

I. INTRODUCTION

The tax law stifles attempts by employees of charities to do volunteer work for their employers. The problem is manifest, for example, when a professor wants to contribute to his or her college or university employer by teaching a class for no compensation. This Article analyzes the problem of donated services by employees of charities (particularly in the context of colleges and universities), suggests reforms to remove the tax barriers to donating time, and recommends measures charities can take to ameliorate the tax impediments to employee volunteerism.

A. Illustrating the Problem: The Tax Education of Professor Flinty

Professors Flinty and Clement were as different as they were inseparable. For thirty-four years, Flinty and Clement taught accounting at Metro-State University—a quality, but perpetually underfunded, regional institution. “Hard Case” Flinty had a stern reputation for rigor. “Easy A” Clement was known for his jovial nature. Both were excellent teachers revered by generations of students. Together, they battled countless committee assignments, fought to keep the sparse budget from being diverted from traditional disciplines (like accounting, marketing, and the arts and sciences) to “new age” programs and centers, graded thousands of exams, consulted on troubled students, co-authored twenty-two peer-reviewed articles (three of which were actually worthwhile), dodged dozens of pushy textbook salesmen, hiked in thirty-two national parks (thirty of which were actually worthwhile), attended 176 home football games, and pondered and debated the great accounting questions of the day. Their relationship ended with Clement’s sudden death on a spring day at age sixty-two.

Flinty, nearing retirement and devastated over the loss of his friend, wanted to memorialize his colleague. Rather than donate money to the university in Clement’s name, he thought a more appropriate honor would be to donate his time—doing what both he and Clement loved to do—teach. Flinty agreed to take over a summer course on basic accounting that Clement was assigned to teach. Flinty wanted to waive the usual \$6,000 that he would receive for teaching the course and asked his department chair, Professor Toptier, to use the funds as seed money for a scholarship in Clement’s memory. Toptier wanted to oblige, but informed Flinty that the Dean of the College of Business, Dean Rankings, was taking all available salary

1. A. BARTLETT GIAMATTI, A FREE AND ORDERED SPACE: THE REAL WORLD OF THE UNIVERSITY 43 (1990), *reprinted in* ROBERT BIRNBAUM, SPEAKING OF HIGHER EDUCATION: THE ACADEMIC’S BOOK OF QUOTATIONS 218 (2004).

savings and redeploying the funds to set up a new online degree program in underwater basket weaving management.² Dean Rankings was under a lot of pressure to use the college's resources to get the program running because a major donor made his most recent gift contingent on the college setting up the new online program.³ This was just the sort of "distracting new age boondoggle" that Clement and Flinty had fought against their entire careers.

Furious, Flinty insisted that Dean Rankings agree—in writing—that the \$6,000 savings be used for the Clement Memorial Scholarship fund rather than the new online program. After some posturing and making it seem like he was doing Flinty a huge favor, the Dean agreed. All was well—or so Flinty thought.

That summer, after the accounting course had ended, Flinty noticed that his paycheck was lower than usual. Upon inspection, he discovered that \$6,000 had been added to his taxable income and that the income and payroll tax withholdings due on the \$6,000 had been taken out of normal salary—reducing his take home pay. Figuring this was an error, Flinty immediately called the payroll department to complain about being taxed on \$6,000 of salary that he never received. Payroll referred him to the university's in-house tax attorney, Ms. Chary.

Chary had recently been put in charge of the university's tax compliance after an IRS audit revealed some rather slipshod procedures, particularly with regard to payroll reporting. Chary had been instructed by the university's Chief Financial Officer to ensure compliance with the tax law and to err on the side of the government if there was any ambiguity.

Chary explained that since Flinty directed where the \$6,000 would be spent (on the scholarship fund rather than at the whims of the Dean), in substance Flinty had received the \$6,000 salary and then contributed it to the scholarship fund. Chary referred to this phenomenon as "anticipatory assignment of income."⁴ Accordingly, the \$6,000 salary was subject to income and payroll taxes as if he had received the cash. Sensing Flinty's rising anger, Chary quickly added that Flinty would be eligible to deduct the \$6,000 that he was deemed to have contributed as a charitable contribution

2. Cf. Ali Cybulski, "'UnderAcademy College' Satirizes Massive Open Online Courses," *THE CHRON. HIGHER EDUC.* (Sept. 14, 2012), <http://chronicle.com/blogs/wiredcampus/underacademy-college-satirizes-massive-open-online-courses/39716> (reporting on a free online "experimental college" that uses the motto "unaccredited since 2011" and offers courses such as "Grammar Porn" and "Underwater Procrastination and Advanced Desublimation Techniques").

3. Someone likely convinced the Dean that the program aligned with (at least) two of the four goals in the college's strategic plan (increasing online offerings and increasing interdisciplinary programs). Never underestimate the importance of aligning—at least in form—your suggestions with the otherwise ignored strategic plan.

4. This confused Flinty, who had given out a lot of assignments in his career, but never income.

deduction. After all, Chary explained, if Flinty had simply donated \$6,000 in cash to the scholarship fund, he would have been donating after-tax money and then taking a charitable tax deduction on his tax return. Chary stressed that the charitable deduction would only eliminate part of Flinty's issue because, while it would reduce his taxable income for income tax purposes, it would not reduce his taxable income subject to payroll tax. Chary's logical explanation and alluring promise of a deduction came as cold comfort, since Flinty and his wife did not itemize deductions on their tax return (even taking into account the \$6,000).

Flinty attempted to honor his dear friend by donating his time doing what they both loved—teaching. His reward was lower take-home pay. Flinty then realized two things. First, even time could be taxed. Second, he was glad that he had not specialized in tax accounting.

B. The Problem of Donated Services

The tax law governing services donated by employees of charities, especially by employees of colleges and universities (like Flinty), is in need of clarification and liberalization. In a time of budget cuts due to declining state funding or endowment earnings, colleges and universities must get creative. Reliance on more volunteers is one way to continue to staff student services while reducing costs. The ones most likely to volunteer to help with the teaching missions of the colleges and universities are those who have dedicated their careers to that endeavor—full time faculty members. Such faculty may be willing to teach an extra class or a summer class sans compensation. Local business folks or other alumni also may be willing to pitch in and teach a course pro bono.

Unfortunately, as Flinty discovered, a tax barrier stands in the way of these otherwise salutary relationships. Unless structured properly, the service provider will have income and be deemed to have made a charitable contribution. Apart from the possible negative tax consequences,⁵ the tax reporting involved simply comes as an unpleasant surprise and annoyance that may stifle attempts to encourage volunteerism.

While focusing specifically on the unique landscape of higher education (be it state or private, nonprofit institutions), many of the issues explored here would be applicable to services donated by employees of charities in general. The challenge lies in crafting a rule that fosters donations of services while also keeping the door to abuse firmly shut. This seemingly straightforward issue not only invokes important issues of tax law, tax policy, and modern higher education practice, but is also framed by the dark underside of faculty politics and the specter of subterfuge.

5. The negative tax consequences include the imposition of payroll taxes and the possibility that a charitable deduction will not fully offset the imputed income because of limits on the deduction for charitable contributions. See discussion *infra* Part III.E.

The remainder of this Article is organized as follows. Part II briefly reviews the basic, relevant tax rules governing charitable contributions. Part III then looks at the rules that currently apply when services are donated to charity, how colleges and universities apply those rules, justifications for the rules, and how those rules can result in negative tax consequences to the donor. Part IV presents numerical examples of the impact of the current rules, shows how the current rules can sometimes violate horizontal equity, and makes the case for relaxing the rules. Part IV also provides examples of existing and proposed tax law provisions that provide (or would provide) relief in situations that are somewhat analogous to donated services. Part V suggests ways that the rules can be relaxed and reviews the benefits and possible objections to relaxation. Part VI suggests ways that colleges and universities can, in the absence of liberalized treatment, remove the tax barriers themselves either by grossing-up employee-volunteers for the negative tax consequences of donating time or by changing their policies regarding the internal deployment of funds saved because of donated services. Part VII briefly concludes the Article.

II. CHARITABLE CONTRIBUTIONS IN GENERAL

To understand the discussion that follows, this Part will briefly review the basic tax rules of charitable contributions. Individuals may deduct the amount of cash donated to charity during the year.⁶ The deduction is only available if the taxpayer elects to itemize deductions rather than take the standard deduction.⁷ The deduction is generally limited to fifty percent of the taxpayer's adjusted gross income (AGI), with any excess carried over to the subsequent five years.⁸ While donations of cash are deductible, dona-

6. I.R.C. § 170(a)(1) (2006). Special rules, not relevant here, apply to property donations.

7. See I.R.C. § 63(d) (2006) (defining itemized deductions as all allowable deductions except those allowable in calculating adjusted gross income). See also I.R.C. § 62(a) (2006) (listing the deductions allowable in calculating adjusted gross income; the deduction for charitable contributions under I.R.C. § 170 is not on the list). Taxpayers who itemize tend to be those who own homes, with the mortgage interest and real estate tax deductions pushing their itemized deductions over the standard deduction. Because of the limits on deductibility, a minority of taxpayers actually benefit from the charitable contribution deduction. Nonetheless, charities often tout the benefits of tax-deductibility to potential donors, without acknowledging the limitations. Lilian V. Faulhaber, *The Hidden Limits of the Charitable Deduction: An Introduction to Hypersalience*, 92 B.U. L. REV. 1307, 1309–10 (2012).

8. I.R.C. § 170(b)(1)(A) (2006) (setting forth the general fifty percent limitation); I.R.C. § 170(d)(1)(A) (2006) (providing rules for the five-year carryover of excess contributions). This is the general rule. Lesser percentage limitations apply to special situations not relevant here. Technically, the limit is fifty percent of the taxpayer's "contribution base" for the year, but the contribution base is simply the taxpayer's adjusted gross income without considering any net operating loss carrybacks. I.R.C. § 170(b)(1)(G) (2006). To simplify matters, and since net operating loss carrybacks are rare for employees, I will assume that the taxpayers in the examples in this Article do

tions of time and services are not.⁹ Unreimbursed out-of-pocket expenses incurred while performing volunteer services for a charity, however, are deductible.¹⁰

To qualify for a deduction, the contribution must be made to (or for the use of) an entity listed in Section 170(c) of the Internal Revenue Code. For present purposes, the most relevant entities on the list are states and their political subdivisions,¹¹ as well as entities “organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes.”¹² The latter category embraces the archetypal charities like churches, homeless shelters, museums, and private schools. These charities are normally ones that qualify for tax-exempt status under Section 501(c)(3).¹³

A private, nonprofit college or university, because it exists for educational purposes, is normally operated as a Section 501(c)(3) organization and is eligible to receive tax-deductible charitable donations.¹⁴ A public college or university is exempt from the federal income tax by virtue of being part of the state government.¹⁵ While state governments are eligible to

not have any net operating loss carrybacks.

9. Treas. Reg. § 1.170A-1(g) (as amended in 2008).

10. *Id.* Such expenses are normally similar to the types of expenses one would incur with respect to a business. With regard to travel expenses incurred in charitable work, a deduction will only be allowed if “there is no significant element of personal pleasure, recreation, or vacation in such travel.” I.R.C. § 170(j) (2006). Apparently the tax law views charitable work as serious labor. So whatever you do, do not enjoy yourself while volunteering. The standard mileage rate allowed for charitable use of a passenger automobile is limited to fourteen cents per mile rather than the normal business mileage rate. I.R.C. § 170(i) (2006).

11. I.R.C. § 170(c)(1) (2006). Payments are only deductible to such entities if “made for exclusively public purposes.” *Id.*

12. I.R.C. § 170(c)(2)(B) (2006).

13. Compare I.R.C. § 501(c)(3) (2006) with I.R.C. § 170(c)(2) (2006). While I.R.C. § 501(c)(3) defines what types of organizations are eligible for the exemption, it is I.R.C. § 501(a) that actually grants the exemption. Organizations that qualify for tax-exempt status under § 501(c)(3) and are eligible to receive tax-deductible contributions under § 170(c) are subject to several requirements to attain and maintain their tax-favored status. Such requirements are beyond the scope of this article. For more details, see generally Mark J. Cowan & Denise English, *A Tax Primer for CPAs Volunteering at Nonprofit Organizations*, TAX ADVISER 150 (March 2007). For present purposes, I assume that all organizations at issue in this Article meet the requisite requirements.

14. We are, of course, not discussing for-profit colleges and universities, since such entities are taxable and are not eligible to receive tax deductible donations.

15. At first glance, it appears that I.R.C. § 115 covers the tax treatment of state governments. Section 115(1) states that “[g]ross income does not include . . . (1) income derived from any public utility or the exercise of any essential governmental function and accruing to a State or any political subdivision thereof” Thus, per § 115, it appears that income from a commercial enterprise of a state government (which would not be considered an “essential governmental function”) would be subject to the federal income tax while income from a governmental function would be exempt. The IRS, however, has interpreted the “accruing to” language in § 115 as meaning that the commercial/governmental distinction only applies to entities owned by state governments. See I.R.S. Gen. Couns. Mem. 14407, 1935-1 C.B. 103 (1935).

receive tax-deductible donations directly,¹⁶ most donors give to a public college or university via a separate “supporting organization” that independently qualifies as a section 501(c)(3) organization. A supporting organization raises funds, manages endowments, and distributes funds for the benefit of the supported public college or university.¹⁷ There appears to be, therefore, little distinction between giving to a private, nonprofit college or

State governments themselves are not subject to § 115. *Id.* Rather, the IRS views state governments as simply falling outside the scope of the Internal Revenue Code. *Id.* Under the IRS’s view, *all* income of a state government, commercial or governmental, is exempt from the federal income tax. *See id.* While the rationale for this stance is unclear, the IRS’s approach at least has the virtue of avoiding the difficult task of distinguishing between the commercial and governmental functions of the state government.

Although the IRS views states (including state colleges and universities) as generally beyond the reach of the I.R.C., there is one code provision that specifically subjects some income of states to the federal income tax. I.R.C. § 511(a)(2)(B) applies the unrelated business income tax (UBIT) to state colleges and universities.

16. *See* I.R.C. § 170(c)(1) (2006); *supra* text accompanying note 11.

17. The structure used by the University of Idaho, for example, is typical. The school’s endowment is owned and managed by a separate entity, the University of Idaho Foundation, Inc., for the exclusive benefit of the University of Idaho. *See* Univ. of Id. Found., About the Foundation, <http://www.uidahofoundation.org> (last visited Dec. 13, 2013). The foundation handles fundraising for the University of Idaho, and all decisions regarding fundraising priorities are set by the administration of the university itself. *See* Univ. of Id. Found., FAQs, <http://www.uidaho.edu/uidahofoundation/about/faqs>. The foundation’s website explains the use of a separate fundraising and endowment organization as follows:

Why is the [University of Idaho] Foundation separate from the University of Idaho?

The vast majority of American public colleges and universities have separate Foundations, organized as not-for-profit 501(c)(3) corporations, and for good reasons: confidentiality of personal documents related to gifts such as wills, trust agreements and correspondence; stewardship of endowment funds to ensure the joint goals of growth and return are met in the best interest of the donors; and to provide flexibility through discretionary funds to the growth of programs of excellence at the University of Idaho.

Id.

The last point, regarding “flexibility through discretionary funds” is critical. Public colleges and universities use separate foundations in order to raise private money that they can use outside of the confines of state-imposed restrictions on expenditures. *E.g.*, BRUCE M. STAVE, RED BRICK IN THE LAND OF STEADY HABITS: CREATING THE UNIVERSITY OF CONNECTICUT, 1881-2006 112-13 (2006) (reporting that the University of Connecticut established a foundation in the 1960s to create a pool of funds the school could use, without state restrictions, to help the school achieve excellence). *See also* UConn Found., UConn Found. FAQ at <http://www.foundation.uconn.edu/faq.html> (last visited Dec. 13, 2013) (explaining the relationship between the University of Connecticut and its foundation). Many schools have more than one supporting foundation. For example, a school may have, in addition to its general supporting foundation, an athletic booster club that raises and invests money to support the school’s athletics programs. *See e.g.*, Paul Fain, *Oregon Debates Role of Big Sport Donors*, THE CHRON. OF HIGHER EDUC., Oct. 26, 2007, at A38 (indicating how donations raised by booster clubs are used in college and university athletic departments).

university and a public one.¹⁸ But the distinction may become important, as discussed below, when looking at the tax treatment of an employee's donation of time to his or her employer-university that benefits a separate supporting organization.¹⁹

A donation to an individual is not deductible, regardless of how needy the recipient may be.²⁰ Likewise, a donation to a charitable organization is not deductible if it is designated for the benefit of a particular individual.²¹ Indeed, an essential element of a charitable contribution is "indefiniteness of bounty," in that the gift benefits the charitable class of the organization

18. The private/public distinction is, of course, relevant for nontax legal reasons. For example, a public institution owes due process and other constitutional protections to students, faculty, and staff while private institutions generally do not. *See, e.g.*, WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 42 (4th ed. 2006). The line dividing public and private institutions is not always clear. *See id.* at 42–43.

19. *See infra* Part V.A.1. Private colleges and organizations supporting public colleges are generally not classified as "private foundations" under the tax law. Colloquially, a private foundation is an I.R.C. § 501(c)(3) organization that derives the bulk of its support from limited sources—normally a wealthy family or a corporation. JAMES J. FISHMAN & STEPHEN SCHWARZ, *TAXATION OF NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 472 (3d ed. 2010).

Note that whether or not an organization has "foundation" in its name is of no consequence. Many nonprofits use "foundation" in their name but are not subject to the private foundation rules. Technically, all I.R.C. § 501(c)(3) organizations are considered private foundations unless they meet one of the enumerated exceptions to such status. I.R.C. § 509 (2006). Colleges and universities, regardless of the source of their funds, are not classified as private foundations. I.R.C. § 509(a)(1) (2006) (indicating that an organization described in I.R.C. § 170(b)(1)(A) will not be considered a private foundation); I.R.C. § 170(b)(1)(A)(ii) (2006) (referring to "an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on"—a definition which obviously applies to the typical college or university). Likewise, organizations supporting public colleges and universities are normally exempt from private foundation status. I.R.C. § 509(a)(1) (2006) (indicating that an organization described in I.R.C. § 170(b)(1)(A) will not be considered a private foundation); I.R.C. § 170(b)(1)(A)(iv) (2006) (referring to an organization with substantial public support "which is organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a college or university . . . and which is an agency or instrumentality of a State. . ."). Such organizations are commonly referred to as "supporting organizations." Provided these organizations meet the requisite public support test, they will not be classified as private foundations. I.R.C. § 501(c)(3) organizations that are classified as private foundations are subject to a litany of requirements in addition to the normal rules governing tax exempt organizations. *See generally* I.R.C. § 4940–4945 (2006). Further discussion is not necessary. Throughout all of the examples in this Article, I assume that the organizations at issue (be they associated with a college or not) are not private foundations.

20. *See* I.R.C. § 170(c) (2006) (listing the *organizations* eligible to receive tax-deductible donations).

21. *S.E. Thomason v. Comm'r of Internal Revenue*, 2 T.C. 441 (1943) (holding that a taxpayer could not deduct payments made to support a specific individual, who was a ward of a charitable organization).

in general and not any particular individual.²² Thus, a donor cannot mandate that an endowed chair go to a particular professor or that a scholarship fund be disbursed to a particular student. However, short of naming the intended beneficiary, donors have a great deal of leeway in designating how their gifts will be used. A donor may, for example, earmark the donation for use in the construction of a particular building, for a scholarship for students with a particular attribute (e.g., junior year accounting majors),²³ or for an endowed chair to be awarded to a scholar who researches or teaches in a particular area.²⁴ The key is that the organization (and not the donor) must have control over the funds and the donor's "intent in making the payment must have been to benefit the charitable organization itself and not the individual recipient."²⁵ Given this landscape (no deduction for a gift designated for a particular individual; deduction for a gift with a designated purpose), charities and their donors can be quite ingenious in structuring donations so that the identity of the individual(s) benefiting are theoretically "indefinite," but in reality are readily known. This "wink and nod" type of arrangement, while questionable, is likely rather common. Imagine, for example, a wealthy donor wants to benefit a favorite teacher from many years ago who studies the impact of beer sales on fruit flies. The donor can designate her gift for an endowed chair for a scholar of such a topic. Lo and behold, it would turn out there is really only one scholar eligible for the support.

Another limit on deductibility is that the donation must be a true gift to the charity. That is, the donation must be made with "detached and disinterested generosity," with no expectation that the donor will receive an economic benefit in exchange for the donation.²⁶ This rule exists to prevent taxpayers from deducting amounts paid to a charity that were really for

22. *Id.* at 444. As the Tax Court notes: "Charity begins where certainty in beneficiaries ends, for it is the uncertainty of the objects and not the mode of relieving them which forms the essential element of charity." *Id.* at 443.

23. The attributes should not involve racial or other suspect classes. There is a loose "public policy" requirement that is imposed by the courts. The primary authority in this area is *Bob Jones University v. United States*, 461 U.S. 574 (1983). Even though I.R.C. § 501(c)(3) has no explicit public policy requirement, the Supreme Court upheld the revocation of Bob Jones University's tax exemption because the school discriminated on the basis of race. *Id.* at 605. Such discrimination violated a clear public policy and therefore violated common law notions of "charity." *Id.* at 586.

24. *See, e.g.*, Rev. Rul. 68-484, 1968-2 C.B. 105 (allowing a charitable deduction for amounts given to schools for scholarships where the schools chosen were those at which the taxpayer recruited employees; a scholarship recipient was under no obligation to work for the donor and the donor was under no obligation to hire the scholarship recipient).

25. *Id.*

26. *Comm'r v. Duberstein*, 363 U.S. 278, 285 (1960). While *Duberstein* involved the issue of whether a transfer was a gift for income tax purposes under I.R.C. § 102, the same standard applies for purposes of the charitable contribution deduction under I.R.C. § 170.

purchases of goods and services. For example, a taxpayer cannot claim charitable contribution deductions for payments of tuition to a college or university or medical bills to a hospital. The payments were made to charities, but they were made in return for services, not as gifts.²⁷

Individuals are motivated to donate for a variety of reasons. Some give out of pure altruism—a genuine concern for the welfare of others.²⁸ Those who give out of a sense of altruism do so unselfishly and do not receive a return benefit from their donations.²⁹ Others donate to experience a “warm glow”—the enjoyment from making others happy, the recognition, and the sense of self-satisfaction that can come with donating.³⁰ Some may give for religious reasons or for more selfish reasons—to butter up a business acquaintance, to bolster one’s image in the community, to attain donor privileges to buy athletic tickets, etc. The more selfish the reason for a donation, where the donor receives a substantial return benefit, the more likely that a deduction will be limited or even erased.³¹

Some scholars opine that the deduction for charitable contributions is a government subsidy; akin to the government providing funds to donors or charitable organizations.³² But others view charitable contributions not as a subsidy but as a necessary deduction to arrive at a normative measure of income.³³ The tax law’s normative notion of income, at least in the personal realm, derives from the Haig-Simons definition: income is equal to the taxpayer’s consumption during the year plus the increase in the taxpayer’s wealth during the year (wealth at the end of the year less wealth at the beginning of the year).³⁴ The question is whether donations to charity are

27. Such payments may be deductible under other provisions of the Internal Revenue Code—for example as tuition payments or medical expenses—but the payments do not qualify as charitable contributions. Often a taxpayer will make a payment to a charity that is really a dual payment—part charitable gift, part purchase. This often occurs where a taxpayer buys tickets to a benefit concert for more than the fair market value of the concert tickets. Part of the payment is a nondeductible purchase (the fair market value of the concert tickets) and part is a charitable contribution (the excess over fair market value). The taxpayer must prove that he intended to make a charitable gift for the excess. *See* Treas. Reg. § 1.170A-1(h) (as amended in 2008). *See also* Rev. Rul. 67-246, 1967-2, C.B. 104. Further discussion is beyond the scope of this Article.

28. STAFF OF JOINT COMM. ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO THE FEDERAL INCOME TAX TREATMENT OF CHARITABLE CONTRIBUTIONS 33 (Comm. Print 2013) [hereinafter PRESENT LAW].

29. *Id.*

30. *Id.*

31. *See supra* notes 26–27 and accompanying text.

32. For an overview of the subsidy view of charity, see FISHMAN & SCHWARZ, *supra* note 19, at 595–615 (internal citations omitted). *See also* William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 344 n. 64 (1972) (referencing sources that call the charitable deduction a subsidy).

33. *See, e.g.,* Andrews, *supra* note 32, at 346.

34. HENRY C. SIMONS, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY* 50 (1938).

“consumption” for purposes of this definition. If charitable contributions are not consumption, but rather decreases in wealth, then they should be deductible. If charitable contributions are consumption, then they should not be deductible under a normative income tax. If charitable contributions are consumption but the government nonetheless allows a deduction for charity, then the government has made a policy choice to deviate from the norm and provide a subsidy to the charitable sector and to donors. Indeed, the tax expenditures budget, which reports the government’s revenue losses from special tax breaks that deviate from a normal income tax, takes this view.³⁵ The deduction for individuals was expected to cost the government \$36.2 billion in lost revenue in 2012.³⁶

Scholars such as William Andrews disagree with the subsidy view and argue that many contributions are not consumption by donors, but are consumption by the charitable class (needy, students, patients, etc.) of the donee organization.³⁷ Since consumption is shifted from the donor to the donee, the charitable contributions should be removed from the donor’s taxable income under a normative income tax.³⁸ Andrews notes that this phenomenon occurs in other areas of the tax law. When generous business owners pay slightly above-market wages to their employees, for example, they receive business deductions which shift the income from the business owners to the employees.³⁹ Andrews opines that a similar shift of income should occur for taxpayers who give to charity.⁴⁰

With this basic overview in mind, we now look in more detail at the tax

35. STAFF OF JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2012–2017 2 (Comm. Print 2013) [hereinafter TAX EXPENDITURES].

36. *See id.* at 37 (\$4.9 billion in lost revenue on charitable contributions to educational institutions); *id.* at 38 (\$28.8 million in lost revenue on charitable contributions other than for education and health; includes charitable donations to religious organizations); *id.* at 39 (\$2.5 million in lost revenue on charitable contributions to health organizations).

37. Andrews, *supra* note 32, at 347.

38. *Id.* Andrews argues that the donation should, in theory, be taxed at the tax rate of the recipient members of the charitable class, but notes the rate will be zero in most cases (because the recipients are likely to have few earnings—most of which will be offset by personal exemptions and standard deductions in calculating taxable income). *Id.* As a practical matter, recipients of charitable assistance are normally viewed as receiving non-taxable gifts.

39. *Id.*

40. *Id.* Andrews acknowledges counterarguments that charitable contributions may be consumption if the donor is buying warm-glow effects or simply because the donor controls the resources being used—even though the resources are being used to help others. *Id.* at 346. Similarly, some commentators say that those who give out of pure altruism are shifting wealth rather than engaging in consumption while those who give for warm glow or other benefits are in fact engaging in consumption. *See* PRESENT LAW, *supra* note 28, at 33. But, as a practical matter, unless something tangible is received in return, it is hard for the tax system to look too closely into the subjective motives of donors.

treatment of donated services.

III. THE CURRENT TAX TREATMENT OF DONATED SERVICES

This Part provides an overview of the current tax law guidance about donated services and the theories that commentators have articulated to explain those rules. The tax treatment of donations of time by employees of charities could arguably take one of two opposing forms, both based on long-established tax law. One possibility follows the general rules for donations of time in which there are no tax consequences. The second possibility, and the one that colleges and universities are assuming (with good reason) is applicable, relies on doctrines such as constructive receipt and assignment of income to impute income to the employee and then (if the employee otherwise qualifies) allow the employee a deduction for the charitable contributions. Parts A and B discuss each possibility, Part C reviews current practice in higher education, Part D reviews the rationale for the current rules, and Part E shows how the tax law does not always allow a taxpayer in the imputed income/deduction category to come out even.

A. First Possibility: No Income/No Deduction

As noted above, donations of services to charity are normally not deductible. There are two rationales for this seemingly harsh rule—one practical and the other theoretical. First, unlike cash donations, service donations are difficult to value. Any value chosen would necessarily be subjective, and the tax law becomes difficult to administer when forced to deal with subjectivity. The value of the donated services will vary by the skills of the individual donor and the nature of services being provided. The IRS simply cannot be expected to police the amount of claimed tax deductions for time on a taxpayer-by-taxpayer basis. The IRS does not confront this valuation issue in the non-gratuitous setting because the tax law assumes (reasonably, in most cases) that the services provided are worth exactly what the service recipient paid for those services. This notion, known as the arm's length concept,⁴¹ is not available to assist in valuing services

41. See, e.g., JOEL SLEMROD & JON BAKIJA, *TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES* 317 n. 15 (4th ed. 2008). Under the arm's length concept, the tax law generally assumes that the contracting parties and the market set prices and values in transactions between unrelated parties. The tax law will respect such prices and values in calculating tax even if they are "wrong" and one party got a bargain while another got a bad deal. But the tax law carves out special rules for, and the tax authority focuses its limited enforcement resources on scrutinizing, those prices/values that were *not* established in arm's length dealings—like transactions between related parties. It is those transactions that may well result in manipulated prices and reduced tax liability, and which are worthy of special scrutiny and possible adjustment to fair market value. See, e.g., I.R.C. § 482 (2006) (giving Treasury power to reallocate income, deductions, and other tax items among related entities to clearly reflect income).

performed for charity without compensation.⁴² Accordingly, not allowing a deduction for donated services appears sensible.

One could argue that the tax law could have taken a less draconian approach to the valuation issue. Congress could have, for example, provided for a deduction for time based on some arbitrary but uniform per-hour rate, with charities subject to reporting requirements regarding the amount of time donated by each individual.⁴³ Such an approach would still suffer from practical difficulties in that charities would need to keep better track of their various volunteers (sometimes an informal and chaotic process). Also, such an approach would not satisfy the second rationale for non-deductibility of service donations—to which we now turn.

The second, and more theoretical, rationale for not allowing a deduction for the value of donated services is to prevent taxpayers from getting a double benefit for donating time. Because our income tax code has a broad definition of income, most charitable donations of cash are financed by funds that were taxed.⁴⁴ Allowing a deduction for cash donations thus can-

42. Despite the practical difficulties of valuation, charities that prepare financial statements under Generally Accepted Accounting Principles (GAAP) are required to report the fair market value (both as revenue and as an expense—or an asset if capitalized) of certain donated services. These are generally limited to service contributions that enhance nonfinancial assets (like land, buildings, or supplies) or that require specialized skills (generally services provided by licensed professionals—like an accountant, a lawyer, a plumber, a teacher, etc.). FIN. ACCOUNTING STANDARDS BD. (ASC), 958-605-25-16. The value of other service contributions need not be reported but must be disclosed if practicable. FIN. ACCOUNTING STANDARDS BD. (ASC) 958-605-50-1. It could be argued that since this information is readily available for GAAP, the tax law can simply accept these values. But, first, not all charities report their results under GAAP. The tax form that most charities are required to file, Form 990, specifically instructs charities to NOT include the value of donated services in revenue or expense (although they may provide a narrative description of such services). INTERNAL REVENUE SERV., 2010 INSTRUCTIONS FOR FORM 990, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX 12 (2010), available at <http://www.irs.gov/pub/irs-prior/i990-2010.pdf>. Second, the tax law often disregards GAAP, especially when GAAP uses estimates. For example, for-profit entities estimate their bad debt expense for credit sales each year for GAAP purposes, but are only allowed to deduct such expense on their tax returns when the related receivable has been written-off/becomes worthless. I.R.C. § 166 (2006). As the Supreme Court has stated:

Financial accounting, in short, is hospitable to estimates, probabilities, and reasonable certainties; the tax law, with its mandate to preserve the revenue, can give no quarter to uncertainty. This is as it should be. Reasonable estimates may be useful, even essential in giving shareholders and creditors an accurate picture of a firm's overall financial health; but the accountant's conservatism cannot bind the Commissioner in his efforts to collect taxes.

Thor Power Tool Co. v. Comm'r of Internal Revenue, 439 U.S. 522, 543 (1979). Accordingly, the availability of some estimate of value for some donated services for some charities that report under GAAP cannot reliably be used to support a tax law that would allow a deduction for donated services.

43. See *infra* note 215 for a similar proposal.

44. See, e.g., I.R.C. § 61(a) (2006) (noting that “[e]xcept as otherwise provided . . . gross income means all income from whatever source derived”). Of course, not all in-

cels out the taxed income and effectively removes the donation from the tax base. With a donation of time, the taxpayer is not reporting any taxable income for their forgone earnings. Allowing a deduction for such taxpayers would thus create a double benefit: no income included in taxable income for the forgone earnings and a deduction for the volunteered time.

The Haig-Simons normative definition of income, discussed above, does not tackle the issue of time donated to charity.⁴⁵ But Henry Simons does note that “income in kind”—in particular income generated from one’s own labors—cannot practically be taxed under a normative income tax.⁴⁶ That is, the value of goods and services we produce for ourselves—such as growing our own food or mowing our own lawns—is technically “income” but the value of such income cannot be accurately measured and cannot be policed efficiently by the tax authority. Simons calls income in kind “one of the real imponderables of the income definition,” yet one that “considerations of justice, not to mention those of administration, argue” should be excluded from taxable income.⁴⁷

William Andrews has taken Simons’s thoughts a bit further by analyzing the interaction of the exclusion for imputed income and the charitable deduction rules.⁴⁸ In a classic example, adapted here with some modifications, Andrews compares the tax consequences that befall a doctor who treats patients for free at a 501(c)(3) medical clinic with a tax lawyer who donates money to the medical clinic.⁴⁹ Assume the doctor and the lawyer each makes \$800 per day in doing their regular jobs. The doctor takes a day off from work to provide services at the medical clinic. The lawyer, who has no skills the clinic can use, works an extra day at his job, earning an additional \$800, and then donates the \$800 (in cash) to the clinic. Under our tax law, the doctor would receive no deduction for her charitable work. The lawyer, on the other hand, would receive an \$800 deduction for his charitable donation of cash.⁵⁰ While it appears the lawyer is in a better tax position, in reality the doctor and the lawyer are in the same position. This is because the lawyer realized \$800 of taxable income from working the extra day while the doctor did not need to include in taxable income the

come is subject to tax. For example, the income donated to charity may have been made with tax-exempt income, such as interest income from municipal bonds (I.R.C. § 103(a) (2006)) or the rental of property for less than fifteen days (I.R.C. § 280A(g) (2006)). Also, the donation may have been funded by a nontaxable gift or inheritance (I.R.C. § 102(a) (2006)). Of course, such income tax free transfers may have been subject to gift tax or estate tax. Thus, the theory is not perfect.

45. See SIMONS, *supra* note 34 and accompanying text.

46. *Id.* at 110–12.

47. *Id.* at 124.

48. See Andrews, *supra* note 32, at 347–48.

49. *Id.* Andrews’ original example did not include numbers. I have added them—and a few other details—here for illustration.

50. Assuming the lawyer itemizes his deductions and is not impacted by the limits on deductibility discussed at *infra* Part III.E.

\$800 of salary she gave up to work at the clinic.⁵¹ Thus, the doctor and the lawyer are in the same tax position, illustrated as follows:

	DOCTOR	LAWYER
TAXABLE INCOME	\$0	\$800
CHARITABLE DEDUCTION	\$0	(\$800)
NET	\$0	\$0

Since the donor of time and the donor of cash end up in the same position, this can justify denying a charitable deduction to the former while granting it to the latter.

While Andrews's example comes out neatly, keep in mind it only shows that the two taxpayers are on the same footing when it comes to income taxes. But the two are not in the same position for payroll/self-employment taxes. The doctor, without any wages, has no payroll tax liability. The lawyer, however, will need to pay FICA (if an employee) or self-employment tax (if self-employed) on his \$800 of extra earnings. FICA and self-employment taxes are on gross pay; there is no deduction for charitable contributions from payroll taxes.⁵² Furthermore, the lawyer may have limits on his ability to deduct the full \$800, as discussed below.⁵³ Because of the deduction limits that can apply, it is possible that the lawyer (who receives a deduction) will actually be worse off tax-wise than the doctor (who receives no deduction). After all, an exclusion from income is almost always preferred to a deduction.

B. Second Possibility: Imputed Income/Deduction

Donating time may result in tax consequences if the donors are viewed as assigning income that they earned to a charity. In such a case, the donors will be deemed to have earned taxable income via their work and must pay income tax (including FICA). The donors will then be deemed to have donated the earned income to the charity and may take charitable contribution deductions as if they had remitted cash to the charity. An assignment of income situation can occur when individuals assign their wages to a charity, or (as in Flinty's situation in our opening example) when the donors are employed by a charity but forgo some of their salary.

Because there is no primary authority directly on point, this Part will analogize from authorities in related areas. In the materials reviewed in this

51. Treas. Reg. § 1.61-2(c) (as amended in 2003) (discussed in more detail at *infra* Part III.B.5.)

52. See *infra* Part III.E.5 for more detail.

53. See *infra* Part III.E.

subsection, two fundamental tax doctrines are invoked: constructive receipt and assignment of income. The constructive receipt doctrine prevents a cash basis taxpayer from postponing the reporting of income “by failure to exercise his or her unrestricted power to collect it.”⁵⁴ Cash basis taxpayers normally include amounts in taxable income upon actual receipt in cash.⁵⁵ But this rule provides the opportunity for manipulation. Cash basis taxpayers might be motivated, for example, to refuse cash they are owed near year-end and then ask the payor to pay in the new tax year. Unchecked, cash basis taxpayers could postpone income into a different tax year. The taxpayer will still pay tax on the payment but will have managed to defer the tax a year while only deferring the receipt of the payment by a few days. Deferral of tax is a classic strategy of tax planning that makes the taxpayer better off on an after-tax time value of money basis.⁵⁶ To prevent this tax deferral, the tax law requires that cash method taxpayers not only report actual cash received but also cash *constructively* received.⁵⁷ The regulations note:

Income although not actually reduced to a taxpayer’s possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer’s control of its receipt is subject to substantial limitations or restrictions.⁵⁸

So, if income is available for a taxpayer to claim in cash, the taxpayer cannot turn his back on the income and wait until a later tax year to claim it. Regardless of when he claims the cash, it is taxable in the year it is available to him and within his control to claim. A fitting, but hard to detect, example would be a cash basis plumber who repairs a customer’s sink on December 27, 2012 and then bills the customer \$1,000. The customer is so pleased with the job that he offers the plumber a \$1,000 check on December 27. If the plumber refuses the check and asks the customer to mail him the check instead—and the check arrives on January 2, 2013—the plumber may think he has deferred income to his 2013 Form 1040. But under the constructive receipt doctrine, the plumber would be required to include the \$1,000 in income on his 2012 Form 1040, despite the fact that he

54. RICHARD A. WESTIN, WG&L TAX DICTIONARY 132 (2000).

55. Treas. Reg. § 1.446-1(c)(1) (as amended in 2004).

56. Deferral makes sense if the taxpayer will be subject to the same marginal tax rate in each year. If the marginal rate in the second year is expected to be higher, the taxpayer would balance the additional tax that would be due because of deferral against the time value of money savings associated with deferral.

57. Treas. Reg. § 1.446-1(c)(1) (as amended in 2004).

58. Treas. Reg. § 1.451-2(a) (as amended in 1979).

“received” the cash/check in 2013.⁵⁹

The classic case of constructive receipt, explained above, would not appear to apply to a situation like Flinty’s. The plumber was trying to defer income by waiting a few days (until the new tax year) to claim his income. At the end of the day, he still receives the \$1,000. But Flinty was not attempting to game the system. Flinty is never going to receive the \$6,000. Even so, Flinty does *constructively* receive the \$6,000 because of his control over the funds. Even though the cash never passed through his hands, he did oversee its passage from the university’s payroll accounts to the scholarship fund. It is no different from Flinty taking the cash in his paycheck and then sending the cash to the scholarship fund. He cannot avoid the income by simply controlling things from afar. Thus, while the constructive receipt doctrine is not directly on point, its core principle can be applied to donated services.⁶⁰

The second tax doctrine that might be invoked is assignment of income. Like constructive receipt, even though it does not neatly fit into the donated services context, its principles still apply. The assignment of income doctrine is “a judicial doctrine that treats attempts at gratuitous transfers of income interests as ineffective to shift income to another.”⁶¹ As discussed more fully below in connection with the *Earl* case, the doctrine requires that one who earns income pay tax on the income. A taxpayer cannot assign income to another (oftentimes a family member) and escape taxation. In the donated services context, the taxpayer is not trying to shift income to a related party. Flinty is not assigning his salary to, say, his son, so as to keep the income in his family. Instead, he is giving the income away to an entity—the university or its foundation—that would not pay tax on the salary in any event. It does not benefit Flinty from an economic perspective to undertake such an action. It does, however, accomplish his goal of funding a scholarship in honor of his friend.

There is no regulation, case, or ruling that explicitly applies either the constructive receipt doctrine or the assignment of income doctrine to do-

59. As noted, this would be hard for the IRS to detect. But the law is the law, and the constructive receipt doctrine helps protect the government from these maneuvers on a much larger scale. Given the difficulty that the IRS has in auditing a small business like the plumber, we should be thankful the plumber is reporting the \$1,000 at all. There is strong incentive to take payment in cash and not report it since there is no third party reporting (1099s, W-2s) like there is in other tax situations. Furthermore, it is not very efficient for the IRS to audit many small businesses like the plumber for a small amount of revenue per audit.

60. It has been suggested that Flinty might avoid the constructive receipt doctrine because he refused the income *prior* to rendering services. The problem with this conclusion is that Flinty had control over where the saved proceeds were used—they were designated for a particular scholarship program. Even if he avoids constructive receipt under such facts, he would be subject to tax under the assignment of income doctrine. See discussion of *Giannini* and *Hedrick* *infra* Part III.B.4.

61. WESTIN, *supra* note 54, at 54.

nated services like in Flinty's case. But as the materials explored below show, it is not a far journey from existing case law, regulations, and rulings to Flinty's situation.

1. Assignment in the Employment Context: *Old Colony Trust*

In *Old Colony Trust*,⁶² the American Woolen Company paid the federal and state income tax liabilities on the salaries of its executives for 1918, 1919, and 1920.⁶³ These payments, approved by the company's board of directors, ensured that the executives would take home their full pre-tax salary.⁶⁴ For example, if an executive had a gross salary of one million dollars and was in the thirty-five percent tax bracket,⁶⁵ the company would pay \$350,000 to the federal government on behalf of the executive—allowing the executive to enjoy his or her full \$1 million cash salary after taxes. The issue before the U.S. Supreme Court was whether the company's payments of employee income taxes (\$350,000 in our example) were taxable compensation income to the employee.

The Court ruled that the tax payments were compensation and so were taxable to the employees.⁶⁶ Writing for the Court, Chief Justice Taft noted that the tax payments were made under an agreement between the employee and employer—indicating that the payments were intended as compensation.⁶⁷ The fact that the company made the payments directly to the government (rather than to the employee) was of no importance: “[t]he discharge by a third person of an obligation to him is equivalent to receipt by the person taxed.”⁶⁸ In other words, the employee has constructively received the tax payment and thus must include it in taxable income.

Old Colony Trust makes it clear that employees cannot avoid taxation by having their employers pay their personal bills—tax bills or otherwise. This rule makes perfect sense and protects the tax system from disguised income techniques. For example, assume that my personal monthly electric bill is fifty dollars. I have to pay this bill out of my earnings—most of which, if not all, have been subject to income tax. Thus, I must pay the fifty dollars with after-tax income. Since personal electric bills (like federal income tax payments) are not deductible, I would have no offsetting deduction for making the payment. I cannot change this result by having my employer pay the electric bill for me. If I asked my employer, Boise State University, to hold back fifty dollars of my paycheck and send the fifty dollars directly

62. *Old Colony Trust Co. v. Comm’r of Internal Revenue*, 279 U.S. 716, 719 (1929).

63. *Id.* at 719–20.

64. *See id.*

65. For simplicity, 2012 tax rates are used and payroll taxes are ignored.

66. *Old Colony Trust*, 279 U.S. at 729.

67. *Id.*

68. *Id.*

to the Idaho Power Company to pay my personal electric bill, Boise State would still report the transaction as if I had received the income and then paid the power bill myself. Thus, I would be taxed on the fifty dollars, just as if I had received it in cash. The fifty dollars would be subject to income tax withholding and payroll tax withholding. Since payments of personal electric bills are not deductible, I would not get an offsetting deduction for the fifty dollars I would be deemed to have paid to Idaho Power. *Old Colony Trust* thus ensures that the tax treatment of paying a personal expense (be it taxes or electric bills) is the same whether taxpayers pay them directly or have their employer pay them.

It is easy to extrapolate from the tax payments at issue in *Old Colony Trust* to the utility bill example because both tax payments and personal utility bills are not deductible. But what if an employer makes a payment on behalf of an employee for an expense that would normally be *deductible* if paid directly by the employee? *Old Colony Trust* would indicate that the amount paid by the employer is still taxable to the employee (subject to withholding of income tax and payroll taxes). The employee would still be deemed to have paid the expense directly and therefore would be able to claim a deduction on his or her Form 1040. The employee is still in the same position as if he or she had earned the income, paid income and payroll tax on it, and then took an income tax deduction for it.

For example, if I wish to make a \$100 charitable donation to the United Way, I could either (1) write a check for \$100 to the United Way or (2) ask my employer to withhold \$100 from my paycheck(s) and remit it to the United Way. While the two options differ in form, they are the same in substance and thus should lead to the same tax results. And they do. In both options, my normal gross pay is subject to income and payroll tax withholding without reduction by the \$100. I then can claim a charitable contribution deduction for \$100, assuming I meet all the requirements to do so.

But the analogy between *Old Colony Trust* and the United Way example is not exact. *Old Colony Trust* involved a payment by an employer to an employee's creditor (the federal government).⁶⁹ The payment benefited the employee by paying the employee's obligation.⁷⁰ In contrast, the donation to the United Way is presumably not obligatory, but rather is gratuitous. Indeed, it *must* be gratuitous to be deductible. As noted previously, a charitable contribution must be given with no expectation of a return benefit; that is, with detached and disinterested generosity.⁷¹ In contributing to the United Way, I, unlike the executives in *Old Colony Trust*, did not receive a benefit from the employer's payment.⁷² Does the gratuitous nature of the

69. *Id.*

70. *Id.*

71. See *supra* note 26 and accompanying text.

72. See Patricia A. Cain, *The Story of Earl: How Echoes (and Metaphors) from the Past Continue to Shape the Assignment of Income Doctrine*, in *TAX STORIES: AN IN-*

payment make a difference for tax purposes? To find out, we now turn to a discussion of the assignment of income doctrine and its application in the gratuitous setting.

2. Assignment in the Gratuitous Context: *Earl* and *Corliss*

The Supreme Court established the assignment of income doctrine—one of the key concepts underlying the federal income tax—in *Lucas v. Earl*.⁷³ In an era before spouses had the option of filing joint tax returns, Mr. Earl legally assigned half of his earnings to his wife and claimed that he needed only to report half of his income on his tax return and that his wife should report the other half that was assigned to her on her tax return.⁷⁴ The Court said this was not allowed; whoever earns the income must pay tax on it. Therefore, Mr. Earl was required to pay tax on 100% of his income. The assignment of half of such income to his wife, although legally enforceable, represented a gift. In an oft-quoted phrase, Justice Oliver Wendell Holmes noted that the “tax could not be escaped by anticipatory arrangements and contracts however skillfully devised . . . by which the fruits are attributed to a different tree from that on which they grew.”⁷⁵

In a subsequent assignment of income case, *Corliss v. Bowers*, the Court held that the grantor of a trust was taxable on the trust’s income even though title to the property was held by the trust and the income was payable to the trust’s beneficiaries (the grantor’s wife and children) rather than the grantor.⁷⁶ The grantor was unable to shift the income to the trust beneficiaries because he retained the right to revoke the trust.⁷⁷ Justice Holmes, writing for the Court, stated that “taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid.”⁷⁸ Combined, *Earl* and *Corliss* make clear that the person earning income or having control over income producing property is taxable on the resulting income. As Holmes stated, “income that is subject to a man’s unfettered command and that he

DEPTH LOOK AT TEN LEADING FEDERAL INCOME TAX CASES 275, 299 (Paul L. Caron ed., 2003) (noting that *Old Colony Trust* involved an assignment of income “to a creditor who has provided the taxpayer with value” rather than a gratuitous transfer and noting the argument that “[i]t is not the assignment alone that causes the income to be taxed to the employee, but rather the fact that the income was paid for the employee’s benefit”).

73. *Lucas v. Earl*, 281 U.S. 111 (1930).

74. *See id.* at 113–14.

75. *Id.* at 115. Scholars have noted that this metaphor is often inapt, especially where the earner is not entitled to all the income. For example, an associate at a law firm may earn fees in excess of her salary, but she is only taxed on her salary, not on the amount of extra fees she earned for the firm. Cain, *supra* note 72, at 276.

76. *Corliss v. Bowers*, 281 U.S. 376, 377–78 (1930).

77. *Id.* at 377.

78. *Id.* at 378.

is free to enjoy at his own opinion may be taxed to him as his income, whether he sees fit to enjoy it or not.”⁷⁹ If you earn income by virtue of working for it or via control over income-producing property, you cannot avoid paying tax on the income by assigning the earnings or property to another.

A person not familiar with taxation might ask why the government should care who pays the taxes—so long as the taxes are paid. Why should the government care whether Mr. Earl or Mrs. Earl paid the tax on Mr. Earl’s earnings or whether a trust grantor or the trust beneficiaries paid the tax on income from trust property, as long as the tax was paid? The reason the government wants to ensure that whoever earns income pays tax on it is that each of us has different tax attributes. In our progressive tax rate system, if income shifting were allowed, then taxpayers in high tax brackets could assign their income to family members in lower tax brackets—thus reducing the tax.⁸⁰ Virtually everyone would end up being taxed at the lowest tax rate.

The tax system’s use of the assignment of income doctrine to protect the progressive tax rate structure is necessary, regardless of the taxpayer’s motives in assigning income to another.⁸¹ Tax avoidance need not be the rationale behind the assignment. Mr. and Mrs. Earl, for example, likely did not have tax planning in mind when they entered into their contract to legally split Mr. Earl’s earnings. In fact, the contract assigning income to Mrs. Earl was entered into in 1901, twelve years before the passage of the income tax.⁸² Nonetheless, the assignment of income doctrine applied as a means to avoid the shifting of income and of protecting the progressivity of the income tax.

3. Assignment in the Charitable Context: The Controversy over Eleanor Roosevelt’s Radio Broadcasts

While both *Earl* and *Corliss* involved gratuitous transfers, neither involved a transfer to *charity*. Nonetheless, assignment of income principles still apply to assignments to charity. Indeed, the assignment of income doctrine was infamously raised in the 1930s in connection with First Lady Eleanor Roosevelt’s radio broadcasts. Mrs. Roosevelt agreed to do a series of radio broadcasts sponsored by Selby Arch Preserver Shoe Company. Under

79. *Id.*

80. *See, e.g.,* Cain, *supra* note 72, at 279.

81. *Id.* at 279 (noting that agreements to assign income “should be ignored by the tax collector regardless of the taxpayer’s innocent non-tax avoidance motives”).

82. *Lucas v. Earl*, 281 U.S. 111, 13 (1930). The speculation is that Mr. and Mrs. Earl entered into the agreement for estate planning purposes. It effectively created joint property with rights of survivorship. So it would make it easier for all of Mr. Earl’s property to pass to Mrs. Earl upon his death—without the need of a probate process. Cain, *supra* note 72, at 285. For more on the *Earl* case and its impact, *see generally* Cain, *supra* note 72.

the agreement, for each broadcast Selby paid one dollar to Mrs. Roosevelt and \$3,000 to a charity, the American Friends Service Committee.⁸³ Since the transfer to charity was directed by Mrs. Roosevelt, assignment of income principles should have applied to require Mrs. Roosevelt to include the \$3,000 in income and then (if she met the requirements) to take a deduction for \$3,000 transfer to charity. At the behest of President Roosevelt's political rivals, the House Committee on Ways and Means held a hearing about the taxation of Mrs. Roosevelt's broadcasts.⁸⁴ Assistant Attorney General Robert Jackson testified he had previously issued an opinion that Selby's payments were not taxable to Mrs. Roosevelt:⁸⁵

Anyone with a salary or wage or with income from invested property cannot assign that income, nor order it be paid to a person or corporation so as to avoid taxes. The doctrine of constructive receipt of income, however, cannot be used to create income when there is no income and has never been used to justify a tax on services devoted to charity. Mrs. Roosevelt declined to work for money and was only willing to serve for charity's sake. It was and is my opinion that such benefit broadcasts do not result in taxable income.⁸⁶

Jackson thus drew a line between assigning wages or other income and working for free while directing where the refused fee should go. Jackson's opinion would not apply to, for example, a professor diverting some of his salary to a particular college or university fund, but would apply to an adjunct agreeing to teach a class for free while doing the same thing (designating where the forgone fee would be used within the college or university empire).

While Jackson's opinion put Mrs. Roosevelt's issue to rest, subsequent commentators have made clear that Jackson's opinion was incorrect.⁸⁷ Under basic assignment of income principles, Mrs. Roosevelt should have been taxed on the income diverted to charity at her request. As one commentator put it, if Jackson's opinion were to hold up, then "we might each designate a few hours rendered to our employers for charity and those wag-

83. JAY STARKMAN, *THE SEX OF A HIPPOPOTAMUS: A UNIQUE HISTORY OF TAXES AND ACCOUNTING* 324 (2008). Selby also paid a \$1,000 commission to journalist Miles Lasker for each broadcast. Lasker, in turn, sent \$400 of the commission to Nancy Cook—a friend of Mrs. Roosevelt's. *Id.* While the payment of this commission raises assignment of income issues, I ignore them for purposes of this Article to focus on the transfer that was made to charity.

84. *Id.* at 324–25.

85. *Id.* Jackson later became Attorney General and then an Associate Justice of the Supreme Court. *Id.* at 325.

86. BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS* ¶ 75.2.4 (2010) (quoting *Hearings before the Joint Comm. On Tax Evasion and Avoidance*, 75th Cong., 1st Sess. 426 (1937)).

87. *See, e.g.*, STARKMAN, *supra* note 83, at 325.

es would escape taxation.”⁸⁸

4. Assignment in the Charitable Context: *Giannini* and *Hedrick’s* Interpretation of *Giannini*

The courts had an opportunity to weigh in on assignment of income issues in the charitable context in the 1940s. The first, *Commissioner of Internal Revenue v. Giannini*, involved a president of a for-profit corporation who received 5% of the corporation’s profits in lieu of a salary.⁸⁹ Upon learning that he had earned nearly \$450,000 under this arrangement from January to July 1927, Giannini informed the corporation that he would refuse any additional compensation for the rest of the year and asked that the corporation “do something worthwhile with the money.”⁹⁰ The salary savings from the refused compensation came to approximately \$1.4 million.⁹¹ The corporation donated these funds to the University of California to establish the Foundation of Agricultural Economics in Giannini’s honor.⁹²

The IRS claimed that Giannini had, in substance, been paid the \$1.4 million before donating it to the University of California.⁹³ The Ninth Circuit, after reviewing the assignment of income cases (including *Lucas v. Earl*⁹⁴), held that Giannini never constructively received, and did not direct the disposition of, the \$1.4 million.⁹⁵ It was the corporation, not Giannini, that decided to donate the refused salary to the University of California.⁹⁶ In other words, the corporation was in control of the funds, not Giannini. Accordingly, Giannini did not realize any taxable income when he refused the \$1.4 million in salary.⁹⁷

In *Hedrick v. Commissioner of Internal Revenue*, a later case that did not involve a charitable transfer, the Second Circuit held that an employee who refused the pension he had earned was nonetheless taxable on the pension payments that his former employer provided to him.⁹⁸ The court explicitly applied the constructive receipt doctrine, but also cited the assignment of income cases, *Earl* and *Corliss*.⁹⁹ The court noted that *Giannini* might be distinguished on the facts because Giannini refused his compensation *be-*

88. *Id.*

89. 129 F.2d 638 (9th Cir. 1942).

90. *Id.*

91. *Id.* at 639.

92. *Id.*

93. *Id.* at 640. The focus in the case was on the \$1.4 million and whether it was taxable income to Giannini. The court did not discuss the possible deductibility of the subsequent transfer to the University of California.

94. See discussion *supra* Part III.B.2.

95. *Giannini*, 129 F.2d at 641.

96. *Id.*

97. *Id.*

98. 154 F.2d 90, 91 (2d Cir. 1946).

99. *Id.* See discussion of *Earl* and *Corliss supra* Part III.B.2.

fore he had earned it and his employer had agreed to honor his refusal.¹⁰⁰ In contrast, in *Hedrick* the taxpayer had already earned the pension at issue (through his years of service with his former employer) and the former employer had not acquiesced to the refusal (the employer actually sent the taxpayer the pension checks). The *Hedrick* court, through its interpretation of the Ninth Circuit's decision in *Giannini*, thus appears to have carved out an exception to the constructive receipt doctrine where compensation is refused prior to performing services. But, it is critical to recall that in *Giannini* itself the court found that Giannini did not exercise any control over the disposition of the saved funds. Thus, the combination of *Hedrick* and *Giannini* indicates that, to avoid assignment of income, the income must be refused prior to the performance of services *and* the taxpayer can have no direction or control over how the saved funds are used.¹⁰¹

5. Assignment in the Charitable Context: Regulations and Rulings

The Department of the Treasury finally weighed in on assignment of income in the charitable context in 1957, only after Assistant Attorney General Robert Jackson and the courts had already grappled with the issue. However, it did so in a way that is hard to reconcile with Jackson's ruling in Mrs. Roosevelt's situation.¹⁰² The key authority is the following regulation:

The value of services is not includible in gross income when such services are rendered directly and gratuitously to an organization described in section 170(c) [a charitable organization eligible to receive tax-deductible contributions]. Where, however, pursuant to an agreement or understanding, services are rendered to a per-

100. *Id.* Presumably, the *Hedrick* court interpreted the facts of *Giannini* as follows: Giannini accepted approximately \$450,000 as his salary for January through July of 1927. Then, in July, he refused to take any further salary for the future work he would do for the corporation through the end of the year. Thus, Giannini refused approximately \$1.4 million in compensation before he earned it. In reading the Ninth Circuit's opinion in *Giannini*, however, it is not clear whether the Second Circuit's interpretation of the facts was correct. Indeed, the Second Circuit itself detected some ambiguity in *Giannini* and noted that if it was not correct about Giannini refusing the compensation before performing services, then it would refuse to follow the holding in *Giannini*. *See id.* at 91. In other words, the Second Circuit would likely have found Giannini taxable on the \$1.4 million in refused salary if Giannini had, in fact, not refused it before he earned it.

101. The constructive receipt and assignment of income doctrines are somewhat conflated in both *Giannini* and *Hedrick*. Thus, it is hard to discern how far and under what circumstances any "pre-services rendered" exception would apply. But it seems fairly clear that control over saved funds is what matters in assessing taxation (whether viewed through a constructive receipt lens or an assignment of income lens).

102. *See supra* Part III.B.3.

son for the benefit of an organization described in section 170(c) and an amount for such services is paid to such organization by the person to whom the services are rendered, the amount so paid constitutes income to the person performing the services.¹⁰³

The regulatory language requires some unpacking. First, the regulation validates that donated services do not produce taxable income (and thus do not result in a charitable contribution deduction) as noted in Part III.A above. Second, the regulation indicates that someone in Mrs. Roosevelt's position would in fact be taxed on his or her forgone income. Mrs. Roosevelt performed services for Selby (radio broadcasts) and then "pursuant to an agreement or understanding," Selby paid the American Friends Service Committee (an organization described in section 170(c)). So, per the regulation, Mrs. Roosevelt should have taxable income equal to the amount Selby paid to the American Friends Service Committee. Presumably, upon including the amount in income, she would be entitled to take a charitable contribution deduction as if she had paid the American Friends Service Committee directly.¹⁰⁴

The regulation provides guidance in situations like that of Mrs. Roosevelt but does not directly address the situation that is the subject of this Article: What happens when a professor or other employee of a charity forgoes salary under an "agreement or understanding" that the saved funds will be redeployed for a particular charitable purpose of the employer? The regulation could be read to cover this situation if there was "an agreement or understanding" and the "organization described in section 170(c)" and the "person to whom the services are rendered" could be the same—that is, the college, university, or other charitable organization. While this appears to be a strained reading of the language, it is, in fact, how the regulation has been interpreted—at least by cautious college and university counsel.¹⁰⁵

Specific revenue rulings shed more light on the meaning of the regulation. Revenue Ruling 58-495 involves employees who entered into an agreement with their employer to aid charity.¹⁰⁶ The employees agreed to forgo five hours of pay for charity, and the employer remitted what it would have paid the employees to the designated charity.¹⁰⁷ The ruling held that the pay for the five hours of income paid to charity by the employer was taxable compensation to each employee.¹⁰⁸ The outcome of this ruling is not surprising, given that the facts are similar to the scenario stated in the regulation itself.

103. Treas. Reg. § 1.61-2(c) (as amended in 2003).

104. Subject to the limitations on charitable contribution deductions discussed at *infra* Part III.E.

105. *See infra* Part III.C.

106. Rev. Rul. 58-495, 1958-2 C.B. 27.

107. *Id.*

108. *Id.*

Revenue Ruling 79-121 says that an honorarium due to an elected government official for speaking to a national professional society that was paid to an educational organization at the official's request is taxable income to the official.¹⁰⁹ In addition, the official is entitled to a charitable donation, to the extent allowed by section 170.¹¹⁰

Other interpretations of the regulation, which placed the transactions at issue in the no income/no deduction category, resulted in no imputation of income.¹¹¹ Revenue Ruling 68-503, for example, found that an entertainer who performed for no compensation at events planned, organized, promoted and scheduled by a political fundraising organization realized no income from their donated services.¹¹² The political organization charged admissions to the events and used the funds to run the organization's activities, but no amount was paid to the performer.¹¹³ In that scenario, however, the entertainer donated services directly to the benefiting organization, which made the entertainer look like any other volunteer. The Eleanor Roosevelt situation, by contrast, did not involve a direct donation of time to a charitable organization.¹¹⁴ Instead, Mrs. Roosevelt worked for Selby (the sponsor) who then paid the charity at Mrs. Roosevelt's request.

In addition, Revenue Ruling 71-33 found that a taxpayer who transferred all of his interests in a manuscript (his memoirs) to a charity and then gratuitously assisted the charity in preparing the manuscript for publication did not realize any income from the charity's use or sale of the memoirs.¹¹⁵ This situation is distinguished from an assignment of income arrangement because the taxpayer essentially made a contribution of *property* (the manuscript)—entitling the charity to all subsequent income from the property—followed by a contribution of services (getting the memoirs ready for publication).¹¹⁶

C. Current Practice in Higher Education

As noted above, there is no specific ruling in the charitable context where employees of a charity volunteer time with their employer and are deemed to have imputed income. But, by extension, the materials reviewed

109. Rev. Rul. 79-121, 1979-1 C.B. 61.

110. *Id.* In 1995, the IRS ruled that Revenue Ruling 79-121 was obsolete because it contained references to statutes that have changed. Rev. Rul. 95-71, 1995-2 C.B. 323. However, the regulation on donated services that Revenue Ruling 79-121 was interpreting has not changed. So, while Revenue Ruling 79-121 is no longer good law, its conclusion still appears consistent with the regulation it interpreted.

111. *See supra* Part III.A.

112. Rev. Rul. 68-503. 1968-2 C.B. 44.

113. *Id.*

114. *See supra* Part III.B.3.

115. Rev. Rul. 71-33, 1971-1 C.B. 30.

116. *Id.* *See also* Rev. Rul. 76-20, 1976-1 C.B. 22 (coming to a similar conclusion under slightly different facts).

above show a great risk of income imputation where the employee is giving up a specific amount of salary and there is an agreement or understanding about how the salary savings will be deployed in the charitable organization.

Applying the above rules in the higher education context can be somewhat tricky, given the unique legal structure and internal political structures that can predominate. Most colleges and universities that are aware of this issue proceed cautiously, requiring that either donated time be included in income or allowing the “donor” absolutely no say over how the “saved” funds resulting from their volunteer work will be spent.¹¹⁷ Indeed, college and university counsels who have opined on the donated services issue conclude that income must be imputed, unless the employee disclaims all right to any income prior to rendering services and there is no binding agreement about how the savings will be used.¹¹⁸

117. A graduate assistant spoke informally with executives at several large colleges and universities (or their supporting foundations) who confirmed that they take this approach. (Notes on file with author). This small, unscientific survey indicated that, perhaps due to the tax impediments, colleges and universities are not actively seeking donations of time from their employees. (Being unable to include donated time in capital campaign goal reports was also a factor.) One university used to actively seek donations of employee time and required that employees sign a contract (on file with author) waiving all right to determine where the salary savings would be used. The university would then not include the forgone salary in the employee’s income. But the university stopped this practice, in an abundance of caution, upon being audited by the IRS. Because the donated time program was suspended, it never became an issue in the IRS audit. Given that our informal survey showed little encouragement of donated services, it is doubtful that a full blown empirical survey would shed additional light on current practice. The hope is that a well-crafted tax rule that removes some of the impediments to donating time might encourage donations of time by faculty and greater use by university development offices in taking advantage of this resource. Anecdotal evidence suggests that many faculty would be interested in donating time (especially toward the end of their careers) if they had a say over where the funds would go (e.g., a scholarship fund in honor of the faculty member’s family).

118. See, e.g., Office of the Gen. Couns., Q&A on Tax, at <http://counsel.cua.edu/tax/questions/index.cfm> (last visited Nov. 26, 2012). The Campus Legal Information Clearinghouse included two questions and answers regarding donated services:

Donation in Lieu of Salary?

Q: We pay emeritus faculty \$7,500 per course to teach for us. One such retired professor wants to teach two courses, but only wants to receive \$6,000 total (\$3,000 per course), for purposes of Social Security. He wants the University to give the remaining \$9,000 that he would have received to our foundation’s alumni scholarship fund. Any problems here with the 501(c)(3) status of our foundation or with the IRS generally?

A: It is taxable income to the recipient (and reportable on the faculty member’s IRS Form W-2 and subject to income/employment tax withholding) by this exercise of control and dominion over the payment. This assignment of income to the foundation/charity does not work to avoid the recipient’s tax liability on it; the good news is that he may be entitled to a charitable contribution deduction (depending upon the status of the foundation).

College and university tax counsels who advise against allowing donated services without imputing income have cause to take a conservative approach. In the past, colleges and universities, by their nature and because of their tax-exempt status, were often left alone by the government and could engage in informal transactions (like allowing donated services without income imputation) without much consequence. However, this has changed as IRS scrutiny of colleges and universities has increased substantially in the past few years. Indeed, in October of 2008, the IRS sent compliance check questionnaires to 400 private and public colleges and universities.¹¹⁹

To avoid incurring the taxable income, an individual must disclaim any right to the income BEFORE any services are performed and the person vests and otherwise has a right to receive payment. Also, if the person would like the money to go to some pet charity or a particular purpose, the disclaimer should not make the payment contractually binding. For example, the individual could say he hereby irrevocably and forever disclaims any right, title or interest in the payment and, the person respectfully requests, but does not require, that the payment be made instead to XYZ charity.

Answer courtesy of Sean P. Scally, University Counsel and Tax Attorney, Vanderbilt University.

Gift with Pretax Dollars:

Q: Can an employee make gifts to the university with pretax dollars, and only be taxed on the net amount received as income?

A: The concept is that an employee earning, say, \$10,000 [from] the University could reduce his/her salary to, say, \$9,000, and the difference of \$1,000 be a gift to the University. If legally permissible, those advocating this arrangement note that the employee would be taxed only on \$9,000, but would not be entitled to a charitable contribution deduction for the gift amount, i.e., \$1,000. You asked if this arrangement is legally permissible.

After undertaking such research and analysis as is necessary, we have concluded that the arrangement is not legally permissible, but rather is a legally impermissible assignment of income. As a general income tax principle, income is taxed to the person who earns it. I cannot, for example, assign a portion of my income to my son or daughter to take advantage of their being taxed at a lower bracket. I cannot assign a portion of my income to a needy relative or friend who may not otherwise have income. And, similar to what you have asked, I cannot assign a portion of my income to my church to take advantage of its tax exemption.

In the example above, the individual employee earned \$10,000 and even though he/she assigned \$1,000 of that to the University, the employee earned, and is taxable on, the full \$10,000. The individual would be entitled to a charitable contribution deduction of \$1,000. Certain assignments are specifically authorized by statute, i.e., the authorization for employees to assign a portion of their income, pretax as salary reductions, to the University's pension plan as an employee contribution. There is no statutory or other authorization to allow pretax assignments for charitable gift purposes. The arrangement being proposed would be strongly resisted by the IRS and, if implemented, could cause the University to be subject to penalties and fines.

Answer courtesy of Thomas Arden Roha, Esquire, Roha & Flaherty, Washington, D.C. Attorney Roha serves as tax counsel for The Catholic University of America. *Id.*

119. INTERNAL REVENUE SERV., IRS EXEMPT ORGANIZATIONS, COLLEGES AND

Based on the questionnaire responses, and information available on Forms 990, the IRS commenced audits of more than thirty colleges and universities.¹²⁰ The audits targeted executive compensation issues and reporting of the unrelated business income tax (the tax that nonprofits must pay on their commercial income).¹²¹

While the audits were not aimed at donated services/assignment of income issues,¹²² they sent a signal that colleges and universities are subject to scrutiny and should be scrupulous in complying with the tax law (including the law of donated services). As one sociologist put it, “*higher education is one of the last revered Western institutions to be ‘de-churched’*”; that is, it is one of the last to have its ideological justification recast in terms of corporatization and commodification and to become subject to serious state surveillance.”¹²³ With scrutiny by the IRS, colleges and universities are likely to shun donated services unless income is imputed.¹²⁴ But taking the imputed income/charitable contribution deduction approach has negative tax consequences—as we are about to discover—sufficient to deter faculty volunteerism.¹²⁵

D. Justification for Current Rules: Control and Horizontal Equity

It all comes down to control. The justification for treating some donated service situations as resulting in no income/no deduction (as discussed above in Part III.A) and others as resulting in imputed income coupled with a possible deduction (as discussed above in Part III.B) is based on control of the saved funds. Volunteers in the former category control the services they provide but do not control how the saved funds will be used.¹²⁶ Volunteers in the latter category control both the services they provide and have a say in how the saved funds will be used. Volunteers in the latter category are like donors of cash, and in theory they should be taxed as if they had donated cash.

An effective tax system should strive to achieve horizontal equity—that

UNIVERSITIES COMPLIANCE PROJECT INTERIM REPORT 1 (May 7, 2010), available at http://www.irs.gov/pub/irs-tege/cucp_interimrpt_052010.pdf.

120. *Id.* at 5.

121. *Id.*

122. *See generally id.* (not raising the assignment of income issue).

123. GAYE TUCHMAN, WANNABE U: INSIDE THE CORPORATE UNIVERSITY 41 (2009).

124. Keep in mind that the IRS can hold an employer (here the college or university) liable for any taxes that should have been withheld from the employee, but were not. In addition, failure-to-deposit penalties may also apply, although waivers may be granted if the failure is due to reasonable cause and not willful neglect. The imposition of tax and penalties can get complicated and will vary by circumstance. A detailed review of the penalty provisions is beyond the scope of this Article. For more detail, *see generally* INTERNAL REVENUE SERV., PUBLICATION 15, CIRCULAR E, EMPLOYER’S TAX GUIDE (2013), available at <http://www.irs.gov/publications/p15/>.

125. *See infra* Part III.E.

126. *See, e.g.*, discussion of *Giannini supra* Part III.B.4.

is, tax individuals in the same position in the same way.¹²⁷ If horizontal equity is lacking, taxpayers may judge the tax system to be unfair, lose respect for the tax system, and perhaps not strive to comply with the law. Thus, lack of horizontal equity undermines the ability of a tax system to effectively generate revenues.

The current rules on donated services appear to achieve horizontal equity between donors of cash and donors of time in most situations. Assume Professor Pedant, who works for Metro-State University, donates \$1,000 to Metro-State, designating that the donation help fund scholarships for business students.¹²⁸ Pedant would have to earn income at Metro-State, which would be taxable (and subject to FICA) sufficient to generate a net amount of \$1,000 and then he would take a deduction (if he gets past the limits on deductibility discussed below in Part III.E) of \$1,000. He would also have control over how the donation was used (scholarships for business students versus some other Metro-State program). If Pedant instead donates time to Metro-State and designates the use of the saved funds, then he is in the same position as if he had donated cash: he has taxable income and (perhaps) an offsetting deduction. If Pedant wants to fall into the no income/no deduction category in donating time to Metro-State, he can only choose the nature of his services (e.g. the class he will teach for free). He cannot choose how the saved funds will be allocated. While he is in a better position tax-wise, he is in a different position from a donor of cash because he has no control over how the cash resulting from his gift of time is used.

Likewise, consider the following examples:

Example #1: Professor Overwhelmed works “overtime” without pay. There is no imputed income in this case and no deduction. In a sense, Overwhelmed has contributed something.¹²⁹ But the exact value cannot be

127. SLEMROD & BAKIJA, *supra* note 41, at 89.

128. The fact Pedant is donating to the same organization at which he is employed makes no difference. The cash donation could have been made, for example, to the United Way and designated for a particular United Way program (say, homeless shelters). An employee donating cash to his charitable employer is treated the same as any other donor of cash.

129. Indeed, just working for a charity is in effect a charitable action, since the employee is likely forgoing a higher salary that might be available from a for-profit employer. See David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 257 (2009) (indicating that senior managers in nonprofit organizations and government are often personally committed to the cause of the organization and are thus willing to work for below-market wages). The willingness of the employee to accept a lower salary in working for a charity might be because of altruism, but is likely more because of the “warm glow” that one receives from doing noble work for a nonprofit. See Brian Galle, *Keep Charity Charitable*, 88 TEX. L. REV. 1213, 1223 (2009) (indicating that “[j]ust as giving to a charity produces a warm glow, so too may working for one” and that warm glow is really “noncash compensation” that may well “lower the actual cost of wages for nonprofits”). See also James R. Hines, Jr., et al., *The Attack on Nonprofit Status: A Charitable Assessment*, 108 MICH. L. REV. 1179, 1197 (2010) (internal citations omit-

quantified; only the salary negotiated at arm's length between Overwhelmed and the university can be quantified. Even if the value could be quantified, Overwhelmed would have no say over how any saved funds were redeployed in the university.

Many professors would argue that they are already donating quite a bit of time to the cause.¹³⁰ They have often nine month contracts,¹³¹ but end up working twelve months to get the job done and often work overtime.¹³² But a professor's work redounds to the benefit of the institution (and thus the

ted) ("Although nonprofit managers are certainly motivated by money, they may have intrinsic motivation that generally requires fewer financial incentives for high performance than do their for-profit counterparts. Nonprofit employees may be more loyal to their employers than for-profit employees, if, as is often alleged, nonprofits provide 'more pleasant amenities on their job, such as flexible hours, more stable job prospects, . . . a slower pace of work' or control over their working environments."). This would fit neatly with higher education—tenure, a connection and long-term shared sense of mission with the school, flexible schedules, and job stability. It would be ridiculous to try to put a value on, and tax, warm glow and these intrinsic rewards, and so the tax system does not even try. One commentator put the issue as follows:

First, if consumption—or income—is ultimately a mental or psychological concept, **the tax base no longer follows precisely from observable transactions**. Rather, an accurate determination of tax liability on this theory would require knowledge of each person's capacity for pleasure, because identical objects purchased for identical prices would almost surely give rise to different amounts of psychic income in different psyches. There apparently could also be a kind of manna under this view, in that a pleasurable sensation arising without an increase in social product would presumably be income. The psychological nature of this concept plainly makes it unworkable as a touchstone for taxation, because it requires calculation of amounts that are totally unknowable.

Alvin Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L. J. 1081, 1096 (1980).

Of course, in the higher education context, warm glow may be harder to identify and quantify in an "observable transaction". While there are for-profit schools that might offer more in the form of immediate or "upside" compensation (stock options, etc.), such positions also lack tenure or other forms of long-term job security. Also, the effect of warm glow may be more easily discernible in certain disciplines where highly compensated for-profit work is available (accounting, law, sciences). Nonetheless, individuals may seek out academic or charitable employment for a variety of reasons, despite the often lower pay—such as intellectual challenge, flexibility, etc.

130. See, e.g., JACQUES BARZUN, *TEACHER IN AMERICA* 29 (1944) reprinted in BIRNBAUM, *supra* note 1, at 131 ("Teaching in America is a twenty-four-hour job, twelve months in the year; sabbatical leaves are provided so you can have your coronary thrombosis off campus.").

131. Martin J. Finkelstein, *The Power of Institutional and Disciplinary Markets: Academic Salaries in the United States*, in *PAYING THE PROFESSORiate: A GLOBAL COMPARISON OF COMPENSATION AND CONTRACTS* 318, 324 (Philip G. Altbach et al. eds., 2012) (noting that most faculty are on nine or ten month contracts).

132. Well, I do anyway. But maybe I am just a slow worker. In any case, many faculty members work a great deal, devoting a lot of their "leisure" time to their professional activities. See Yaroslav Kuminov, *Academic Community and Contracts: Modern Challenges and Responses*, in *PAYING THE PROFESSORiate: A GLOBAL COMPARISON OF COMPENSATION AND CONTRACTS* 331, 332 (Philip G. Altbach et al. eds., 2012).

students, community, and other stakeholders the institution serves) *and* to the benefit of the professor's career. The benefit to the professor's career may not be in the form of cash, but via an enhanced reputation in the broader academic community.

Early career professors, of course, must work more than their contracts call for in the hopes of keeping their job (i.e., attaining tenure). This might be viewed more as an investment than a donation. After all, tenure provides not only guarantees for the professor, but also an attachment between the professor and the institution. The bottom line is that it is often difficult to separate the selfish motives of professors from genuine concern for the institution to which they have devoted their labors. Professors act as both business folks (in the business of being an employee), and as charitable workers. Drawing the line between the two can be difficult.

Example #2: Professor Dedicated works for City State University with a salary of \$80,000. He could work for Corporate University for \$100,000. We do not impute \$20,000 to him and consider it a donation. We do not try to measure Dedicated's cost versus his value. Perhaps he remains at City State out of a sense of mission. Perhaps he stays for the intrinsic, psychic benefits of the job—freedom, flexibility, time off, etc.¹³³ He gets, therefore, essentially a tax benefit in that he is not taxed on the \$20,000 he never earned.¹³⁴ The \$80,000 is the negotiated, arm's length price that will be respected by the tax law.

Example #3: Professor Livewood works for City State University with a salary of \$80,000 and tenure. He could work for Corporate University for \$100,000 without tenure. We don't try to impute \$20,000 in income to Livewood as the intangible value of tenure. But it is becoming easier to es-

133. *Id.* (noting that professors are often willing to settle for less than market pay for the unique working conditions and free-time that a university job provides). These intangible benefits may become less alluring as they become more prevalent in jobs outside of academia that pay more. *See id.* at 339.

134. Commentators critiquing recent calls for "for-profit charities" or L3Cs (new legal entities under state law that can both earn a return to investors and pursue a charitable mission at the same time) have identified an analogous situation: organizations (nonprofit or for-profit) that forgo profits by pursuing a charitable goal receive an implicit tax subsidy even if their income is generally taxed:

[A]s is well known, the tax system effectively subsidizes any investments that produce subpar returns, whether or not undertaken with social goals in mind. Stated another way, there is no tax on the pleasure that comes from making an investment that advances charitable goals, whereas the commercial alternative generates a return that the government taxes. The tax benefits would be greater still if investors were permitted full deductions for their investments in social purposes, but investors nonetheless reap a substantial portion of the tax benefits available to nonprofits simply by virtue of not having to pay taxes on returns they have not earned.

Hines, Jr., et al, *supra* note 129, at 1189–90 (2010). This is similar to the case here: Professor Dedicated is giving up \$20,000 in potential compensation and is not taxed on it.

estimate the monetary value of tenure, as some schools offer salary premiums to faculty on multi-year contracts in lieu of the protections of tenure.¹³⁵ In fact, at one least commentator has even suggested taxing the value of tenure.¹³⁶

Example #4: Professor Entitled works for City State University with a salary of \$80,000 and tenure. He could move to Flagship State University and make \$100,000 with tenure, given current market values, his reputation, and a shortage of qualified people in his field. Entitled decides to stay at City State. We don't tax him on the \$20,000 difference and call it a donation.¹³⁷

Example #5: Professor Entitled works for City State University with a salary of \$80,000 and tenure. He could move to Flagship State University and make \$100,000 with tenure, given current market values, his reputation, and a shortage of qualified people in his field. Entitled tells City State about the offer, and City State offers to increase his salary to \$95,000 to keep him around.¹³⁸ Entitled stays at City State.¹³⁹ He is taxed on the \$15,000 raise, of course, but not on the theoretical \$5,000 he gave up by staying at City State.

Example #6: Flagship State University furloughs all employees, requiring them to take ten days "off" without pay.¹⁴⁰ Since the furlough is re-

135. See Finkelstein, *supra* note 131, at 321.

136. James Lileks, *Let's Invent New Vindictive Forms of Taxation for Fun*, RICOCHEM.COM, Aug. 11, 2010, <http://ricochet.com/main-feed/Let-s-invent-new-vindictive-forms-of-taxation-for-fun>.

137. In some disciplines, individuals are effectively donating their time by staying put. Accounting departments, for example, often have "salary inversion" whereby the newest faculty member is likely paid more than the more senior professors. This is because there might be money to hire new faculty at a market salary, but it is harder to tap into resources to bring current faculty into line with current market salaries. This is pretty rare—only affecting disciplines with a shortage of new, credentialed faculty, such as in the accounting discipline. Nonetheless, a senior professor could cash in on current market salaries by jumping ship to another school. (Indeed, we have all run into academic "gypsies" or "drifters" who do just that every few years.) This is not practical for most people, given that changing jobs involves a lot of costs—moving with a family, establishing a new reputation at the new institution, being at the lower end of the seniority list (which might not be that big of a deal—maybe your office won't be as nice or you'll be a bit further down the list for summer teaching preferences, etc.). Still, it is possible, and quantifiable. Yet, we don't impute income for the forgone wages and treat it like a charitable donation.

138. Perhaps using a secret fund reserved to reward disloyalty. See Dilbert Comic Strip, June 29, 1997, available at <http://dilbert.com/strips/comic/1997-06-29/>.

139. Much to the chagrin of his colleagues. Despite the deal he received, Professor Entitled is no doubt the first one to whine in the faculty lounge about how underpaid he is.

140. Technically, professors are not supposed to work on these days, but they must. They still have to prepare for classes, grade papers, advise students, work on committees, and conduct research. So, professors on furlough are really donating their time (but must remain quiet about it). Perhaps one situation where a furlough really does result in a reduction in workload is when the furlough involves shortening the semester

quired and the employees have no say over how the savings is used, there is no imputed income and no deduction. But if the furloughs are voluntary and the employees are giving up what they are entitled to under their employment contracts, income will be imputed.¹⁴¹

All of the above examples follow the arm's length principle. In each instance, for whatever reason, the professor has decided to settle for less pay. The tax law does not question these arrangements. All of the examples also share in common the fact that the professor does not control how the cost savings from their volunteerism is used in the university. Thus, these volunteers are on par with volunteers who, for example, spend the day raking up a park or volunteering with Habitat for Humanity.

In contrast, volunteers whose compensation is negotiated at arm's length but then is voluntarily surrendered—with the volunteers designating where the saved funds will be used—are treated like donors of cash. The assignment of income doctrine is triggered, and the volunteers have taxable income and (perhaps) a deduction. By these lights, it appears that the current tax treatment of donated services achieves horizontal equity. But, as will be discussed below,¹⁴² this is not always the case. Furthermore, just because the rules make some sense, that does not mean they should be beyond scrutiny. As we are about to find out, the imputed income/deduction tax treatment often stifles volunteerism at colleges, universities, and other charitable organizations.

by a week or so. That does reduce some work, but then you are short-changing the students (not that they'll complain).

141. An ironic example in the non-academic setting involved the Idaho State Tax Commission not understanding the tax ramifications of taking voluntary furloughs. In 2009, the State of Idaho required employees of the Idaho State Tax Commission to take furloughs. The furloughs did not apply to the four Commissioners at the head of the Commission, since their salaries are set by the legislature. The four Commissioners took furloughs anyway, in sympathy with their rank and file employees. As it turned out, the sympathy furlough was in violation of state law, and the Commissioners were required to be paid the salaries and report them in income. They were then free to donate the money to the state or another charity (or keep it). John Miller, *Idaho Tax Collectors Try to Take Pay Cut but Can't*, ASSOC. PRESS, June 23, 2010, <http://www.kboi2.com/news/local/97023724.html>.

Recently, President Obama, in solidarity with federal workers facing furloughs, announced that he would forgo \$20,000 of his \$400,000 salary. Laura Saunders, *Obama Won't Deduct Returned Pay*, WALL ST. J. BLOG (Apr. 5, 2013; 10:34 AM), <http://blogs.wsj.com/totalreturn/2013/04/05/obama-wont-deduct-returned-pay/>. Because the President's pay is set by statute and cannot be changed during his term, the \$20,000 he gives up is still taxable to him. *Id.* But, he is entitled to a charitable contribution for the \$20,000 given to the federal government—a deduction that the White House has stated that the President will not claim. *Id.*

142. See *infra* Part IV.C.

E. Illustrating the Difference Between No Income/No Deduction and Imputed Income/Deduction: The “Wash Preventers”

At this point, a person blissfully unfamiliar with the intricacies of the tax law might reasonably ask, “what is the practical difference between the rules noted in Part III.A (no income/no deduction) and Part III.B (imputed income/deduction)? In either case, won’t the taxpayer end up in the same place—with no income and no deduction in Part A and income offset by a deduction in Part B? Isn’t the imputed income/deduction scenario just a wash?” The answer is no. The following section describes the “wash preventers” in the tax law. These wash preventers illustrate a basic tenant of tax planning: exclusions from income are normally more beneficial than deductions from income.

1. Taxpayers Need to Itemize to Claim a Deduction

As previously noted, individuals can deduct charitable contributions only if they itemize deductions rather than take the standard deduction.¹⁴³ In 2012, the standard deduction is \$5,950 for a single filer and \$11,900 for a married couple, filing jointly.¹⁴⁴ Taxpayers with total itemized deductions, like charitable contributions, mortgage interest, real estate taxes, and state income taxes that do not exceed the standard deduction will opt to deduct the standard deduction. Taxpayers taking the standard deduction, therefore, receive no benefit from the charitable contributions they make. A faculty member who does not itemize and has donated services and been imputed income, like Flinty in the opening example, will not get an offsetting deduction. In fact, only about one-third of taxpayers have sufficient deductions to itemize.¹⁴⁵ Normally, itemizers live in high-tax states (like New York or California) or have homes with mortgages. Taxpayers close to retirement, like Flinty, may well have paid off their mortgage and no longer itemize. It is often faculty who are close to retirement, like Flinty, that are in the best financial position to volunteer their time¹⁴⁶—and yet are the least likely to itemize. Volunteers subject to the general rule of no income/no deduction do not have to worry about whether they itemize—since there is no deduction to begin with.

143. See *supra* note 7.

144. Internal Revenue Service, *In 2012, Many Tax Benefits Increase due to Inflation Adjustments*, <http://www.irs.gov/uac/In-2012,-Many-Tax-Benefits-Increase-Due-to-Inflation-Adjustments> (last visited Dec. 13, 2013).

145. See Tax Policy Ctr., *Tax Facts: Type of Deduction 1999-2009*, <http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?DocID=392&Topic2id=30&Topic3id=34> (last visited Dec. 13, 2013).

146. See Rebecca Nesbit, *The Influence of Major Life Cycle Events on Volunteering*, 41 *NONPROFIT & VOLUNTARY SECTOR* Q. 1153, 1155 (2012) (noting evidence that people increase volunteering as they enter retirement and are more likely to volunteer during retirement than earlier in their lives).

But, note that if a taxpayer donates a sufficient amount of time, he or she may end up itemizing just on the basis of the charitable contribution alone. This scenario could occur, for example, where faculty members donate their full salaries to the institution. That is, they are working for free—normally in their last year on the job. If income is imputed, then presumably there would be enough of a deduction to allow the faculty members to itemize. But such retirement-minded faculty will likely run afoul of the next wash preventer: deduction ceilings based on adjusted gross income.

2. Charitable Contribution Ceilings Based on Adjusted Gross Income

Even faculty members who itemize may not be able to deduct the full amount of their salary donations. Charitable contribution deductions are generally limited to fifty percent of the taxpayer's adjusted gross income (AGI).¹⁴⁷ Amounts in excess of the limit may be carried forward and deducted within the next five years (subject to the fifty percent limit applying in each of those years).¹⁴⁸

AGI equals a taxpayer's gross income (from wages, interest, dividends, capital gains, etc.) minus a limited number of enumerated deductions (normally business-related expenses).¹⁴⁹ The government uses AGI to gauge a taxpayer's income level for purposes of limiting tax benefits (like certain itemized deductions and credits) to taxpayers below certain AGI thresholds.¹⁵⁰

147. See *supra* note 8. The theoretical justification for the fifty percent of AGI limit is unclear. Miranda Perry Fleischer has suggested a “dual-majority” theory to explain the limit, opining that the limit likely exists less out of concern for over-benefiting the wealthy (charitable contribution deductions do that naturally—since they increase in value along with the taxpayer's income level and marginal tax rate) than to ensure that the wealthy don't use their generous giving to completely wipe out their taxable income. Without the limit, wealthy taxpayers could give away 100% of their income and avoid all federal income taxes. Taxes pay for government services which presumably benefit society. Donations pay for good works by charities that also presumably benefit society. Society needs both government and charity. Taxpayers can reduce their taxes to the government if they give to a charity of their choice. This gives the taxpayer more say over exactly how they will aid society—by directing their funds to a school, a museum, a homeless shelter, or some other charity they care about—rather than to the general coffers of the government. But at some point this flexibility needs to give way for the need for the government to get tax revenue to carry out its functions (determined by lawmakers representing the majority). So, wealthy donors are given some latitude to decide how their “society” money is spent—but only up to a point. A fifty percent limit seems like a reasonable place to draw the line. For further discussion on these points, see Miranda Perry Fleischer, *Generous to a Fault? Fair Shares and Charitable Giving*, 93 MINN. L. REV. 165, 168–69 (2008).

148. I.R.C. § 170(d)(1) (2006).

149. I.R.C. § 62 (2006). AGI appears as the last line (line 37) on page 1 of Form 1040 and the first line (line 38) of page 2 of Form 1040.

150. For more on the impact of AGI on the service donations, see *infra* Part III.E.3.

While the AGI limit is unlikely to affect a taxpayer giving up part of his or her compensation (like Flinty in the opening example), consider the impact on faculty members donating their entire salary during their final year before retirement. If the imputed income from the donation is the only item of income for the year, they will likely be able to deduct only fifty percent of the income as a charitable contribution. They may even have difficulty deducting the rest over the five-year carryover period if, as is often the case, they have low AGI after retirement since most of their income will be in the form of pensions and (perhaps nontaxable) social security benefits. Even if the faculty members could ensure enough AGI in the carryover period (for example, by taking more distributions out of their retirement accounts than is legally required), they still have a significant problem. In the year of the donation, they must pay tax on about one-half of their forgone salary. This creates a cash-flow problem. The faculty member will have to pay the tax—perhaps via taking money out of savings or perhaps by reducing the contribution. That is, the faculty member may need to exclude the tax bill on the non-deductible donation from his or her donation. This makes Flinty's problem (from the opening example) seem like small potatoes—and ultimately is likely to prevent some faculty from volunteering their time in the first place.¹⁵¹ Indeed, they could save a lot of headache by just working for their normal salary and then donating as much as they could (economically) in cash over a period of time that would maximize their deduction. That is, they might spread out the contributions over a few years to reduce the impact of the fifty percent of AGI limit. Volunteers subject to the general rule of no income/no deduction need not worry about the limit since there is no income increasing their AGIs and no deductions to worry about.

3. The General Problem of Increases in AGI

In addition to the specific fifty percent of AGI ceiling on charitable deductions, another wash preventer is the broader impact of imputed income on AGI. As noted above, many tax deductions and credits are limited based on a taxpayer's AGI.¹⁵² Donors of time may view imputed income as artificial increases in their AGI that trigger reductions in their tax benefits.

One could argue that a time donor is no worse off because his AGI is the same as it would have been in the absence of the donation. With the donation, the faculty member has imputed income. Without the donation, the

151. I have a couple of colleagues who had long spoke of working their last year before retirement for no salary and asking that the salary savings be used to establish a scholarship fund. Knowing the tax ramifications—and the impact of the AGI limits—they are no longer planning to do so.

152. The list of AGI-dependent tax benefits is too long to be reproduced here. A good example, however, is the Pease limits on overall itemized deductions discussed at *infra* Part III.E.4.

faculty member has an equal amount of actual income. Either way, AGI would be the same. The difference is really one of cash flow. Without the donation, faculty members may have an AGI that limits tax breaks, but at least they have after-tax cash from their salary to pay their bills—including their tax bills. Faculty members donating their time, however, end up with the same AGI, but no after-tax cash to pay their bills—including their tax bills.

A good example relates to Social Security benefits. Social Security benefits are generally exempt from tax unless the taxpayer exceeds certain AGI thresholds.¹⁵³ The thresholds start at relatively low AGIs (\$32,000 for married couples filing jointly and \$25,000 for other taxpayers).¹⁵⁴ Donors at or near retirement—the ones in the best position to donate time—may be collecting Social Security benefits.¹⁵⁵ Such donors would be sensitive to increases in their AGI—which would result in a greater amount of their Social Security benefits becoming subject to income tax. Although the same amount of Social Security benefits would be taxed with or without the donation, the donating faculty member may realistically only be able to donate his or her time because of having the Social Security income to provide sustenance. If such benefits were taxable, it could make the cost of the donation prohibitive. Faculty members of a certain age contemplating donating time would be choosing among 1) working for free and having taxed Social Security benefits, 2) working for pay and having taxed Social Security benefits, and 3) not working at all (retiring) and having nontaxable (or lighter-taxed) Social Security benefits. Framing the choice this way makes options 2 or 3 more palatable than option 1, thus causing the general AGI wash preventer to stifle donations of time.

4. The “Pease” Limits on Itemized Deductions

Effective January 1, 2013, the American Taxpayer Relief Act of 2012 resurrected and modified the “Pease” limitations on the overall deductibility of itemized deductions—including charitable contributions.¹⁵⁶ In general, itemized deductions are reduced by the lesser of: (1) Three percent of the excess of the taxpayer’s AGI over \$300,000 for married couples filing jointly and \$250,000 for single filers, or (2) 80% of the itemized deductions otherwise allowable for the year.¹⁵⁷ Because of the high AGI thresholds,

153. I.R.C. § 86 (2006).

154. I.R.C. § 86(c) (2006).

155. Keep in mind that there is no mandatory retirement age for faculty. A faculty member in her seventies, for example, may be working full time and collecting Social Security benefits at the same time. Such a faculty member would be more inclined to donate her salary—since she can use her Social Security benefits for day-to-day sustenance.

156. I.R.C. § 68.

157. I.R.C. § 68. The AGI thresholds are for 2013 and will be adjusted for inflation starting in 2014. I.R.C. § 68(b)(2).

the Pease limitations are likely to have limited impact on professors or other employees of charities who donate time.¹⁵⁸ Indeed, the Pease limitations are expected to affect fewer than the top two percent of households.¹⁵⁹ Even if it applies in a particular case, unlike the other wash preventers, it probably won't—standing alone—influence an employee's decision whether to donate time.¹⁶⁰ But it could, in some cases, increase the tax cost of donating time—just as it would reduce the tax benefit of donating cash. The Pease limits would not affect donations of time that fall under the general rule of no income/no deduction, since in such a case there would be no deduction to limit.

5. Payroll Taxes

Taxable imputed income is subject to state and federal income tax withholding, which must somehow be paid in cash. But income tax withholding can be reduced if the employee files an updated Form W-4 to reflect the expected charitable contribution deduction. What cannot be avoided, however, are the payroll taxes due on the imputed income. There is no charitable deduction available to reduce or eliminate the income subject to payroll taxes.

Under the Federal Insurance Contributions Act (FICA), employees must pay 6.2% of their taxable wages to fund Old Age, Survivors, and Disability Insurance (OASDI/Social Security) up to a wage cap (\$110,100 in 2012) and 1.45% of their taxable wages to fund Hospital Insurance (HI/Medicare) with no wage cap.¹⁶¹ For 2011 and 2012, Congress declared a payroll tax “holiday” and reduced the OASDI rate on the employee portion of the tax

158. In the donated services context, the Pease limits would be most likely to strike executives (like a university president), high-salaried professors in certain fields (like medicine or law), or professors with modest salaries with spouses with high incomes.

159. CHYE-CHING HUANG, ET AL., “PEASE” PROVISION IN FISCAL CLIFF DEAL DOESN'T DISCOURAGE CHARITABLE GIVING AND LEAVES ROOM FOR MORE TAX EXPENDITURE REFORM 2 (CTR. ON BUDGET AND POL'Y PRIORITIES 2013).

160. As the Center on Budget and Policy Priorities has pointed out, except in very rare cases, the Pease limits are based on the amount of a taxpayer's income (AGI), not on the amount of the taxpayer's itemized deductions (including the amount he or she gives to charity). *Id.* at 3. Since the Pease limit increases with income, not with deductions, it should not be a disincentive to give to charity. *See id.* But the Center on Budget and Policy Priorities did not analyze the Pease limits in the context of donated services—where imputed income increases both AGI and deductions. Thus, taxpayers donating time and being imputed income may experience greater impacts on their Pease limits. Nonetheless, the impact of the Pease limits on donated services should be rare. Since (let's face it) faculty members typically make less than the threshold for limitation, I did not include the limitations in the numerical examples at *infra* Part IV.A.

161. IRC §§ 3101–02, 3111, 3121–28 (Federal Insurance Contributions Act—including employee and employer portions of Social Security and Medicare taxes); §§ 3401–06 (withholding from wages).

to 4.2% as an economic stimulus.¹⁶² The holiday expired December 31, 2012, and so the OASDI rate returned to 6.2% on January 1, 2013.¹⁶³ Employers—including otherwise tax-exempt charitable employers like colleges and universities—are required to withhold the payroll taxes from employees and remit those taxes to the government, and to match employee contributions.

Volunteers falling under the no income/no deduction rule escape not only income tax, but FICA assessments as well. But volunteers with imputed income end up paying the FICA taxes and need to find a way to fund the required FICA withholding. This might be enough to stifle the donation from ever occurring.

If the tax law is going to impute income in the donated services context, it makes sense to impose FICA. Income from services, after all, is the classic type of income taxed under FICA. Indeed, wages are taxable under FICA when “they are actually or *constructively* received.”¹⁶⁴

One could argue that FICA is not so much a “tax” as a payment for social insurance (pension payments and medical care in retirement). If viewed as an insurance payment, the only issue would be the cash flow problem of making the payment—since the payment is going to buy (in theory) additional benefits. But, as discussed below, there are good reasons to view FICA as a true tax.¹⁶⁵

6. A Possible Wash Preventer on the Horizon

The wash preventers noted above are the ones most likely to create a hardship on the donating employee sufficient to stifle the donation. As of this writing, another item may be poised to further dirty the wash: a proposal to limit the tax benefits of itemized deductions to twenty eight percent for those with income over \$200,000, regardless of the taxpayer’s marginal tax rate.¹⁶⁶ This would further reduce the benefit of the charitable contribution deduction, leaving some income in the tax base that, in theory, should not be there. It is unclear whether such a proposal will become law, but deduction limitations of one kind or another have been a frequent topic of conversation during the 2012 presidential race. Like the Pease limitations, this limit would affect donations of time involving imputed income and donations of cash. But it would not disturb donations of time that fall

162. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act § 601, Pub. L. No. 111-312, 123 Stat. 3296 (codified as amended in scattered sections of 26 U.S.C.).

163. *Id.*

164. Reg. § 31.3121(a)-2(a) (emphasis added).

165. *See infra* Part V.C.

166. CCH, 2012 TAX POLICIES OF THE MAJOR PRESIDENTIAL CANDIDATES, SPECIAL REPORT 3 (Sept. 11, 2012), available at <http://tax.cchgroup.com/downloads/files/pdfs/legislation/candidates-taxpolicy.pdf>

under the general no income/no deduction rule—since there would be no deduction to limit.

IV. THE CASE FOR RELAXING THE RULES

This Part reviews the reasons to relax the imputed income/deduction approach when employees of charities donate time to their employers. Part A provides some numerical examples, showing the negative impact of the current rules on donors of time. Part B reviews how the current rules discourage employee volunteerism at colleges, universities, and other large, complex charitable organizations, given the unique political environment in which those organizations operate. Part C shows that the current rules can create horizontal equity problems. Part D gives examples of analogous areas of the tax law where the rules have been relaxed. Part E gives examples of analogous areas of the tax law where scholars have *proposed* the rules be relaxed.

A. Numerical Examples

The following section provides examples to show the impact of the assignment of income doctrine on donors of time. In doing so, these examples illustrate some of the wash preventers that have been discussed earlier.

Numerical Example #1: Professor Cranky teaches for City State University. He agrees to teach a summer course for no compensation and asks that the saved funds be used to fund a scholarship for art students. Under a standard summer contract, Cranky would earn \$10,000 from teaching the summer course. Cranky earns his normal salary based on a nine month contract, but is paid his normal salary over twelve months under state law (so, he gets a regular pay check all summer.) For simplicity's sake and to focus on the tax aspects of the issue, the impact of retirement plan contributions and other benefits that vary with salary level are ignored. Assume Professor Cranky has not reached the OASDI wage cap. Also, the impact of the temporary payroll tax holiday is ignored. Cranky is in the twenty-five percent marginal federal tax bracket (with any impact of lower tax brackets ignored). State income taxes are ignored. Cranky elects to itemize his deductions and his charitable contributions for the year will be less than fifty percent of his AGI.

	IMPACT ON TAXABLE INCOME	TAX COST	NOTES
INCOME ADDED TO CRANKY'S FORM W-2	\$10,000		
PAYROLL TAXES AT 7.65%		\$765	Since Cranky is not getting any cash for his summer pay, the \$765 will reduce his take-home pay from his normal salary. City State University will also need to pay an additional \$765 in payroll taxes under the employer match.
CHARITABLE CONTRIBUTION DEDUCTION	(\$10,000)		
NET IMPACT ON TAXABLE INCOME:	\$0		
FEDERAL TAX AT 25%		\$0	
EXTRA COST OF THE DONATION TO CRANKY		\$765	

In this example, Cranky is in the best possible position a donor of services can be. He itemizes and the only wash preventer at issue is FICA. Even so, Cranky would likely get, well, cranky about all this business and simply donate cash. In that way, he will not see his normal take-home pay reduced and will be able to better manage the cash flow aspects of the donation. The problem with donating cash is that once he earns the money—and sees it in his bank account—it is hard to be generous after the fact and follow through on the donation. Things get even worse if Cranky is out of pocket *income tax* on the donation, as we see in the next example.

Numerical Example #2: Same as Numerical Example #1, except that Cranky does not itemize:

	IMPACT ON TAXABLE INCOME	TAX COST	NOTES
INCOME ADDED TO CRANKY'S FORM W-2	\$10,000		
PAYROLL TAXES AT 7.65%		\$765	Since Cranky is not getting any cash for his summer pay, the \$765 will reduce his take-home pay from his normal salary. City State University will also need to pay an additional \$765 in payroll taxes under the employer match.
CHARITABLE CONTRIBUTION DEDUCTION	\$0		Cranky does not itemize.
NET IMPACT ON TAXABLE INCOME	\$10,000		
FEDERAL TAX AT 25%		\$2,500	Since Cranky is not getting any cash for his summer pay, the \$2,500 will reduce his take-home pay from his normal salary.
EXTRA COST OF THE DONATION TO CRANKY		\$3,265	

Cranky's tax bill would go up (and take-home pay on his regular salary would go down) by \$3,265. Professor Cranky will be discouraged from doing this, since he might not be able to afford it. He would experience the same result if he gave cash that he generated via his taxable salary. But then he would have more control over the cash flow—deciding perhaps not to give the whole \$10,000 but only the after-tax amount or perhaps timing the cash donation in a year when he will be able to itemize.

Numerical Example #3: Professor Overhill works for City State University for free his final semester before retirement. His normal gross pay for a semester is \$50,000. City State University has agreed to use the \$50,000 to

establish a graduate assistantship in the university's center on aging. Overhill has no other income from any sources and will live off of his savings. He does not yet collect Social Security benefits. The donation of his time will be his only charitable contribution for the current tax year. Assume (unrealistically) he has no other itemized deductions for the year. For simplicity and to focus on the tax aspects, the impact of retirement plan contributions and other benefits that vary with salary level are ignored. Assume Overhill has not reached the OASDI wage cap. Also, the impact of the temporary payroll tax holiday is ignored. Overhill is in the twenty-five percent marginal federal tax bracket (with any impact of lower tax brackets ignored). State income taxes are ignored.

	IMPACT ON TAXABLE INCOME	TAX COST	NOTES
INCOME ADDED TO OVERHILL'S FORM W-2	\$50,000		Since he is waiving his entire salary, this would also equal the total amount on his W-2.
PAYROLL TAXES AT 7.65%		\$3,825	Since Overhill is not getting any cash for his work, he will need to withdraw this amount from savings and give it to City State University to remit to the government. City State University will also need to pay an additional \$3,825 in payroll taxes under the employer match (just as they would with a cash salary).
CHARITABLE CONTRIBUTION DEDUCTION	(\$25,000)		Since Overhill's only income is \$50,000, that is also his AGI. Cash donations to charity are limited to 50% of AGI or \$25,000. He can carry the rest forward.
NET IMPACT ON TAXABLE INCOME	\$25,000		
FEDERAL TAX AT 25%		\$6,250	Since Overhill is not getting any cash for his work, he will need to remit this to City State University.
EXTRA COST OF THE DONATION TO OVERHILL		\$10,075	

So, it cost Overhill \$10,075 out of pocket to fund the donation. This cost

is the same as it would have been had he given cash, but he could have better managed the cash flow. Also, he may get some of the \$6,250 in taxes back by carrying forward the \$25,000 unused deduction over the next five years. But he still has a cash flow issue initially. Had he given cash, he could have spread the cash donations over a number of years to maximize his deduction and avoid the AGI limits.¹⁶⁷ This is probably not something that Overhill would want to do. And he may be reluctant to give cash after retirement. Still, for \$10,075 or something less he gets “credit” and “warm glow” for a \$50,000 donation—enough to get him invited to the big donor banquets and such—at least this year.

This may not seem like much of a hardship—after all, these are the same results (although hidden) that he would get with cash donations. However, while the assignment of income process depicted here ensures horizontal equity between cash donations and time donations, it has other horizontal equity problems—as will be discussed below at Part IV.C.

B. Encouraging Volunteerism at Colleges, Universities, and Other Complex Charities

*The university is a collection of departments tied together by a common steam plant.*¹⁶⁸

*In an area where heating is less important and the automobile more, I have sometimes thought of [the college or university] as a series of individual faculty entrepreneurs held together by a common grievance over parking.*¹⁶⁹

At this point, it should be apparent that the tax law, while validly trying to prevent assignment of income, stifles the donation of time by employees of charities when there is an agreement about how the saved funds will be used. It would seem there is a simple solution: just take control of the saved funds away from the employee. Have no explicit or implicit agreement about how the saved funds will be used. If done carefully and truthfully, this should put the donating employee in the no income/no deduction category—avoiding all the tax limitations and headaches noted above in Part III.E.¹⁷⁰ If an employee of a charity is truly charitably-minded/dedicated to

167. Alternatively, he could elect to take part of his salary in cash that would be sufficient to pay the tax, but this would reduce his charitable contribution as well.

168. Attributed to Robert Maynard Hutchins (former president of the University of Chicago) in GEORGE DENNIS O'BRIEN, ALL THE ESSENTIAL HALF-TRUTHS ABOUT HIGHER EDUCATION 30 (2000), reprinted in BIRNBAUM, *supra* note 1, at 185.

169. CLARK KERR, THE USES OF THE UNIVERSITY 20 (1963), reprinted in BIRNBAUM, *supra* note 1, at 185. Kerr was a long-time president of the University of California.

170. See *supra* note 118 for university counsel advice to this effect.

the cause, he or she should be glad to help out without needing to direct the funds to a specific use within the charitable organization.

But as anyone who has worked in the academic setting—or in any large, complex charity—can attest, internal politics and budget priorities are constant worries.¹⁷¹ Control matters. The use of the redeployed funds matters. If anything is darker than the specter of the tax law, it is the specter of faculty politics—especially when it comes to money.¹⁷²

Even among the most collegial faculty, disputes arise over funding. For example, a cash-strapped accounting program may look askance when a graduate of the accounting program is induced by a slick marketing professor to fund an endowed marketing chair instead of contributing to the accounting program. In such an environment, it is understandable that an accounting professor (like Flinty in the opening example) would want to ensure that his donations (in cash or service) are channeled into programs that benefit accounting students rather than the liberal arts, athletics, or other areas. Likewise, English professors presumably would want to see their donations benefiting their department or college rather than the business school.¹⁷³

The same concerns motivate volunteer adjunct faculty from the professional community. A Chief Financial Officer (CFO) of a local business, for example, may agree to teach a basic accounting course for free. If the university had cut funding to the course the CFO is teaching, the CFO's time itself benefits the department. But, in theory, the CFO's services should free up accounting department funds (say \$3,000) that the college or university had allocated to the course but was not spent. The reality is that perhaps the \$3,000 may be swept into the general college or university budget when the funds are not spent for their designated purpose.¹⁷⁴ The

171. See, e.g., BENJAMIN GINSBERG, *THE FALL OF THE FACULTY: THE RISE OF THE ALL-ADMINISTRATIVE UNIVERSITY AND WHY IT MATTERS* 8 (2011) (describing how the administration at one school devoted funds to establish a graduate college of business without consulting faculty—even faculty that might be expected to teach in the new college).

172. As Henry Kissinger has noted, “University politics are vicious precisely because the stakes are so small.” BIRNBAUM, *supra* note 1, at 187. See also Erik M. Jensen, *Planning for the Next Century or the Next Week, Whichever Comes First*, 117 *PENN ST. L. REV. PENN STATIM* 7 (2012) (presenting a hilarious “farce” about a fictional law school faculty meeting and the politics involved).

173. Similarly, outside donors of cash are well-advised to designate the specific program or project they want to support, rather than giving unrestricted cash. See GINSBERG, *supra* note 171, at 216 (advising against unrestricted gifts “which will almost certainly flow into the coffers of the deans and improve the quality of food served during administrative retreats more than the quality of the education offered by the school”). Most professors would like to see the saved funds going to something worthwhile, like cancer research in a science department or a subscription to *Tax Notes Today* in an accounting department.

174. It would make life easier to claim that there was no imputed income if the amounts paid for adjuncts were not so “one size fits all.” If the salary was not a flat

college or university will thus redeploy the funds to causes outside the department the CFO was attempting to support. This series of actions may seem petty, but in these lean times, it is the reality. Internal budget and governance procedures may dictate how well these arrangements work. These political issues are removed if the CFO is allowed to designate that the saved \$3,000 is deposited into an account benefiting the accounting department.¹⁷⁵ This is not possible under current law without taxing the CFO and then having him take a deduction as if he donated cash. This seems like an unnecessary amount of hassle.¹⁷⁶

Because of the politics involved and the motivations of faculty members, it would seem that allowing generic donations would offer little incentive to donate services without granting the ability of some say in where those donations go. Indeed, scholars have noted that volunteers enter into various types of psychological contracts with the charities they are assisting.¹⁷⁷ Under one type of psychological contract, known as a value-based psychological contract, volunteers perceive that they are giving time to a charity in exchange for the charity continuing to support the specific programs or principles that motivated the volunteers to give.¹⁷⁸ If a volunteer gives time and the charity later ends the specific program that the volunteer cared about, the volunteer will perceive that the charity has breached the psychological contract.¹⁷⁹ Breach can lead to anger, frustration, and decreased satisfaction with the charity.¹⁸⁰ A volunteer whose trust has been violated in this manner is unlikely to donate time or money to the charity in the future. When the charity is also the volunteer's employer, such a scenario could even poison the workplace. Thus, Flinty in the opening example, the CFO as adjunct in the above example, and other faculty members would not be likely to volunteer time unless they could ensure the saved funds would go to designated uses without negative tax consequences.

To get around these issues and put the donation in the no income/no deduction category, there is no doubt subterfuge—wink and nod arrangements between donating faculty members and the administration.¹⁸¹ After

\$3,000 (regardless of whether the instructor is teaching Astrophysics, International Tax, or Intro to Business), then it would be harder to settle on a specific number for income imputation.

175. At a state college or university, the academic department likely controls specific accounts at the college or university's foundation which cannot be tapped by the dean or central administration.

176. But see *infra* Part VI.A regarding the possible use of gross-ups to address this problem.

177. Tim Vantiborgh et al., *Volunteers' Psychological Contracts: Extending Traditional Values*, 41 *NONPROFIT & VOLUNTARY SECTOR Q.* 1072, 1072 (2012).

178. *Id.* at 1074.

179. *Id.*

180. *Id.* at 1073–74.

181. Similar arrangements are sometimes made with respect to expense accounts. Faculty earning supplemental income (such as via an internal research grant or an en-

all, if the administration wants to encourage volunteerism, it should be motivated to use the funds as the volunteers desire.¹⁸² But this hardly aids

dowed chair) sometimes have the option of taking \$x in additional taxable compensation or taking \$x plus \$y if the amounts are placed into an account to pay for research expenses (books, travel, etc.) The “plus” arises because the college or university saves money on benefits that go along with additional salary benefits (retirement contributions, etc.) when the funds are taken in a nontaxable form. For this choice to avoid assignment of income issues, the amount placed in the “account” really cannot belong to the faculty member; the administration is free to sweep the account at any time. While the promise of the account funds is normally honored, so long as the money is spent on bona fide business expenses within a reasonable time period, there is always the possibility that the administration will take the funds away in tight budgetary times (and I have witnessed this occur). *See, e.g., Allie Bidwell, At Marshall U., President’s Raid on Department Funds Sparked Ire, Then a New Approach*, CHRON. HIGHER EDUC., Apr. 19, 2013 (reporting on how a central administration transferred balances from departmental accounts to a central university account to address budgetary issues). The faculty must accept this risk to avoid assignment of income.

One could question whether the substance of these accounts is really compensation, but this issue does not appear to have yet hit the radar screens of colleges and universities or the IRS. *But see* I.R.S. Priv. Ltr. Rul. 9325023 (June 25, 1993) (ruling that a manager who forgoes future compensation in consideration of his employer’s agreement to reimburse expenses of an equal amount has made an anticipatory assignment of income and must include the reimbursement in income). Indeed, in the higher education context, tax advisors suggest that faculty forsake salary in favor of reimbursed expenses when the opportunity arises. *E.g., John A. Miller & Robert Pikowsky, Taxation and the Sabbatical: Doctrine, Planning, and Policy*, 63 TAX LAW. 375, 406–07 (2010).

Engaging in some speculation, let’s consider the consequences if the IRS were to successfully argue that these expense accounts are, in fact, taxable to the faculty member. My guess is that expense arrangements would cease and the faculty would simply receive the compensation in cash (rather an account). Any business expense a faculty member incurred would be deductible as an unreimbursed employee business expense, meaning that the faculty member would need to itemize and the deduction would only be allowed to the extent it exceeds 2% of the faculty member’s adjusted gross income. *See* I.R.C. § 67 (2012). This means that the “wash preventers” here are worse than is the case with charitable deductions. *See supra* Part III.E. If amounts are still put into an expense account for the faculty member’s use (despite being taxable), no charitable contribution deduction (which is not subject to the 2% of adjusted gross income rule) would result. This is because the account is earmarked for the “donating” faculty’s use—which indicates a lack of charitable intent and a lack of “indefiniteness of bounty.” Indeed, it would be hard to see how the amount deposited in the account could be viewed as being given with “detached and disinterested generosity.” *See generally* Part II for a discussion of the requirements for the charitable contribution deduction. If amounts are still put into an expense account and are taxed, what happens if the funds are subsequently taken away by the university? My guess is claim of right principles would come into play, allowing a refund of the taxes paid on the account. *See* I.R.C. § 1341 (2012). Again, this is speculation and would depend on the specific facts of how the account was set up and the circumstances under which it was taken away. A charitable contribution deduction upon the loss of the account would not be appropriate, since the loss would be forced (not voluntary) and, thus, could not be viewed as a “gift” given with “detached and disinterested generosity.” While the expense account issue raises similar issues to donated services, it is worthy of a separate analysis. Therefore, further discussion of the expense account issue is beyond the scope of this Article.

182. Indeed, one of the anonymous referees of this Article pointed out that such wink and nod agreements are quite common, and “suggestions” about how saved funds

transparency and such arrangements reek of secret backroom, faculty lounge, or deanery deals. Such deals may have been more acceptable in an earlier age, but not at a time when colleges and universities have been “de-churched” and are subject to more public and IRS scrutiny. Furthermore, faculty members are supposed to be modeling ethical behavior for their students, and wink and nod arrangements to avoid taxes and control funds are hardly the way to go about doing so.

C. Horizontal Equity Issues

As discussed above in Part III.D, the current tax rules governing donated services do a fairly good job of maintaining horizontal equity. But, in certain situations, singling out donating professors who are explicit and honest about how the saved funds should be spent violates horizontal equity as compared with other donors of time. This situation occurs when control over the saved funds arises not by an agreement made between the institution and the employee, but by the inherent powers of the donor’s position in the college or university.

For example, consider the increasingly common situation in which college or university presidents reduce their salaries in times of fiscal distress.¹⁸³ If a president of a college or university takes a voluntary ten percent pay cut when renegotiating his contract, no one questions that he has provided value to the institution, yet he has no imputed income.¹⁸⁴ This is true even though, as president, he likely has a lot of say over how the savings are used in the institution’s operations. He might direct it to a pet project, a favored department, a new program he is keen on, etc. He, the donor, is in control of the funds not because there were strings attached to his donation but because he is the president.

A similar result occurs when a president negotiates his or her salary, perks, and working conditions. Perhaps he or she receives a “slush” fund to use for college or university expenses at his or her discretion—for example, to fund pet projects and unexpected opportunities. No one imputes that in-

should be used are almost always honored. Such arrangements obviously raise classic substance-over-form issues, and colleges and universities would be well-advised, given the IRS’s increased scrutiny of higher education, to avoid them.

183. See, e.g., Jack Stripling & Andrea Fuller, *Presidents Defend Their Pay as Public Colleges Slash Budgets*, CHRON. OF HIGHER EDUC., Apr. 2, 2011 (listing college and university presidents who have voluntarily reduced their pay).

184. The president would have imputed income, however, if he voluntarily donated a portion of a salary that he was already entitled to by contract. Presidents sometimes do this when their compensation goes up, but the rest of the college and university employees have their wages frozen. These “sympathy” pay cuts are normally still taxable. For example, E. Gordon Gee, President of the Ohio State University, “used his bonus to finance scholarships and other university efforts” in fiscal 2009–10. *Id.* Presumably this resulted in taxable income to Mr. Gee and then a charitable contribution deduction. See *supra* note 141 for a similar situation involving the leaders of the Idaho State Tax Commission.

come to the president even if he or she could have negotiated for a higher salary in the absence of the slush fund. The president avoids imputed income and has effectively made a donation to the college or university, the use of which the president controls.

When those who control the budget donate their time, they control how the funds will be used. This means that such individuals are not on par with those who donate time and do not have control over budgetary matters. Unlike college and university leaders, faculty members who donate their time and want to fall into the no income/no deduction category have no control over how the saved funds will be used. This creates a horizontal equity problem and indicates that some relaxation of the law of donated services may be in order.

A similar horizontal equity problem occurs between employees of small charities with focused missions and large charities with multiple programs and layers of administration. Employees of a homeless shelter, for example, who reduce their salary in times of need, know where the money is going—to help the homeless. In contrast, employees at larger charities with multiple programs, such as the Red Cross or a college or university, can never be sure where the funds resulting from their work ends up. Allowing some relaxation would restore horizontal equity between these two groups.

D. Precedents—Other Examples of Relaxed Donation Rules

Relaxed rules for donated earnings are not unprecedented. This Part presents examples of where the tax law has been relaxed when it comes to donations to charity. First, there is the donation of leave time. Second, there is the donation of employer matching contributions. Third, there is the donation of certain prizes and awards. Fourth, there is the donation of certain distributions of individual retirement accounts. Fifth, there is the special rule for members of religious orders who have taken a vow of poverty.

1. Donation of Leave Time

Some employers allow their employees to donate their accrued sick, vacation, or leave time to charity. Generally, the donating employee would recognize income equal to the cash value of the leave under the assignment of income doctrine.¹⁸⁵ Presumably, the donating employee would then be

185. See *supra* Part III.B. A similar assignment of income problem arises when employees are allowed to donate their unused sick or vacation time to fellow employees who need additional leave, but they have exhausted their own leave time and will suffer financially if forced to take unpaid leave. IRS Letter Ruling 200720017 notes that such arrangements would normally generate taxable compensation income to the donating employee equal to the cash value of the donated leave. I.R.S. Priv. Ltr. Rul. 2007720017 (May 18, 2007). But there are exceptions for leave sharing plans where the leave is donated to employees with personal or family medical emergencies (Rev. Rul. 90-29, 1990-1 C.B. 11) or who are victims of a major disaster as declared by the

allowed a charitable contribution deduction for the amount included in income.¹⁸⁶

But, on occasion, the IRS will relax these rules in order to encourage donations of leave time in times of hardship. Most recently, in the wake of Hurricane Sandy (which hit the northeast in October of 2012), the IRS issued Notice 2012-69,¹⁸⁷ explaining the tax treatment when employees forgo vacation, sick, or personal leave in exchange for cash payments made by their employers to charities that aid victims of the hurricane. Specifically, the IRS will not treat the forgone benefits as constructive receipt of gross income or wages for the employees and will not view the cash donation made by the employer as income to the employees if the donations are made to qualified charitable organizations for the relief of victims of Hurricane Sandy before January 1, 2014.¹⁸⁸ Under this approach, the employee will not be allowed a deduction for the forgone benefits but will have no imputed income. Accordingly, the employee effectively gets to deduct the benefits donated via this exclusion. Thereby, FICA taxes are avoided along with the charitable deduction limitations. Notably, the IRS provided this relief “in view of the extraordinary damage and destruction caused by Hurricane Sandy.”¹⁸⁹ The IRS had previously issued such relaxed rules when “extreme need” dictated, such as after the September 11, 2001 terrorists attacks and Hurricane Katrina in 2005.¹⁹⁰

These examples show that it is not unprecedented to allow employees to donate to charity by forgoing earned income. However, the connection to donated services by employees of charities is not perfect. First, donated leave involves donations for a specific cause (such as, hurricane relief) rather than a blanket license to donate. Second, the relief is provided in the wake of a specific disaster rather than a general problem (such as lower funding for education or charity in general). Third, the relief is provided to all employers offering such a plan—whether nonprofit or for-profit.¹⁹¹ In contrast, relaxing the assignment of income rules for donated services would only involve employees of charities.

2. Employer Matching Contributions

Some employers offer an employee benefit whereby they agree to match donations the employee makes to a charity. In general, employer matching

President (Notice 2006-59, 2006-2 C.B. 60). If the employer leave-sharing plan meets one of the exceptions, then the donating employee will neither recognize taxable compensation income nor get a deduction upon donating leave.

186. Subject to the wash preventers discussed at *supra* Part III.E.

187. 2012-51 IRB 712.

188. *Id.*

189. *Id.*

190. *See id.*

191. *See id.*

contributions are not considered compensation income to the employees because the employees “are merely performing administrative duties for the corporation by suggesting specific qualified recipient organizations.”¹⁹² The matching contributions are considered charitable contributions by the employer, rather than by the employee.¹⁹³

The result of the matching contribution tax rules is that the employee has no income and no deduction from the employer’s matching contribution. This result is similar to the no income/no deduction treatment of donated services that exists when there are no assignment of income issues. Why are there no assignment of income issues when it comes to matching contributions? The employee picks the charity, presumably can designate how the donation will be used within the charity’s operations, and is getting an employee benefit (something that would normally be taxable as compensation absent a specific exclusion in the Code) via the employer match. This appears to be no different from a professor donating time to a university and asking the college or university to allocate the saved funds to a particular unit or operation of the school. Yet, assignment of income principles are not applied in the case of the matching contributions, but likely are applied in the case of the professor’s donated services. The difference between the two, in the eyes of the IRS, is that the latter involves a situation in which the “donation” is made “in return for specific and identifiable services [the professor’s teaching of a particular course], so that the payment represents a mere assignment of income.”¹⁹⁴

The distinction between matching donations and service donations may be easy to identify, but it is questionable whether they are, in substance, different enough to call for radically different tax results.

3. Donation of Certain Prizes and Awards

Generally, prizes and awards are taxable to the recipient.¹⁹⁵ An exception is provided for prizes and awards which are “made primarily in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievement” if the recipient did not take any action to apply for the award, is not required to provide substantial future services in order to re-

192. Rev. Rul. 67-137, 1967-1 C.B. 63. *See also* Gen. Couns. Mem. 39877, Sept. 8, 1992 (finding no income to employees where an employer donates an amount to a charity of the employee’s choosing equal to the amount the employee donated to the employer’s Political Action Committee in the previous year).

193. Rev. Rul. 67-137, 1967-1 C.B. 63. A similar result occurs when shareholders control a corporation’s choice over which organizations will receive its charitable donations. The shareholders do not recognize a constructive dividend as a result of the corporate donations unless the shareholders receive a property or economic benefit in return. *Knott v. Comm’r of Internal Revenue*, 67 T.C. 681 (1977); Rev. Rul. 79-9, 1979-1 C.B. 125.

194. Gen. Couns. Mem. 39877, Sept. 8, 1992.

195. I.R.C. § 74(a) (2006).

ceive the award, and the prize or award is transferred by the payor to a governmental unit or charitable organization selected by the recipient.¹⁹⁶ In the absence of this exception, presumably the recipient would have taxable income and then would be able to deduct any subsequent contribution of the proceeds to charity—subject to the wash preventers discussed above in Part III.E.

Thus, this exception is another example of where the tax law turns off the assignment of income concept and puts the recipient of the income in the no income/no deduction category. The assignment of income doctrine is cast aside, despite the fact that the award recipients control the direction of the funds to specific charities of their choosing. Indeed, President Barack Obama used this exception when he received the 2009 Nobel Peace Prize.¹⁹⁷ He directed the Norwegian Nobel Committee to split the prize amount among ten different charities—even going so far as to designate, in broad terms, how the charities were to use the funds.¹⁹⁸ By complying with the exception, President Obama did not need to recognize any taxable income from the Nobel Prize and did not claim any charitable contribution deductions for the transfer of the prize to the designated charities.

While this exception provides another example of ignoring assignment of income in the charitable context, it does not neatly fit within the fact pattern of donated services. First, the exception is very narrow,¹⁹⁹ and cannot be used in the case of awards provided by an employer to an employee.²⁰⁰ Second, the exception relates to awards for work done in the past, not work

196. I.R.C. § 74(b) (2006).

197. See Portion of the President and First Lady's returns related to the Nobel Prize, available at <http://www.whitehouse.gov/sites/default/files/president-obama-2010-nobel-charity.pdf>.

198. See *id.* The charities with the amounts and designations were: Fisher House Foundation, Inc. (\$250,000, program expenses), Clinton-Bush Haiti Fund of the Clinton Foundation (\$200,000 plus any remaining funds, program expenses for the Clinton-Bush Haiti Fund), American Indian College Fund (\$125,000, scholarships), Appalachian Leadership and Education Foundation (\$125,000, program expenses), College Summit (\$125,000, program expenses), The Posse Foundation (\$125,000, program expenses), Hispanic Scholarship Fund (\$125,000, scholarships), United Negro College Fund (\$125,000, scholarships), Africare (\$100,000, program expenses), and Central Asia Institute (\$100,000, program expenses).

199. Indeed, it seems to have been tailor made for the Nobel Prize—where a college or university professor can donate the award to his or her school. See Reg. § 1.74-1(b) (noting the exception can apply to the Nobel Prize or the Pulitzer Prize). The college or university would presumably have an incentive to direct the funds back to the professor's department or lab, allowing the professor the use of the funds for his or her work while helping retain the prestigious, award-winning professor on the faculty. For more on the workings of the exception in the context of the Nobel Prize, see Bridget J. Crawford & Jonathan G. Blattmachr, *The Tax Man Wins the Nobel Prize*, 133 TAX NOTES 1421 (2011).

200. Reg. § 1.74-1(b) (indicating that the exclusion does not apply to “prizes or awards from an employer to an employee in recognition of some achievement in connection with his employment”).

done concurrently with the donation (as is the case with donated services). Third, donated services reflect earned income (subject to employment taxes) while awards generally are not subject to employment taxes.²⁰¹ Thus, the exclusion for awards transferred to charity does not provide a FICA tax benefit since the award would not have been subject to FICA tax in the first place. The award exclusion does, however, remove the other wash preventers discussed above in Part III.E.²⁰²

4. Charitable Distributions from Individual Retirement Accounts

A temporary provision of the tax law allows individuals aged seventy and a half or older to transfer up to \$100,000 per year in otherwise taxable distributions from their individual retirement accounts (IRAs) to charity without incurring any taxable income.²⁰³ While taxpayers using this provision recognize no income from the distribution, they also are denied a deduction for the donation.²⁰⁴ Thus, taxpayers using this provision are like service donors in the no income/no deduction category. They get to pick the charity they support—and the specific activity of the charity they support—yet avoid income and most of the wash preventers noted above.²⁰⁵ This IRA provision is expected to cost the Treasury \$1.28 billion if extended through 2022.²⁰⁶

The IRA provision is hardly a perfect model for relaxing the assignment of income rules in the donated services context. First, because this is a tem-

201. This assumes that the awards are not provided as compensation for services. That is, they are “unearned.” This also assumes that the employer did not provide the award (since taxable awards provided by employers are subject to FICA). But this will not be an issue, since employer awards are not eligible for the exclusion. *See supra* note 200.

202. Another point should be noted. The current law exclusion for awards transferred to charity originally was a complete exclusion for such awards—whether or not the awards were donated to charity. The rule was changed to require a transfer to charity for exclusion as part of the base-broadening approach of the Tax Reform Act of 1986. *See* THE STAFF OF THE JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 30–38 (1987). By adding the requirement that the award be donated to charity, the exclusion was greatly narrowed. In contrast, this Article is proposing expanded exclusions in the case of donated services.

203. I.R.C. § 408(d)(8) (2006). Unless extended, this provision, first put into the law in 2006, expires (as of this writing) on December 31, 2013. I.R.C. § 408(d)(8)(F) (2006). The age of seventy and a half years is significant because that is the age at which individuals are required to begin withdrawing taxable funds from their individual retirement accounts.

204. I.R.C. § 408(d)(8)(E) (2006).

205. *See supra* Part III.E. Notably, the payroll tax wash barrier is not eliminated, as discussed below.

206. JOINT COMM. ON TAXATION, ESTIMATED REVENUE EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN AN AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 8, THE “AMERICAN TAXPAYER RELIEF ACT OF 2012,” AS PASSED BY THE SENATE ON JANUARY 1, 2013 4 (JCX-1-13 JAN. 1, 2013).

porary provision of the tax law that only applies to individuals aged seventy and a half or older (with means sufficient to not need some of the funds in their IRAs), it is quite narrow. Relaxing the rules in the donated services context would have much wider application. Second, the IRA provision does not result in a forgiveness of payroll taxes. The income being transferred from the IRA to charity is most likely a mix of earned income (which was already subject to payroll taxes when earned) and accrued investment income (which is not subject to payroll taxes in any event).²⁰⁷ But an effective relaxation of the assignment of income rules for donated services would need to provide relief from payroll taxes. In the case of the IRA, the payroll taxes were paid years ago and do not present a cash flow problem at the distribution to charity. With donated services, the payroll taxes are due along with the imputed income—creating a salient tax barrier to the donation. Despite the differences, the IRA relaxation provision at least provides a precedent for having the tax law get out of the way of charitable contributions.

5. Income Earned by Members of Religious Orders Who Took a Vow of Poverty

Members of religious orders who take a vow of poverty usually agree to turn over all of their earnings to the order. Such promises are legally enforceable.²⁰⁸ Normally, assignment of income principles would require the members to pay taxes on their earnings, even though they have been legally assigned to their order.²⁰⁹ But when members work for their church or an affiliated organization, they are considered agents of the order and the salary that is remitted to the order is not taxable to the member who earned it.²¹⁰ In contrast, the general assignment of income rule applies when members work for another employer—one that is not their church or an affiliated organization.²¹¹ In that case, members are taxed on their salary even though the wages are turned over to the order.²¹²

207. This is true if one ignores the new Medicare Contribution Tax on investment income of high-AGI taxpayers, which is beyond the scope of this Article.

208. Samira Alic Omerovic, *Improper Taxation of the Vowed Religious: How Glen-shaw Glass Principles Can Reestablish Horizontal Equity*, 51 B.C.L. REV. 1247, 1257 (2010) (reviewing Supreme Court cases finding that vows of poverty are legally enforceable).

209. See *supra* Part III.B.

210. Rev. Rul. 77-290, 1977-2 C.B. 26.

211. Perhaps one might think of an American version of Fraulein Maria being dispatched by the Abbey to work as a governess for the Von Trapp children, with the Captain remitting Maria's fee to the Mother Abbess. See *THE SOUND OF MUSIC* (20th Century Fox 1965). Although Maria had not yet taken her final vows to become a nun, she did report that when she joined the Abbey all her worldly goods were given to the poor. Except, that is, for the clothing she was wearing—which the poor did not want. See *id.*

212. Rev. Rul. 77-290, 1977-2 C.B. 26. For a review of the case law in this area, see Omerovic, *supra* note 208, at 1255–66. Omerovic opines that the government ap-

The exemption for wages earned by the vowed religious who work for the church or an affiliated organization and turn over their income to the order seems to fit neatly with professors donating their time to a college or university. In both cases, the worker is essentially turning over his or her wages to the charitable employer or an affiliate of the charitable employer.²¹³ Of course, the analogy is not perfect. Professors, unlike the vowed religious, have more control over whether they take salary or donate time. The vowed religious agree to give up their income for life; a professor agrees on a case-by-case, course-by-course basis. Although, some might say that professors take a vow of poverty just by being in the professoriate.²¹⁴

E. Other Relaxation Proposals

This Part will discuss proposals made by scholars to relax the normal charitable contribution rules in other contexts. First, there is a proposal to allow the donation of unused flexible spending accounts to charity free of tax consequences. Second, there is a proposal to allow exclusions for lottery winnings given to charitable causes. These two proposals simply turn-off the assignment of income doctrine and allow taxpayers to exclude income that is transferred to charity.²¹⁵

plies the assignment of income doctrine to vowed religious who work for outside employers to combat personal church tax avoidance schemes. *Id.* at 1258. “The schemes involved protesters becoming ordained as ministers of mail order churches, taking vows of poverty, assigning their income to the fictitious churches, and then receiving access to this income for living expenses.” *Id.* Omerovic notes that undercover police officers are not taxed on the income they earn and turn over to the police department while undercover—and that members of religious orders who have taken a vow of poverty should be afforded similar tax treatment since they—like the police officers—have no dominion and control over the wages they earn. *Id.* at 1250.

213. In the case of the professor, the wages are turned over to their college or university or a foundation that supports the college or university. *See* discussion of university/foundation relationships *supra* note 17 and accompanying text. As for the similarity between being a member of the professoriate and being a member of a religious order, *see supra* note 123 and accompanying text (regarding the de-churching of higher education). Presumably religious orders have not been de-churched—yet.

214. I used to joke that, as a professor at a state university, I was on a “fixed income” (raises are rare). I stopped saying that when I found Idaho State Board of Education Policy § II.G.1.c., indicating that tenured and untenured faculty salaries are not guaranteed from year to year; the salaries may be “adjusted” because of financial exigency or through furlough or work hour adjustments. Perhaps adjusted to zero? Now I am glad to have maintained a fixed income.

215. Other proposals, not reviewed in detail here, go further and advocate an exclusion from income *and* a deduction for donated services. As discussed in Part III.A, allowing both exclusion and deduction provides a double tax benefit to volunteers. *See, e.g.,* Alice M. Thomas, *Re-envisioning the Charitable Deduction to Legislate Compassion and Civility: Reclaiming Our Collective and Individual Humanity Through Sustained Volunteerism*, 19 KAN. J.L. & PUB. POL’Y 269 (2010) (calling for a deduction or refundable tax credit for time given to charity or in helping individuals directly—assuming verification—and capped at \$2,000 per individual per year). The relaxation

1. Donation of Unused Healthcare Flexible Spending Accounts

Adam Chodorow has proposed that taxpayers be allowed to donate their unused Flexible Spending Account (FSA) balances to charity without assignment of income consequences.²¹⁶ FSAs allow employees to put aside a portion of their salary—capped at \$2,500 per year²¹⁷—in an account which can be used to pay for out-of-pocket medical expenses.²¹⁸ Amounts contributed to an FSA are exempt from income and payroll taxes,²¹⁹ but an employee must spend the funds in the FSA on qualified medical expenses by the end of the plan year or forfeit any unused amounts left in the FSA.²²⁰ Chodorow suggests that, rather than forfeiting the unused FSA balance, employees should be allowed to donate it to charity.²²¹ Under Chodorow's proposal, an employee who donates his or her unused FSA balance would realize no income and have no deduction.²²² Since the original contribution to the FSA was excluded from income, the employee would, in effect, get a 100% deduction for the amounts that went to charity without worrying about the wash preventers discussed above.²²³

Chodorow's proposal is a good, but imperfect match with the donated services relaxation proposals suggested in this Article.²²⁴ In both cases, earned income is diverted, in an income and payroll tax-free manner, to charity. In addition, employees would get to designate the cause to which their funds would be directed in both cases.²²⁵ Chodorow's proposal is both narrower and broader than the donated services proposal. It is narrower because it has a built-in limitation—the maximum amount allowed in a health

proposals suggested in this Article are more modest, only calling for the partial shut-off of the assignment of income doctrine and only for employees of charitable organizations. *See infra* Part V.A.

216. Adam Chodorow, *Charitable FSAs: A Proposal to Combine Healthcare and Charitable Giving Tax Provisions*, 2011 BYU L. REV. 1041 (2011).

217. I.R.C. § 125(j). The \$2,500 limit is for 2013 and will be adjusted for inflation in future years. *Id.*

218. Flexible Spending Arrangements, 72 Fed. Reg. 43957 (proposed Aug. 6, 2007) (to be codified at 26 C.F.R. pt. 1).

219. *See* I.R.C. § 105 (employer reimbursements of employee medical costs excluded from taxable income); I.R.C. § 125 (allowing health benefits to be offered via cafeteria plans); Prop. Reg. 1.125-5 (including FSAs within the cafeteria plan structure); I.R.C. § 3121(a)(5)(G) (excluding amounts paid under a cafeteria plan from wages).

220. Flexible Spending Arrangements: Use-or-Lose Rule, 72 Fed. Reg. 43957 (proposed Aug. 6, 2007) (to be codified at 26 C.F.R. pt. 1).

221. Chodorow, *supra* note 216, at 1043.

222. *Id.* at 1075.

223. *See supra* Part III.E.

224. *See infra* Part V.A.

225. In the case of the FSA, Chodorow envisions (for administrative reasons) allowing each employee to designate one charity to receive the leftover FSA balance. Chodorow, *supra* note 216, at 1074. In the case of donated services, the saved funds would be deployed within the charitable employer as the employee designated.

FSA (\$2,500). There is no such built-in limit in the donated services context—although I will suggest some possible limits below in Part V.A. It is broader because it would encompass all employees who work at companies with FSAs. By contrast, the donated services proposal would apply only to employees of charities.

Chodorow's proposal arguably would not cost the Treasury much revenue. Taxpayers are already contributing to FSAs and doing their best to spend all the money in them by the plan deadlines.²²⁶ All Chodorow's proposal does is shift some of the funds from medical payments to charitable donations. Either way, the Treasury is already out the tax savings (for both income and payroll tax purposes) that result from the existence of FSAs.²²⁷ In contrast, the donated service proposal could produce revenue losses for the Treasury.²²⁸

2. Exclusion for Donated Lottery Winnings

Lottery winners who wish to donate some of their winnings to charity must include the winnings in income and then take a deduction for the donation—subject to the wash preventers discussed above.²²⁹ To avoid this result, the lottery winner would need to legally assign the ticket (or part of the ticket) to the charity at purchase (or at least before winning)—something that would be very difficult to do given the costs and the slim odds of winning.²³⁰

C. Eugene Steuerle has recommended changing the law to allow lottery winners to donate some or all of their winnings to charity within a certain period of winning without tax.²³¹ Effectively, this would turn off assignment of income with respect to lottery winnings given to charity. In fact,

226. See Susan Johnston, *Money Still in Your Flexible Spending Accounting? Use It or Lose It: Know What's Eligible for Reimbursement Before Developing a Spending Plan*, U.S. NEWS AND WORLD REPORT, <http://money.usnews.com/money/personal-finance/articles/2012/11/19/money-still-in-your-flexible-spending-account-use-it-or-lose-it> (last visited October 26, 2013).

227. Of course, FSAs could become more attractive if employees knew that unused amounts would go to charity instead of being forfeited. In that case, the estimated revenue cost to the Treasury might increase. See Chodorow, *supra* note 216, at 1082.

228. The issue of lost revenue is discussed at *infra* Part V.C.

229. See *supra* Part III.E.

230. *The Tax Treatment of Charities & Major Budget Reform: Hearing on Tax Reform Options: Incentives for Charitable Giving Before the U.S. Senate Committee on Finance*, 112 Cong. 9 (2011) (statement of C. Eugene Steuerle, Richard B. Fischer chair and an Institute Fellow at the Urban Institute). Other countries take a different approach. In Canada, for example, a couple that won the Canadian lottery was able to donate ninety-eight percent of their \$11.2 million prize to charity without tax consequence because Canada does not tax lottery winnings. Paul L. Caron, *Canadian Couple Who Gave \$11.2 million Lottery Winnings to Charity Would Have a U.S. Tax Problem*, TAXPROF BLOG (Nov. 6, 2010), http://taxprof.typepad.com/taxprof_blog/2010/11/good-thing.html.

231. Steuerle, *supra* note 230, at 9.

Steuerle's proposal goes further than the donated services relaxation proposals suggested in this Article in that Steuerle would allow the lottery winners to actually receive cash (the lottery winnings) and then have a period of time to donate.²³² By contrast, no actual cash would flow through the hands of the donating charitable employee.

The lottery proposal provides further evidence that relaxing the rules for donated services would not be radical and may help encourage giving. But the analogy between the lottery proposal and donated services is not perfect. In particular, lottery winnings are not subject to payroll taxes while constructively received wages are subject to payroll taxes. Thus, while the donated services proposal would result in a loss of revenue via payroll taxes, Steuerle's lottery proposal would not result in that same loss.

V. RELAXATION POSSIBILITIES AND THEIR BENEFITS AND COSTS

This section discusses the various ways that the rules governing donated services can be relaxed to allow donations of time without tax consequences. While this might be accomplished via IRS rulings or Treasury Regulations, given the current guidance, it would most effectively be accomplished via an amendment to the Internal Revenue Code.²³³

Less important than the actual form or extent of relaxation is that there be some relaxation provided in a way that affords certainty to colleges, universities, and their faculty and staff. In today's environment, colleges and universities are under too much scrutiny to be engaging in aggressive tax strategies or wink and nod arrangements. Many schools, likely still in the process of professionalizing their tax reporting, are understandably taking conservative approaches to tax matters and would need clear, certain rules before allowing for the donation of services without assignment of income.

As noted above, anecdotal evidence suggests that few colleges and universities have active, advertised volunteer programs—likely due to the possible adverse tax consequences.²³⁴ Therefore, it is unclear what impact a relaxed rule might have. Because of the uncertainties, perhaps a relaxed rule might be implemented for a test period—say two to four years—with the Treasury conducting a study to quantify the costs incurred (lost revenue) and benefits realized (increased donations).²³⁵

232. *Id.*

233. See discussion *supra* Part III.B, noting that most of the guidance in this area comes from rulings, regulations, and court decisions.

234. See *supra* note 117.

235. The problem with a temporary approach is that arguably too much of our tax law is already temporary—resulting in many provisions that are in need of periodic extensions. In this case, however, with a few years of study presumably we should be able to judge whether the provision should be scrapped or made permanent. Admittedly, the track record for temporary provisions is not good. They often end up being extended

This Part proceeds as follows. Part A reviews the possibilities for relaxation from strong to weak. Part B summarizes the possible benefits from relaxation, and Part C addresses possible objections.

A. Relaxation Possibilities

1. Deep Relaxation: Turn Off the Assignment of Income Doctrine

One relaxation possibility is to simply turn off the assignment of income doctrine when employees of charities give up some of their compensation to their charitable employers and designate how the savings will be used. This would be similar to the current rules allowing charitable contributions from IRAs and the proposal to allow donations of unused health flexible savings accounts.²³⁶ This could be accomplished via a new Code provision stating that gross income does not include the value of services donated to a charity by an employee of that charity under an agreement between the employee and the charity.²³⁷ The employee and the charity would have to finalize the agreement prior to the rendering of services, the employee would be allowed to designate how the saved funds are redeployed within the charitable organization, and it would be made clear that the employee would not be entitled to a charitable contribution deduction.

To ensure horizontal equity between private nonprofits and public institutions (like state colleges and universities), the savings may be allowed to go not just to the employing institution itself, but also to its affiliated and supporting organizations—such as a college or university's supporting foundation, alumni association, or athletic booster association.²³⁸ Allowing affiliated organizations to participate would also avoid discrimination against charities based solely on their legal structure. Even outside of the higher education context, charitable structures can vary. Some charities operate through one legal entity while others have multiple affiliated organizations—like supporting foundations—to carry out their missions.²³⁹ The

without much study. For example, in 2006 Congress relaxed the tax treatment of income § 501(c)(3) organizations earn from their for-profit subsidiaries. The relaxed rules were put in place in 2006 on a temporary basis pending study by the Treasury. But the relaxed rules have been periodically extended (as of this writing through December 31, 2013), and it appears that no study of the provision has been released. *See* I.R.C. § 512 (b)(13)(E) (2006).

236. *See supra* Parts IV.D.4, IV.E.1.

237. This new provision likely belongs in the exclusion section of the Internal Revenue Code. Section 139F, for example, is currently available.

238. *See supra* note 17 and accompanying text for discussion of these supporting organizations. For those concerned about the commercialization of college and university sports programs, the new Code provision might exclude supporting organizations—like athletic booster associations—that primarily benefit athletic departments.

239. For example, the Idaho Youth Ranch, a charity that runs thrift stores and programs for high-risk youth in Idaho, has a separate organization to manage its endow-

relaxation rule, therefore, should be broad enough to extend not just to the employing charity, but to its related charities as well. In all cases, the saved funds ultimately flow to the charitable class of the employing charity or one of its nonprofit affiliates.

If there is concern that the new provision would primarily benefit highly compensated employees, like the college or university president and other executives, then a non-discrimination component (like those included in qualified cafeteria and pension plans) could be included.²⁴⁰

The advantages of deep relaxation are that it is simple, easy to understand, and would be most effective at encouraging charitable employees to donate time. It would, in most cases, completely remove the specter of imputed income and eliminate worries about the wash preventers. Deep relaxation would take care of the problem for all employees—including those donating their entire salary or those contributing a portion of their salary (like their compensation for teaching a summer course).

But deep, near-complete relaxation carries disadvantages. First, it would be too broad. It would allow charitable employees to effectively enter into salary reduction agreements with their employers. Employees would fund all of their donations to their employers with pre-tax dollars, something that is not allowed to employees of for-profit enterprises. While employees of nonprofits likely give to a variety of causes, they are under particular pressure to give to the employer. This pressure is particularly acute in the higher education context.²⁴¹ After all, the administration and the professionals in the development office want to be able to advertise to outside stakeholders (and potential contributors) that a high percentage of the faculty and staff contribute to the institution. With complete relaxation, it is possible that employees of charities would no longer give cash donations; instead, they would give time. In the for-profit world, employees are likewise under pressure to give to the employer's charity of choice (for example, the United Way), but they would not have the pre-tax option that their counterparts in the nonprofit world would enjoy with deep relaxation of the assignment of income doctrine.

Thus, while deep relaxation would be easiest, some sort of limiting principle is needed. To that issue, we now turn.

ment funds. See Idaho Youth Ranch Found., <http://www.youthranch.org/IYRFoundation.aspx> (last visited Dec. 13, 2013).

240. A non-discrimination rule may not be entirely effective, however, for employees of independent means. Employees who are wealthy yet earn modest salaries (putting them beyond the reach of non-discrimination rules) may be tempted to give their entire salary back—effectively giving them a tax advantage in their giving programs. But such individuals are likely to be few. Such individuals may already be working for zero salary under a no income/no deduction regime if they have given up control over where the saved funds will be spent.

241. See Gene C. Fant, Jr., *Give a Little Bit . . . More*, CHRON. HIGHER EDUC., Oct. 8, 2012, <http://chronicle.com/blogs/onhiring/give-a-little-bit-more/34338>.

2. Gentle Relaxation: Partial Turn Off of the Assignment of Income Doctrine

Instead of turning off the assignment of income doctrine for all services contributed by employees of charities, Congress could restrict the relaxation to discrete amounts of income. For example, many faculty members are paid a base salary based on a nine month (academic year) contract. Faculty members often have the opportunity to earn additional income from the college or university by teaching a class on an overload basis (in excess of their assigned teaching load), teaching during the summer or intersession, teaching in executive education programs run by the school, participating in certain faculty development programs, being assigned extra income via an endowed professorship, receiving a cash award for teaching, research, or service, or receiving summer research support.²⁴² A limited relaxation proposal might only allow such supplemental, non-base salary income to be contributed without assignment of income. Further, the relaxation might be limited to a fixed dollar amount—say \$10,000 of this extra income, indexed to inflation.²⁴³ This limit could also be applied to adjunct salaries for professionals who teach a course and want to donate the usual compensation back to the college or university and designate how the funds will be spent.

This gentle relaxation proposal might not translate easily outside of the higher education context. But it could encompass, for example, bonuses or other supplemental compensation that employees of charities may be entitled to from time to time. This would extend the relaxation beyond the landscape of higher education.

This more limited relaxation approach would have the advantage of encouraging volunteerism by employees of charities without creating an unlimited loophole. This eliminates the problem of satisfying normal employ-

242. According to a 2004 survey, over half of faculty members get such supplemental pay from their employing institution. Finkelstein, *supra* note 131, at 326. But many faculty members need these funds to make ends meet—and thus would not be in a position to donate their time. *Id.* at 327.

243. Indexing to inflation is important to keep the limited tax benefit from slowly being wasted away by the ravages of inflation. Some limits put into the tax code without the protection of inflation adjustments become less and less important over time. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 65–68 (1982) (noting that non-indexed amounts in statutes may reflect a provision designed to satisfy a vocal interest group to gain their support for broader legislation while ensuring that the impact of the non-indexed provision lessens with the passage of time); Richard Schmalbeck & Jay A. Soled, *The Cultural Symbolism of the Deductible Skybox*, 126 TAX NOTES 1524, 1528 n.35 (2010) (noting how, in 1964, Congress enacted an exclusion from income for employer paid premiums on up to \$50,000 of group term life insurance for employees without indexing—and how the value of that exclusion is becoming less and less important over time). The proposal described here is structured as an improvement to the tax system rather than a one-time reaction to a problem. As such, indexing of any cap that is chosen would be appropriate.

ee campaign donations out of the regular paycheck. The proposal would also offer clear rules (limited as they are) that colleges and universities could openly use to encourage volunteerism by their employees and potential employees (like adjuncts drawn from the community).

3. Weak Relaxation: Waiving the AGI Limits

An even weaker relaxation option would be, rather than turning off the assignment of income doctrine, eliminating one of the wash preventers—the fifty percent of AGI limit—for donated services. This would allow faculty to donate an entire year's salary (say their final year's salary) with less of a tax consequence.²⁴⁴ They would still have income and pay payroll taxes, but they could deduct the contributions more easily. This would allow for the funding of more scholarships or endowments for other projects. Such a provision is not unprecedented. A similar rule was put in place, on a temporary basis, to encourage charitable contributions in the wake of Hurricane Katrina.²⁴⁵

This weaker option would still help encourage deductions, but it would not help smaller donors who do not itemize. Therefore, a combination of a capped limit with no assignment of income and a waiver of the fifty percent limit for those who exceed it—or those paid out of base salary—might be ideal.

Regardless of the specific relaxation option enacted, the key is to clarify the rules allowing donors to contribute services and give colleges or universities more certainty regarding the tax consequences of the donation. This would allow these arrangements to take place in the open, with solid agreements in place. In any case, the rules should not be structured to cast doubt on current transactions that are already squarely within the no income/no deduction rule.

B. The Benefits of Relaxation

Regardless of the form chosen—deep, gentle, or weak—relaxation would result in more donations going to colleges and universities when they are most needed. If the proposal is not enacted, the specter of taxation will cause even the most generous faculty to forego donations of the magnitude that can result from donated services. While relaxation will cost the

244. I am ignoring the implication of wage and hour laws and am assuming most employee volunteers would be considered non-classified employees under state law—like faculty members, executives, and managers. This might taint the proposal as benefiting high income elites, but I think the proposal could be extended to classified staff so long as the donations do not violate the wage and hour laws of the jurisdiction. Further discussion is beyond the scope of this Article.

245. I.R.C. §1400S(a) (2006) (suspending the fifty percent of AGI limit on qualified charitable contributions made between August 28 and December 31, 2005).

government revenue,²⁴⁶ it will cause donations to increase. Relaxation would have the salutary effect of ending the subterfuge; the wink and nod arrangements where the professor agrees to teach and not have any formal say over where the money goes yet the decision maker (Dean, President, Provost or whoever controls the purse strings at issue) just happens to fund the professor's preferred project. Relaxing the rules would get these arrangements out in the open, let everyone be honest and transparent, and avoid misunderstandings. Colleges and universities would be free to set up donation policies that fit within the relaxed tax rules—freely promoting the ease of giving by faculty. Faculty who donate time can even be treated as if they had donated cash and be initiated into the “club” levels of giving—entitling them to invitations to events where the big-ticket donors are feted. Furthermore, faculty contributions of time could “count” towards capital campaign drives, highlighting faculty support for the institution.

Relaxation of the tax rules governing donated services would also vest more control over the saved funds in the donor, rather than the institution. This is the same control that cash donors enjoy. Faculties, historically self-governing, are increasingly left out of decision-making by the corporatization of the college or university.²⁴⁷ Administrators with access to private benefactors and control over budgets normally determine funding priorities. Allowing faculty members to donate time, free of tax headaches, gives them a say, in a small way, over where funds go and what gets prioritized. This result could be empowering.²⁴⁸ That empowerment should increase donations—making the cost of forgoing taxes worth it given the additional funds flowing to the colleges and universities.²⁴⁹

Studies have shown that taxpayers respond to tax incentives for charitable giving.²⁵⁰ Taxpayers will decrease contributions as the after-tax cost of giving increases, and they will increase contributions as the after-tax cost

246. See discussion *infra* Part V.C.

247. See generally GINSBERG, *supra* note 171.

248. It might even help alleviate faculty grievances. Or not:

If one listens to academics, one might make the mistake of thinking they would like their complaints to be remedied; but in fact the complaints of academics are their treasures, and were you to remove them, you would find either that they had been instantly replenished or that you were now their object. The reason academics want and need their complaints is that it is important to them to feel oppressed, for in the psychic economy of the academy, oppression is the sign of virtue. The essence of it all is . . . *Academics like to eat sh[**], and in a pinch, they don't care whose sh[**] they eat.*

STANLEY E. FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO 276, 278 (1994) reprinted in BIRNBAUM, *supra* note 1, at 219.

249. Of course, many faculty members may have odd ideas about how funds should be used. But odd, inefficient allocations of donated funds results from cash donors as well. Such is the nature of having an independent third sector. Efforts may be wasted, but pluralism and freedom are fostered. See FISHMAN & SCHWARZ, *supra* note 19, at 61 (internal citations omitted).

250. PRESENT LAW, *supra* note 28, at 3.

of giving decreases.²⁵¹ Relaxation would clearly reduce the after-tax cost of giving by moving the donation from the imputed income/deduction category into the no income/no deduction category. With increased publicity, clearer rules, removed tax barriers, and faculty control over the saved funds, relaxation would cause giving to increase. Indeed, a faculty member who would never dream of taking \$10,000 out of his or her savings to donate to the college or university may be more than willing to do something he or she loves (teaching) for free—resulting in \$10,000 being donated to the college or university. But that scenario can only arise if there are no adverse tax consequences and the faculty member has some say over which programs would benefit from the saved funds. When deciding whether a new tax law will be good policy, the general test is to see if the benefits from taxpayer behavior caused by the law change will exceed the costs in revenue loss to the government.²⁵² Relaxation of the tax law of donated services passes this policy test because, as shown here, there is a strong likelihood that the increase in giving caused by relaxation will exceed the revenue costs of relaxation.²⁵³

C. Problems with Relaxation

One could raise objections to relaxing the rules for donated services. The first is the revenue loss to the government. Deficits are currently of paramount concern to politicians and the public, with talk of cutting spending and enhancing revenues by reducing tax breaks and “loopholes.” In such an environment, policymakers may well object to supporting yet another relief provision that could reduce revenue. In reality, however, the income tax revenue impact would likely be difficult to measure. Loss of income tax receipts would only occur to the extent the wash preventers currently apply.²⁵⁴ The Tax Expenditures Budget does not attempt to capture the revenue losses that occur from no income/no deduction situations. Even though the government is theoretically losing revenue because volunteers in the no income/no deduction category are forgoing income in the name of charity, such losses cannot be easily measured. They are not tracked.²⁵⁵ Relaxation of the donated services rules would simply help more donors avoid the wash preventers and land in the currently unmeasured no income/no deduc-

251. *Id.*

252. *See, e.g., id.*

253. For more discussion on lost revenue from relaxation, see *infra* Part V.C. For public schools, relaxation to some extent involves using federal dollars (via lost tax revenue) to make-up for state reductions in higher education spending. For private schools, relaxation can be viewed as substituting federal dollars (via lost tax revenue) for federal dollars (in terms of financial aid). In any case, this issue is beyond the scope of this Article.

254. *See supra* Part III.E.

255. Likewise, the Tax Expenditures Budget makes no attempt to measure revenue losses from those who choose not to work.

tion category. Furthermore, some of the relaxation would simply be legitimizing arrangements that were previously accomplished by subterfuge. If so, the government really has not “lost” any revenue over the pre-relaxation baseline—it is just that the revenue “loss” will have been acknowledged and made more salient.

If relaxation occurs, the revenue loss could be measured by having charities report the known value of volunteer time that falls under the relaxation rule on their Forms 990. This is another reason to enact the relaxation rules on a temporary basis to study their impact. Reporting on Form 990 could help the government track trends in volunteering under the relaxation rules and better reckon the costs. But given the cloudy revenue impact now, it is worth giving relaxation a chance.

The most significant revenue loss is likely not via the income tax but via payroll taxes. Payroll taxes are the most pernicious of the wash preventers and likely the single biggest roadblock to donated services. Indeed, payroll taxes will apply every time income is imputed for donated services.²⁵⁶ Relaxing the rules thus has the potential to remove a great deal of payroll tax revenue at a time when the long-term viability of Social Security and Medicare is causing concern. But any notion that these dedicated revenue sources are sacred was thrown away when Congress declared a payroll tax holiday—reducing the OASDI rate by two percent for 2011 and 2012.²⁵⁷ Although Congress directed the Treasury to make up for the revenue losses suffered by the OASDI Trust Fund from the payroll tax holiday, its tampering with the dedicated revenue stream that supports Social Security shows that payroll taxes are not as inviolable as once thought.²⁵⁸ Indeed, the promised benefits will likely need to be funded out of general Treasury funds should the dedicated revenue source (payroll taxes) prove inadequate.²⁵⁹ Also indicative of the lack of sacredness is the fact that the gov-

256. But the impact may be limited to the HI/Medicare portion of FICA if the donating employee is already over the OASDI wage cap.

257. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 § 601, Pub. L. No. 111-312, 124 Stat. 3296 (codified as amended in scattered sections of 26 U.S.C.).

258. *Id.* at § 601(e).

259. One might view the Social Security and Medicare taxes not as “taxes” but as payments for specific benefits (i.e., a future pension, disability insurance, and future medical insurance). See JULIAN E. ZELIZER, *TAXING AMERICA: WILBUR D. MILLS, CONGRESS, AND THE STATE, 1945–1975* 14 (1998), (explaining how Social Security was originally set up as an insurance program specifically financed by payroll “contributions” rather than a welfare program financed out of general tax revenue to ensure that the system would have its own funding source sufficient to “withstand the anti-statist culture of the United States”).

Today, however, there is a strong case for viewing the employment taxes as just that: taxes. See *id.* at 343–46 (discussing the expansion of Social Security benefits which began in the early 1970s and which were not coupled with appropriate increases in the contribution rate). See also LEONARD E. BURMAN & JOEL SLEMROD, *TAXES IN AMERICA: WHAT EVERYONE NEEDS TO KNOW* 54 (2013) (noting “[a]s the connection

ernment does not currently prepare a tax expenditures budget to track revenue losses for payroll taxes.²⁶⁰

The second objection to relaxation is the possibility of resentment. Faculty members already enjoy special tax and non-tax benefits that are being scrutinized in today's troubled economic environment. Many (but a dwindling number) have or can attain tenure, a form of job security unheard of outside of academia and the federal bench. Many colleges and universities allow employees or their dependents to take courses at a discounted tuition or even tuition-free.²⁶¹ These tuition benefits are generally not taxable to the employee.²⁶² This tax break has been criticized because only employees in the higher education enjoy it.²⁶³ But the relaxation proposals introduced here would benefit all employees of charities, not just those in higher education. The relaxation may be more palatable if viewed as a charitable helper rather than a special break for pampered faculty.

Beyond perk resentment, higher education has been experiencing broad criticism because of its high cost. Donors and federal policymakers are starting to reconsider the efficacy of support for higher education in light of tuition increases, higher student debt loads in the face of a soft job market, the commerciality of college and university athletics, and the "hoarding" of endowment earnings.²⁶⁴ This is yet more evidence of the "de-churching" of higher education and shows that now may not be an ideal time to ask for yet another special rule that benefits higher education and costs the public treasury. But the relaxation scheme presented here could potentially lower costs if volunteering faculty members covered needed courses and asked

between payroll taxes and benefits becomes more and more attenuated, the programs [Social Security and Medicare] may come to seem more like welfare and less like insurance"); Charles Murray, *Tax Withholding is Bad for Democracy*, WALL ST. J., Aug. 13, 2009, at A15 (calling on Congress to fold payroll taxes into the general income tax because it "will tell everyone the truth: Their payroll taxes are being used to pay whatever bills the federal government brings upon itself, among which are the costs of Social Security and Medicare").

260. See TAX EXPENDITURES, *supra* note 35, at 3 (indicating that the Joint Committee on Taxation does not track employment tax expenditures in its income tax expenditures report). See also Tax Policy Ctr., Tax Expenditures: What is the tax expenditure budget?, <http://www.taxpolicycenter.org/briefingbook/background/expenditures/budget.cfm> (last visited Dec. 13, 2013) (indicating that the "government could, but does not, formulate tax expenditure budgets for Social Security and other taxes"). Many employee benefits that are excluded for income tax purposes are also excluded from payroll taxes, yet the impacts are not tracked.

261. See, e.g., *Office of Human Resources: Notre Dame Educational Benefit*, UNIV. OF NOTRE DAME, <http://hr.nd.edu/nd-faculty-staff/forms-policies/notre-dame-educational-benefit/> (last visited October 26, 2013).

262. I.R.C. § 127(d) (2013) (known as a "qualified tuition reduction").

263. See, e.g., STAFF OF JOINT COMM. ON TAXATION, *OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES* 44–46 (Comm. Print 2005).

264. For a general overview of some of these issues, see Mark J. Cowan, *Taxing and Regulating College and University Endowment Income*, 34 J.C. & U.L. 507, 508 n.10 (2008).

that the funds saved be used in a manner that aids students—like for scholarships.²⁶⁵ Indeed, the increased frequency and visibility of faculty volunteerism made possible by relaxation may show efforts to reduce costs and may even create goodwill in the community and with policymakers.

The third objection to relaxation is the possible collateral effects on non-tenured faculty, especially adjuncts. Colleges and universities are already heavily relying on the cheap teaching labor that is available in fields with an oversupply of PhDs.²⁶⁶ If more faculty members start donating time, in theory colleges and universities might reduce positions for low-paid adjuncts trying to stitch together a living. It is easy for those who teach in professional fields like accounting or law and work with highly-paid professionals interested in teaching on a part-time, adjunct basis to forget that the poor pay, benefits, and working conditions for adjuncts in many other fields is well-documented.²⁶⁷ It would be difficult to build in safeguards for adjuncts in a relaxation statute. Ideally, this issue would be best addressed at the institutional level with each school adopting policies—approved by the faculty senate or a similar faculty governance body—to ensure that donated services will not crowd-out adjunct faculty. But even if policies are not put in place, most full-time faculty would likely donate their salary for courses they were going to teach already (like summer courses) or were forced to teach because of a critical need (like classes on overload). In most cases, those courses would have been taught by the faculty member anyway, and thus the mere relaxation of the donated services rules is unlikely to crowd out the adjuncts.

A fourth problem with relaxation is the possibility for precedent and peer pressure. If Professor X teaches Course A for free, then when he retires his replacement, Professor Y, may well be under pressure to do the same. If Professor Y refuses, perhaps because of his personal financial situation, Y might be viewed as miserly in comparison to his benevolent predecessor.²⁶⁸ But such fears are likely misplaced. Presumably there is gen-

265. The relaxation proposal might be tailored so that donated services could avoid assignment of income only if the savings are redirected to programs that directly benefit students—like scholarships. But this would add needless complexity to the relaxation rules. Most donation-minded faculty would want their donations to fund scholarships or other programs that directly or indirectly benefit the students.

266. This is particularly true in certain areas of the humanities. By contrast, my field (accountancy) has an undersupply of credentialed faculty applicants. *See supra* note 137.

267. *See, e.g.,* Audrey Williams June & Jonah Newman, *Adjunct Project Reveals Wide Range in Pay*, CHRON. HIGHER EDUC., Jan. 4, 2013, <http://chronicle.com/article/Adjunct-Project-Shows-Wide/136439/>.

268. Anecdotal evidence suggests that a somewhat analogous situation can occur in K–12 public schools. Sometimes union rules prohibit teachers from teaching without compensation. A teacher who wants to run a summer program for which there is no funding, for example, may be prohibited by the union from running the program for no compensation. These rules presumably prevent peer pressure and avoid setting prece-

eral understanding that individual faculty members each have different financial positions and views on donations. Some are in a better position to give time than others. Furthermore, a relaxed donated services regime could *reduce* peer pressure. Relaxed rules would allow professors to designate where the cost savings go—and different professors have different views on which programs need support. Professor X, for example, may teach a course for free and designate that the funds go to the X Family Scholarship. No one would expect his replacement, Professor Y, to teach for free and donate it to the X Family Scholarship. Relaxation, by providing tracing of funds, would thus make it clear that giving goals are not transferred from one faculty donor to another.

A fifth problem with relaxation is the possible collateral effects on funding. One issue is measurement of resources. As budgets contract, faculty lines may be eliminated. If professors pick up the slack by donating teaching time and the essential classes are still being taught, then the pain of the lost line would not be as salient.²⁶⁹ Administration may get the misperception that the faculty position does not need to be restored because it appears that the department is doing just fine with less resources. But this is already occurring—with high-cost tenure track positions being replaced by less expensive adjunct labor.²⁷⁰ In such an environment, relaxing the donated service rules would likely not add very much to the problem.

Likewise, visible donations of time may induce states to reduce funding for state colleges and universities. But states are already doing this even without evidence of increased donations.²⁷¹ It is unlikely that a relaxed donated services regime would tip the scales towards even less state support.²⁷² In any case, if funding is in fact cut—by the administration of the institution or by the state—the problem is easily corrected. Once the problem is identified or even threatened, the faculty members can simply stop donating their time.

dents that the administration may attempt to exploit.

269. Research and service associated with the lost position are not salient to begin with—at least in the short term. It is really the teaching load associated with the lost faculty line that would cause the institution immediate pain.

270. See, e.g., AM. ASS'N OF UNIV. PROFESSORS, THE STATUS OF NON-TENURE TRACK FACULTY (1993), <http://www.aaup.org/report/status-non-tenure-track-faculty>.

271. See PHIL OLIFF, VINCENT PALACIOS, INGRID JOHNSON & MICHAEL LEACHMAN, CTR. ON BUDGET & POLICY PRIORITIES, RECENT DEEP STATE HIGHER EDUCATION CUTS MAY HARM STUDENTS AND THE ECONOMY FOR YEARS TO COME (2013), available at <http://www.cbpp.org/files/3-19-13sfp.pdf>.

272. Increased donated services would also have little impact on donor support at both public and private institutions. External donors are unlikely to reduce their contributions simply because the faculty are pitching in. In particular, the faculty may not be donating to the same programs that external donors wish to support. Increased faculty donations of time should not crowd out giving by external donors. In fact, it may even encourage more external donations if donors are inspired by, and feel solidarity with, those faculty that are donating their time.

In addition, one could argue that if relaxation is too successful in encouraging donated time, cash donations may decrease as faculty substitute their labor for cash donations. Some of this could happen, but the effect is not likely to be great. Indeed, studies have shown that volunteering and cash donations are complements rather than substitutes.²⁷³ Even if faculty members do cut back on their cash donations,²⁷⁴ their service donations are likely to be more lucrative for the institution. Accordingly, relaxation of the donated services tax rules should result in new donations, not cannibalize current cash donations.

VI. SELF-HELP MEASURES

While Part V, above, makes a compelling case for reform, the reality is that the current trend is pointing away from these reforms. Looming budget deficits have drawn calls for tax reform and spawned many thoughtful ideas for raising revenue along the way. Overall, Congressional action on reforming the tax treatment of donated services is slight. Accordingly, this section suggests ways that colleges and universities can remove the tax barrier to donated services: via a gross-up or by changing their policies regarding salary savings.

A. The Gross-Up Alternative

Gross-ups have long been used by for-profit employers to shelter employees from adverse or unseemly tax consequences. Indeed, *Old Colony Trust*, discussed earlier, involved a gross-up that occurred nearly a century ago.²⁷⁵ Because our income tax system's definition of income is so broad,²⁷⁶ many items that an employer provides to an employee are taxable. If an employer gives an employee a set of golf clubs as a bonus for increasing sales, the value of the golf clubs is taxable to the employee and is subject to income tax withholding and payroll taxes. Since the government wants its withholding in cash (and not in the form of, say, a nine iron), the employer will need to take the withholding on the value of the golf clubs out of the employee's normal cash pay. Doing so will cause the employee's take-home pay to decrease in the pay period in which the value of the golf clubs is included. This puts the employer in the awkward position of saying: "Thanks for all your hard work. Here are some nice golf clubs. Oh, by the way, your paycheck will be a little light next week. Don't go spending

273. Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 863 (2001).

274. See *supra* Part V.A.1 (noting that a problem with *complete* relaxation is that it would result in faculty members being able to essentially donate cash on a pre-tax basis by donating time).

275. See *supra* Part III.B.1.

276. See I.R.C. § 61(a) (2013) (stating that "gross income means all income from whatever source derived").

all your cash on club dues and greens fees just yet.”

The employer could avoid this awkward and morale-sapping predicament by paying the employee’s tax on the compensation related to the golf clubs. But, as *Old Colony Trust* teaches, that tax payment would itself be taxable.²⁷⁷ Therefore, if the employer wants to hold the employee harmless from tax on the golf clubs, it must not only pay the tax on the golf clubs but also the tax on the tax on the golf clubs, and then the tax on the tax on the tax on the golf clubs, and so on.²⁷⁸ Because there are several layers of payments involved, the amount the employer must pay will be greater than simply the employee’s tax rate times the value of the golf clubs, and the process of absorbing the employee’s tax is called a “gross-up” rather than simply a “tax payment.” The basic gross-up formula is:

$$\frac{1}{(1 - \text{Tax Rate})} \times \text{After-Tax Amount} = \text{Pre-Tax Amount}$$

The after-tax amount is the value the employer wants the employee to receive free and clear of tax. Here, that would be the value of the golf clubs. The pre-tax amount is the total cost to the employer of providing both the golf clubs and the gross-up payments. The tax rate is the employee’s tax rate—which can sometimes be hard to determine given state taxes, progressive tax rates, etc.²⁷⁹

Grossing-up is a relatively simple way to provide taxable benefits to employees while reducing the tax consequences to the employee. Overall, more tax is paid to the government, but the employee is held harmless. In fact, other than some unusual numbers (a higher than normal gross pay and higher than normal withholdings) flowing through the pay stub, the employee is unlikely to notice the taxable golf clubs or the gross-up—since the employee’s take-home pay remains the same.

While gross-ups have long been used in industry, they are less common in colleges and universities. In fact, one rarely sees any mention of gross-ups in discussions of campus tax issues.²⁸⁰ This may be because colleges

277. *Old Colony Trust Co. v. Comm’r of Internal Revenue*, 279 U.S. 716, 729 (1929).

278. The Court in *Old Colony Trust* referred to this as the “tax upon a tax” problem. *Id.* at 730. This was a problem which the Court did not resolve. *See id.* at 731.

279. If the tax rate is too hard to estimate, the employer and the employee can simply agree on a rate that might over—or under—compensate the employee, but is close enough to avoid a hardship.

280. Except when it comes to compensation contracts for campus executives. Jack Stripping, *Senator Grassley Denounces Tax-Free Perks for College Chiefs*, CHRON. HIGHER EDUC., Dec. 11, 2012, <https://chronicle.com/article/Senator-Grassley-Denounces/136239/> (noting that about half of the fifty highest paid private-college and university presidents in the U.S. receive some sort of tax gross-up—often related to bonuses, their children’s tuition, or other benefits). The practice of grossing-up significant compensation items for executives in both the nonprofit and for-profit worlds has

and universities were traditionally less sophisticated about payroll reporting and are now tightening their policies as they are being put under greater IRS scrutiny.²⁸¹ As colleges and universities develop tax awareness and sophistication, they should also consider adopting for-profit techniques for dealing with the tax law, such as gross-ups.

Deploying tax gross-ups in situations where donated services result in imputed income would remove the tax barrier to giving and encourage employee donations of time. But the cost of the gross-up would reduce the benefit to the college or university. The following two examples illustrate the use of gross-ups in the donated services context.

Gross-Up Example #1: Same as Numerical Example #1 in Part IV.A above, but with a gross-up. The basic facts are as follows. Professor Cranky teaches for City State University. He agrees to teach a summer course for no compensation and asks that the saved funds be used to fund a scholarship for art students. Under a standard summer contract, Cranky would earn \$10,000 from teaching the summer course. Cranky has not reached the OASDI wage cap. The impact of the temporary payroll tax holiday is ignored. Cranky is in the twenty-five percent federal tax bracket. State income taxes are ignored. Cranky elects to itemize his deductions and his charitable contributions for the year will be less than fifty percent of his AGI.

Based on these facts, any imputed income is offset by a charitable deduction for income tax purposes. Therefore, the only tax (wash preventer) at issue is the 7.65% FICA rate. In this case, the gross-up formula is:

$$\frac{1}{(1-7.65\%)} \times 10,000 = \$10,828.^{282}$$

Of the \$10,828, \$10,000 represents the imputed income and \$828 represents the gross-up (tax on the \$10,000, tax on the tax, tax on the tax on the tax, etc.).²⁸³ Removing the payroll tax barrier while letting Cranky decide

caused some controversy—indicating that there is a separate set of rules for highly-paid executives. Despite the controversy, gross-ups are perfectly reasonable ways to address the tax issues associated with noncash compensation (including the imputed income that comes from donated services) for rank and file employees.

281. See *supra* Part III.C.

282. One who views FICA as a purchase of social insurance rather than a “tax” might find grossing-up for FICA objectionable. But there is a good case to be made that FICA is in fact a tax. See discussion *supra* Part III.E.5 and *supra* note 259.

283. I am making the assumption that Cranky can deduct not only the \$10,000 of imputed income donated to the university, but the \$828 gross-up payment as well. Only then would his taxable income be fully offset by a charitable contribution deduction. One might argue that \$828 is really a return benefit made by the university in connection with Cranky’s \$10,000 donation. See *supra* Part II for a discussion of return benefits. Return benefits reduce the charitable contribution deduction. But, in this case, Cranky must include the gross-up *in his taxable income*, just like he includes the \$10,000 in his taxable income. It would seem that any amount included in his taxable

how the saved funds will be used would encourage Cranky to donate his time. The following shows the net impact on the university:

SALARY SAVINGS FROM CRANKY'S DONATED TIME	\$10,000
LESS: COST OF GROSS-UP	(\$828)
LESS: ADDITIONAL UNIVERSITY MATCH FOR PAYROLL TAXES (7.65%) ON THE GROSS-UP OF \$828 ²⁸⁴	(\$63)
NET SAVINGS TO THE UNIVERSITY	\$9,109

The university does not get the full \$10,000 but comes fairly close. And it probably never would have received anything from Cranky in the absence of the donation—which would not have occurred without the gross-up. Therefore, the gross-up makes a lot of sense, despite the cost to the university.

Gross-Up Example #2: The cost of the gross-up can go up significantly if the faculty member is subject to more wash preventers. Assume, for example, that Cranky has the same facts as in Gross-Up Example #1, above, except that he does not itemize deductions and his combined federal, state, and FICA tax rate is 37.65%.²⁸⁵ The gross-up formula is:

$$\frac{1}{(1 - 37.65\%)} \times 10,000 = \$16,038$$

Of this, \$10,000 represents the imputed income from the donated services and \$6,038 represents the tax gross-up. The impact on the university

income should also appear as a charitable contribution deduction. Otherwise, he would be counting the \$828 “benefit” twice—once in his taxable income as compensation and a second time as a reduction in the charitable contribution deduction.

This is not free from doubt, however. One might still view the gross-up as providing a return benefit in the form of increased Social Security benefits (see more on this at *supra* note 259). But the impact is likely to be small. If I am incorrect about the gross-up adding to the charitable contribution deduction, then the numbers in the example could be adjusted to include a gross-up for the income tax on the difference between Cranky's income and his deduction.

284. Only the additional match on the gross-up is considered. The university would have incurred the match on the payroll taxes on the \$10,000 base pay whether donated or paid in cash.

285. Of course, if the value of the donated services increases much more, he will become an itemizer (from charitable contributions alone), which would gradually (as Cranky exceeds the standard deduction) lower the required gross-up. The required gross-up could then go back up once Cranky hits the fifty percent of the AGI ceiling. The amount the gross-up would need to increase would depend on Cranky's predictions about using the carry over and the university's agreement with Cranky's estimates.

would be as follows:

SALARY SAVINGS FROM CRANKY'S DONATED TIME	\$10,000
LESS: COST OF GROSS-UP	(\$6,038)
LESS: ADDITIONAL UNIVERSITY MATCH FOR PAYROLL TAXES (7.65%) ON THE GROSS-UP OF \$6,038 ²⁸⁶	(\$462)
NET SAVINGS TO THE UNIVERSITY	\$3,500

In this case, a lot of value is lost in the gross-up, and Cranky would be working quite a bit for the university to save \$3,500. But that is still \$3,500 more than the university would have had in the absence of the donated services. The university and the employee would need to decide whether the donated services would make sense in this case. Cranky's decision about where the saved funds would go and the administration's view of that use may well decide whether the university will agree to a donated services and gross-up arrangement with Cranky.

Like nearly everything else in higher education, there would no doubt be political issues to navigate. Perhaps the central administration would not want to implement a gross-up program because of the potential cost and because control of any saved funds would shift from the administrators to the donating faculty members. If central administration could be convinced, however, that a gross-up would lead to more service donations overall (freeing up cash—regardless of who gets control of that cash) they might be more willing. This would be especially true if the cost of the gross-up (including, perhaps, an administrative fee) could be charged back to the department, unit, or center that is benefiting from the donated services. Of course, if a donated service program becomes too successful—providing a steady stream of income—then, perhaps, central administration may reduce the department's overall budget—effectively capturing the benefit of the donated services for its own use. Such maneuvers, if salient, would likely put a damper on faculty donations of time even with gross-ups.

Regardless of the politics involved, the issue of whether and to what extent a gross-up should be offered—unlike the tax law—is within the control of the college or university. This makes gross-ups an attractive way for colleges and universities to use self-help to encourage donated services.

B. Changing Salary Savings Policies

Another self-help measure would be for colleges and universities to

286. Only the additional match on the gross-up is considered. The university would have incurred the match on the payroll taxes on the \$10,000 base pay whether donated or paid in cash.

change their policies to give more comfort to service providers. For example, they can specify that donated salary savings will automatically and in all cases go to the department of the donating faculty member rather than to the college or university as a whole. This would lessen the chance of diversion to programs that the service provider does not want to support—like the online program for underwater basket weaving management in the opening example. Of course, to avoid taxation the employee would need to relinquish control and rely on the policy to ensure that the funds are being directed at causes that the donor wishes to support. That may cool off some of the warm glow that normally comes with giving. Also, the donating faculty members would not be able to specifically designate the use of the funds. They might know that the funds will be returned to their departments, but they are not sure how the funds will be used (maybe for a scholarship, travel, etc.). This could further diminish the warm glow or could lead to more wink and nod arrangements. In any case, there could be political barriers to such policy enactments. Such policies should only be enacted if they advance the school's mission (which could involve attracting more time-donors in teaching) rather than merely to get around an inconvenient tax rule.

VII. CONCLUSION

In summary, tax rules may frustrate something that should be encouraged in these tough budgetary times: the donation of services by employees of colleges, universities, and other charities. The tax law should be changed to remove this frustration. Otherwise, individual colleges and universities hoping to expand their volunteer programs should implement gross-up procedures or consider clarifying allocation policies pertaining to internal funds. Either approach would have the benefit of allowing the college or university (or other charities) to openly advertise (on its giving website or otherwise) that it is open to accepting donations of time and that such donations could occur unhindered by the tax system. By changing the law or engaging in self-help, we can let faculty like Flinty be free of taxes and faculty like Clement rest in peace.

JUDICIAL REVIEW OF NCAA ELIGIBILITY
DECISIONS:
EVALUATION OF THE RESTITUTION RULE AND
A CALL FOR ARBITRATION

STEPHEN F. ROSS, RICHARD T. KARCHER, & S. BAKER KENSINGER*

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INTRODUCTION

Imagine being a star athlete at a prominent Division I college or university. Now suppose that the National Collegiate Athletic Association (“NCAA”) notified your college or university that you were being investigated for possible violations of their regulations, and shortly thereafter found a violation, declaring that you were ineligible to participate in intercollegiate athletics. With strong evidence of your innocence, suppose that you were to retain an attorney to take the matter to a court of equity, where your counsel met the high standards required and a sympathetic judge granted injunctive relief, allowing you to play just in time for the season opener. Thrilled with your victory, you would likely be shocked and heartbroken to learn that, in all likelihood, your institution would still not allow you to play. This is because, despite the judicial determination of your innocence, if your injunction is “voluntarily vacated, stayed or reversed or it is finally determined by the courts that injunctive relief is not or was not justified,”¹ the NCAA may impose severe financial penalties on member schools under Bylaw 19.7.² Known as the Restitution Rule, this Bylaw effectively prevents student-athletes from participating in intercollegiate athletics even though they have a court-ordered injunction that says otherwise.³

As the above hypothetical illustrates, the Restitution Rule serves to frustrate judicial relief granted to student-athletes, even if the athlete has conclusively demonstrated the likelihood of success on the merits, irreparable

1. NAT’L COLLEGIATE ATHLETIC ASS’N, 2012–2013 NCAA DIVISION I MANUAL, art. 19.7 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf> [hereinafter NCAA DIVISION I MANUAL].

2. *Id.*

3. *Id.*

harm, and that the balance of hardships favors immediate equitable relief. The rule places member schools in an impossible position. While a court order grants student-athletes the legal right to participate, the Restitution Rule prevents schools from allowing them to participate for fear of *potential* NCAA sanctions. The rule's clear effect is precisely the same as if the student-athlete had been required, as a condition of participation in NCAA athletics, to sign a waiver of recourse to judicial review of NCAA eligibility decisions. Courts in similar contexts have refused to enforce compulsory waivers of recourse as contrary to public policy, unless the parties' agreement contains an arm's length negotiated arbitration procedure for resolving their disputes.⁴

This article begins with a brief discussion of interim equitable relief and why it is a necessary remedy for eligibility decisions rendered under the NCAA's procedure for resolving eligibility disputes, as it currently exists.⁵ Next, it examines the Restitution Rule, the interests it purports to protect, and its actual effects on student-athletes and member schools.⁶ Judicial precedents have generally supported the principle of independent review of NCAA decisions regarding student-athlete eligibility, declining to apply the doctrine of non-interference decisions of private associations, which would otherwise operate to preclude independent judicial review.⁷ Judicial treatment of the Restitution Rule, however, has not corresponded with these precedents.⁸ This article will demonstrate how the Restitution Rule effectively operates as a waiver of recourse clause, and will demonstrate the courts' abhorrence of such clauses, generally, as well as in the sports league context.⁹ This article will then discuss why the NCAA's legitimate concern regarding local court bias is insufficient to justify Bylaw 19.7, concluding that the courts should declare the Restitution Rule unenforceable as contrary to public policy.¹⁰ Finally, we propose independent impartial arbitration as an alternative to court intervention.¹¹ This alternative would not only satisfy the NCAA's interest in maintaining fairness to competing institutions, which is the purported justification for the Restitution Rule, but would also provide quick, independent, and final resolution of NCAA eligibility disputes in compliance with the Federal Arbitration Act.¹² The NCAA should replace Bylaw 19.7 with a system of independent impartial arbitration, similar to the numerous arbitration systems adopt-

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4. *See infra* Part IV.
 5. *See infra* Part I.A–B.
 6. *See infra* Part I.C.
 7. *See infra* Part II.
 8. *See infra* Part III.
 9. *See infra* Part IV.
 10. *See infra* Part V.
 11. *See infra* Part VI.
 12. *Id.*

ed by other leagues and associations throughout the sports industry.¹³

I. THE NECESSITY OF INJUNCTIVE RELIEF UNDER THE NCAA'S CURRENT SYSTEM OF RESOLVING ELIGIBILITY DISPUTES

A. The Purpose of Equitable Relief

The concept of equity, which was developed by the English common law and grew out of necessity to meet the needs of the time and of efficient judicial administration, was designed to prevent injustice that could occur if a plaintiff were only left to remedies at law.¹⁴ Modern equity is designed to complement legal jurisdiction, allowing relief where courts of law are traditionally unable to act. As the Arkansas Supreme Court once explained, "A court of conscience must keep the granted relief abreast of the current forms of iniquity."¹⁵ Thus, courts have developed injunctive relief as a way to ensure that equity is done. A federal court may issue injunctive relief under Rule 65 of the Federal Rules of Civil Procedure.¹⁶ However, the rule itself "does not set forth a specific standard for the determination of a request for a preliminary injunction."¹⁷ In place of a statutory standard, courts have generally relied on the traditional principles of equity when evaluating an application for a preliminary injunction.¹⁸

With equity as a guide, each federal circuit has developed its own test for determining whether interim judicial relief is appropriate.¹⁹ Generally, federal courts balance the following factors: (1) the movant's likelihood of success on the merits; (2) the likelihood that the movant will suffer irreparable injury if the request for preliminary injunction were to be denied; (3) the hardships imposed on parties and non-parties by the issuance or non-issuance of preliminary relief; and (4) the effect of a grant or denial of preliminary injunctive relief on public policy.²⁰ State courts use a variety of methods in deciding whether to grant a temporary injunction.²¹ Virtually

13. *Id.*

14. *See* *Quinn v. Phipps*, 113 So. 419, 425–26 (Fla. 1927); *Jones v. Newhall*, 115 Mass. 244, 244 (1874). *See also* CHRISTOPHER GUSTAVUS TIEDEMAN, A TREATISE ON EQUITY JURISPRUDENCE 9–11 (F.H. Thomas Law Book Co. 1893).

15. *Renn v. Renn*, 179 S.W.2d 657, 661 (Ark. 1944).

16. FED. R. CIV. P. 65.

17. 13 JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE § 65.22[1] (3d ed. 2013).

18. *Id.*; *SEC v. Mono-Kearsarge Consol. Mining Co.*, 167 F. Supp. 248, 260 (D. Utah 1958).

19. *See* 13 JAMES WM. MOORE ET. AL., MOORE'S FEDERAL PRACTICE § 65.22 (3d ed. 2013).

20. *Id.*

21. Some states, such as Minnesota, have created their own common law test, utilizing several factors:

We evaluate the situation in light of five considerations which we consider

all jurisdictions provide for the granting of equitable relief in situations where irreparable harm is done to a party by the mere passage of time.²²

B. The Appropriateness of Injunctive Relief for NCAA Eligibility Decisions

The underlying principles that led courts to develop interim equitable relief apply with particular force to review of NCAA eligibility decisions. In a number of cases, courts have developed a significant body of precedent that substantively constrains the unfettered ability of NCAA officials to exercise discretion in ruling student-athletes ineligible for intercollegiate competition. Federal and state laws impose substantive limitations on the NCAA's ability to implement and apply certain regulations. For example, a regulation might violate a student-athlete's constitutional rights if imposed by a state college or university,²³ or be constrained by non-discrimination

relevant in deciding whether the determination made by the trial court should be sustained on appeal:

- (1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.
- (2) The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial.
- (3) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief.
- (4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal.
- (5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros., Inc. v. Ford Motor Co., 272 Minn. 264, 274–75 (Minn. 1965) (internal citations omitted).

Other states, such as Iowa and New York, frame the test within their state's code of civil procedure. *See* IOWA R. CIV. P. 1.1502; N.Y. C.P.L.R. 6301. Virginia adopted the test used by the Fourth Circuit Court of Appeals. *See* *Danville Historic Neighborhood Ass'n v. City of Danville*, 64 Va. Cir. 83 (Va. Cir. Ct. 2004) (citing *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353 (4th Cir. 1991)).

22. *See, e.g., Hall v. Univ. of Minn.*, 530 F. Supp. 104 (D. Minn. 1982) (holding that a university student and varsity basketball player, whose applications for admission into a degree program had been denied, and whose athletic eligibility had been lost as a result, was entitled to a preliminary injunction because otherwise his overall aspirations regarding a career in professional basketball would be substantially threatened, the harm to the student outweighed any harm that granting the injunction would inflict on other parties, and the student demonstrated a substantial probability of success on his due process claim).

23. Courts are divided as to whether athletic participation is a property right protected by the Due Process Clause. *See, e.g., Campanelli v. Bockrath*, 100 F.3d 1476 (9th Cir. 1996) (state university athletic program subject to due process requirements of the Fourteenth Amendment); *Colo. Seminary v. NCAA*, 417 F. Supp. 885 (D. Colo.

provisions of federal civil rights and disability laws that apply to the vast majority of NCAA members that receive federal funding,²⁴ or a regulation or application of the regulation may be arbitrary and capricious.²⁵ Recent cases have established the principle that NCAA rules operate as a contract among member schools, with student-athletes as third-party beneficiaries, so that a challenge to an improper application of an NCAA rule or even a challenge to the rule itself is legally actionable.²⁶

Despite these legal constraints on the NCAA's authority to rule a student-athlete ineligible, courts struggle to meaningfully protect a student-athlete's constitutional, statutory, or contractual rights in time-sensitive cases, where the ruling comes shortly before or during a season. Depending upon the particular facts and circumstances of the case, the time-sensitive nature of an athletic career and the potential adverse effect of ineligibility on a particular player and others (such as the college or university and fellow teammates) may demonstrate irreparable harm on the basis that money damages would be extremely difficult or impossible to ascertain.²⁷ For example, a federal district court judge analyzing this issue emphasized, with regard to a collegiate swimmer, the few years available and the significant proportion of a swimming career that could be lost while the case was being litigated.²⁸ The judge further noted that such harm could not easily

1976), *aff'd*, 570 F.2d 320 (10th Cir. 1978); *Hall v. Univ. of Minn.*, 530 F. Supp. 104 (D. Minn. 1982) (holding that athletic participation is a protected right); *NCAA v. Yeo*, 171 S.W.3d 863, 870 (Tex. 2005) (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)) ("Yeo's claimed interest in future financial opportunities is too speculative for due process protection. There must be an actual legal entitlement.").

24. See 20 U.S.C. § 1681 (2012). *Cf.* *Ganden v. NCAA*, No. 96 C 6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996) (reviewing NCAA eligibility rules for compliance with Americans with Disabilities Act).

25. See *Bloom v. NCAA*, 93 P.3d 621, 624 (Colo. Ct. App. 2004) (quoting *NCAA v. Lasege*, 53 S.W.3d 77, 83 (Ky. 2001) ("With respect to a claim of arbitrary and capricious action . . . 'relief from our judicial system should be available if voluntary athletic associations act arbitrarily and capriciously toward student-athletes.'").

26. See, e.g., *Bloom*, 93 P.3d at 623-24 ("Here, the trial court found, and we agree, that the NCAA's constitution, bylaws, and regulations evidence a clear intent to benefit student-athletes. And because each student-athlete's eligibility to compete is determined by the NCAA, we conclude that [plaintiff] had standing in a preliminary injunction hearing to contest the meaning or applicability of NCAA eligibility restrictions."). See also *Hall v. NCAA*, 985 F. Supp. 782 (N.D. Ill. 1997); *NCAA v. Brinkworth*, 680 So. 2d 1081 (Fla. Dist. Ct. App. 1996).

27. See, e.g., *Ganden*, 1996 WL 680000; *Hall*, 530 F. Supp. at 106 (noting that college basketball players' overall aspirations regarding a career in professional basketball would be substantially threatened and such harm outweighed any harm that granting the injunction would inflict on other parties). Although *Hall's* analysis of the merits of the plaintiff's claim has been subsequently questioned, *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983), the trial court's analysis of the other factors relevant to equitable relief remain valid.

28. See *Ganden*, 1996 WL 680000.

be quantified in financial terms were the plaintiff ultimately to prevail.²⁹ Moreover, the court suggested that the balance of hardship tips so decidedly in favor of the athlete, minimizing any harm to the NCAA, that the athlete need only demonstrate a “modest probability of success on the merits.”³⁰

Public policy considerations often will support injunctive relief for student-athletes who can demonstrate that they have been wrongfully ruled ineligible by the NCAA. As discussed below,³¹ courts have found a strong public interest in independent review for organizations whose rules must be followed by all those seeking to participate in their chosen endeavors. The NCAA dominates and is a monopolist in the field of elite collegiate athletics.³² Thus, it is important that participant student-athletes have fair and impartial review of NCAA eligibility decisions. Due to the time-sensitive nature of NCAA eligibility decisions, student-athletes who can show a strong likelihood of success on the merits should be granted interim judicial relief in the form of a preliminary injunction.³³

C. Impact of the Restitution Rule on Principles of Equitable Relief

The NCAA’s Restitution Rule, Bylaw 19.7, provides:

If a student-athlete who is ineligible under the terms of the constitution, bylaws or other legislation of the Association is permitted to participate in intercollegiate competition contrary to such NCAA legislation but in accordance with the terms of a court restraining order or injunction operative against the institution attended by such student-athlete or against the Association, or both, and said injunction is voluntarily vacated, stayed or reversed or it is finally determined by the courts that injunctive relief is not or was not justified, the Board of Directors may take any one or more of the following actions against such institution in the interest of restitution and fairness to competing institutions: (*Revised: 11/1/07 effective 8/1/08*) [List of nine categories of punishments is omitted].³⁴

29. *Id.*

30. *Id.* This conclusion likely understates the NCAA’s legitimate concerns about the integrity of an athletic competition that includes a player who may well be ineligible and the need for prompt resolution of the dispute.

31. *See infra* Part II.B.

32. *See infra* Part V.

33. *See, e.g.,* Oliver v. NCAA, 920 N.E.2d 203, 206 (Ohio Ct. Com. Pl. 2009) (granting declaratory and permanent injunctive relief).

34. NCAA DIVISION I MANUAL, *supra* note 1 art. 19.7. For a complete history of the adoption, amendment, and modification of the Restitution Rule since 1975, see Richard G. Johnson, *Submarining Due Process: How the NCAA Uses its Restitution Rule to Deprive College Athletes of their Right of Access to the Courts . . . Until Oliver*

Despite the propriety of injunctive relief, the Restitution Rule distorts the underlying principles that led courts to develop interim equitable relief by making courts reluctant to issue these preliminary injunctions in the first place.³⁵ Although the NCAA's legitimate concerns that underlie the Restitution Rule are properly considered by the equity court in the discretionary balancing of interests inherent in equity cases, the Restitution Rule distorts the court's exercise of discretion by adding the concern for potentially harsh retributive sanctions that will be imposed on member schools.³⁶ Indeed, one trial judge expressly refused to grant an injunction for this precise reason:

The harm to [Colorado University] would be that an injunction mandating that they declare Mr. Bloom eligible and allow him to compete on the football team would risk the imposition of sanctions pursuant to [Bylaw 19.7], which would allow the NCAA to impose sanctions if an injunction was erroneously granted. These sanctions could include: forfeiture of all victories, of all titles, TV revenue, as well as others; forfeiture of games would irreparably harm all of the member[s] of the CU football team who would see their hard earned victories after great personal sacrifice nullified; the loss of revenues would harm all student athletes at CU who would find their various programs less economically viable; imposition of NCAA sanctions would harm CU's reputation; and sanctions would reduce the competitiveness of various sport[s] teams at CU. I find that the harm to CU and the NCAA is more far reaching, especially because it could harm other student athletes, than the harm to Mr. Bloom. Therefore, the public interest would not be served by an injunction.³⁷

The Restitution Rule is grounded on legitimate concerns for parity and

v. NCAA, 11 FLA. COASTAL L. REV. 459, 482–520 (2010).

35. See Alain Lapter, *Bloom v. NCAA: A Procedural Due Process Analysis and the Need for Reform*, 12 SPORTS L. J. 255, 270 (2005).

36. Gordon E. Gouveic, *Sport: Making a Mountain out of a Mogul: Jeremy Bloom v. NCAA and Unjustified Denial of Compensation under NCAA Amateurism Rules*, 6 VAND. J. ENT. L. & PRAC. 22, 24 (2003).

37. *Bloom v. NCAA*, No. 02-CV-1249, slip op. at 8 (Colo. Dist. Ct. Aug. 15, 2002), *aff'd*, 93 P.3d 621 (Colo. Ct. App. 2004). See also *Due Process and the NCAA: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 18–19 (2004) [hereinafter *Due Process and the NCAA*] (statement by Jeremy Bloom, former student-athlete) (“In my experience, this [R]estitution [Rule] brought much concern to the judge who heard my case as well as spurred university officials to notify me that, even if I were granted injunctive relief by the court, that the university would not take the risk of allowing me to play for fear of possible sanctions.”).

fairness to competing institutions.³⁸ If a member school allows a player to compete pursuant to a trial court order and a reviewing court concludes that the trial court was in error, the school has gained a competitive advantage by continuing to play an ineligible player.³⁹ Another argument put forth in favor of the Restitution Rule is that it is necessary to protect the NCAA's legitimate interest in preserving the integrity of its eligibility rules against injunctions by local courts, which are likely to be unduly favorable to local schools and athletes. Professor Gary Roberts testified before Congress that the rule is needed to protect against injunctions "from local judges who often act out of partisan or parochial interests."⁴⁰ According to Roberts, the fear is that, without the Restitution Rule, there will be nothing to prevent local courts from sanctioning blatant violations of eligibility rules:

If an institution were not subject to penalties in such a situation, coaches could recruit a number of ineligible players, seek short-term injunctions just before important contests. . . allow[ing] the player to participate to the substantial competitive advantage of the team (and unfair disadvantage to its opponents), all without any fear of subsequent penalty [if] the appellate courts inevitably reverse the injunction.⁴¹

While the NCAA certainly has a legitimate interest in protecting the integrity of its rules, a review of reported cases where the NCAA rules have been enjoined, discussed in Part III below, shows that concerns about bias may be overstated.⁴² In general, courts defer to the NCAA. Most importantly, as will be discussed in Part VI below, arbitration provides a better alternative for protecting these legitimate interests while allowing those subject to NCAA governance the critical opportunity for independent review.⁴³

The Restitution Rule goes much further than simply precluding potentially biased judicial review of its eligibility decisions; rather, it oftentimes prevents any judicial review at all.⁴⁴ Freeing a dominant standard-setting organization from any judicial review regarding eligibility decisions is neither a legitimate interest worthy of protection nor sound public policy.⁴⁵

38. NCAA DIVISION I MANUAL, *supra* note 1.

39. See W. Burlette Carter, *Student-Athlete Welfare in a Restructured NCAA*, 2 VA. J. SPORTS & L. 1, 82–83 (2000) (noting that the Restitution Rule "is not driven by academic or amateurism concerns" but rather "[i]t is driven by concerns over parity . . . and possibly concerns over litigation costs").

40. See *Due Process and the NCAA*, *supra* note 37, at 15 (statement of Gary Roberts, then-Professor of Sports Law, Tulane Univ.).

41. *Id.*

42. See *infra* Part III.

43. See *infra* Part VI.

44. See *infra* Part II.

45. See *infra* Part V.A.

As the remainder of this article shows, the law properly imposes substantive limits on the discretion of NCAA officials to apply their bylaws in whatever manner they see fit.⁴⁶ Effective independent review is essential to enforce these limits, but Bylaw 19.7 frustrates this process.⁴⁷ In other contexts, courts disfavor contractual agreements that have the same effect as Bylaw 19.7 (so-called “waiver of recourse clauses”).⁴⁸ This article demonstrates that mandatory arbitration addresses the legitimate concerns about parity and biased local judicial review, while permitting independent enforcement of legal constraints on the exercise of unfettered discretion by colleges and universities and NCAA officials.⁴⁹

II. EXCEPTIONS TO THE GENERAL RULE OF DEFERENCE TO PRIVATE ASSOCIATIONS

A. The General Rule of Deference

Generally, courts will refuse to “intervene in questions involving the enforcement of bylaws and matters of discipline in voluntary associations.”⁵⁰ This reluctance is based on several complementary concerns about active judicial review: (1) individuals should have the freedom to choose their associations and their rules; (2) judicial review of private associations would impinge on the right to freedom of association; and (3) rules and regulations of private associations are often unclear and are better evaluated by the association rather than by the courts.⁵¹

Having regard for these concerns, however, courts have created numerous exceptions to the broad principle of non-interference. As one annotation observed, “[u]nless the property or pecuniary rights of members are involved, the decisions of the tribunals of an association with respect to its internal affairs will, in the absence of mistake, fraud, illegality, collusion, or arbitrariness, be accepted by the courts as conclusive.”⁵² More broadly, another noted, “courts will exercise power to interfere in the internal affairs of an association where law and justice so require.”⁵³

46. See *infra* Part II–VI.

47. See *infra* Part IV.

48. *Id.*

49. See *infra* Part VI.

50. *Am. Fed’n of Technical Eng’rs v. La Jeunesse*, 347 N.E.2d 712, 715 (Ill. 1976).

51. See *Gulf S. Conf. v. Boyd*, 369 So. 2d 553, 556–57 (Ala. 1979) (internal citations omitted); Zechariah Chaffee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1022 (1930).

52. 6 AM. JUR. 2d *Associations and Clubs* § 27 (2013).

53. 7 C.J.S. *Associations* § 83 (2007).

B. The Exceptions

Disputes in social, political, or religious associations can be quite bitter, and their resolution can be of the utmost importance to the antagonistic parties. But courts have distinguished between these disputes, which must be resolved in accordance with internal rules and procedures, and other situations where the concerns underlying the principles of non-interference are absent or less severe. Thus, courts have found that judicial intervention into the rules of private associations is warranted in a variety of instances, including in the context of sports leagues. In *Board of Regents of the University of Oklahoma v. NCAA*,⁵⁴ the Oklahoma Supreme Court addressed the general rule and cited exceptions:

It is asserted by the NCAA that judicial scrutiny of the bylaw is inappropriate. Courts are normally reluctant to interfere with the internal affairs of voluntary membership associations, however, in particular situations, where the considerations of policy and justice are sufficiently compelling judicial scrutiny and relief are available. In dealing with an organization in which membership is an economic necessity, the courts must be particularly alert to the need for protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity to earn a livelihood while not impairing the proper standards and objectives of the organization. *The necessity of court action is apparent where the position of a voluntary association is so dominant in its field that membership in a practical sense is not voluntary but economically necessary.* It was proper for the trial court to examine the validity of the bylaw.⁵⁵

The NCAA is a private association appropriately subject to the exception applicable when an organization is so dominant that conformance to its rules is not really voluntary; any student-athlete wishing to participate in elite collegiate athletic competition must attend an NCAA member school that is bound by the association's rules.⁵⁶ Under this exception, the Supreme Court of Alabama made clear that, because student-athletes lack bargaining power, and because the "freedom of association" principle that supports the general rule of deference is lacking with student-athletes, courts may intervene in disputes between college and university athletes and the Association:

[T]he general non-interference doctrine concerning voluntary associations does not apply to cases involving disputes between college athletes themselves and college athletic associations.

54. 561 P.2d 499 (Okla. 1977).

55. *Id.* at 504 (emphasis added) (internal citations omitted).

56. *Id.*

There is a cogent reason for this position. In such cases the athlete himself is not even a member of the athletic association; therefore, the basic "freedom of association" principle behind the non-interference rule is not present. The athlete himself has no voice or bargaining power concerning the rules and regulations adopted by the athletic associations because he is not a member, yet he stands to be substantially affected, and even damaged, by an association ruling declaring him to be ineligible to participate in intercollegiate athletics. Thus he may be deprived of the property right eligibility to participate in intercollegiate athletics.⁵⁷

A second exception to the general non-interference doctrine arises where the private association's laws are themselves illegal, or where they are incompatible with one another.⁵⁸ This exception applies "where the rules, regulations or judgments of the association are in contravention to the laws of the land or in disregard of the charter or bylaws of the association."⁵⁹ Under this exception, the courts may strike down a private association's rule if it violates the law or if it is not consistent with the association's other laws.⁶⁰

A third exception arises when a private association "has failed to follow the basic rudiments of due process."⁶¹ Additionally, "courts have demonstrated more of a willingness to intervene in the internal matters of private associations when they conclude that there are inadequate procedural safeguards to protect members' rights."⁶²

A fourth exception to the general rule arises when the rules of private associations violate public policy. As noted by one commentator, "[a]nother factor that courts have often considered in determining the degree of scruti-

57. *Gulf S. Conf v. Boyd.*, 369 So. 2d 553, 557. *See also* Johnson, *supra* note 34, at 595 (italics in original) ("[T]he courts have shown deference to unincorporated associations when there is a dispute between *its* members and *the* associations, because the members' real remedy is to quit the clubs they do not like, subject to certain legal exceptions. Here, a college athlete is not a member of the NCAA, and there is no case where an unincorporated entity should be afforded deference in regards to actions taken against a nonmember third-party.").

58. *See* Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 544 (7th Cir. 1978).

59. *Id.* (citing *Allen v. Chicago Undertakers' Ass'n*, 137 Ill. App. 61 (Ill. App. Ct. 1907), *aff'd*, 83 N.E. 952 (Ill. 1908); *Ryan v. Cudahy*, 41 N.E. 760 (Ill. 1895)).

60. *Cal. State Hayward v. NCAA*, 121 Cal. Rptr. 85, 89 (Cal. Ct. App. 1975) (citing *Smith v. Kern Cnty. Med. Ass'n*, 120 P.2d 874 (Cal. 1942)) ("In any proper case involving the expulsion of a member from a voluntary unincorporated association, the . . . courts may . . . determine whether the association has acted . . . in accordance with its laws and the law of the land.").

61. *Finley*, 569 F.2d at 544. *See also* *Lindemann v. Am. Horse Shows Ass'n*, 624 N.Y.S.2d 723, 734 (N.Y. Sup. Ct. 1994) (holding that athletes' suspensions were "arbitrary and capricious and imposed without a meaningful hearing and in the absence of substantial evidence").

62. *Crouch v. NASCAR*, 845 F.2d 397, 401 (2d Cir. 1988).

ny they will apply is the extent to which action by the association conflicts with public policy.”⁶³ In *Gulf South Conference v. Boyd*, the court noted that judicial review is appropriate “when the actions of an association are the result of fraud, lack of jurisdiction, collusion, arbitrariness, or are in violation of or contravene any principle of public policy.”⁶⁴ Under a public policy analysis, courts may evaluate the actions of private associations in a variety of contexts, such as where the action violates the association’s own rules or there is evidence of fraud or bad faith.⁶⁵ Thus, public policy analysis allows the courts to scrutinize the rules and actions of voluntary private associations when there is evidence of fraud, bad faith, malicious intent, collusion, or arbitrariness, and in instances when the association is not following its own rules or is directly violating them.

In addition to the express exceptions listed above, courts are more willing to intervene in the affairs of private associations when membership in an association is an economic necessity or the plaintiff’s career or livelihood is involved.⁶⁶ For example, the Oklahoma Supreme Court in *Board of Regents* noted that courts must be particularly careful to protect the interests of individuals when membership in an association is an economic necessity or impacts their ability to earn a livelihood.⁶⁷ Also, in *Pinkser v. Pacific Coast Society of Orthodontists*,⁶⁸ a member was excluded from a professional orthodontist association that offered professional advantages but was not required for professional practice, and the California Supreme Court held that the plaintiff had a right to judicial review in order to determine whether he was reasonably excluded.⁶⁹ Finally, in *Bixby v. Pierno*,⁷⁰ the California Supreme Court made it clear that exclusions from professional associations must be based on substantial evidence that the excluded individual was not qualified for admission.⁷¹ Although these cases are not directly on point because student-athletes are not members of the NCAA, one commentator suggests that “[i]f an athlete can show that action by the NCAA is likely to have a detrimental effect on his future professional ca-

63. Kenneth J. Philpot & John R. Mackall, *Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association*, 24 STAN. L. REV. 903, 914 (1971).

64. *Gulf S. Conf. v. Boyd*, 369 So. 2d 553, 557 (Ala. 1979).

65. Philpot & Mackall, *supra* note 63, at 911 (“Courts have not hesitated to intervene in the internal affairs of private associations where the action by the association constitutes a clear violation of its rules or where it evidences malicious intent, such as fraud or bad faith.”).

66. *Id.* at 912.

67. *See Bd. of Regents of the Univ. of Okla. v. NCAA*, 561 P.2d 499, 504 (Okla. 1977).

68. 460 P.2d 495 (Cal. 1969).

69. *Id.* at 498.

70. 481 P.2d 242 (Cal. 1971).

71. *Id.* at 257.

reer, a court might rely on these cases and subject the NCAA's actions to a higher standard of review"⁷²

C. Application of the Exceptions to the Restitution Rule

The noted exceptions to the principle of non-interference demonstrate that there are many judicially—and legislatively—created limits on the unfettered discretion of private associations to enforce their internal rules. All of them suggest that NCAA eligibility determinations should likewise be subject to judicial review. A student-athlete excluded from participation in an NCAA-sanctioned sporting competition is not like someone kicked out of the local Moose Lodge, both in terms of the impact on a potential professional career, as well as the absence of an alternative association such as the local Elks Lodge. As with non-sports-related precedent, when the NCAA rules a student-athlete ineligible, the determination is sometimes challenged on the grounds that the decision is contrary to existing NCAA rules, in violation of external constitutional or statutory limits, or because the decision-making process deprived the affected athlete of due process. NCAA eligibility decisions are also attacked on grounds of arbitrariness, collusion, or inconsistency with public policy.

Application of precedent regarding other dominant, standard-setting associations suggests that NCAA eligibility decisions should also be given close judicial scrutiny. However, the Restitution Rule's effect is to preclude such review. In essence, the Restitution Rule attempts to act as an exception to the exceptions. This inherent conflict further demonstrates the need for the Restitution Rule to be evaluated by the courts.

III. JUDICIAL TREATMENT OF THE RESTITUTION RULE

Despite its review-precluding effect, courts have traditionally treated the Restitution Rule very favorably. Time and again, the Restitution Rule has been upheld by courts citing theories of deference to private associations and the freedom of contract. In *Lasege v. NCAA*,⁷³ the Kentucky Supreme Court stressed that “[i]n general, the members of such [voluntary athletic] associations should be allowed to ‘paddle their own canoe’ without unwarranted interference from the courts.”⁷⁴ The court further explained that the NCAA is a voluntary athletic association and that member schools agree to abide by its rules and regulations.⁷⁵ Moreover, the court favorably cited *Indiana High School Athletic Ass'n v. Reyes*,⁷⁶ a decision in which the In-

72. Philpot & Mackall, *supra* note 63, at 913.

73. 53 S.W.3d 77 (Ky. 2001).

74. *Id.* at 83.

75. *Id.* at 87.

76. 694 N.E.2d 249 (Ind. 1997).

diana Supreme Court upheld the Restitution Rule in the high school sports context stating:

Member schools voluntarily contract to abide by the rules of the organization in exchange for membership in the association. One of those rules is the Restitution Rule. Undeniably, the Restitution Rule imposes hardship on a school that, in compliance with an order of a court which is later vacated, fields an ineligible player. On the other hand, use of an ineligible player imposes a hardship on other teams that must compete against the teams fielding ineligible players. While schools will contend that it is unfair when they have to forfeit victories earned with an ineligible player on the field because they complied with a court order, competing schools will reply that it is unfair when they have to compete against a team with an ineligible student athlete because a local trial judge prohibited the school or the IHSAA from following the eligibility rules. The Restitution Rule represents the agreement of IHSAA members on how to balance those two competing interests. The Restitution Rule may not be the best method to deal with such situations. However, it is the method which the member schools have adopted. And in any event, its enforcement by the IHSAA does not impinge upon the judiciary's function.⁷⁷

Reyes drew an explicit distinction between challenges to the Restitution Rule by an association member and challenges to an association decision by a student-athlete:

Unlike most [association] cases, here we are not faced with a student athlete's challenge to an [association] decision. Rather, it is [the high school] that challenges the Restitution Rule. Although we hold in *Carlberg* that we will continue to review for arbitrariness and capriciousness [association] decisions affecting students, we see little justification for it when it comes to the [association's] member schools. As to its member schools, the [association] is a voluntary membership association. Judicial review of its decisions with respect to those schools should be limited to those circumstances under which courts review the decisions of voluntary membership associations—fraud, other illegality, or abuse of civil or property rights having their origin elsewhere.⁷⁸

In a companion case decided on the same day as *Reyes*, the Indiana Supreme Court upheld the Restitution Rule against a student-athlete's chal-

77. *Id.* at 257–58.

78. *Id.* at 257.

lunge that the rule was arbitrary and capricious.⁷⁹ The court found that the Indiana High School Athletic Association had an interest in restitution and fairness to schools that would be forced to compete against ineligible students.⁸⁰

Likewise, the Michigan Supreme Court reached a similar decision in upholding their state high school athletic association's version of the Restitution Rule:

[The restitution rule] is reasonably designed to rectify the competitive inequities that would inevitably occur if schools were permitted without penalty to field ineligible athletes under the protection of a temporary restraining order, pending the outcome of an ultimately unsuccessful legal challenge to one or more eligibility rules. We find relevant to our decision the fact that [the restitution rule] does not purport to authorize interference with any court order during the time it remains in effect, but only authorizes restitutive penalties when a temporary restraining order is ultimately dissolved and the challenged eligibility rule remains undisturbed in force. We also find relevant the fact that the member schools of the MHSAA have voluntarily agreed to submit to the MHSAA's regulations, including [the restitution rule], as a condition of their membership. Furthermore, compliance with MHSAA rules on the part of student athletes is an appropriate and justifiable condition of the privilege of participating in interscholastic athletics under the auspices of the MHSAA.⁸¹

The foregoing decisions reflect a view that the courts "are a very poor place in which to conduct interscholastic athletic events . . ."⁸² In *Lasege*, the court denied that the Restitution Rule "thwarts the judicial power," arguing that "the authority of the courts is . . . in no way compromised" because Bylaw 19.8 only allows for "post-hoc equalization when a trial court's erroneously granted temporary injunction upsets competitive balance."⁸³ Thus, for the most part courts have refused to invalidate the Restitution Rule.

It is difficult to reconcile these cases upholding the Restitution Rule with the line of cases that impose substantive limits on private associations and

79. Ind. High Sch. Athletic Ass'n v. Carlberg, 694 N.E.2d 222, 235 (Ind. 1997).

80. *Id.*

81. Cardinal Mooney High Sch. v. Mich. High Sch. Athletic Ass'n, 467 N.W.2d 21, 23-24 (Mich. 1991). The Michigan court mentioned in a footnote that while the validity of the NCAA Restitution Rule was not directly at issue in *Wiley v. NCAA*, 612 F.2d 473 (10th Cir. 1979), the court "appears to assume [its] validity." *Cardinal*, 467 N.W.2d at 24 n.3.

82. Ky. High Sch. Athletic Ass'n v. Hopkins Cnty. Bd. of Educ., 552 S.W.2d 685, 690 (Ky. Ct. App. 1977), *overruled* by *NCAA v. Lasege*, 53 S.W.3d 77, 89 (Ky. 2001).

83. *Lasege v. NCAA*, 53 S.W.3d 77, 88 (Ky. 2001).

exceptions to the general rule of noninterference.⁸⁴ The same concerns that led other courts to refuse to defer to decisions by private associations,⁸⁵ including dominant professional associations and dominant sports competition organizers,⁸⁶ ought to be raised by the courts with regard to the Restitution Rule. Indeed, the court in *Reyes* acknowledged that “[t]he Restitution Rule may not be the best method to deal with such situations.”⁸⁷ Although courts generally do not get involved in the decisions of athletic associations, the exceptions to the general rule of judicial non-interference in private associations’ procedures⁸⁸ could be applied to allow the court to step in and strike down the Restitution Rule. This was the basis of a widely publicized 2009 Ohio state court decision, *Oliver v. NCAA*:

Student-athletes must have their opportunity to access the court system without fear of punitive actions against themselves or the institutions and teams of which they belong. The old adage, that you can put lipstick on a pig, but it is still a pig, is quite relevant here. The defendant may title Bylaw 19.7 “Restitution,” but it is still punitive in its achievement, and it fosters a direct attack on the constitutional right of access to courts.

Bylaw 19.7 takes the rule of law as governed by the courts of this nation and gives it to an unincorporated business association. The bylaw is overreaching. For example, if a court grants a restraining order that permits a student-athlete the right to play, the institution will find itself in a real dilemma. Does the institution allow the student-athlete to play as directed by the court’s ruling and, in so doing, face great harm should the decision be reversed on appeal? Alternatively, does the institution, in fear of Bylaw 19.7, decide that it is safer to disregard the court order and not allow the student-athlete to play, thereby finding itself in contempt of court? Such a bylaw is governed by no fixed standard except that which is self-serving for the defendant. To that extent, it is arbitrary and indeed a violation of the covenant of good faith and fair dealing implicit in its contract with the plaintiff, as the third-party beneficiary.⁸⁹

84. See *supra* Part II.

85. See *supra* Part II.B–C.

86. *Id.*

87. Ind. High Sch. Athletic Ass’n v. *Reyes*, 694 N.E.2d 249, 258 (Ind. 1997).

88. See *supra* Part II.B.

89. 920 N.E.2d 203, 216 (Ohio Ct. Com. Pl. 2009). *Oliver* and the NCAA reached a settlement whereby *Oliver* was paid \$750,000 and the trial court’s order was vacated. See Katie Thomas, *N.C.A.A. to Pay Former Oklahoma State Pitcher \$750,000*, N.Y. TIMES, Oct. 8, 2009, at B12.

IV. THE RESTITUTION RULE AS A WAIVER OF RECOURSE

The Restitution Rule constitutes, in effect, a waiver of recourse clause.⁹⁰ Although the Restitution Rule does not preclude access to the courts on its face, it effectively stops member institutions from honoring and enforcing valid court orders and injunctions. As a practical matter, by inhibiting the issuance and enforcement of preliminary injunctions, the rule effectively removes a judge's ability to independently review eligibility decisions. As a result, preliminary injunctions are rendered useless to student-athletes when NCAA member institutions refuse to comply with them out of fear that they will receive future penalties by the NCAA. This leaves ineligible student-athletes without adequate access to meaningful judicial review. As former student-athlete Jeremy Bloom testified before Congress, "[i]t has proven to be virtually impossible for a student athlete to get relief or due process within the courts . . . as a result of the NCAA's restitution by-law."⁹¹

The favorable judicial treatment of the Restitution Rule contrasts sharply with judicial treatment of express clauses with the same practical effect—an explicit agreement among private parties to waive recourse to the courts and thereby effectively preclude any independent dispute resolution mechanism. In general, such contractual provisions have been held to violate public policy.⁹² Moreover, federal legislation, supported by broadly interpreted Supreme Court precedent, has drawn a critical distinction between an agreement that renders decisions of private associations final, and one that, while still insulating decisions from judicial review, provides for impartial review through a mutually agreed upon form of private arbitration. Historically, courts viewed agreements to arbitrate as equivalent to waivers of recourse, and often refused to enforce them.⁹³ The Federal Arbitration

90. For purposes of the discussion contained in this Section, it is not our position that student-athletes, by signing the Letter of Intent or grant-in-aid with a college or university, have expressly or implicitly consented or agreed to the NCAA's Restitution Rule.

91. *Due Process and the NCAA*, *supra* note 37, at 21 (prepared statement by Jeremy Bloom, former student-athlete).

92. Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 233 (2008).

93. As an arbitration scholar observed:

[W]hen . . . [courts] are asked to . . . compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider whether such tribunals possess adequate means of giving redress, and whether they have a right to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs.

THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* 49 (3d ed. 2003) (citing *Tobey v. Cnty. of Bristol*, 23 F. Cas. 1313, 1320–21 (C.C.D. Mass. 1845)).

Act (“FAA”)⁹⁴ modified that doctrine. Without affecting state court decisions holding that waivers to recourse were contrary to public policy, the FAA “validates arbitration agreements as contracts” and finds that an agreement to have a dispute resolved by arbitration, rather than judicial determination, is not against public policy.⁹⁵ The United States Supreme Court has interpreted the FAA as “a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”⁹⁶

The close relationship between independent arbitration and the enforceability of a waiver of recourse clause is illustrated, in the context of sports leagues, by *Charles O. Finley & Co. v. Kuhn*,⁹⁷ where a team owner sought judicial review of a controversial adverse decision by the Commissioner of Baseball.⁹⁸ The league constitution and bylaws provided that “[t]he Major Leagues and their constituent clubs, severally agree to be bound by the decisions of the Commissioner, and the discipline imposed by him under the provisions of this Agreement, and severally waive such right of recourse to the courts as would otherwise have existed in their favor.”⁹⁹ In upholding the clause, the Seventh Circuit viewed the waiver of recourse provision together with the mandatory arbitration clause in the Major League Agreement: “Considering the waiver of recourse clause in its function of requiring arbitration by the Commissioner, its validity cannot be seriously questioned.”¹⁰⁰ The court of appeals also noted that, under the FAA, federal courts have upheld arbitration clauses in private agreements to waive judicial review of an arbitrator’s decision.¹⁰¹ The court of appeals emphasized that the arbitration provision was not the only saving grace for the waiver of the recourse clause: “Even if the waiver of recourse clause is divorced from its setting in the charter of a private, voluntary association and even if its relationship with the arbitration clause in the agreement is ig-

94. 9 U.S.C. § 2 (2000).

95. See Carbonneau, *supra* note 92, at 247.

96. *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Indeed, in the context of collective bargaining agreements between unions and employers, the Court has declared that arbitration is to be presumed as the means of dispute resolution absent clear evidence of the parties’ intent to the contrary. See *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960). See also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001).

97. 569 F.2d 527 (7th Cir. 1978).

98. *Id.*

99. *Id.* at 533 n.14 (quoting Major League Agreement, Art. VII, Sec. 2).

100. *Id.* at 543.

101. *Id.* (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Rossi v. TWA*, 507 F.2d 404 (9th Cir. 1974), *aff’g* 350 F. Supp. 1263 (C.D. Cal. 1972); *Euzzino v. London & Edinburgh Ins. Co.*, 228 F. Supp. 431 (N.D. Ill. 1964)).

nored, we think that it is valid *under the circumstances here involved*.”¹⁰² What makes *Finley* pertinent to the Restitution Rule is what the court of appeals explained in a footnote: “Waiver of recourse clauses rarely appear in the absence of an association charter or an agreement to arbitrate. Indeed, the waiver of recourse clause presented here must be viewed in light of the totality of circumstances presented, *wherein private contractual recourse remedies are provided*.”¹⁰³

The totality of the circumstances test includes careful consideration of whether the waiver of the recourse clause, with or without an arbitration clause, is the product of negotiation. “[U]nder circumstances where the waiver of rights is not voluntary, knowing or intelligent, or was not freely negotiated by parties occupying equal bargaining positions,” the court will find that it is invalid as against public policy.¹⁰⁴ Thus, in *Finley*, the waiver of recourse clause was upheld because the owners bargained for and agreed to include the clause in the Major League Agreement. Owners, after all, were agreeing to submit disputes to determination by a single individual whom they had the power to hire and terminate. This is, of course, in marked contrast to granting unreviewable discretion to the individual members of the NCAA reinstatement committee empowered by the NCAA to render eligibility decisions without any input into their selection by, or accountability to, the student-athletes whose fates are in their hands. The Seventh Circuit clarified in *Finley* that even though the waiver of recourse clause was upheld in this instance, it does not “foreclose[] access to the courts under all circumstances.”¹⁰⁵ Thus, *Finley* stands for the proposition that, despite a waiver of recourse provision, judicial review still exists under the recognized exceptions to the general rule of non-interference with private associations or where the requirements of the FAA¹⁰⁶ are not followed.¹⁰⁷

The Seventh Circuit’s qualified acceptance of the owners’ waiver of recourse clause in *Finley* is remarkable in light of the traditional judicial deference to the broad powers given to the Commissioner to act in the best interests of baseball.¹⁰⁸ In dismissing the lawsuit, the court of appeals concluded that Commissioner Kuhn’s broad authority included the power to veto three extraordinary player transfers for cash, particularly in the

102. *Id.* (emphasis added).

103. *Id.* at 544 n.61 (emphasis added).

104. *Id.* at 543–44.

105. *Id.* at 544.

106. *See* 9 U.S.C. § 2 (2000).

107. *Finley*, 569 F.2d at 527.

108. *See, e.g., Milwaukee Am. Ass’n v. Landis*, 49 F.2d 298, 299 (N.D. Ill. 1931) (looking for “clear intent upon the part of the parties to endow the commissioner with all the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial pater familias”).

unique circumstances of the radical changes occurring within baseball's labor market.¹⁰⁹ The court of appeals made it clear that if they had found that Kuhn's decision was arbitrary or exceeded his authority, they would have acted notwithstanding the waiver of recourse clause.¹¹⁰

This reasoning is also illustrated in *Atlanta National League Baseball Club, Inc. v. Kuhn*,¹¹¹ another challenge to a ruling by the Commissioner of Baseball.¹¹² In *Atlanta National*, the district court modified the Commissioner's challenged disciplinary action, despite the waiver of recourse provision. The district court noted that, "[w]hen faced with the same waiver provision in *Finley & Co. v. Kuhn*, the court rejected the Commissioner's argument that the waiver of recourse to the courts deprived the court of subject-matter jurisdiction."¹¹³ The *Atlanta National* court explained that "[t]he extent of defendant Kuhn's contractual power is a question for the court. Indeed, whether the Commissioner's decision in issue here is the type of decision to which the parties agreed they would be bound is itself at issue. Accordingly, jurisdiction is not lacking."¹¹⁴ Thus, the district court stated that while the waiver provision illustrates the broad powers given to the Commissioner, it "operates to make the *Finley* court, and this court, hesitant, but not powerless, to upset the exercise by the Commissioner of such discretion."¹¹⁵ Ultimately, the district court determined that one of the Commissioner's sanctions imposed on the plaintiff went beyond the powers authorized by the Major League Agreement.¹¹⁶ The *Finley* and *Atlanta National* cases show that the waiver of recourse provision does not act as a complete bar to judicial action.¹¹⁷

Applying these principles to Bylaw 19.7, it is apparent that courts should not uphold the NCAA's rule that effectively precludes any independent review of internal decisions regarding eligibility. Unlike the waiver of recourse provision in the Major League Agreement, the Restitution Rule is not the product of arm's length negotiation—let alone *any* negotiation—between student-athletes and the NCAA. Unlike a prospective owner, who has alternative options for investment (or even consumers subject to adhesion provisions of consumer contracts), the NCAA dominates the field of college athletics. In essence, the Restitution Rule constitutes an agreement among the NCAA and its members to subject student-athletes to an internal process of resolving eligibility disputes—the NCAA's reinstatement pro-

109. *Finley*, 569 F.2d at 539.

110. *Id.* at 539 n.44.

111. 432 F. Supp. 1213 (N.D. Ga. 1977) [hereinafter *Atlanta National*].

112. *Id.* at 1218, 1220.

113. *Id.* at 1218 (citations omitted).

114. *Id.* (quoting *Finley & Co. v. Kuhn*, No. 76C-2358 (N.D. Ill. Sept. 7, 1976)).

115. *Id.*

116. *Id.* at 1226.

117. *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 543 (7th Cir. 1978).

cess. To deprive student-athletes of a meaningful opportunity for judicial review, the agreement must, as a matter of law, comply with the provisions of the FAA. In other words, if the Restitution Rule operates to deprive student-athletes of a fundamentally fair process of resolving eligibility disputes, then the Restitution Rule is not consistent with the FAA and the reinstatement process used for resolving disputes must be reviewed to determine if it affords student-athletes a process of independent impartial review.¹¹⁸ Part V addresses these issues.

V. REVIEWING THE RESTITUTION RULE AND THE REINSTATEMENT PROCESS UNDER THE FEDERAL ARBITRATION ACT

A. Basic Principles Regarding Agreements Unenforceable on Public Policy Grounds

Generally, parties are able to contract as they see fit. However, contracts imposing obligations that violate public policy will not be enforced. In these instances, the Restatement (Second) of Contracts states that “a court will decide that the interest in freedom of contract is outweighed by some overriding interest of society and will refuse to enforce a promise or other term on grounds of public policy.”¹¹⁹ The Restatement defines when a contract term is unenforceable under public policy analysis:

- (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.
- (2) In weighing the interest in the enforcement of a term, account is taken of
 - (a) the parties’ justified expectations,
 - (b) any forfeiture that would result if enforcement were denied, and
 - (c) any special public interest in the enforcement of the particular term.
- (3) In weighing a public policy against enforcement of a term, account is taken of
 - (a) the strength of that policy as manifested by legislation or judicial decisions,

118. See *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 176 (Cal. 1981) (“[I]f a party resisting arbitration can show that the rules under which arbitration is to proceed will operate to deprive him of what we in other contexts have termed the common law right of fair procedure, the agreement to arbitrate should not be enforced.”).

119. RESTATEMENT (SECOND) OF CONTRACTS 8 Intro. Note (1981).

- (b) the likelihood that a refusal to enforce the term will further that policy,
- (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
- (d) the directness of the connection between that misconduct and the term.¹²⁰

There is no general definition of public policy.¹²¹ Instead, the drafters of the Restatement have attempted to “establish general, though highly variable, principles to give guidance to courts in particular cases.”¹²² One court’s approach states that a “contract is against public policy if it is injurious to interests of the public, or contravenes some established interest of society or some public statute, or is against good morals, or tends to interfere with the public welfare.”¹²³

The principle of public policy has been used to review agreements in the context of private associations. “Courts have more readily restricted the actions of private associations when these actions conflict with [public] policy.”¹²⁴ When dealing with expulsion from a private association, courts have been even more willing to intervene.¹²⁵ Although student-athletes are not members of the NCAA, the association’s determinations regarding their ineligibility to compete are akin to an expulsion from membership. “Generally, courts will provide relief from an expulsion from membership in a private association on substantive grounds . . . if the association’s rules or its actions with respect to an individual member ‘conflict with public policy.’”¹²⁶ This is especially true in instances where the association is in monopolistic control of an area affecting an individual’s economic livelihood.¹²⁷ Many examples of courts overturning an expulsion from a private association on the grounds of public policy exist.¹²⁸ In *Finley*, the court upheld the waiver of recourse provision only after deciding that it did not violate public policy.¹²⁹ The court in *Gulf South* also evaluated the agree-

120. *Id.* § 178.

121. *Id.*

122. SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 12.1 (4th ed. 1993).

123. *Canal Ins. Co. v. Ashmore*, 126 F.3d 1083, 1087 (8th Cir. 1997).

124. *Philpot & Mackall*, *supra* note 63, at 914.

125. *See Higgins v. Am. Soc’y of Clinical Pathologists*, 238 A.2d 665 (N.J. 1968).

126. *Cipriani Builders, Inc. v. Madden*, 912 A.2d 152, 159 (N.J. Super. Ct. App. Div. 2006) (quoting *Higgins v. Am. Soc. of Clinical Pathologists*, 238 A.2d 665, 671 (N.J. 1968)).

127. *Id.*

128. *See Brounstein v. Am. Cat Fanciers Ass’n*, 839 F. Supp. 1100 (D.N.J. 1993); *Zelenka v. Benevolent and Protective Order of Elks of U.S.*, 324 A.2d 35 (N.J. Super. Ct. App. Div. 1974); *Loigman v. Trombadore*, 550 A.2d 154 (N.J. Super. Ct. App. Div. 1988).

129. *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 543–44 (7th Cir. 1978).

ment under public policy concluding that judicial review is appropriate when “the actions of an association . . . are in violation of or contravene any principle of public policy.”¹³⁰

Federal law overlays these common law principles when it comes to agreements between the parties to substitute arbitration for judicial resolution of their dispute. Section 2 of the FAA states that arbitration provisions will be valid and enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”¹³¹ This has been interpreted as precluding state laws that specifically limit arbitration contracts, but allows a court to invalidate even an arbitration clause included in a contract if the provision is unconscionable or violates public policy according to general contract law principles.¹³² As such, the Restitution Rule and the NCAA’s reinstatement process, like any private arbitration agreement, may be invalidated under the FAA on grounds of unconscionability or they are deemed to be against public policy.¹³³

Under public policy principles, courts can invalidate arbitration provisions that take away the possibility of impartial review. In *Hooters of America, Inc. v. Phillips*,¹³⁴ the Fourth Circuit invalidated an employer’s arbitration scheme providing that the employer’s pre-approved arbitrators would be selected to hear any employment-related dispute:

The Hooters rules also provide a mechanism for selecting a panel of three arbitrators that is crafted to ensure a biased decisionmaker. The employee and Hooters each select an arbitrator, and the two arbitrators in turn select a third. Good enough, except that the employee’s arbitrator and the third arbitrator must be selected from a list of arbitrators created exclusively by Hooters. This gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list. Under the rules, Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management. In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list. Further, nothing in the rules restricts Hooters from punishing arbitrators

130. *Gulf S. Conf. v. Boyd*, 369 So. 2d 553, 557 (Ala. 1979).

131. 9 U.S.C. § 2 (2000).

132. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

133. *See Harold Allen’s Mobile Home Factory Outlet, Inc. v. Butler*, 825 So. 2d 779, 782 (Ala. 2002) (“[A]s a general rule, applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate an arbitration agreement without contravening § 2 of the Federal Arbitration Act.”); *Lewis v. Prudential-Bache Sec., Inc.*, 225 Cal. Rptr. 69, 73 (Cal. Ct. App. 1986) (“Under the Federal Arbitration Act, an arbitration clause can be revoked on any legal or equitable ground that allows revocation of contracts, including unconscionability.”).

134. 173 F.3d 933 (4th Cir. 1999).

who rule against the company by removing them from the list. Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decision maker would be a surprising result.¹³⁵

Numerous state courts have also struck down clauses whereby one of the parties selects the arbitrator(s), as inherently inequitable, unconscionable, and lacking fundamental fairness.¹³⁶ Additionally, in *Finley*, the court noted that although an arbitration clause was a valid waiver of recourse, access to the courts was not foreclosed in all circumstances.¹³⁷ Thus, even the existence of an agreement to arbitrate or waive access to the courts does not preclude a court from deciding that public policy justifies judicial modification or alteration of the agreement.

B. The NCAA's Concern about Local Bias is Insufficient to Justify the Restitution Rule

One of the NCAA's strongest arguments for the Restitution Rule is that it has a legitimate interest in protecting its rules against injunctions by local

135. *Id.* at 938–39 (internal citations omitted). *See also* *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 208 (D. Mass. 1998) (“[F]ederal law and arbitral norms and practices have evolved standards of impartiality that require arbitrators to be independent of the parties before them. . . . In addition, both parties to a dispute must have an equal right to control the appointment of the arbitral panel, and neither side should play a disproportionate role in the decision-making.”).

136. *See, e.g., Butler*, 825 So. 2d at 784 (noting that its research “ha[d] not disclosed a single case upholding a provision in an arbitration agreement in which appointment of the arbitrator is within the exclusive control of one of the parties”); *Bd. of Educ. of Berkeley v. W. Harley Miller, Inc.*, 236 S.E.2d 439, 443 (W. Va. 1977) (“[T]his Court would not countenance an arbitration provision by which the parties agree that all disputes will be arbitrated by a panel chosen exclusively by one of the parties. . . . Such a contract provision is inherently inequitable and unconscionable because in a way it nullifies all the other provisions of the contract.”); *Ditto v. RE/MAX Preferred Props., Inc.*, 861 P.2d 1000, 1004 (Okla. Civ. App. 1993) (“[S]uch an arbitration clause as would exclude one of the parties from any voice in the selection of arbitrators cannot be enforced. Such a clause conflicts with our fundamental notions of fairness, and tends to defeat arbitration’s ostensible goals of expeditious and equitable dispute resolution.”).

137. *See* *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 544 (7th Cir. 1978). *See, e.g., State ex. rel. Hewitt v. Kerr*, No. ED 100479, 2013 WL 5725992 (Mo. Ct. App. Oct. 22, 2013) (arbitration provision in employment agreement between NFL team and equipment manager was unconscionable and unenforceable, and, thus, trial court was required to appoint arbitrator, where it entrusted the arbitration proceedings to the Commissioner of the NFL, his decision was final, binding, conclusive, and unappealable, arbitrator was the Commissioner’s designee, Commissioner owed his position to the teams comprising the NFL, and process of receiving, reviewing, and signing the contract, which was presented to employee on a take-it or leave-it basis with the admonition that acceptance of the contract was a condition of continued employment, lasted less than one minute).

courts likely to be unduly favorable to local athletes.¹³⁸ However, this concern is greatly overstated. Not only does the argument presume that local judges are biased, but the NCAA's doomsday predictions of biased local courts enjoining justified sanctions have failed to materialize.¹³⁹ To the contrary, with a few exceptions,¹⁴⁰ the courts have generally been unwilling to enjoin NCAA rules and decisions concerning student-athlete eligibility. The Tenth Circuit stated that, "unless clearly defined constitutional principles are at issue, the suits of student-athletes displeased with high school athletic association or NCAA rules do not present substantial federal questions."¹⁴¹ Following the general unwillingness to enjoin NCAA rules and decisions concerning eligibility, most courts have refused to enjoin the Restitution Rule.¹⁴²

More significantly, the Restitution Rule is not necessary to address the NCAA's concern about court bias towards local athletes and colleges and universities. Even if overstated, the NCAA does maintain a legitimate interest in protecting the integrity of its rules and ensuring fairness to competing institutions. However, instead of developing a set of procedures that ensure NCAA rules are properly followed by creating a mechanism of independent outside review, the NCAA has chosen to effectively preclude any independent review. Under this analysis, it appears that the Restitution Rule actually works against the NCAA's *legitimate interests*. In order to ensure that the integrity of NCAA rules are upheld and to ensure that competing institutions are not unfairly penalized by incorrect eligibility decisions, there needs to be a procedure through which eligibility decisions can be independently and efficiently reviewed, so that all bias can be removed from the process. The *Reyes* court itself recognized that the "Restitution Rule may not be the best method to deal with such situations."¹⁴³ For the reasons discussed in the next subpart, the NCAA's current student-athlete reinstatement process does not provide for independent, impartial review of eligibility decisions. In our view, a system of independent arbitration can ensure that the integrity of NCAA rules is protected.

C. The Student-Athlete Reinstatement Process

In order to achieve the legitimate goal of organizing a distinctive, intercollegiate sporting competition among student-athletes that is distinct from professional sports,¹⁴⁴ the NCAA has an obvious and legitimate interest in

138. See Johnson, *supra* note 34, at 558–59.

139. See *id.* at 559–60.

140. See *supra* Part II.B.

141. Wiley v. NCAA, 612 F.2d 473, 477 (10th Cir. 1979).

142. See *supra* Part II.

143. Ind. High Sch. Athletics Ass'n v. Reyes, 694 N.E.2d 249, 258 (Ind. 1997).

144. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101–02 (1984)

ensuring that participation in its competitions is limited to those student-athletes who meet otherwise lawful eligibility requirements contained in the association's bylaws. The bylaws expressly provide that it is the obligation of the member institutions to certify the eligibility of their student-athletes¹⁴⁵ and to immediately withhold a student-athlete from competition if the institution determines that the student-athlete "is ineligible under the [NCAA's] constitution, bylaws, or other regulations."¹⁴⁶ Because sanctions for playing an ineligible player are so significant, Bylaw 19.7 has the clear effect of requiring an institution to make such a finding if there is any serious doubt about the player's eligibility.¹⁴⁷ After the institution makes such a determination, if the institution "concludes that the circumstances warrant restoration,"¹⁴⁸ it may then appeal to the Committee on Student-Athlete Reinstatement (hereafter referred to as the "Reinstatement Committee") for restoration of the student-athlete's eligibility.¹⁴⁹ The Reinstatement Committee can then restore the eligibility of a student-athlete *only if*, after reviewing the eligibility dispute, it decides that the "circumstances clearly warrant restoration."¹⁵⁰ Further, the NCAA bylaws provide that "the eligibility of a student-athlete involved in a major violation shall not be restored other than through an exception authorized by the [Reinstatement Committee] in a unique case on the basis of specifically stated reasons."¹⁵¹ Pursuant to NCAA bylaws, the determination of the Reinstatement Committee "shall be final, binding and conclusive and shall not be subject to further review by any other authority."¹⁵²

For all the reasons noted in Part II, under the common law of private associations, courts can find that the exclusion of a student-athlete from intercollegiate competition is an exception to the general rule of deference,¹⁵³ and, as outlined in Part IV, to the extent that a student-athlete's agreement to follow all NCAA rules could be construed as acceptance of a waiver of

("NCAA seeks to market a particular brand of football—college football. The identification of this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball.")

145. NCAA DIVISION I MANUAL, *supra* note 1 art. 14.10.1.

146. *Id.* art. 14.11.1 ("If a student-athlete is ineligible under the provisions of the constitution, bylaws or other regulations of the Association, the institution shall be obligated to apply immediately the applicable rule and to withhold the student-athlete from all intercollegiate competition.").

147. *Id.*

148. *Id.*

149. *Id.* See also *id.* art. 14.12.1.

150. *Id.* art. 14.12.3.

151. *Id.*

152. *Id.* art. 21.7.7.3.3.1.

153. See *supra* Part II.

recourse, the clause would be found to be contrary to public policy.¹⁵⁴ Furthermore, the NCAA cannot persuasively claim that its rules constitute an agreement to have any dispute resolved by the Reinstatement Committee as an arbitrator under the FAA. The appeals process used for resolving eligibility disputes does not comport with the FAA's requirement of independent impartial review. First, the student-athlete is not afforded a right of appeal;¹⁵⁵ the member institution has the right to appeal, but only if *it* concludes that the circumstances warrant a restoration of eligibility.¹⁵⁶ Second, the standard of review applied by the Reinstatement Committee—when the circumstances *clearly warrant restoration*—is akin to a “clearly erroneous” standard, which is not only a highly unusual standard for a reviewing panel charged with analyzing facts, but it is nearly impossible for a student-athlete to overcome because it requires the committee to defer to the member institution's determination of ineligibility and to make a determination that the school's findings of fact and eligibility determination was clearly in error.¹⁵⁷ Lastly, all five members of the Reinstatement Committee serve a three-year term and are selected by the NCAA; the student-athlete has no ability to appoint or remove any member.¹⁵⁸ A selection process in which one party appoints the arbitrators, that party being the NCAA, raises concerns over institutional bias—the “tendency for arbitration outcomes to favor one class of participants over another.”¹⁵⁹ Thus, on its face, the process lacks independence and impartiality because it requires: (1) the college or university to determine that a student-athlete is ineligible under NCAA rules, but then to appeal its own determination when it believes the student-athlete should not be ineligible; and (2) a reviewing committee made up of members selected by the NCAA to be convinced that a member institution's original determination of ineligibility was clearly wrong.¹⁶⁰

154. See *supra* Part IV.

155. NCAA DIVISION I MANUAL, *supra* note 1 art. 21.7.7.3.3.1.

156. *Id.* art. 14.12.3.

157. See Josephine (Jo) R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infraction Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 286 (2010) (“[T]he Reinstatement Committee and staff neither conduct investigations nor engage in independent fact finding. Instead, they assess a student-athlete's responsibility based on information that his institution provides and then decide whether—and, if so, how—he may be reinstated to eligibility.”).

158. NCAA DIVISION I MANUAL, *supra* note 1 art. 21.7.7.3.

159. Roger J. Perlstadt, *Timing of Institutional Bias Challenges to Arbitration*, 69 U. CHI. L. REV. 1983, 1986 (2002).

160. Recognizing that the Reinstatement Process lacks independence and impartiality, at the time of publication of this Article a proposed bill, titled the “National Collegiate Athletics Accountability Act,” is pending in the House of Representatives. This bill, which was introduced on August 1, 2013, would amend Section 487(a) of the Higher Education Act of 1965 to provide that an institution is prohibited from member-

The case of *Paxton v. University of Kentucky*¹⁶¹ highlights the need for, as well as the Restitution Rule's practical effect of denying student-athletes access to, independent, impartial review.¹⁶² James Paxton was selected in the 2009 Major League Baseball June draft in the summer following his junior year at Kentucky, but he decided not to sign a professional contract and returned to Kentucky for his senior year.¹⁶³ When Paxton returned to school that fall, the NCAA personnel informed Kentucky that they wanted to interview him based solely upon a journalist's blog post, which suggested that Paxton's lawyer may have had communications with the MLB club that drafted him.¹⁶⁴ NCAA Bylaw 12.3.2.1 prohibits a student-athlete from having a lawyer engage in *any* communications with professional club personnel, including for the purpose of negotiating a professional contract.¹⁶⁵ Paxton refused to participate in the interview with the NCAA, and Kentucky's athletic department informed Paxton that it was withholding him from competition on the basis that his failure to participate in an NCAA interview constituted a violation of the "Unethical Conduct" rule (Bylaw 10.1) and could result in sanctions from the NCAA.¹⁶⁶

Apparently, Kentucky did not believe there was sufficient evidence of a violation of Bylaw 12.3.2.1 because it did not withhold Paxton from competition on that basis. Rather, Kentucky asserted that Paxton was obligated to submit to an NCAA interview on the basis that there were "unresolved eligibility questions."¹⁶⁷ Thus, not only did the Restitution Rule give Kentucky every incentive to withhold Paxton from competition before the university even made a determination that he violated Bylaw 12.3.2.1, but it clearly influenced the judge's decision as lawyers for Kentucky told the judge in Lexington that the entire baseball program and university would be at risk if he granted an injunction directing Kentucky to allow Paxton to

ship in a nonprofit athletic association unless the association, prior to enforcing any remedy for an alleged infraction or violation of the association's rules, affords the student-athlete, 1) the opportunity for a formal administrative hearing, 2) the right to an appeal, and 3) any other due process procedure the Secretary of Education determines to be necessary. *See* National Collegiate Athletics Accountability Act, H.R. 2903, 113 Cong. (2013). The amendment would also stay the association's enforcement until all appeals have been exhausted or the deadline to appeal has passed. *Id.*

161. No. 09-CI-6404 (Ky. Cir. Ct., Jan. 15, 2010).

162. *Id.*

163. *Id.*

164. *Id.* Whether this particular bylaw is reasonably tailored to protecting the NCAA's interest in preserving amateurism and maintaining a clear demarcation between college and professional sports has been questioned by at least one state court. *See* *Oliver v. NCAA*, 920 N.E.2d 203 (Ohio Ct. Com. Pl. 2009).

165. NCAA DIVISION I MANUAL, *supra* note 1 art. 12.3.2.1.

166. *Paxton v. Univ. of Ky.*, No. 09-CI-6404 (Ky. Cir. Ct. Jan. 15, 2010).

167. *See* Defendant's Response to Plaintiff's Motion for a Temporary Injunction at 7, *Paxton v. Univ. of Ky.*, No. 09-CI-6404 (Ky. Cir. Ct. Jan. 15, 2010).

compete.¹⁶⁸ Thus, while the Restitution Rule's stated purpose is to act as a shield against injunctions by local courts likely to be unduly favorable to local athletes, in this case, the Restitution Rule was being used as a sword by Kentucky in its own hometown court likely to be biased in the university's favor. Indeed, the Restitution Rule should not have been of any concern to the judge in this particular case because Paxton was not seeking a court order mandating that he be allowed to compete (as suggested by University of Kentucky) but rather that Kentucky make a determination, as the member institution is obligated to do under NCAA bylaws, on whether he violated Bylaw 12.3.2.1 or any other amateurism rule, which Kentucky apparently was not willing to do based solely upon a blog post.¹⁶⁹ Nevertheless, the judge denied Paxton's motion for temporary injunction,¹⁷⁰ and Paxton left the University without any official determination of his status.¹⁷¹

VI. INDEPENDENT IMPARTIAL ARBITRATION IS AN EFFECTIVE ALTERNATIVE TO THE RESTITUTION RULE AND REINSTATEMENT PROCESS

A. Arbitration Produces Quick and Final Resolution of Eligibility Disputes

In cases where timely final decisions are necessary, parties benefit from having an arbitration procedure in place to resolve the dispute. Instead of bouncing around the courts, disputes go directly through a pre-agreed upon system of binding arbitration, which produces a quick and final result. NCAA eligibility disputes and decisions are similar to time-sensitive eligi-

168. *See id.* In its Response to Plaintiff's Motion for a Temporary Injunction, the University proclaimed that, "If the Court enters an injunction directing UK to have plaintiff participate in intercollegiate contests when there are unresolved eligibility questions, the Court puts the other student-athletes on the baseball team, the baseball team, and the University at risk." *Id.*

169. Indeed, before any member institution could even *possibly* be sanctioned under the Restitution Rule, there is a chain of events that must take place and in the following order (and the first step did not even occur in the *Paxton* case): First, a student-athlete must be declared ineligible by a member institution and not be reinstated by the NCAA. Second, a court must enter an order or an injunction requiring the institution to disregard the ineligibility determination. Third, the institution must then allow the student-athlete to compete. Fourth, the court's original order must be subsequently reversed on appeal. Fifth, the NCAA must then make a determination to impose sanctions on the institution under Bylaw 19.7 for allowing the student-athlete to compete. NCAA DIVISION I MANUAL, *supra* note 1 art. 19.7 (2012).

170. *Paxton*, No. 09-CI-6404.

171. *See* B. W. Jones, *Paxton leaves UK baseball team*, KENTUCKYKERNEL (Feb. 27, 2010), available at <http://kykernel.com/2010/02/27/paxton-leaves-uk-baseball-team/>. He is currently pitching in the Seattle Mariners' farm system. *See James Paxton*, MiLB.COM, http://www.milb.com/milb/stats/stats.jsp?sid=milb&t=p_bp&pid=572020 (last visited Oct. 21, 2013).

bility decisions of governing bodies involving Olympic athletes, which are subject to quick and impartial arbitration.¹⁷² The NCAA and its members would benefit from a system of binding arbitration; arbitration is superior to judicial review in providing finality, certainty, and accuracy of results. Moreover, college athletes' careers are limited in duration, and wins on appeal that occur years after a dispute arises provide no real relief for student-athletes who have long since graduated. Thus, it is important to have arbitration procedures in place, so that athletes can get independent, impartial review of NCAA eligibility decisions in a timely manner. "[G]iven the unique circumstances of the fast-paced world of sports competition [binding arbitration] may offer the most viable option to quickly settle disputes."¹⁷³

The Olympic Games use arbitration to resolve eligibility disputes in a timely and fair manner. The International Olympic Committee ("IOC"), which controls the Olympic Games, entrusts national Olympic committees with the determination of which athletes are eligible to compete; in the United States, this national committee is the United States Olympic Committee ("USOC").¹⁷⁴ The IOC created the Court of Arbitration for Sport ("CAS"),¹⁷⁵ which has evolved into the world leader in sports arbitration.¹⁷⁶ International governing federations recognize the CAS as the exclusive and binding dispute resolution mechanism for all cases and controversies involving athletes.¹⁷⁷ The CAS provides fast and final review of eligibility decisions, disciplinary actions for misconduct, contested drug test results, and challenges to technical decisions made by competition officials.¹⁷⁸ Final decisions of the sports federations on such matters are appealable to the CAS, and cases must be decided within four months from the filing of an appeal.¹⁷⁹ As one commentator notes, the CAS "provides a forum for the world's athletes and sports federations to resolve their disputes through a single, independent and accomplished sports adjudication body that is capable of consistently applying the rules of different sports organizations"¹⁸⁰

172. MATTHEW MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 320 (2d ed. 2009).

173. Melissa R. Bitting, *Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for "Job Security"?*, 25 FLA. ST. U. L. REV. 655, 678 (1998).

174. See PAUL C. WEILER ET AL., *SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS* 1051 (4th ed. 2010).

175. See Eric T. Gilson, *Exploring the Court of Arbitration for Sport*, 98 LAW LIBR. J. 503 (2006).

176. See *id.* at 503.

177. See WEILER, *supra* note 174, at 1071.

178. See MITTEN, *supra* note 172, at 320.

179. *Id.*

180. Richard H. McLaren, *The Court of Arbitration for Sport: An Independent*

The USOC grants the national governing body (“NGB”) for each sport the exclusive authority to resolve athlete eligibility issues, and if an athlete claims that the NGB denied her the opportunity to participate in competition, the USOC constitution provides that the USOC must promptly investigate the complaint and take appropriate steps to settle the controversy.¹⁸¹ The Ted Stevens Olympic and Amateur Sports Act¹⁸² (“Stevens Act”) provides that the USOC “shall establish and maintain provisions in its constitution and bylaws for the swift and equitable resolution of disputes involving any of its members and relating to the opportunity of an amateur athlete . . . to participate in [competition].”¹⁸³ First passed in 1978 and extensively amended in 1998, the Stevens Act gives athletes a statutory right to submit the eligibility dispute to the American Arbitration Association, which provides for independent, impartial review and a final and binding decision.¹⁸⁴ Arbitration awards can be judicially confirmed and enforced by the athlete under the provisions of the FAA.¹⁸⁵

The statute also explicitly prevents an athlete from being able to seek injunctive relief against the USOC regarding his or her eligibility within twenty-one days before the Olympic Games, the Paralympic Games, or the Pan-American Games, if the USOC certifies to the court that its constitution and bylaws cannot provide for the resolution of the dispute prior to the beginning of such games.¹⁸⁶ As one court noted, the twenty-one day rule “is designed to prevent a court from usurping the USOC’s powers when time is too short for its own dispute-resolution machinery to do its work.”¹⁸⁷ It also reinforces the notion that the USOC should be able to have the final say, free of court interference, on eligibility questions that might arise so close before a covered competition.¹⁸⁸ However, the Stevens Act also requires the USOC to hire an ombudsman, at no cost to the athletes, who provides athletes and their attorneys with independent advice and guidance concerning eligibility disputes and their rights under the Stevens Act.¹⁸⁹ The ombudsman’s job also includes providing mediation in disputes over whether an athlete is eligible to compete in a covered compe-

Arena for the World’s Sports Disputes, 35 VAL. U. L. REV. 379, 381 (2001).

181. See MITTEN, *supra* note 172, at 293 (citing United States Olympic Committee Constitution art. IX, § 2).

182. 36 U.S.C. § 220501–512 (2006).

183. § 220509(a).

184. § 220529(a).

185. MITTEN, *supra* note 172, at 304.

186. § 220509(a).

187. *Lindland v. U.S. Wrestling Ass’n*, 227 F.3d 1000, 1007 (7th Cir. 2000).

188. S. REP. NO. 105–325, at 7 (1998).

189. § 220509 (b)(1).

tition and reporting to the Athletes' Advisory Council on a regular basis.¹⁹⁰

B. Other Benefits of Arbitration in Resolving NCAA Eligibility Disputes

In addition to providing quick and final, independent review, arbitration promotes review by experts in the often-arcane field of collegiate sports law, as well as increased privacy, flexibility, and cost-effectiveness.

First, because the NCAA and its member schools would set up the arbitrator selection procedures, they could ensure that an expert arbitrator or panel of arbitrators is selected to hear eligibility disputes. In many cases involving private associations, non-expert judges are unqualified to make informed decisions. As Professor Chaffee observed, the "[r]esult has often been that the judicial review . . . is really an appeal from a learned body to an unlearned body."¹⁹¹ Thus, the NCAA and its member schools could ensure an accurate decision by implementing a process that appoints a neutral, expert arbitrator who brings experience to the process and gains experience for future cases.

A second benefit that arbitration offers is privacy. Many eligibility decisions concern sensitive issues about the academic or personal life of young men and women. Sensitive information can have effects that go beyond determining NCAA eligibility, such as affecting athletes' future professional careers or negatively impacting their personal reputations. By implementing a confidential arbitration procedure, potentially embarrassing information can be kept private.

A third benefit of arbitration is its flexibility. The desire to accurately determine whether a student's eligibility has been wrongly denied need not be restricted by formal rules of evidence. Additionally, the time-sensitive nature of eligibility decisions suggests that a more flexible period of discovery is appropriate. Due to the unique circumstances presented by NCAA eligibility decisions, arbitration provides the degree of flexibility required to ensure that accurate decisions are made in a timely manner.

A fourth benefit of arbitration is that it allows final decisions to be made in a cost-effective manner. The costs associated with appealing an eligibility decision are potentially prohibitive for many student-athletes. Arbitration, through its speed, flexibility, and pre-arranged structure, greatly reduces the costs that student-athletes will face in appealing a denial of eligibility.

190. § 220509 (b)(1)(c).

191. Chaffee, *supra* note 51, at 1024.

C. Implementing a Process that would Ensure Independent, Impartial Review and Resolution of NCAA Eligibility Disputes

There are many possible ways to formulate an arbitration process that ensures independent, impartial review and resolution of eligibility disputes. We propose that the NCAA and its member schools amend the NCAA By-laws by replacing and substituting the athlete reinstatement process with an arbitration process that expressly adopts the American Arbitration Association's ("AAA") Commercial Arbitration Rules and Mediation Procedures.¹⁹² This would ensure the selection of an arbitrator who is both an expert and impartial, pursuant to the Commercial Arbitration Rules and Mediation Procedures' strike and rank R-11 (Appointment from National Roster) method, described as follows:

This method begins with the parties providing the case manager with the qualifications they are seeking in an arbitrator. For example, they might desire commercial litigators with experience in accounting disputes, or CPAs that handle business valuations. The case manager then develops a list that meets the parties' expectations. If the parties cannot agree, they must choose who they want to eliminate, and rank those remaining in order of preference. The AAA then tallies the results and appoints the arbitrator ranked highest by the parties. If the parties do not return the lists, the AAA will deem all arbitrators to be acceptable and invite an arbitrator from that list to serve. The parties may also request that the AAA administratively appoint the arbitrator.¹⁹³

This method ensures that the NCAA, the member institution, and the student-athlete are given the chance to have meaningful input in the selection of an expert and impartial arbitrator, thereby eliminating the inherently inequitable, unconscionable, and fundamentally unfair process that currently exists under the NCAA reinstatement process whereby one of the parties (the NCAA) selects the arbitrator(s).¹⁹⁴

CONCLUSION

Eligibility disputes involving student-athletes are time-sensitive, which makes injunctive relief appropriate. However, because of the Restitution Rule, this equitable remedy is effectively frustrated. While courts generally do not interfere in the rules and decisions of private associations, judicial

192. COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (American Arbitration Association ed., 2013), available at <http://www.adr.org/commercial>.

193. Elizabeth Champnoi, *The Arbitrator Selection Process and New Ethical Standards*, THE CPA JOURNAL ONLINE (Dec. 2005), available at <http://www.nysscpa.org/cpajournal/2005/1205/essentials/p60.htm>.

194. See *supra* Part V.C.

review is warranted by well-established exceptions. Because the Restitution Rule effectively serves as a waiver of recourse provision, the courts should refuse to enforce it as a matter of public policy. Indeed, if the NCAA's reinstatement process is replaced by a system of arbitration that would ensure timely, independent, impartial, and final review of NCAA eligibility disputes, the immensely controversial Restitution Rule would be no longer necessary to protect the NCAA's legitimate interest in preserving the integrity of its eligibility rules against injunctions by local courts.

RESCUING ACADEMIC FREEDOM FROM
GARCETTI V. CEBALLOS:

AN EVALUATION OF CURRENT CASE LAW
AND A PROPOSAL FOR THE PROTECTION OF
CORE ACADEMIC, ADMINISTRATIVE, AND
ADVISORY SPEECH

BRIDGET R. NUGENT & JULEE T. FLOOD*

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*“To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. 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.”*¹

INTRODUCTION

Academic freedom is a conceptual chameleon. Sometimes it is thought to be about institutions;² sometimes about individuals.³ When it is thought to be about individuals, sometimes it is thought to be about academics only,⁴ sometimes about academics and students.⁵ In both of those contexts,

1. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

2. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 605, 629 (1967) (court explaining that the university is a traditional sphere of free expression fundamental to the function of society); *Wieman v. Updegraff*, 344 U.S. 183, 194–198 (1952) (Frankfurter, J., concurring). Joined by Justice Douglas, Justice Frankfurter laid out the case for protecting universities as centers of independent thought and criticism. *Id.*

3. *See generally*, J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 *YALE L.J.* 251, 257 (1989) (explaining that the Supreme Court “has been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning”).

4. *See, e.g.*, Dahlia Lithwick & Richard Schragger, *Jefferson v. Cuccinelli: Does the Constitution Really Protect a Right to “Academic Freedom”?*, *SLATE* (June 1, 2010, 6:19 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/06/jefferson_v_cuccinelli.2.html

In other words, the core and central enterprise of academic faculty in the university is to exercise First Amendment rights In performing their core functions, faculty are always engaged in the process of free inquiry. And free

academic freedom is usually thought of as having weight, both with respect to what happens in the classroom and with respect to what is published in academic publications—perhaps even to what is said in debates about academic policy at the institution at which the academic in question is employed, or about what is said in debates about local, national, or global policy by the academic in question.⁶ Sometimes, furthermore, it is thought to be a constitutional phenomenon and, for that reason, applicable only to governmentally run institutions and to academics (and to students) at those institutions, as private institutions lack the state-actor feature that is essential to the applicability of most constitutional mandates.⁷ Sometimes, however, academic freedom is thought to be a contractual phenomenon (either independent of, or in addition to, academic freedom as a constitutional phenomenon) and, as such, potentially applicable to academics (and perhaps to students) at both public and private academic institutions.⁸ Some-

inquiry is the central project of the university—the university can't exist without it, as Thomas Jefferson well understood when he founded the University of Virginia.

Whatever the judicial doctrine of academic freedom may mean, at its heart it must protect those exercising core First Amendment rights—like researching, writing, speaking, and teaching. If government officials are allowed to dictate how the faculty exercises those rights, they are surely impinging on free speech.

Id. at 2.

5. *See, e.g.*, *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding that First Amendment rights of students were violated when a state university refused to pay for the printing expenses of one student publication that expressed a belief in a deity or an ultimate reality, yet paid for the printing expenses of other student publications); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a state university that made its facilities available for the activities of certain registered student groups violated the First Amendment rights of other students by closing its facilities for religious worship and discussion).

6. *See Univ. of Mich. v. Ewing*, 474 U.S. 226, 226 n.12 (internal citations omitted) (“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on decisionmaking by the academy itself.”); *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992) (holding that college violated professor’s right to free speech by creating an alternative section of his class and investigating his conduct as a result of articles he wrote and speeches he gave arguing that blacks are less intelligent than whites). *See generally*, Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 827–28 (2010).

7. *See* David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom under the First Amendment*, 53:3 LAW AND CONTEMPORARY PROBLEMS 227, 229 (Summer 1990) (“Threats to professors from university trustees loomed behind the seminal professional definition produced in 1915 Threats to universities from the state, arising out of general concerns during the late 1940s and 1950s about the dangers of communism to American society and institutions, prompted the cases that led the Supreme Court to identify academic freedom as a first amendment right.”).

8. *See, e.g.*, *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (internal citations omitted).

times, finally, academic freedom is thought of (if only rarely by lawyers) as a cultural phenomenon; that is, it is of significant normative value to academics and students at both public and private academic institutions for reasons that are neither literally constitutional nor literally contractual, shielding those academics and those students from adverse action predicated upon their exercise of that freedom.⁹ This article focuses on academic freedom with respect to individuals—academics specifically. It engages constitutional and contractual questions regarding academic freedom for public university faculty.

Academic freedom is an essential component of vibrant public colleges and universities.¹⁰ Uncensored speech by university professors facilitates an uninhibited pursuit of truth and the advancement of knowledge, encouraging both innovative scholarship and instruction by enabling scholars to speak candidly about potentially unwelcome or unsettling concepts. Academic freedom's critical importance suggests that it be given constitutional protection under the First Amendment; however, current constitutional law does not reflect this understanding.¹¹

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."

Id.

9. See FREDERICK P. SHAFFER, A GUIDE TO ACADEMIC FREEDOM (2011), available at <http://agb.org/sites/agb.org/files/u1525/A%20GUIDE%20TO%20ACADEMIC%20FREEDOM.pdf>); CARY NELSON, NO UNIVERSITY IS AN ISLAND: SAVING ACADEMIC FREEDOM 26 (2010) ("Much as we might like to imagine that academic freedom is a stable unchanging value, a kind of Platonic form, in truth it is under constant pressure to redefine its nature, its scope, and its application. The need to clarify academic freedom anew, to elaborate on its implications, and to respond to its critics is never ending. It is important to remember in this context that both the AAUP itself and its classic statements of principle developed in specific historical contexts and reflect specific cultural and political struggles.").

10. In *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (internal citations omitted), Justice Powell explained, "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body." *Id.* See also *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). In *Sweezy*, Justice Frankfurter summarized the four essential freedoms that constitute institutional academic freedom, explaining that it was the business of a college or university to provide that atmosphere which is most conducive to experimentation and creation by determining for itself (1) who may teach, (2) what may be taught, (3) how it shall be taught, and (4) who may be admitted to study. *Id.*

11. See Byrne, *supra* note 3, at 252–53 ("Attempts to understand the scope and foundation of a constitutional guarantee of academic freedom . . . generally result in

This paper is inspired by the leading case on free speech in the workplace, *Garcetti v. Ceballos*.¹² In *Garcetti*, the Supreme Court held that the First Amendment does not protect the speech of governmental employees who speak out pursuant to job responsibilities, stating that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”¹³ However, the Court said in dicta that an academic freedom exception to this limit may exist, explaining:

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.¹⁴

In the eight years since the *Garcetti* decision, the Court has declined to provide any guidance for this hypothetical academic freedom exception, or even to clarify whether it exists. Of those lower courts that have provided guidance or clarified whether it exists, few have agreed on the boundaries of the exception.¹⁵ These inconsistencies threaten to chill First Amendment freedom of speech by leaving educators in a state of doubt about the degree to which their controversial statements in publications, in the classroom, in the faculty lounge, and in the public sphere are protected.

In order to allow academic speech to thrive in its fullest form, the Supreme Court should establish a clear academic freedom exception to the public employee speech doctrine articulated in *Garcetti*. There should be spaces and times in which a public university professor is assured the right to speak freely and without consequence to his position. This paper discusses the parameters of such an exception. Its primary mission is not to argue that an academic freedom exception should *exist*; although it addresses in context the necessity of an academic freedom exception to the “pursuant to official duties” standard, an extensive literature already details the need for an exception to the *Garcetti* holding for academics.¹⁶ This pa-

paradox or confusion. The cases . . . are inconclusive, the promise of rhetoric re-proached by the ambiguous realities of academic life. . . . There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it.”). See also Rabban, *supra* note 7, at 237.

12. 547 U.S. 410 (2006).

13. *Id.* at 421.

14. *Id.* at 425.

15. See *infra* notes 119–126, 141–156, 160–161, 197–206 and accompanying text.

16. Larry D. Spurgeon, in particular, has explored the dichotomy of professors as citizens and professors as academics. See Larry D. Spurgeon, *The Endangered Citizen*

per's mission, rather, is two-fold: first, to illustrate trends across circuits following *Garcetti* regarding the treatment of academic speech, distinguishing the treatment of speech within enumerated roles that public university faculty assume; and second, to argue for a distinction between the protection of speech related to the roles of teaching and researching from that related to the roles of administrator and advisor.¹⁷

Part I outlines the relevant First Amendment law surrounding free speech in the workplace, ending with the *Garcetti* decision. Part II discusses the development of constitutional protections for academic freedom and the practice of shared governance in academia. Part III analyzes the application of *Garcetti* to the various roles that professors assume—specifically, the roles of teacher, researcher, advisor, administrator, and citizen—and the divergent approaches to *Garcetti* in the academic context. Part IV explains why an academic freedom exception is still relevant in light of contractual provisions in public college and university faculty contracts. Finally, in Part V, the paper develops the policy concerns implicit in strict public employee speech analysis, as applied to public college and university faculty. It distinguishes the imperative of protecting speech related to the roles of teaching and researching from that related to the roles of administrator, advisor, or citizen. It then offers two proposals for the protection of academic freedom, the first describing areas of speech that should be assured protection by the courts, the other suggesting areas of speech of which academics

Servant: Garcetti Versus the Public Interest and Academic Freedom, 39 J.C. & U.L. 405 (2013). He distinguishes professors as experts versus citizens, and professional academic freedom versus constitutional academic freedom, which clashes with the *Garcetti* rule. However, whereas Spurgeon's thesis is that the *Garcetti* rule damages the public interest in free speech, this paper explains that *Garcetti* need not be overruled. Instead, we argue that there is a way to analyze and differentiate the speech existing within academia and the exceptions. Where Spurgeon argues that the Court should recognize and respect most all speech in academia, due to academic institutions' being so very different from other governmental institutions, we delineate speech that is unique to academia, and speech that is more alike that within non-academic governmental institutions. This article is especially cognizant that some issues in academia are best dealt with in the cultural context and not in the courts. Thus, it suggests policy issues that should be addressed by academia itself.

17. This piece specifically discusses individual academic freedom; it does not speak to institutional academic freedom. In 1957, in the Court's first discussion of institutional academic freedom, Justice Frankfurter defined academic freedom as the freedom of universities to decide "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). Then, in 1978, Justice Powell suggested that academic institutions might be entitled to academic freedom (sometimes confused with "autonomy") under the First Amendment. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). On the basis of the *Regents* and *Sweezy* opinions, several other Supreme Court Justices, federal appellate judges, and commentators have come to assume that the Court has held that the First Amendment protects the "academic freedom" (or "autonomy") at least of public universities. *See Richard H. Hiers, Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLIN L. REV. 1, 21 (2007).

themselves are the most appropriate guardians.

I. AN EVOLUTION OF SPEECH PROTECTIONS: FROM *PICKERING* TO *GARCETTI*

In *Garcetti*, the United States Supreme Court announced that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”¹⁸ Thus, the Court vindicated managerial prerogative while providing a disincentive for an employee to speak out pursuant to job-related duties. In dissent, Justice Souter argued that this new rule conflicted with academic freedom because academic personnel both lecture and produce scholarly work—activities long thought to be protected by academic freedom—in accordance with their official duties.¹⁹ Writing for the majority, Justice Kennedy explained that the Court was not deciding whether the new rule was applicable to “speech related to scholarship or teaching.”²⁰ Accordingly, to understand the boundaries of academic freedom, one must look to the framework in place prior to *Garcetti*: one in which speech by a public employee was protected if it (1) involved a matter of public concern, and (2) outweighed the public employer’s justification for limiting that speech.²¹

A. The *Pickering* Balancing Test

The watershed case on the scope of protected speech for government employees is *Pickering v. Board of Education*.²² In *Pickering*, a high school teacher named Marvin Pickering was fired for publishing a letter criticizing his school board as to its approach to athletic funding.²³ The Court held that Pickering was speaking as a citizen about an important public issue.²⁴ The fact that he was a teacher did not preclude him from invoking this right because the letter was not directed at anyone with whom he would come into contact at work.²⁵ Without proof that Pickering knowingly or recklessly made false statements, the Court explained, his speech on “issues of public importance” could not furnish the basis for his dismissal from public employment.²⁶ The Court did not rely upon the concept of aca-

18. *Garcetti*, 547 U.S. at 421.

19. *Id.* at 438–39 (Souter, J., dissenting).

20. *Id.* at 425.

21. *See* *Connick v. Myers*, 461 U.S. 138, 146–52 (1983); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.*, 391 U.S. 563, 568 (1968).

22. 391 U.S. 563 (1968).

23. *Id.* at 564.

24. *Id.* at 574.

25. *Id.* at 569–70.

26. *Id.* at 574.

democratic freedom in its determination. Instead, recognizing that government employers may object to critical statements made by their employees in an “enormous variety of fact situations,”²⁷ Justice Marshall, writing for the majority, deemed it appropriate to balance the interests belonging to the employee “as a citizen, in commenting upon matters of public concern,” with those belonging to the government employer “in promoting the efficiency of the public services it performs through its employees.”²⁸

B. Balancing Revisited: *Connick v. Myers*

The *Pickering* balancing test was modified in *Connick v. Myers*.²⁹ Sheila Myers was an assistant district attorney who had been fired for soliciting the views of other employees about office morale, the level of confidence in supervisors, and whether employees felt compelled to work on political campaigns.³⁰ Myers brought a § 1983 action alleging that her speech was protected.³¹ The district court agreed, ordering Myers to be reinstated, and the Fifth Circuit Court of Appeals affirmed.³²

The Supreme Court reversed the decision, however, distinguishing Myers’ speech from that which could be characterized as relevant to matters of public concern. The Court noted that in all of *Pickering*’s progeny, “the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs.”³³ Speech on public issues “occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.”³⁴ The *Connick* court concluded that it was unnecessary to scrutinize the reasons for Myers’ discharge if her questionnaire could not be fairly characterized as constituting speech on a matter of public concern. Put another way, *Connick* adds a threshold requirement to the *Pickering* test. When a public employee speaks as an employee on matters of only personal interest, and not as a citizen, courts are not the appropriate fora in which to review personnel decisions.³⁵

Together, *Pickering* and *Connick* stand for the principle that unless em-

27. *Id.* at 569.

28. *Id.* at 568.

29. 461 U.S. 138 (1983).

30. *Id.* at 141.

31. *Id.* A § 1983 lawsuit is a means for bringing civil claim against government officials and government agencies for violations of the U.S. Constitution and other federal laws. It is a type of civil rights lawsuit and is based on the Civil Rights Act of 1871, now codified as Section 1983 of Title 42 of the United States Code. 42 U.S.C. § 1983 (2006).

32. *Connick*, 461 U.S. at 142.

33. *Id.* at 144–145.

34. *Id.* at 145 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

35. *Id.* at 146; see also Marni M. Zack, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893, 897 (2005).

ployee expression can be fairly considered as relating to some matter of political, social, or community concern, government officials may manage their offices without intrusion by the judiciary in the name of the First Amendment.³⁶ The *Connick* court read *Pickering* to hold that this burden of proof in these cases “varies depending upon the nature of the employee’s expression.”³⁷ The Court also emphasized the importance of giving “a wide degree of deference to the employer’s judgment” about the context of the speech, with a “stronger showing necessary if the . . . speech more substantially involve[s] matters of public concern.”³⁸

C. A Twist of Reasonableness: *Waters v. Churchill*

In *Waters v. Churchill*,³⁹ the Supreme Court assessed whether an employee’s speech should be evaluated as the employer understood it, or whether the fact-finder should independently collect and determine the factual basis of the claims. In this case, Cheryl Churchill was fired after co-workers told their supervisor that she had made negative comments about work conditions.⁴⁰ Churchill claimed that her comments were intended to improve patient care.⁴¹ The Seventh Circuit found that the speech was a matter of public concern, that it was not disruptive, and that the employer should have conducted an investigation to determine what Ms. Churchill had, in fact, said before it fired her.⁴² The Supreme Court rejected the Seventh Circuit’s approach, finding that such an investigation would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court. Instead, the Court held that an employer must reach its conclusion in good faith, rather than as a pretext, and the trial court should look into the reasonableness of the employer’s conclusions.⁴³

D. The Latest Words on Employee Speech: *Garcetti v. Ceballos*

In a major elaboration on the doctrine emanating from *Pickering*, *Connick*, and *Waters*, the Court held in *Garcetti v. Ceballos*⁴⁴ that the First Amendment does not protect a government employee from discipline based

36. *Connick*, 461 U.S. at 147.

37. The Court criticized the district court’s decision to place the burden of proof on the employer, a burden that required the employer to “‘clearly demonstrate’ that the speech involved ‘substantially interfered’ with [Myers’] official responsibilities.” *Id.* at 150.

38. *Id.* at 152. The Court also noted that private expression may “bring additional factors to the *Pickering* calculus.” *Id.* at 152–53.

39. 511 U.S. 661 (1994).

40. *Id.* at 665.

41. *Id.* at 666.

42. *Id.* at 667.

43. *Id.* at 677.

44. 547 U.S. 410 (2006).

on speech made pursuant to the employee's official duties. Richard Ceballos, a deputy district attorney for the Los Angeles County District Attorney's Office, was overruled in a meeting with various supervisors with regard to his recommendation to dismiss a criminal case.⁴⁵ The meeting at which his supervisors rejected his recommendation reportedly became quite heated. Ceballos later sued the office, alleging that in the aftermath of these events he was subjected to a series of retaliatory employment actions, such as reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion.⁴⁶

Justice Kennedy's majority opinion opened by acknowledging that "[t]he Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment."⁴⁷ He reiterated that the First Amendment protects a public employee's right to speak as a citizen when addressing matters of public concern, explaining that, "[as] long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."⁴⁸ The First Amendment interests at stake, the opinion explains, "extend beyond the individual speaker."⁴⁹ There is a public interest in "receiving the well-informed views of government employees engaging in civic discussion."⁵⁰

The Court also explained that, despite First Amendment interests, a government entity needs discretion to restrict speech when it acts in its role as employer because that speech could potentially affect the entity's entire operations.⁵¹ Thus, when a citizen enters government service, the citizen by necessity must accept certain limitations on his freedom of speech. Applying these principles in the case at hand, the Court held that Ceballos had expressed his view inside his office, rather than publicly.⁵² Whether Ceballos' speech touched on a matter of public concern was not dispositive, the Court said. Instead, the controlling factor in Ceballos' case was that his expressions were made pursuant to his duties as a calendar deputy.⁵³ This "pursuant to duty" test was the Court's important elaboration on the *Pickering/Connick* line of decisions. In the words of the Court:

[T]he fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor . . . distinguishes Ceballos' case from those in which the First Amendment provides protection

45. *Id.* at 414.

46. *Id.* at 415.

47. *Id.* at 417.

48. *Id.* at 419.

49. *Id.*

50. *Id.*

51. *Id.* at 418.

52. *Id.* at 420.

53. *Id.* at 421.

against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.⁵⁴

Ceballos said what he did because that was what he was employed to do, and restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a "private citizen." Rather, the restriction simply "reflects the exercise of employer control over what the employer itself has commissioned or created."⁵⁵ The Court added that Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. The fact that his duties sometimes required him to speak or write did not mean, as far as the Court was concerned, that his supervisors were prohibited from evaluating his performance.⁵⁶

In a strongly worded dissent, Justice Souter worried that the decision could have important ramifications for academic freedom:

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's 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.'⁵⁷

Justice Kennedy, in his majority opinion, acknowledged this concern, recognizing that the *Garcetti* ruling "may have important ramifications for academic freedom, at least as a constitutional value."⁵⁸ His next two sentences 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.⁵⁹

The import of these words has yet to be determined, as the Court has yet to embrace the academic speech exception to the *Garcetti* doctrine contem-

54. *Id.*

55. *Id.* at 422.

56. *Id.*

57. *Id.* at 438 (Souter, J., dissenting).

58. *Id.* at 425.

59. *Id.*

plated by Justice Kennedy, or to provide any suggestion of the possible contours of such an exception. Justice Kennedy's comments in *Garcetti* suggest, however, that the Court may, at some point in the future, search for ways to honor its commitment to academic freedom while adhering to its First Amendment jurisprudence.

Since the *Garcetti* decision, lower courts have alternatively applied its per se rule to professorial speech, or, recognized spaces in which professors can speak without employer censorship or retaliation.⁶⁰ In the absence of clear guidance from the Court, the concept of academic freedom in higher education is more opaque than crystalline: lower courts' opinions defining the parameters of a professor's "official duties" are growing increasingly disparate.⁶¹ In light of these developments, the legacy and meaning of *Garcetti* is as gray and mercurial now as it has ever been. This article argues that the best way for the Court to fix the problem is by recognizing an exception to *Garcetti*'s "official duties" rule for core academic speech.

Any discussion of the future implications of *Garcetti* should be set against the historical protections developed with respect to academic freedom and the development of shared governance. In Part II, this paper sets forth the legal and non-legal developments of academic speech protection in the United States. This establishes a foundation on which to assess the jurisprudence that has followed *Garcetti* and to extrapolate the varying forces that compete within the contemporary legal battleground for professors' academic freedom in public colleges and universities.

II. THE ORIGINS OF ACADEMIC FREEDOM AND SHARED GOVERNANCE

The American Association of University Professors ("AAUP") developed the United States' first robust conception of academic freedom in the early years of the twentieth century. Well into the 1900s, the faculty members of prestigious colleges and universities limited themselves to diffusing already-accepted knowledge.⁶² As science began to take the place of reli-

60. See *infra* Part III.

61. The parties in *Garcetti* did not dispute the official nature of the activity in that case, so the Court had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." 547 U.S. at 424. They have even reached different results as to whether the "official duties" inquiry is a generally a question of law for the court, or one of fact. Compare *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1130 (9th Cir. 2008) ("Agreeing with the Third, Seventh, and Eighth Circuits, we hold that after *Garcetti* the inquiry into the protected status of speech presents a mixed question of fact and law, and specifically that the question of the scope and content of a plaintiff's responsibilities is a question of fact."), with *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202-03 (10th Cir. 2007) ("[Determinations as to] whether the employee [has spoken] 'pursuant to [his] official duties.' . . . are to be resolved by the district court . . . [and not] the trier of fact.>").

62. AM. ASS'N OF UNIV. PROFESSORS, DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915) [hereinafter 1915 DECLARATION], available

gious instruction in a number of colleges and universities, however, faculty members started performing original research and developing scholarly expertise in a variety of disciplines, complementing accepted theories with their own as they continued teaching. Publicized conflicts between faculty members and university governing boards arose at Stanford,⁶³ the University of Wisconsin,⁶⁴ Vanderbilt,⁶⁵ and the University of Pennsylvania,⁶⁶ among others, as instructors increasingly introduced free thought into their classrooms and laboratories. The AAUP was founded in 1915 in response to conflicts of this sort between faculty and university administrators; that same year, the AAUP issued its Declaration of Principles on Academic Freedom and Academic Tenure (“1915 Declaration”).⁶⁷ Modern scholars consider the 1915 Declaration to be the seminal statement of American academic freedom, as it developed within the culture of colleges and universities.⁶⁸

The 1915 Declaration broadly defined academic freedom from a cultural perspective to encompass speech within a professor’s professional capacity.⁶⁹ It viewed the basic job of professors as sharing the results of their in-

at <http://www.aaup.org/file/1915-Declaration-of-Principles-on-Academic-Freedom-and-Academic-Tenure.pdf>.

63. Edward Ross’ public advocacy of free silver and opposition to the exploitation of foreign labor offended Mrs. Leland Stanford, the sole surviving trustee of the University in 1897. She demanded that the president of Stanford fire Professor Ross. The president forced Ross out in 1900. See ORRIN LESLIE ELLIOTT, *STANFORD UNIVERSITY: THE FIRST TWENTY FIVE YEARS* 326–78 (1937).

64. Professor Richard Ely in 1894 was tried by a committee of the Regents of the University of Wisconsin for advocating strikes and boycotts. See Theodore Herfurth, *Sifting and Winnowing: A Chapter in the History of Academic Freedom at the University of Wisconsin*, in *ACADEMIC FREEDOM ON TRIAL: 100 YEARS OF SIFTING AND WINNOWING AT THE UNIVERSITY OF WISCONSIN-MADISON* 58, 59–67 (W. Lee Hansen ed., 1998).

65. In one of the first American disputes over the teaching of evolution, a local bishop serving as ex officio president of the governing board of Vanderbilt hired Alexander Winchell, a respected geologist and known evolutionist. After a number of religious journals accused Professor Winchell of attempting to destroy the truths of the Gospel, he was dismissed in 1878. See RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 330–32 (1955).

66. Scott Nearing’s contract as an assistant professor at the Wharton School of the University of Pennsylvania was not renewed in 1915. Although the trustees denied that they acted because of Nearing’s support of legislation to limit child labor, faculty members were not persuaded. See LIGHTNER WITMER, *THE NEARING CASE: THE LIMITATION ON ACADEMIC FREEDOM AT THE UNIVERSITY OF PENNSYLVANIA BY ACT OF THE BOARD OF TRUSTEES* 3–14 (1915).

67. See HOFSTADTER & METZGER, *supra* note 65, at 474–77.

68. See, e.g., Byrne, *supra* note 3, at 276 (calling the Declaration “the single most important document relating to American academic freedom”); Robert Post, *The Structure of Academic Freedom*, in *ACADEMIC FREEDOM AFTER SEPTEMBER 11*, at 61, 64 (Beshara Doumani ed., 2006) (deeming the Declaration “[t]he first systematic and arguably the greatest articulation of the logic and structure of academic freedom in America”).

69. See 1915 DECLARATION, *supra* note 62.

dependent and expert scholarly investigations with students and the general public.⁷⁰ Adapting the German concept of academic freedom to the American context, the 1915 Declaration identified three elements of academic freedom: “freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action.”⁷¹ Academic freedom, the 1915 Declaration explained, serves the fundamental purposes of educating youth: it provides instruction to students and develops experts for public service.⁷²

The 1915 Declaration identified both university boards of trustees and legislatures as threats to academic freedom. It explained that trustees are in a position to act as autocratic employers, using the power of dismissal to impose their personal ideological and pedagogical views on professors.⁷³ The 1915 Declaration warned against this practice, explaining that professorial opinions lose value if they are not the product of free inquiry. The Declaration further warned of the dangers to academic freedom from state legislatures, which control the state’s purse strings and can thereby manipulate the academic inquiries of professors if scholarly interests conflict with established governmental policies or respected societal values.⁷⁴ Whatever the pressures on academic freedom, the 1915 Declaration stated that the university must be a place of refuge for intellect and independent scholarly investigation.⁷⁵

In 1940, the AAUP and the Association of American Colleges (“AAC”), an organization of presidents of undergraduate institutions, collaborated to condense and revise the 1915 Declaration.⁷⁶ At its heart, the 1940 Statement endorsed the same core principles as the 1915 Declaration: academic freedom and a fair hearing for faculty facing dismissal or disciplinary measures.⁷⁷ The 1940 Statement has since been widely adopted: over 200 learned societies and higher education associations formally endorse it and its Comments.⁷⁸ Moreover, it has been relied upon by courts and been in-

70. *See id.*

71. *Id.* at 292.

72. *Id.* at 296.

73. *Id.* at 293–294.

74. *Id.* at 297.

75. *Id.* The committee of professors that drafted the 1915 Declaration made a special point of dissociating academic freedom from other forms of expression and conduct. The committee asserted that teachers who failed to meet standards of competence, or who abused their positions to indoctrinate students, could not claim the protection of academic freedom and were subject to discipline.

76. *See* AM. ASS’N OF UNIV. PROFESSORS & ASS’N OF AM. COLLEGES, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 3 (1940) [hereinafter 1940 STATEMENT], available at <http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>.

77. *Id.* at 3–4.

78. *Id.* at 7–11.

corporated in hundreds of faculty contracts.⁷⁹ A notable distinction between the 1915 Declaration and the 1940 Statement is the description of faculty roles. The 1940 Statement describes university instructors as “educational officers”⁸⁰ rather than as “employees,” as did the 1915 Declaration. This language in the 1940 Statement implies that the roles of faculty members encompass managerial and governing tasks as well as academic matters. It was not for another twenty years, however, that any professional organization would explicitly name and describe academia’s long-standing practice of shared governance.

Then, in 1966, the AAUP, the American Council of Education, and the Association of Governing Boards of Universities and Colleges crafted the Statement on Government of Colleges and Universities (“1966 Statement”).⁸¹ The 1966 Statement endorsed shared responsibility for governance between boards, faculties, and administrators. It acknowledged that “the variety and complexity of the tasks performed”⁸² by modern colleges and universities require governing boards to “entrust[] the conduct of administration to the administrative officers [and] teaching and research to the faculty.”⁸³ The 1966 Statement explained, however, that “curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process” should be overseen primarily by the faculty.⁸⁴ The Statement said that university boards should override faculty decisions about such academic matters “only in exceptional circumstances,” such as when the institution faced budgetary and logistical challenges.⁸⁵ In the decades since the release of the 1966 Statement, the practices and values of shared governance have been evidenced within the major accredited public colleges and universities.⁸⁶ In

79. See, e.g., *Vega v. Miller*, 273 F.3d 460, 476 (2d Cir. 2001) (Cabranes, J., dissenting) (“The AAUP’s 1940 Statement of Principles on Academic Freedom and Tenure has been relied upon as persuasive authority by courts to shed light on, and to resolve, a wide range of cases related to academic freedom and tenure.”); *Jimenez v. Almodovar*, 650 F.2d 363, 368 (1st Cir. 1981) (“American court decisions are consistent with the 1940 Statement of Principles on Academic Freedom and Tenure widely adopted by institutions of higher education and professional organizations of faculty members.”); AM. ASS’N OF UNIV. PROFESSORS, ACADEMIC FREEDOM AND TENURE INVESTIGATIVE REPORTS (2013), available at <http://www.aaup.org/report/freedom-classroom> (listing universities following policies drawn from the 1940 Statement).

80. 1940 STATEMENT, *supra* note 76, at 3.

81. Am. Ass’n Association of Univ. Professors, 1966 Statement on Government of Colleges and Universities, in AAUP POLICY DOCUMENTS & REPORTS 135–40 (10th ed. 2006).

82. *Id.* at 135–36.

83. *Id.* at 138.

84. *Id.* at 139. Faculty also should establish “the requirements for the degrees offered in the course, determine[] when the requirements have been met, and authorize[] the president and board to grant the degrees thus achieved.” *Id.*

85. *Id.*

86. See Gabriel E. Kaplan, How Academic Ships Actually Navigate, in GOVERN-

colleges and universities across the country, faculty members participate in the governance of academic matters through standing committees, joint ad hoc committees, and membership of faculty members on administrative bodies.⁸⁷

Specifically addressing issues pertaining to public colleges and universities, the United States Supreme Court has noted that academic freedom is a “special concern of the First Amendment,”⁸⁸ and lower courts have shown varying levels of respect for some contours of academic freedom.⁸⁹ Even so, its protections remain largely grounded in cultural rather than constitutional principles. Part III of this article sets forth the modern treatment of academic freedom by the Supreme Court and by lower federal courts. Primarily examining circuit court decisions in the wake of *Garcetti*, this next Part divides the different roles professors assume into four categories and evaluates the treatment of each category’s correlative speech and the relation of each type of speech to academic freedom. It analyzes the ways in which courts have diverged on protecting academic speech since *Garcetti*, identifying the trends within the case law with respect to the different “official duties” of public college and university professors.

III. SPEECH (UN)SECURED: THE MANY FORMS OF ACADEMIC SPEECH

The decision in *Garcetti* was grounded on the idea that a government employer may control what it has created—speech included.⁹⁰ To ensure the effectiveness and efficiency of a government workplace, the government enjoys far greater power to regulate the speech of its employees than it does of its citizens generally.⁹¹ Professors are of course citizens, and as a citizen, a professor’s extramural speech should be legally protected equally to that of any other citizen. However, professors at public universities are precariously poised within the context of free speech analysis because of the nature of academic work. Construing speech related to scholarship or research as pursuant to “official duties” under the *Garcetti* standard runs the risk of inhibiting the free pursuit of unpopular or socially charged ideas—precisely what the First Amendment was designed to protect.

In the absence of guidance from the Supreme Court, lower courts have

ING ACADEMIA 165, 172 (Ronald G. Ehrenberg ed., 2004). Accredited colleges and universities have adopted policies designating faculty members to contribute to or directly determine curriculum content, review the appointments of full-time faculty, and make tenure decisions. *Id.* at 202.

87. *Id.* at 201–207.

88. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

89. *See infra* Part III.

90. *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006).

91. *Id.* at 418. There is an ongoing debate about whether professors are employees or quasi-managers, or even independent contractors. It is beyond the scope of this paper to enter the debate, and for its purposes, this paper assumes that professors employed by a public institution are employees of the state.

yet to develop any consensus regarding the boundaries of speech protection enjoyed by a professor speaking pursuant to his official duties. Within the context of higher education, however, it is probably fair to start with the assumption that the official duties of a professor include teaching and research. Relying on the tradition of shared governance, a professor's official duties may also extend to actions in his capacity as an administrator. Moreover, professors are frequently under contract to act as advisors to their students, both formally and informally; thus, advising actions could also be considered official duties. Finally, professors can be prolific citizens, writing in newspapers, blogs, etc., or speaking through other fora. In a given situation, the distinction between "official" and "unofficial" speech can be imprecise. This Part reviews the professor's roles as teacher, researcher, administrator, advisor, and citizen and examines when the speech relevant to these roles should receive special First Amendment protection.

A. Professors as Teachers and Researchers

1. Professors as Teachers

The courts of the United States have long recognized that the inquiry and ideas of educators deserve special protection under the law. As Justice Frankfurter said, teachers are the "priests of our democracy."⁹² It is the "special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens."⁹³ They cannot carry out this "noble task if the conditions for the practice of a responsible and critical mind are denied to them."⁹⁴ That is precisely why Justice Souter expressed concern about the impact of the *Garcetti* per se rule on academic freedom.⁹⁵ It is also the reason Justice Kennedy acknowledged the possibility of different constitutional protection for speech related to "academic scholarship or classroom instruction."⁹⁶ When speaking on matters within their disciplines, professors are speaking as experts, educating the citizenry.

92. See *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

93. *Id.*

94. *Id.* Justice Frankfurter adds:

To regard teachers . . . as the priests of our democracy is therefore not to indulge in hyperbole. . . . They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.

Id. at 196–97.

95. *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting).

96. *Id.* at 425.

However, the constitutional treatment of academic speech often yields a different result from what may be commonly accepted under principles of academic freedom as articulated in the university setting. There is a twist of irony in many of the results, in that the more some courts interpret a professor's speech as "academic" (that is, related to their subject area), the less that speech is constitutionally protected. A cultural understanding of academic freedom rights would yield just the opposite result. Such an understanding would demand that academics are granted the most protection when speaking *in their subject area*—i.e., when their speech is most related to their "official duties." Courts' constitutional interpretations are thereby not always aligned with interpretations based on cultural principles of academic freedom.

Some courts have strictly applied the *Garcetti* standard to classroom activities, ruling that the more a professor's speech is related to his expertise, the more it can be regulated; others have been mindful of the reservations expressed in *Garcetti* as they decide speech cases involving public university instruction, ruling that professorial speech within one's discipline deserves the highest protection. In the recently released *Demers v. Austin*, the Ninth Circuit Court of Appeals highlighted the concern that if *Garcetti* applied to teaching and academic writing, it would directly conflict with First Amendment values.⁹⁷ As a matter of first impression, the Ninth Circuit determined that the *Pickering* test, not the *Garcetti* test, applies to teaching and writing on academic matters by state-employed teachers.⁹⁸ The issue in *Demers* was whether the plaintiff, David Demers, a tenured associate professor at Washington State University, suffered retaliation by the university in response to two writings.⁹⁹ One writing, called *The 7-Step Plan*, addressed departmental restructuring; the other was a draft of his book, *The Tower of Babel*. Demers argued that his writing and distributing *The 7-Step Plan* and *The Tower of Babel* were not done pursuant to his official duties, and thus did not come under the purview of *Garcetti*.¹⁰⁰ Moreover, he claimed that even if he wrote both publications pursuant to his official duties, the *Garcetti* holding did not extend to speech and academic writing by a publicly employed teacher.¹⁰¹ The Ninth Circuit ruled that both publications were part of Demers' official duties because it was "impossible" to separate out Demers' writing as private or public. The court then stated:

Demers presents the kind of case that worried Justice Souter. Under *Garcetti*, statements made by public employees 'pursuant to their official duties' are not protected by the First Amendment. But teaching and academic writing are at the core of the official

97. *Demers v. Austin*, No. 11-35558, 2013 WL 4734033 (9th Cir. Sept. 4, 2013).

98. *Id.*

99. *Id.* at *3.

100. *Id.* at *4.

101. *Id.*

duties of teachers and professors. . . . We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.¹⁰²

The Court held that *Garcetti* does not apply to teaching and writing on academic matters by teachers employed by the state. Rather, such writing is governed by *Pickering*.¹⁰³

However, not all Circuits have come as close to equating the academic freedom of scholarship with First Amendment protections. For example, in *Nichols v. University of Southern Mississippi*, the court strictly applied *Garcetti* to yield an unfavorable result for a university professor.¹⁰⁴ Dr. Nichols, a non-tenured faculty member, sued after the University of Southern Mississippi's School of Music decided not to renew his contract after complaints over his classroom speech regarding homosexuality.¹⁰⁵ The district court applied *Garcetti* and held that the speech was not protected because the comments were made in the classroom by a professor to a student.¹⁰⁶ The court ruled that the speech in question was best characterized as being made pursuant to the professor's "official capacity" and could not be afforded First Amendment protection under *Garcetti*.¹⁰⁷

On similar facts in *Piggee v. Carl Sandburg College*, however, the Seventh Circuit concluded that *Garcetti* was inapplicable because the speech in question did not relate to the instructor's official duties.¹⁰⁸ In *Piggee*, a part-time cosmetology instructor at a community college placed religious pamphlets in a smock of a student she believed to be gay.¹⁰⁹ The student was offended and complained to the director of the cosmetology program.¹¹⁰ The college decided not to renew Piggee's contract, and she filed suit, alleging infringement of her First Amendment rights.¹¹¹ In reviewing the case, the Seventh Circuit referred to the right of faculty members to engage in academic debate.¹¹² Holding without elaboration that *Garcetti* "is not directly relevant to our problem," however, the court determined that, while Piggee's speech occurred in her classroom and in the context of instruction, it "was not related to her job of instructing students in cosmetol-

102. *Id.* at *6 (internal citations omitted).

103. *Id.*

104. 669 F. Supp. 2d 684 (S.D. Miss. 2009).

105. *Id.* At the end of a voice lesson in his classroom, the professor had spoken negatively about homosexuals and homosexual activity. *Id.* at 689.

106. *Id.* at 698.

107. *Id.* at 699.

108. 464 F.3d 667 (7th Cir. 2006).

109. *Id.* at 668–69.

110. *Id.*

111. *Id.* at 669.

112. *Id.* at 671.

ogy.”¹¹³ Ultimately, the court ruled for the college, determining that “we 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.”¹¹⁴

Other courts have been similarly reluctant to apply *Garcetti*. In *Sheldon v. Dhillon*,¹¹⁵ an adjunct biology instructor’s contract was not renewed after a student complained about offensive statements the instructor made in response to a question in the classroom.¹¹⁶ The subject matter was the genetic basis of homosexuality, and course material related to that subject.¹¹⁷ Similar to the Seventh Circuit’s determination in *Piggee*, the Northern District of California held that the classroom conversation was protected speech,¹¹⁸ but instead of characterizing the conversation as being outside of a professor’s official duties, the court instead concluded that it did not have to apply the *Garcetti* analysis because the majority in *Garcetti* “reserved the question of whether its holding extends to scholarship or teaching-related speech.”¹¹⁹ The court read *Garcetti* as indicative of judicial reluctance to apply a public-employee speech rule in the context of academic instruction and ruled accordingly.¹²⁰

The Southern District of Ohio has also shown deference to the Court’s reluctance to extend the *Garcetti* rule to classroom instruction. In *Kerr v. Hurd*,¹²¹ an obstetrician/gynecologist and professor named Dr. Elton Kerr alleged retaliation because of his teaching about the unnecessary nature of certain cesarean procedures and because of his advocacy of vaginal delivery.¹²² Dr. William Hurd, his department chair and one of the defendants in the case, argued that Kerr was acting in the course of his official duties as an employee of the university during this instruction, rendering his speech (with its religious and moral undertones) subject to *Garcetti* analy-

113. *Id.* at 672.

114. *Id.* at 673.

115. No. C-08-03438 RMW, 2009 WL 4282086 (N.D. Cal. Nov. 25, 2009).

116. *Id.* at *2.

117. *Id.* at *1. June Sheldon taught a course in human genetics. *Id.* During class a student asked Ms. Sheldon to explain how heredity does or does not affect homosexual behavior in males and females. *Id.* Sheldon “answered the student’s question by noting the complexity of the issue, providing a genetic example mentioned in the textbook, and referring students to the perspective of a German scientist,” named Dr. Gunter Dörner, who had “found a correlation between maternal stress, maternal androgens, and male sexual orientation at birth,” while cautioning that his “views were only one set of theories in the ‘nature versus nurture’ debate.” *Id.* She briefly described what the students would learn later in the course, that “homosexual behavior may be influenced by both genes and the environment.” *Id.*

118. *Id.* at 3–4.

119. *Id.* at 3.

120. *Id.*

121. 694 F. Supp. 2d 817 (S.D. Ohio 2010).

122. *Id.* at 834.

sis.¹²³ After the court acknowledged, “Dr. Kerr’s speech as to vaginal deliveries was within his ‘hired’ speech as a teacher of obstetrics,”¹²⁴ it concluded that the Supreme Court left undecided the application of *Garcetti*’s per se rule in an “academic setting.”¹²⁵ The court ruled for Kerr, holding that “[a]t 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.”¹²⁶

2. Professors as Researchers

Faculty at public colleges and universities—like professors at private colleges and universities—teach, engage in innovative research, administer academic programs, and contribute to policy debates, both in academia and in the public square. In some respects, it is even more important to protect the free pursuit of new ideas than it is to shield the dissemination of those ideas within a university.¹²⁷

Since the decision in *Garcetti*, however, courts have not consistently protected the research interests of public university faculty. The Seventh Circuit had no hesitation in applying the *Garcetti* official duty rule in *Renken v. Gregory*.¹²⁸ In this case, tenured professor Kevin Renken became involved in a dispute with his dean over the administration of a National Science Foundation (NSF) grant and the use of its funds. During the course of the disagreement, Renken sent written correspondence concerning his situation to a member of the board of regents and others within the institution, alleging harassment and discrimination by the dean’s office.¹²⁹ When Renken refused an agreement proposed by the dean outlining use of the funds, the grant was returned to NSF.¹³⁰ Renken sued, alleging reduction in

123. *Id.* at 843.

124. *Id.*

125. *Id.*

126. *Id.* at 844 (footnote omitted).

127. The disastrous impact on Soviet agriculture of Stalin’s enforcement of Lysenko orthodoxy in biology stands as a strong lesson to those who would discipline university professors for not following the “party line” in their research. Trofim Denisovich Lysenko was director of Soviet biology under Joseph Stalin. His experimental research in improved crop yields earned the support of Joseph Stalin; in 1940, Stalin appointed him director of the Institute of Genetics within the USSR’s Academy of Sciences. Under Stalin, scientific dissent from Lysenko’s theories of environmentally acquired inheritance was formally outlawed; if anyone dared to criticize Lysenko’s theory regarding the heritability of acquired characteristics, they were purged from academic and scientific positions and imprisoned. Lysenko’s work was officially discredited in the Soviet Union in 1964, leading to a renewed emphasis on Mendelian genetics. The Soviet Union quietly abandoned Lysenko’s agricultural practices in favor of modern agricultural practices in the 1960s, after the crop yields he promised consistently failed to materialize. See DAVID JORAVSKY, *THE LYSENKO AFFAIR* 12–17 (1970).

128. 541 F.3d 769 (7th Cir. 2008).

129. *Id.* at 772.

130. *Id.* at 773.

pay and retaliation for exercising his speech rights.¹³¹ Applying *Garcetti*'s official duty rule, the Seventh Circuit held that his complaints about the grant conditions were made pursuant to his official job duties and therefore not protected.¹³² In applying *Garcetti*, the court emphasized the fact that Renken had applied for the grant in the course of official research, and that the funding would have allowed expansive research and a reduction in teaching load.¹³³

On a superficial level, the Seventh Circuit's treatment of faculty speech in Renken seems to conflict with its speech-favorable treatment in *Piggee*. Looking to the reasoning of the opinions, however, both decisions consistently strain to apply the *Garcetti* court's holding, in light of the court's reservations about extending protection to academic speech pursuant to a professor's official duties. The outcomes of these cases turn on their facts and circumstances: the type of speech and its relevance to the academic area in which the faculty member worked. While the Seventh Circuit was averse to applying the *Garcetti* rule to the academically-unrelated classroom speech in *Piggee*, the *Renken* court applied the *Garcetti* rule to activity related to scholarship.¹³⁴ The *Piggee* court did not characterize the speech as being pursuant to official duties.¹³⁵ Because her speech was not related to her job—teaching students about cosmetology—the court ruled in favor of the defendants, stating, “we 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.”¹³⁶ In contrast, the *Renken* court *did* find the research in question to be part of a professor's official duties and therefore held the professor accountable for his remarks.¹³⁷ The Seventh Circuit's two decisions are consistent and neither employs an approach sympathetic to academic speech.¹³⁸

B. Professors as Administrators

Due to the sustained tradition of shared governance, a public college or university faculty member's assigned duties often include a specific role in administering their institution's policy. *Garcetti* may apply to faculty member's speech when expressed in the course of those duties. Unfortunately, courts have done little to clarify the treatment of the administrative speech of public college and university faculty since the *Garcetti* decision in 2006.

131. *Id.*

132. *Id.* at 775.

133. *Id.* at 774.

134. *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 672 (7th Cir. 2006); *Renken*, 541 F.3d at 773–74.

135. *Piggee*, 464 F.3d at 673–74.

136. *Id.* at 673.

137. *Renken*, 541 F.3d at 774–75.

138. *See Piggee*, 464 F.3d at 673–74; *Renken*, 541 F.3d at 775.

In 2008, the D.C. Circuit heard *Emergency Coalition to Defend Educational Travel v. Department of Treasury*,¹³⁹ in which an association of professors challenged federal regulations regarding the Cuba trade embargo,¹⁴⁰ alleging the regulations restricted what they could teach.¹⁴¹ The *Emergency Coalition* court dodged any *Garcetti*-clarifying discussion and merely concluded that the regulations were content neutral and did not violate the First Amendment.¹⁴²

Other circuit courts, however, have outright rejected arguments that administrative speech is worthy of constitutional protection. In *Abcarian v. McDonald*,¹⁴³ for example, 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 insurance premiums,”¹⁴⁴ was protected due to the reservations expressed in *Garcetti*.¹⁴⁵ The Seventh Circuit rejected this “unsupported assertion” because his speech “involved administrative policies that were much more prosaic than would be covered by principles of academic freedom.”¹⁴⁶ The court emphasized that Dr. Abcarian was not merely a staff physician with limited authority.¹⁴⁷ He was, among other things, the Service Chief of the Department of Surgery at the University of Illinois Medical Center as well as Head of the Department of Surgery at the University of Illinois College of Medicine.¹⁴⁸ The court concluded that Abcarian had significant authority and responsibility over a wide range of issues affecting the surgical departments at both institutions and, therefore, had a broader responsibility to speak prudently in the course of his administrative employment obligations.¹⁴⁹

Similarly, the Ninth Circuit affirmed the district court’s decision in *Hong v. Grant*¹⁵⁰ that the administrative concerns of a chemistry professor were expressed in the course of his official duties and were therefore unprotected.¹⁵¹ During a mid-tenure review, Hong complained that too many department courses were taught by lecturers, and opposed a colleague’s pay

139. 545 F.3d 4 (D.C. Cir. 2008).

140. *Id.* at 6.

141. *Id.* at 12.

142. *Id.* at 12–13.

143. 617 F.3d 931 (7th Cir. 2010).

144. *Id.* at 933.

145. *Id.* at 935; *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

146. *Abcarian*, 617 F.3d at 938 n.5.

147. *Id.* at 937.

148. *Id.*

149. *Id.*

150. 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *aff’d*, 403 F. App’x. 236 (9th Cir. 2010).

151. *Id.* at 1169–70.

increase and another faculty appointment.¹⁵² After being denied a merit-based salary increase, Hong concluded that the decision was an act of retaliation over his criticisms.¹⁵³ He brought suit against his department at the University of California, Irvine (“UCI”), but the district court granted summary judgment to the defendants,¹⁵⁴ explaining that Hong’s official duties were not limited to classroom instruction and professional research; rather, they included a “wide range of academic, administrative and personnel functions in accordance with UCI’s self-governance principle.”¹⁵⁵ Consequently, Hong’s reservations were subject to the *Garcetti* rule, as they were expressed out of his “professional responsibility to offer feedback, advice and criticism about his department’s administration and operation”¹⁵⁶

Federal district courts, too, have refused to give protection to administrative faculty speech. In *Miller v. University of South Alabama*,¹⁵⁷ for example, a district court in Alabama concluded that comments at a faculty meeting by Moira Miller, a tenure track assistant professor, were not protected.¹⁵⁸ Miller alleged that she had not been reappointed because of statements she had made expressing concern about the lack of diversity among faculty candidates.¹⁵⁹ The *Miller* court failed to extend First Amendment protection, reasoning that Miller was speaking pursuant to the duties of her job.¹⁶⁰ Most recently, a district court in 2012 failed to protect a group of Idaho State University professors in their attempts to use a university mass-mail email service for speech dissemination.¹⁶¹ The university president had instructed a provisional faculty senate to develop a new constitution and bylaws to be approved by the president and the State Board of Education.¹⁶² When the senate tried to send a draft constitution to the entire faculty for an upcoming vote through the university email service, the Vice President of Academic Affairs objected, arguing that use of the email service “would give the mistaken impression that the poll was sanctioned by the Administration.”¹⁶³ His objection prevailed, so the faculty employees sought injunctive relief. The district court denied this request,

152. *Id.* at 1162–64.

153. *Id.* at 1164.

154. *Id.* at 1170.

155. *Id.* at 1166.

156. *Id.* at 1167.

157. No. 09-0146-KD-B, 2010 WL 1994910 (S.D. Ala. May 17, 2010).

158. *Id.* at *11.

159. *Id.* at *3.

160. *Id.* at *11.

161. *Idaho State Univ. Faculty Ass’n for the Pres. of the First Amendment v. Idaho State Univ.*, No. 4:12-cv-00068-BLW, 2012 WL 1313304, at *1 (D. Idaho Apr. 17, 2012).

162. *Id.*

163. *Id.* at *1–2.

concluding that *Garcetti* precluded protection because the senate members were acting in the course of their official duties.¹⁶⁴

These holdings, unlike the disparate decisions found in the arena of research and instruction, indicate that courts since *Garcetti* are thus far averse to protecting the “official” governance activities of faculty members. Although administrative hiring and advice on college and university academic policies are part of a longstanding tradition of shared governance in higher education, courts have held that speech made pursuant to the exercise of these responsibilities is outside of the protections they are willing to extend to other types speech on the part of public college and university professors.

C. Professors as Advisors

Public faculty members also assume various roles as advisors. When a professor is serving in the capacity of a formal advisor, he is acting as neither an instructor nor an administrator, but his relationship with a student or group of students is nonetheless based on his affiliation with a college or university. The holdings of cases addressing speech protections of professors acting in an advisory capacity are likely to be driven by facts and circumstances. In *Gorum v. Sessoms*,¹⁶⁵ for example, a tenured professor at Delaware State University was dismissed after being accused of changing student grades without departmental approval.¹⁶⁶ Despite having found misconduct of a “damning nature,” a grievance committee did *not* recommend termination of his employment due to what it cited as a lax and permissive academic atmosphere on the campus.¹⁶⁷ Notwithstanding the committee’s recommendation, however, the university’s president moved forward with termination procedures.¹⁶⁸ *Gorum* argued that his dismissal was actually in retaliation for a series of events unrelated to his grade changing, alleging that he had incurred disapproval for declining an invitation from the president to a university breakfast and for his role in advising a sanctioned football player.¹⁶⁹ When he sought protection under the First Amendment, the U.S. District Court for the District of Delaware held that *Gorum*’s advisory actions fell within the scope of his official duties and were therefore unprotected expressions.¹⁷⁰

On appeal, the Third Circuit held that student advising fell within the scope of *Gorum*’s official duties because it related to his knowledge and

164. *Id.* at *7.

165. 561 F.3d 179 (3d Cir. 2009).

166. *Id.* at 182.

167. *Id.* at 183.

168. *Id.*

169. *Id.* at 183–84.

170. *Id.* at 184.

experience with Delaware State University's disciplinary code.¹⁷¹ In Gorum's case, his revocation of the president's speaking invitation to a fraternity's Martin Luther King, Jr. breakfast and his advising of individual students were both pursuant to official duties because the university's by-laws articulated an expectation for professors to act as mentors and advisors.¹⁷² In a footnote, the court explained that the "full implications" of *Garcetti* were unclear, but that Gorum's particular instances of speech were so related to articulated official duties that the First Amendment could not protect them.¹⁷³

The advisory speech by a tenured professor in *Capeheart v. Hahs*¹⁷⁴ also failed to warrant protection under the First Amendment. In *Capeheart*, Loretta Capeheart, a tenured associate professor of Justice Studies at Northeastern Illinois University ("NEIU") in Chicago, advocated on behalf of student protesters who were members of student organizations she had advised.¹⁷⁵ 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.¹⁷⁶ When she was subsequently denied a promotion within her department, she filed suit in the United States District Court for the Northern District of Illinois, alleging violation of her right to free speech.¹⁷⁷ The district court dismissed her lawsuit, applying *Garcetti* and holding that her political activity was pursuant to her "official duties" and therefore not protected by the First Amendment.¹⁷⁸ Unlike the Third Circuit in *Gorum*, however, the *Capeheart* court did not acknowledge the Supreme Court's reservation about the applicability of the official duties standard articulated in *Garcetti*. The court merely explained, "since *Garcetti*, courts have routinely held that even the speech of faculty members of public universities is not protected when made pursuant to their professional duties."¹⁷⁹ The district court concluded, therefore, that Capeheart's protestations regarding the university's treatment of students were not protected under the First Amendment.¹⁸⁰ The *Gorum* and *Capeheart* decisions, taken together, indicate judicial reluctance to accord faculty speech in an advisory capacity the same protections that (at least some) courts have given speech in the context of scholarship or teaching.¹⁸¹

171. *Id.* at 185–86.

172. *Id.* at 186.

173. *Id.* at 186–87 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).

174. No. 08 CV 1423, 2011 WL 657848 (N.D. Ill. Feb. 14, 2011).

175. *Id.* at *1–2, *4.

176. *Id.*

177. *Id.*

178. *Id.* at *4.

179. *Id.*

180. *Id.*

181. It is worth noting that an exception to this trend is seen in a recent opinion of

D. Professors as Citizens

Of course, by its own terms, the per se rule in *Garcetti* does not apply to speech made by professors that is not pursuant to their official duties. Courts are not consistent, however, in their evaluations as to whether a professor is acting in accordance with his official duties or as a citizen. In *Dixon v. University of Toledo*,¹⁸² for example, Crystal Dixon, the Associate Vice President for Human Resources at the Medical College of Ohio, wrote a letter to a newspaper criticizing an opinion piece comparing the struggle for homosexual rights to the African-American experience.¹⁸³ In the letter, she did not identify herself by her job title.¹⁸⁴ Negative response to her letter led to her being placed on leave, however, and the university president, speaking on behalf of the university, publicly repudiated Dixon's opinion.¹⁸⁵ Dixon was terminated, and she filed suit alleging violations of her First and Fourteenth Amendment rights.¹⁸⁶ Notably, the district court concluded that Dixon's speech was not made pursuant to official duties and thereby not subject to *Garcetti*'s per se rule.¹⁸⁷ That conclusion did not help Dixon, however, because the court also found that Dixon's statements failed to warrant protection under the *Pickering* balancing test.¹⁸⁸ The court held that her free speech interests did not outweigh the efficiency interests of the government as her employer under the *Pickering* test since her article directly contradicted the university's policies granting homosexuals civil rights protections and could have done serious damage to the university by disrupting the human resources department and making homosexual employees uncomfortable or disgruntled.¹⁸⁹

In *van Heerden v. Louisiana State University*,¹⁹⁰ however, the determination that a professor's public activity was not pursuant to "official duties" led to protected speech. In *van Heerden*, an associate professor was selected by the Louisiana Department of Transportation to lead a group of scientists in determining the cause of flooding in New Orleans after Hurricane

the Ninth Circuit. See *Demers v. Austin*, No. 11-35558, 2013 WL 4734033 (9th Cir. Sept. 4, 2013). Though courts have generally been averse to protecting administrative speech, the *Demers* court found *Demers' Plan* to be a governance issue. See *id.* at *4. If the court had found his writings purely administrative, or had separated the writings out between scholarly (*The Bell Tower*) and administrative (*The 7-Step Plan*), perhaps the court's analysis would have been different, and this article's treatment of the case would fit better under the administrative/*Garcetti* purview. *Id.* See discussion *supra* Part III.

182. 842 F. Supp. 2d 1044 (N.D. Ohio 2012).

183. *Id.* at 1047.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 1049–50.

188. *Id.* at 1050–53.

189. *Id.*

190. No. 3:10–CV–155–JJB–CN, 2011 WL 5008410 (M.D. La. Oct. 20, 2011).

Katrina.¹⁹¹ Before and after his appointment, van Heerden was outspoken in his criticism of the U.S. Army Corps of Engineers.¹⁹² Louisiana State University (“LSU”) administrators feared losing federal funds and ordered him to stop making public statements about the Corps.¹⁹³ When he continued undeterred, the university stripped him of his teaching duties and did not renew his contract.¹⁹⁴ In response, van Heerden sued LSU for a variety of claims, including defamation, retaliation based on his protected First Amendment speech, and breach of contract.¹⁹⁵

In reviewing the case, the District Court of the Middle District of Louisiana extolled the importance of academics’ ability to express unpopular opinions, but did not expressly recognize an academic freedom exception to *Garcetti*.¹⁹⁶ Instead, the court merely suggested that a categorical application of *Garcetti* to the type of facts presented could lead to a whittling-away of academics’ ability to express opinions that are unpopular, uncomfortable or unorthodox.¹⁹⁷ It instead concluded, “although it is a close question, van Heerden was not acting within his official job duties.”¹⁹⁸ LSU’s change of van Heerden’s job description “to focus solely on research” reflected an attempt by the university to “disavow itself of van Heerden’s statements regarding the cause of levee failure.”¹⁹⁹ As a result, the court held that van Heerden’s statements were protected expressions of a citizen.²⁰⁰ As of the date of this writing, a number of his claims have been dismissed on partial summary judgment, and his First Amendment claim was ultimately settled out-of-court for nearly half a million dollars.²⁰¹

A similar result occurred in *Adams v. Trustees of the University of North Carolina-Wilmington*.²⁰² In *Adams*, a tenured assistant professor of criminology applied for promotion to full professor.²⁰³ Professor Adams had become a prolific Christian commentator on religious and political topics, and listed publications as well as media appearances and speeches to support

191. *Id.* at *1.

192. *Id.* at *5.

193. *Id.* at *1.

194. *Id.*

195. *Id.* at *2.

196. *Id.* at *6.

197. *Id.*

198. *Id.* at *5.

199. *Id.* at *6.

200. *Id.* at *7 (“[B]ased 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.”).

201. See *Van Heerden v. Bd. of Sup’rs of La. State Univ. & Agric. & Mech. Coll.*, No. 10–155–JJB, 2012 WL 1493834 (M.D. La. April 27, 2012); Bill Lodge, *LSU settles van Heerden Case for \$450,000* (Feb. 27, 2013), <http://theadvocate.com/home/5294342-125/lsu-settles-van-heerden-case>.

202. 640 F.3d. 550 (4th Cir. 2011).

203. *Id.* at 553.

his application.²⁰⁴ After being denied the promotion, Adams brought § 1983 action against the university, alleging that the university had retaliated against him on the basis of his speech.²⁰⁵ The district court relied on *Garcetti* and granted summary judgment to the university, holding that Adams' research and commentary had been performed in his official capacity and therefore fell under the umbrella of expression that could be subject to his employer's review.²⁰⁶

On appeal, the Fourth Circuit concluded that the district court had incorrectly applied *Garcetti*.²⁰⁷ The court noted that a *Garcetti* analysis might be appropriate in the instances in which a public university faculty member's assigned duties included a "specific role in declaring or administering university policy, as opposed to scholarship or teaching[.]" but distinguished Adams' commentary from those circumstances because "Adams' speech was intended for and directed at a national audience on issues of public importance . . ."²⁰⁸ The court was concerned that applying *Garcetti* to the "academic work of a public university faculty member" could preclude many forms of public speech or service in which academics engage and concluded that *Garcetti* was inapplicable because Adams' commentary focused on issues of public policy unrelated to his teaching duties or any other university employment assignments.²⁰⁹ In refusing to apply *Garcetti*'s per se rule, the court explained:

Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment.²¹⁰

In ruling that Adams' speech was not tied to any professorial duty, the court found the "thin thread" relating his speech to his official duties was insufficient to judge his expressions under the *Garcetti* standard.²¹¹ Rather, the court concluded that Adams' speech, which related to such issues as academic freedom, abortion, feminism, and religion, was made as a citizen speaking on matters of public interest, and should have been analyzed by the district court under the *Pickering/Connick* standard, not the *Garcetti*

204. *Id.* at 554–55.

205. *Id.* at 556.

206. *Id.* at 561.

207. *Id.*

208. *Id.* at 563–64.

209. *Id.*

210. *Id.* at 564.

211. *Id.*

test.²¹²

As the collective holdings of *van Heerden*, *Dixon*, *Demers*, and *Adams* exemplify, one of the ramifications of *Garcetti*'s logic is that faculty members may secure constitutional speech protections if they manage to portray their speech as being as far away from classroom and research duties as possible. At the same time, administrators are incentivized to go through just as much trouble to characterize all kinds of faculty speech as related to their official duties. The cultural understanding of academic freedom, which affords maximum protection of speech when it is most related to the official duties of teaching and scholarship, is thus at odds with recent case law, which extends the greatest First Amendment protection to those speaking as citizens on matters distant from classroom and research duties. This forces courts to grapple with the applicability of *Garcetti* to the myriad contexts of the educational environment. Speech relevant to a professor's role as a scholar or instructor is sometimes protected, but subject to censorship when *Garcetti* is applied inflexibly.²¹³ Despite the tradition of shared governance, a faculty member's administrative speech is almost never protected.²¹⁴ Similarly, expression relevant to a professor's advisory role has been subjected to the strict *Garcetti* analysis.²¹⁵ Only extramural speech—expression characterized as delivered in a professor's capacity of a citizen, and not as a faculty member—has any predictable chance of protection, precisely because it is not viewed as made pursuant to the professor's official duties.²¹⁶

Upon reviewing the spectrum of post-*Garcetti* case law, speech directly relevant to course instruction and speech markedly distant from the ivy-covered walls are the types most likely to be given First Amendment protection. Between these two extremes, *Garcetti* is a strong tool for would-be censors. In this gray area, lower courts remain disjointed in their application of the *Garcetti* standard to public faculty speech—this is highlighted especially in a growing Circuit split between the Ninth and Fourth Circuits, which hold that *Garcetti* does not apply to academic speech, and the Third, Sixth, and Seventh Circuits, which aver that *Garcetti* prohibits public college faculty members from claiming illegal retaliation for certain types of speech related to their job. Ultimately, the varied opinions reveal substantial questions that the Supreme Court should resolve: Are research and scholarship entitled to special First Amendment protection? Is a faculty member's administrative or advisory speech, relating to and arising from the faculty member's employment, different from other forms of public employee speech at all? The next two Parts address these concerns.

212. *Id.* at 565.

213. See discussion *supra* Part III.A.1–2.

214. See discussion *supra* Part III.B.

215. See discussion *supra* Part III.C.

216. See discussion *supra* Part III.D.

IV. THE NEED FOR FIRST AMENDMENT PROTECTION: CONTRACTS CANNOT WORK ALONE

A clarification of *Garcetti*'s holding is necessary for the protection of academic speech despite the fact that public colleges and universities can include academic freedom protections in contracts. As the AAUP has recognized, one means of protecting academic freedom is by crafting contractual relationships between colleges and universities and faculty members that enshrine the principles recognized in the 1940 Statement.²¹⁷ However, while tenured faculty members tend to possess contractual rights granting them significant freedom in their teaching and research,²¹⁸ tenured professors make up an ever-diminishing proportion of the academic landscape.²¹⁹ The majority of faculty members teaching today are not on a tenure-track, and their freedom to teach and research may not be protected adequately under contract.²²⁰ Furthermore, to claim that a professor's core academic speech can be adequately "protected by contract" assumes that every professor's contract is well written, up to date with all policies, and fully tailored to an individual's unique position and needs. This assumption runs contrary to realities exposed by contemporary lawsuits and surveys of the content of contractual provisions used within public colleges and universities regarding academic freedom.²²¹

In the eight years since *Garcetti*, college and university contracts have not proven to adequately protect expressions of faculty members.²²² With

217. See 1940 STATEMENT, *supra* note 76.

218. See Joan DelFattore, *Defending Academic Freedom in the Age of Garcetti*, ACADEME, Jan.–Feb. 2011, at 18, available at <http://www.aaup.org/AAUP/pubsres/academe/2011/JF/Feat/delf.htm>.

219. For example, almost twenty-five percent of the public two-year faculty members are at colleges that do not offer tenure. About ninety percent of all full-time lecturers and nearly fifty percent of all full-time instructors at four-year colleges and universities are non-tenure track. Among part-time faculty, slightly more than half (52.7%) are employed at the instructor rank, while another quarter (27.6%) are employed either as lecturers or with miscellaneous titles or none at all. Over half of these public institutions do not contractually extend academic speech protections to part-time faculty. See *The Status of Non-Tenure-Track Faculty*, REPORT BY THE COMM. ON PART-TIME AND NON-TENURE-TRACK APPOINTMENTS (AAUP, Washington, D.C.), Jun. 1993, available at <http://www.aaup.org/report/status-non-tenure-track-faculty>.

220. *Id.* at 160–161.

221. See, e.g., *Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos*, REPORT BY THE COMM. ON ACADEMIC FREEDOM AND TENURE (AAUP, Washington, D.C.), Nov. 2009, at 67 [hereinafter, *Protecting an Independent Faculty Voice*], available at <http://www.aaup.org/report/protecting-independent-faculty-voice-academic-freedom-after-garcetti-v-ceballos> (reviewing contracts at various public colleges and universities and evaluating areas for improvement; reporting on cases following *Garcetti* that indicate institutions that need improved academic freedom protections).

222. See, e.g., *Gorum v. Sessoms*, 561 F.3d 179, 186 (3d Cir. 2009) (professor's speech made in support of student at disciplinary hearing and speech made in withdrawing president's invitation to speak at a fraternity's prayer breakfast not covered

tenure comes the ability to speak freely, but for non-tenured faculty members, “[o]pen mouths lead to closed doors.”²²³ Over seventy percent of non-tenured faculty members report that their contracts lack even bare-bones protections for classroom speech and extracurricular expression.²²⁴ If these instructors say something out of line, all an institution has to do is decline to renew their contracts. No explanations are required; no grievance procedures provided. Under such conditions, “people fall like sparrows,” claims Richard Moser, the coordinator for adjunct faculty interests at the AAUP.²²⁵ Sometimes adjuncts who are “on the outs” with administrators are told that their courses have been canceled, or enrollment has dropped, or the department is retrenching—if they are told anything at all.²²⁶ Adjuncts are infrequently given warning before their termination.²²⁷ For example, Steven Bitterman, an adjunct at Southwestern Community College, claims that he was simply fired over the phone after telling his class that people could “more easily appreciate the biblical story of Adam and Eve if they considered it a myth.”²²⁸ Similarly, adjunct June Sheldon alleges that she was fired from San José Community College after a student complained that Sheldon’s answer to the student’s question about homosexual behavior was “offensive.”²²⁹ Her course, Human Heredity, confronted the issue of nature vs. nurture regarding the origins of human sexuality. Sheldon claims that after one student complained, the dean fired Sheldon for commenting that there were no female homosexuals.²³⁰

under his contract and not protected by the First Amendment); *Nuovo v. Ohio State Univ.*, 726 F. Supp. 2d 829 (S.D. Ohio 2010) (statements made by physician employed as professor at state university medical center regarding accuracy of certain medical tests that were conducted by university’s pathology laboratory not protected by First Amendment and not protected under his contract). *See also* Robert J. Tepper, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U. L. REV. 125 (2009) (review of cases in which professors have been found unprotected by contractual provisions since *Garcetti*).

223. Alison Schneider, *To Many Adjunct Professors, Academic Freedom is a Myth*, CHRONICLE HIGHER EDUC. A18 (Dec 10, 1999), available at <http://chronicle.com/article/To-Many-Adjunct-Professors/24384/>.

224. *See* Robin Wilson, *Adjuncts Fight Back Over Academic Freedom*, CHRONICLE HIGHER EDUC. A11–A19 (Oct. 3, 2008), available at <http://chronicle.com/article/Adjuncts-Fight-Back-Over/22742>.

225. *See* Schneider, *supra* note 223.

226. *Id.*

227. *Id.*

228. *See* Wilson, *supra* note 224, at A19.

229. *Sheldon v. Dhillon*, No. C-08-03438 RMW, 2009 WL 4282086, at *2 (N.D. Cal. Nov. 25, 2009); *See* Scott Jaschik, *Teaching or Preaching?*, INSIDE HIGHER EDUCATION (July 15, 2010), <http://www.insidehighered.com/news/2010/07/15/illinois#ixzz2RRawItf9>.

230. Ultimately, in exchange for dropping the lawsuit, the District paid Ms. Sheldon \$100,000 and expunged from her personnel file any record of her termination. *See Sheldon v. Dhillon resource page*, ALLIANCE DEFENDING FREEDOM (JULY 22, 2010), <http://www.adfmedia.org/News/PRDetail/153>.

Even non-tenured faculty members who enjoy contractual protections for academic freedom typically receive less protection than do tenured faculty members.²³¹ Frequently, expansive speech protections will not apply to those who contract with a college or university for short periods of time (e.g., adjunct professors).²³² For instance, a survey of the contractual protections extending to the speech of non-tenured faculty in the areas of teaching and research in 2011 indicates that adjunct professors who are given academic freedom protections largely lack the freedom to speak on subjects outside of pre-specified course material in their classrooms.²³³ Terri Ginsberg is an example. She alleges that in 2010, she was told that she would be considered for a tenure-track opening at North Carolina State University if she came to the campus for a full-time, nine-month position in its cinema program.²³⁴ It did not appear that the university considered her for the tenure-track job, and did not reappoint her to her program position at the end of her nine months. Ginsberg claims that she failed to secure a more permanent position because the university's administrators and faculty members did not approve of her pro-Palestinian views—she describes that she received particular criticism for her decision to screen a Palestinian-made film in a Middle Eastern film series she curated.²³⁵ Her pre-approved curriculum apparently did not extend to the showing of films outside of specific genres and production units, rendering her ineligible to bring an administrative grievance review.²³⁶ The relevance of these kinds of academic freedom constraints for adjunct and other non-tenure track faculty members is significant. Non-tenure track professors, including those who teach part time and those who teach full time but are not on tenure-track career paths, accounted for about half of all faculty appointments in American higher education during 2011; such teachers will likely continue to comprise a majority of faculty positions as long as state budgets are tight and public universities can cut costs by hiring non-tenure track instructors.²³⁷

231. See, e.g., Chris Jay Hoofnagle, *Matters of Public Concern and the Public University Professor*, 27 J.C. & U.L. 669, 707 (2001) (reviewing contracts of tenured and non-tenured faculty members at top public institutions in the United States).

232. See LAWRENCE WHITE, EMERGING ISSUES AFFECTING ACADEMIC FREEDOM AND TENURE 18 (2011); Mark Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831 (1987).

233. WHITE, *supra* note 232, at 13.

234. See Nora Barrows-Friedman, *Fight Continues for Academic Freedom in the US*, THE ELECTRONIC INTIFADA, Dec. 15, 2011, <http://electronicintifada.net/blogs/nora/fight-continues-academic-freedom-us>.

235. *Id.*; see also Ginsberg v. Bd. of Governors of Univ. of N.C., 718 S.E.2d 714, 715 (N.C. Ct. App. 2011).

236. Barrows-Friedman, *supra* note 234.

237. *Id.*; see also John W. Curtis & Saranna Thornton, *The Annual Report on the Economic Status of the Profession 2012–13*, ACADEME, Mar.–Apr. 2013, at 4, 7, 17–18.

Even tenured professors are challenged by academic freedom constraints. There are so many different employment situations and institutions that it is impossible to say confidently that contracts provide needed protection for tenured faculty members in all, or even most, situations in which they find themselves in the academy. A tenured professor's contract, which is formed by a letter of appointment, usually provides a default academic freedom provision.²³⁸ However, default contract provisions can fail to account for the idiosyncrasies of each faculty member's work.²³⁹ Even when professors have the opportunity to review contracts and modify them, a lack of legal training leads to oversight and can result in a lack of adequate speech protection. The more entrepreneurial, diverse, and complex a college or university faculty becomes, the more difficult it is to address every possible situation—or even most situations—in a contractual format that protects needs and interests of individual members. As a result, core academic speech is in peril. Contractual provisions need to be supported by First Amendment protections in those cases in which the employing college or university is a state actor so that the judiciary can protect the rights of governmentally employed professors to engage in truth-seeking, knowledge-building speech.

V. PROTECTING PROFESSORS: LINE-DRAWING AND TWO MODEST PROPOSALS

A. An Exception to *Garcetti* for Academic Speech: Why and Where to Draw a Line?

When a professor speaks as a teacher or scholar, administrator, or advisor, much of the speech reflects elements of that professor's expertise. Whether serving on a curriculum committee, voting on a departmental budget, or interviewing a potential colleague, the tasks may be deemed primarily administrative; even so, with each duty performed—and countless others that reflect the reality of the shared governance structure found in most higher education institutions—the so-called administrative tasks are infused with issues and decisions that rely on, or are at least related to, a scholar's expertise. The very concept of choosing curriculum that is "appropriate" undoubtedly enters the realm of a professor's expertise for discerning content and credibility. Affirming a budget requires knowledge of resources that pertain to the scholarly mission and goals of a department. Choosing a colleague necessitates a professional assessment of a candidate's qualifications and the fit of that candidate to the department and its

238. See AM. ASS'N OF UNIV. PROFESSORS, THE STATUS OF NON-TENURE-TRACK FACULTY 28 (2013). See Jim Jackson, *Express and Implied Contractual Rights to Academic Freedom in the United States*, 22 HAMLIN L. REV. 467, 469–70 (1999).

239. See *id.* at 499. See generally JOHN K. WILSON, PATRIOTIC CORRECTNESS: ACADEMIC FREEDOM AND ITS ENEMIES 68 (2008).

needs. In an institution where the core mission is the education of students, most professorial functions, and the speech made pursuant to those functions, can in some way be connected to the college or university's mission.

In our opinion, administrative and advisory forms of speech, however, do *not* rise to the level of core academic speech meriting an exception from the purview of the “pursuant to their official duties” rule set forth in *Garcetti*.²⁴⁰ We believe that while administrative and advisory speech may be the product of a professor's expertise, neither administrative nor advisory speech is crucial to truth-seeking in teaching and scholarship, the kind of speech that fosters a wide exposure to that “robust exchange of ideas which discovers truth ‘out of a multitude of tongues.’”²⁴¹ Simply put, speech required to challenge and explore unpopular or unchartered areas—the kind that sometimes leads to improved economic theories, innovative scientific discovery, or philosophical debates about social reform—is special in a way that speech related to allocating funding or managing a student group is not. Forms of administrative and advisory speech are not sufficiently bound to the “truth-seeking, instructive character” of core academic speech to warrant special constitutional protection.

We believe that the kind of academic speech that should receive special First Amendment protection is that which feeds directly into the “free and unfettered interplay of competing views . . . essential to the institution's educational mission.”²⁴² Administrative and advisory speech, in contrast, forwards logistical purposes. While these forms of speech are important, they aim primarily at advancing the operational capacities of a college or university. When a faculty member is complaining about leave policy, or procedural decisions as to how teaching assistants are subsidized, or how funding is allocated between departments, this speech may touch on academic interests but it does not contribute to the quintessential “marketplace of ideas” that merits full, or indeed heightened, First Amendment protection.²⁴³ Allowing it to be subject to review by college or university officials does not, in our opinion, chill “opportunity for free political discussion” in such a way as to threaten “the security of the Republic, the very foundation of constitutional government.”²⁴⁴

Indeed, to regard any and all speech made by academics as protected by impervious ivory tower walls would be to provide a bastion in which discrimination could proliferate, contracts could be broken, taxpayer dollars could be misused, and self-interest could abound. Accordingly, courts must determine when administrative or advisory speech—even if it somehow relates to academic concerns—should be protected under the law. Even ten-

240. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

241. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

242. *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989).

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

244. *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

ure decisions, which have received great deference from the courts, cannot be fully assured a hands-off approach when the issue before the court is less about applying professional judgment and more about speaking in a discriminatory or otherwise illegal manner.²⁴⁵ As explained by the court in *Craine v. Trinity College*, a “university cannot claim the benefit of the contract it drafts but be spared the inquiries designed to hold the institution to its bargain The principle of academic freedom does not preclude us from vindicating the contractual rights of a plaintiff who has been denied tenure in breach of an employment contract.”²⁴⁶ Courts play a crucial role in assuring that institutions comply with the law; to do so requires deeming some speech of scholars to be “pursuant to official duties” and thus not constitutionally protected.²⁴⁷

Ultimately, core academic speech is special; when professors speak within the realm of academic disciplines, they are furthering the public interest in freedom to explore ideas. Even though public college or university professors are government employees, they deserve constitutional protection when they are engaged in the practice of expressing speech relevant to their fields and their positions. The nature of a public college or university professor’s role is to generate better teaching and scholarship, constantly striving towards “truth” in each discipline. Academic freedom is worth protecting not because it is exceptionally important to our national well-being; that standard alone would create enhanced First Amendment protection every time speech furthers an important national interest. Rather, academic speech is the kind of speech the First Amendment is designed to protect because the role of a professor in teaching or researching is one in which intellect must be free to safely range and speculate and push inquiry forward. Scientific and philosophical discoveries can be tested, verified and perfected, or analytical rashness rendered innocuous, and error exposed, only by the collision of mind with mind, and knowledge with knowledge.²⁴⁸

245. See, e.g., *Kyriakopoulos v. George Washington Univ.*, 866 F.2d 438, 447 (D.C. Cir. 1989) (“This case does not involve a judicial recalculation of the University’s evaluation of a professor’s scholarly merit. The factfinder’s scrutiny need extend only far enough to ensure that the University perform its contractual duty”); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 201–02 (1990) (holding that neither evidentiary privilege nor First Amendment academic freedom protects peer review materials that pertain to discrimination charges in tenure decisions).

246. 791 A.2d 518, 540 (Conn. 2002) (quoting *Kyriakopoulos v. George Washington Univ.*, 866 F.2d 438, 447 (D.C. Cir. 1989) (internal quotation marks omitted)).

247. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

248. See *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 497 (2d Cir. 2013) (“Where, as here, a statement is made as part of an ongoing scientific discourse about which there is considerable disagreement, the traditional dividing line between fact and opinion is not entirely helpful” “[S]tatements about contested and contestable scientific hypotheses constitute assertions about the world that are in principle matters of verifiable “fact,” for purposes of the First Amendment and the laws relating to fair competition and defamation, they are more closely akin to matters of opinion”).

Currently, the speech of public college and university faculty members is endangered by the willingness of some courts to apply *Garcetti*'s per se rule to core academic speech and chilled by professors' uncertainty as to whether that rule will be applied to the particular facts of their case. Supreme Court guidance on this topic is of paramount importance to protect free inquiry and discourse. In modern institutions of higher education, there will often be blurred lines when trying to discern which professorial functions involve pure professional expertise, such as teaching and scholarship, and which are more administrative or advisory, such as providing committee service. Notwithstanding the fact-intensive nature and challenge of line-drawing between professorial duties, however, courts need more clarity and consistency in jurisprudence related to faculty speech; the line must be drawn somewhere. The U.S. Supreme Court's clarification of *Garcetti*'s official duties test and its application to academic speech is essential to the intellectual growth of the nation. This paper next presents two proposals: one suggesting types of speech that should be assured protection from the courts, the other outlining areas of speech for which academics themselves are the most appropriate guardians.

B. Carving Out an Explicit Exception for Core Academic Speech

Without the assurance of an exception for core academic speech, many faculty members will be discouraged from taking novel or unpopular positions. Important ideas will never be advanced; intellectual debate and advancement will suffer.²⁴⁹ Scholarship cannot flourish in an atmosphere of chilled speech. Justice Kennedy's reservation in *Garcetti* offers space in which the Court may explicitly articulate how the First Amendment can protect faculty speech that relates to instruction and research. Building on the past eight years of speech cases in the lower courts, the Supreme Court can forge an exception to *Garcetti*'s rule for the core academic speech of faculty members at public colleges and universities while keeping intact the heart of the decision with regard to governmental employees.

Due to the burgeoning *Garcetti* progeny²⁵⁰ and the special nature of core academic speech,²⁵¹ the Court should limit an academic speech exception to scholarship and instruction. The reservation in *Garcetti* and its subsequent interpretation within the lower courts speaks clearly to the need to protect core academic speech, or that which is directly relevant to research and course-related discussion. It would be prohibitively difficult, and likely confusing, to attempt to extend an exception for administrative or advisory

249. As the late Chief Justice Earl Warren wrote, "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

250. See discussion *supra* Part III.

251. See discussion *supra* Part V.A.

speech to faculty members in light of *Garcetti*'s articulation of the governmental interest in controlling employee expression in the course of their official duties. In typical public workplaces, the government is understandably concerned with efficiency and employee morale.²⁵² Colleges and universities need to be efficient as well, of course, even if their primary goals are research and teaching. Administrative debate that is an accepted, and even necessary, part of the creation of strong faculty and academic curriculum can still be presented in ways that are disruptive; so can speech given in the process of advising certain students and student groups.

A teaching-and-research exception would be consistent with pre-*Garcetti* treatment of academic speech. Prior to *Garcetti*, many courts already distinguished the protections for speech related to teaching and research from other forms of professorial speech.²⁵³ While courts intervened in administrative or advisory speech that created unfair or unjust situations, they practiced judicial deference in matters closely related to teaching and scholarship.²⁵⁴ Courts linked the rationales for judicial deference in academia to policies of autonomy, judicial respect for academic governance, and the judiciary's lack of expertise in the complex matters of academia.²⁵⁵ These rationales reflected the reality that nowhere are the matters of academia more complex than when a professor speaks within the scope of his expertise. Although any professor's relationship with his institution is likely to be contractual, and ultimately overseen by an administrator, the content and format of instruction is significantly determined by the profession-

252. See *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring).

253. See, e.g., *Linnemeier v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 760 (7th Cir. 2001) ("Classrooms are not public forums; but the school authorities and the teachers, not the courts, decide [the content of] classroom instruction . . ."); *Blum v. Schlegel*, 18 F.3d 1005, 1011 (2d Cir. 1994) ("[L]aw schools promote an environment characterized by the active exercise of [a professor's] First Amendment rights. Indeed, free and open debate on issues of public concern are essential to a law school's function."); *Piarowski v. Ill. Cmty. Coll. Dist.*, 759 F.2d 625, 629 (7th Cir. 1985) (noting "both the freedom of the academy . . . and the freedom of the individual teacher").

254. See, e.g., *Gupta v. New Brit. Gen. Hosp.*, 687 A.2d 111, 121–22 (Conn. 1996) (distinguishing between employment terms and educational terms of residency agreement and holding that resident could be dismissed because decision was evaluation of resident's employment); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 230 (1985) (noting judicial deference to academic professionals on matters of substantive due process and concluding that university officials did not violate the student's substantive due process rights); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 95–96 (1978) (separating academic dismissals from disciplinary dismissals, and holding that formal hearings before decision-making bodies need not be held in the case of academic dismissals).

255. See R.M. O'Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept?* 36 J.C. & U.L. 729, 734–35 (2010). See also *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013) (internal citations omitted) (explaining, in the context of race-sensitive admissions policies, that judicial deference is due when academic decisions are "reasoned [and] principled," "integral" to a university's mission, and "based on [the university's] experience and expertise").

al judgment of a professor. Professors, within the parameters of administrative and/or departmental curricular decisions, develop their courses. Courts recognize that the expertise inherent to teaching and research, and speech associated with such activities, are complex areas into which the judiciary should not ordinarily intrude.²⁵⁶

For areas of professional activity in which the judiciary may be less restrained in their review, such as administrative and advisory tasks, professors should receive institutional policy-based protection from punitive action by college and university officials for certain speech made pursuant to their responsibilities as administrators and as advisors. Due to the tradition of shared governance and the import of an informed college and university administration, a lack of protection in this arena would be inconsistent with development of critical intellectual faculties and the advancement of knowledge. Both administrative and advisory activities of university professors provide for the dissemination of knowledge by academics and the protection of a capable and accomplished faculty. In the absence of First Amendment protection for these types of speech, internal policies can safeguard them.

C. Internal Policies to Protect Administrative and Advisory Speech

To protect forms of administrative and advisory speech, public institutions should expand and revitalize campus policies in recognition of the role that this speech plays in fostering a robust academic environment. Indeed, the *Garcetti* court itself implicitly recognized that these kinds of mechanisms might protect professors who speak out pursuant to official duties.²⁵⁷ Forms of institutional protections for faculty speech already exist within the academic arena; as discussed in Part IV of this article, many public institutions already maintain some internal protections for the speech of their academic personnel.²⁵⁸ While internal policies usually provide less robust safeguards than the First Amendment protection, which speech in the context of teaching and research should receive, they still provide valuable protections for administrative and advisory speech that, for the reasons given above, is not eligible for First Amendment protection.

Springing from a tradition of shared governance, many public colleges and universities already have internal provisions that protect expression within the scope of administrative and advisory governance.²⁵⁹ Giving fac-

256. O'Neil, *supra* note 255, at 729.

257. *Garcetti v. Ceballos*, 547 U.S. 410, 425–26 (2006) (referencing cases involving safeguards in the form of rules of conduct and constitutional obligations apart from the First Amendment).

258. MATTHEW FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 48 (2009).

259. The 2001 Survey of Higher Education Governance is one of the few research studies to look in-depth at the subject. It surveyed 1321 four-year institutions. See Kaplan, *supra* note 86, at 172. Those surveyed reported that 89.9% of the faculties had

ulty members responsibility for reviewing budgetary and tenure decisions increases their buy-in to the college or university mission and is a way to strengthen their commitment to the production and dissemination of knowledge. A faculty that trusts the administration is likely to support it and work for both the letter and the spirit of a department's policies.

Public colleges and universities have many options by which to strengthen existing, or to create new, academic freedom policies protecting administrative and advisory speech. The AAUP is one organization offering boilerplate language for such a policy, and policies can be tailored by individual colleges and universities to reflect the values and purposes of each institution.²⁶⁰ For those who enjoy tenure, AAUP's sample regulations provide that "[a]dequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers. Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens."²⁶¹ The regulations further declare that "[a]ll members of the faculty, whether tenured or not, are entitled to academic freedom as set forth in the 1940 Statement"²⁶² The AAUP regulations further require that colleges and universities provide a hearing procedure in the event that a faculty member alleges that a decision not to reappoint him or her was based upon considerations that violate academic freedom.²⁶³ These principle-based policies protect non-tenured and tenured faculty members alike, ensuring protections for administrative speech and guaranteeing academic due process for alleged violations.²⁶⁴

Tenure can serve to protect all forms of academic speech.²⁶⁵ By limiting

determinative or joint authority with the administration on content of the curriculum; on faculty appointments, it was 69.9% of the faculties; on tenure, it was 66.1%. *Id.* at 184. Participation in governance of academic matters has increased over time. In 1970, faculties determined the content of curriculum at 45.6% of the institutions, and they shared curricular authority with the administration at another 36.4%. *Id.* at 201–02. By 2001, faculties determined curriculum content at 62.8% of the institutions, and they shared authority at 30.4%. In 1970, faculties determined the appointments of full-time faculty in 4.5% of the institutions, and they shared authority at 26.4%. *Id.* By 2001, faculties determined appointments of full-time faculty in 14.5% and shared authority in 58.2% of the institutions. *Id.*; see also Brian Pusser & Sarah E. Turner, *Nonprofit and For-Profit Governance in Higher Education*, in *GOVERNING ACADEMIA* 235, 251 (Ronald G. Ehrenberg ed., 2004).

260. See *Recommended Institutional Regulations on Academic Freedom and Tenure*, AM. ASS'N OF UNIV. PROFESSORS, <http://www.aaup.org/file/regulations-academic-freedom-tenure.pdf> (last visited Oct. 8, 2013).

261. *Id.* at 4.

262. *Id.* at 6.

263. *Id.* at 6–7.

264. See Foreword to *Recommended Institutional Regulations on Academic Freedom and Tenure*, AM. ASS'N OF UNIV. PROFESSORS, <http://www.aaup.org/file/regulations-academic-freedom-tenure.pdf> (last visited Oct. 8, 2013).

265. Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Free-*

the ability of the college or university to fire or otherwise take adverse actions against faculty members, tenure provides protection for faculty members to teach and write as they choose. As Professors Brown and Kurland explain, “a system that makes it difficult to penalize a speaker does indeed underwrite the speaker’s freedom.”²⁶⁶ A tenured faculty member can take a position on an administrative policy knowing that it is unpopular without worrying that it will lead to reprisals. Tenure offers both procedural and substantive protections. Procedurally, tenure means that a faculty member is entitled to continuing employment unless the college or university initiates an action against the faculty member and succeeds in proving “cause” for termination.²⁶⁷ It is the college or university that must begin the proceedings to terminate a tenured faculty member and that must bear the significant burden of proving the justification for its proposed action.²⁶⁸ Substantively, tenure means that only specific, narrowly defined circumstances will constitute “cause” sufficient for termination or other adverse employment actions.²⁶⁹ Although the definition of “cause” varies by college or university, in general there must be serious violations of the law or of principles of academic honesty to meet the standard.²⁷⁰

For untenured professors, contracts can provide protection for administrative and advisory speech equivalent to the procedural and substantive protections afforded by tenure. Long-term contracts coupled with a grievance procedure that would need to be followed before a faculty member could be terminated, could provide job security in the form of contractual protections and procedural safeguards in the nature of grievance hearings and decisions by faculty panels. A contract could have language something like this:

Faculty members have the right to express views on educational policies and institutional priorities of their schools without the imposition or threat of institutional penalty, subject to duties to respect colleagues and to protect the school from external misunderstandings.²⁷¹

This language protects administrative and advisory speech, but protects colleges and universities from speech that could be construed as reflecting

dom, 53 LAW & CONTEMP. PROBS. 325, 331 (1990).

266. *Id.* at 329.

267. *Id.* at 325.

268. *Id.* at 328–30.

269. *Id.*

270. *See id.*

271. This suggestion is based on a similarly drafted proposal by J. Peter Byrne in a 1997 AAHE working paper. J. Peter Byrne, *Academic Freedom Without Tenure?*, in INQUIRY #5, AAHE NEW PATHWAYS WORKING PAPER SERIES (1997). For a detailed critique of Byrne and contractual guarantees of academic freedom, see Erwin Chemerinsky, *Is Tenure Necessary to Protect Academic Freedom?* (Occasional Papers from the Center for Higher Education Policy Analysis, 1997).

an institution's viewpoint and ensures the priority of collegial respect among faculty members.

As a resource for colleges and universities, the AAUP offers general strategies as to how to respond to alleged violations of academic freedom; it recommends that in most instances, a formal investigation and report should occur.²⁷² Alternative suggestions offer the use of peer-based administrative remedies, in which faculty members cannot assert certain rights until internal administrative mechanisms are exhausted.²⁷³

A final important step that tenured and non-tenured faculty can take to protect academic freedom is to invoke state constitutional or statutory provisions. For example, a faculty member could file a claim under the state's equivalent of the First Amendment, and a state court might not be inclined to adopt the *Garcetti* limitation or may have a more expansive view of academic freedom than under the First Amendment to the United States Constitution.²⁷⁴ It is possible that First Amendment-related rights of public college and university faculty members may be more strongly protected through certain interpretations of state constitutional provisions than they might be through the federal constitution.²⁷⁵ Likewise, a state may guarantee due process, both procedural and substantive.²⁷⁶ This tactic may work well when a state court signals that it is open to arguments of free speech, procedural due process, and protection against arbitrary action. State courts might conceivably have differing interpretations of the *Garcetti* per se rule's application to matters of academic freedom.

CONCLUSION

Garcetti, if applied to core academic speech, portends an ominous future for public college and university professorial expression. It is imperative that the Supreme Court, drawing on its reservation in *Garcetti*, craft an ex-

272. See *Recommended Institutional Regulations on Academic Freedom and Tenure*, *supra* note 264, at 9.

273. See, e.g., *Reilly v. City of Atlantic City*, 532 F.3d 216, 235–36 (3d Cir. 2008); *Santana v. City of Tulsa*, 359 F.3d 1241, 1244 (10th Cir. 2004); *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000).

274. See, e.g., Article II, section 17 of the New Mexico Constitution, which provides affirmative protection by allowing individuals to “freely speak, write and publish.” N.M. CONST. art. II, § 17.

275. See, e.g., *Rubin v. Ikenberry*, 933 F. Supp. 1425, 1437 n.4 (C.D. Ill. 1996) (holding that plaintiff's liberty interest was the same under both the state and federal constitutions); *Mills v. W. Wash. Univ.*, 208 P.3d 13, 20–21 (Wash. Ct. App. 2009) (analyzing academic freedom under both federal and state law), *rev'd*, 246 P.3d 1254 (Wash. 2011).

276. See, e.g., *Licari v. Ferruzzi*, 22 F.3d 344 (1st Cir. 1994); *State v. Germane*, 971 A.2d 555 (R.I. 2009). Procedural due process protection ensures that when government action depriving a person of life, liberty, or property survives substantive due process review, that action is implemented in a fair manner. *State v. Thompson*, 508 S.E.2d 277, 282 (N.C. 1998).

ception to the public employee speech doctrine for the speech of academics and address the parameters of such an exception. If it does not do so, lower courts will increasingly diverge in their application of *Garcetti* to various types of academic speech, thus chilling the speech of professors who are unable to guess the framework that will be applied to the facts of their particular situations. Core academic speech is special; when professors speak within the realm of academic disciplines, they are pushing inquiry forward and furthering the public interest. It is the kind of speech the First Amendment is designed to protect because the role of a professor in teaching or researching is one in which intellect must be free to safely range and speculate. Academic speech should not be suppressed because of its content.

While administrative and advisory speech may not be eligible for First Amendment protection, the tradition of shared governance recommends a degree of extra-judicial protection for such speech. College and university officials and faculty members should collaborate to use internal mechanisms to protect these forms of speech. With rights of shared governance for faculty members come responsibilities, and faculty members themselves can strengthen protections for freedom of speech in their varied roles. The well-being of a college or university relies on many forms of official expression by both administrative personnel and faculty members, so it is in the interest of both college and university officials and professors to cooperate to establish protections for respectful but candid speech in the exercise of administrative and advisory responsibilities. In sum, with the protection of an academic speech exception to *Garcetti*'s "pursuant to official duties" rule and internal policies reflecting the traditions of shared governance, public college and university faculty members will remain free to preserve the "transcendent value" of academic freedom to society.²⁷⁷

277. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . .").

NEVER ASCRIBE TO MALICE THAT WHICH IS
ADEQUATELY EXPLAINED BY INCOMPETENCE:
A FAILURE TO PROTECT STUDENT VETERANS

MARK ANDREW NELSON*

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INTRODUCTION

Recent years have seen a surge in the for-profit higher education market. Enrollment at for-profit colleges and universities has expanded significantly. There has also been an influx of veterans of the United States armed services at many of these proprietary institutions. Proponents of the for-profit educational model argue that the growth in the for-profit higher education industry has ushered in a dramatic increase in access to higher education for traditionally underserved segments of the population. A growing number of critics, however, have pointed to various forms of abusive conduct on the part of for-profit institutions and the frequent recurrence of unfavorable outcomes experienced by their enrollees. This Note seeks to analyze a narrow segment of the for-profit debate—how for-profit institutions treat United States military veterans. By examining the interplay between educational funding programs, such as the Post-9/11 GI Bill and Title IV of the Higher Education Act, this discussion aims to expose the impact that veterans’ educational benefits programs have had on the for-profit higher education industry. More importantly, this discussion will highlight the manipulative and deceitful recruitment practices implemented by a number of for-profit institutions at the expense of student veterans. Finally, this Note will examine the uncoordinated and contradictory efforts by the executive, legislative, and judicial branches of the federal government to curb abuses in the for-profit higher education market. This Note will describe the reasons why government efforts have been ineffective at addressing the problem and perhaps have even exacerbated the risk of student veterans falling prey to predatory recruitment tactics of some nefarious proprietary colleges and universities.

I. BACKGROUND

Title IV of the Higher Education Act of 1965 (“HEA”) primarily shapes the current legal and economic landscape of the for-profit education industry.¹ Congress enacted the HEA as a federal mechanism for financing the college and university costs borne by economically disadvantaged

1. Higher Education Act of 1965, Pub. L. No. 89-329, tit. IV, 79 Stat. 1232 (codified as amended in scattered sections of 20 U.S.C. §§ 1070 to 1099c-2, 42 U.S.C. §§ 2751-2756b (2012)).

students.² Financial assistance is available to qualified students via several programs established under Title IV of the HEA (“Title IV”).³ Qualifying students are eligible for federal Pell grants, which need not be repaid,⁴ as well as federally guaranteed loans, which must be repaid by the recipient student.⁵ Initially, participation in Title IV programs was limited to students of public and private non-profit institutions of higher learning.⁶ However, a Congressional shift of position in 1972,⁷ while perhaps well-intentioned, nevertheless set in motion the emergence of for-profit education, which has today become a lucrative and increasingly scandalous industry.⁸

Beginning in the early 1980s, the profit-seeking higher education industry has enjoyed a thirty-year period of rapid expansion and profitability.⁹ By the late 1980s, “[s]tudents at for-profits accounted for 41% of the [Title IV guaranteed loan program] borrowers.”¹⁰ More recently, enrollment in the for-profit college and university sector “increas[ed] from 766,000 students in 2001 to 2.4 million students in 2010.”¹¹ Similarly, the amount of money paid to for-profit institutions of higher education (“FPIs”)¹² in the form of Title IV grants and loans grew

2. S. REP. NO. 89-621, at 28 (1965).

3. 20 U.S.C. § 1070 (2012).

4. *Id.* at § 1070a.

5. *Id.* at § 1071. Importantly, these loans are notoriously dangerous because it is difficult to discharge them in bankruptcy. Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179 (2009). *But see* Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882 (7th Cir. 2013) (affirming a bankruptcy judge’s order to discharge a student loan where the obligor has demonstrated financial circumstances amounting to a “certainty of hopelessness”).

6. Higher Education Act of 1965, Pub. L. No. 89-329, tit. IV, pt. B, § 421(a)(1), 79 Stat. 1232, 1236.

7. Education Amendments of 1972, Pub. L. No. 92-318, tit. I, pt. D, § 417B(a), 86 Stat. 235, 258 (extending Title IV eligibility to students enrolled at proprietary colleges and universities).

8. *See, e.g.*, Kelly Field, *Undercover Probe Finds Widespread Deception in Marketing by For-Profit Colleges*, CHRON. HIGHER EDUC. (Aug. 1, 2010), <http://chronicle.com/article/Undercover-Probe-Finds/123744/>; S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS MAJORITY COMMITTEE STAFF REPORT AND ACCOMPANYING MINORITY COMMITTEE STAFF VIEWS 53 (2012) [hereinafter FAILURE TO SAFEGUARD] (discussing for-profit institution “tactics [that] most people would find misleading and deceptive in order to secure enrollments”).

9. Jennifer Gonzalez, *Federal Proposal Could Jeopardize For-Profit Programs, Especially Bachelor’s Degrees*, CHRON. HIGHER EDUC. (May 17, 2010), <http://chronicle.com/article/Federal-Proposal-on-Student/65604>.

10. William Beaver, *Fraud in For-Profit Higher Education*, 49 SOC’Y 274, 275 (2012).

11. FAILURE TO SAFEGUARD, *supra* note 8, at 31.

12. The Code of Federal Regulations defines and uses the term “proprietary

from about \$5 billion in 2001 to \$32 billion in 2010.¹³ Since Congress extended eligibility for Title IV funding to students enrolled at FPIs, the rate at which this market grows has steadily gained momentum.¹⁴ Since then, the number of student veterans pursuing degrees at FPIs has similarly increased at an unprecedented rate.¹⁵ Today, “[t]he best known of the for-profits is the University of Phoenix with an enrollment of 450,000 making it the second largest university system in the country.”¹⁶

Proponents of the for-profit educational market argue that the aggressive recruitment techniques and innovative instructional programs that are commonly associated with FPIs have expanded access to higher education for traditionally underrepresented demographics, such as adults, racial and ethnic minorities, the economically disadvantaged, and even the homeless.¹⁷ Proponents highlight this expansion of access in defense of the for-profit model.¹⁸ Proponents of FPIs also argue that these institutions have helped to fill a void left by the two-fold effect of shrinking higher education budgets at the state level and the ubiquitously growing demand for skilled labor.¹⁹ They claim that criticisms of FPIs are unduly harsh,²⁰

institution” in a similar sense to my use of the term FPI. *See, e.g.*, 34 C.F.R. § 600.5(a). For the purposes of this Note, the terms may be used interchangeably.

13. FAILURE TO SAFEGUARD, *supra* note 8, at 15. *See also*, Beaver, *supra* note 10, at 275 (“Like the G.I. Bill, the large infusion of government funds provided another windfall for proprietary education. During the 1980s alone, it is estimated that for-profits accounted for one-half the increase in higher education’s total enrollment, and federal student-aid became the crucial element to the financial well-being and survival of for-profit schools.”).

14. EARNINGS FROM LEARNING: THE RISE OF FOR-PROFIT UNIVERSITIES 51 (David W. Breneman et al. eds., 2006) (“Over the past three decades, for-profit enrollments . . . have increased at about seven times the rate of the entire postsecondary sector, or at a rate of 10.4% versus 1.4% for [traditional colleges and universities].”).

15. S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., BENEFITTING WHOM? FOR-PROFIT EDUCATION COMPANIES AND THE GROWTH OF MILITARY EDUCATIONAL BENEFITS 1 (2010) [hereinafter BENEFITTING WHOM?] (“Revenue from VA educational programs for [a selection of] 18 for-profit education companies increased from \$26.3 million in 2006 to an expected \$285.8 million for 2010, including a five-fold increase between 2009 and 2010.”).

16. Beaver, *supra* note 10, at 274.

17. Daniel Golden, *The Homeless at College*, BLOOMBERG BUS. WK. (Apr. 30, 2010), http://www.businessweek.com/magazine/content/10_19/b4177064219731.htm.

18. Kenneth J. Cooper, *Minority Leaders Oppose “Gainful Employment” Rules for For-Profit Colleges*, DIVERSE (Sep. 20, 2010), <http://diverseeducation.com/article/14154/>.

19. FAILURE TO SAFEGUARD, *supra* note 8, at 167 (“The for-profit sector will continue to play an important role in providing capacity to the Nation’s higher education infrastructure. And, indeed, the sector can play a constructive role, bringing much-needed innovation to the higher education sector and producing graduates in high-demand fields.”).

20. Bonnie K. Fox Garrity, Mark J. Garrison & Roger V. Fiedler, *Access for Whom, Access to What? The Role of the “Disadvantaged Student” Market in the Rise of For-Profit Higher Education in the United States*, 8 J. FOR CRITICAL EDUC. POL’Y

ostensibly because abusive and unethical recruitment practices are kept in check by a number of legislative safeguards embedded within the HEA. The lion's share of this Note is dedicated to an analysis of the efficacy of these safeguards in the context of student veterans, in light of "factors in the social, political, and economic environment that are likely to facilitate malfeasance" among FPIs.²¹

A. Statutory Rules of the HEA

There are statutory safeguards in place to discourage abuse by FPIs that participate in Title IV programs. Due to the complexity of the legal framework under the HEA, it is crucial for the purposes of this Note to carefully distinguish between purely statutory rules *vis-a-vis* regulatory rules: the former are fully animated by the text of legislation produced by Congress, while the latter are at least partly defined by regulations promulgated by federal administrative agencies, such as the Department of Education. The four salient rules in this regard are: (1) the "Cohort Default Rate Rule," (2) the "90/10 Rule," (3) a rule prohibiting FPIs from communicating certain misrepresentations to students, and (4) a rule against performance-based pay incentives for recruiting staff.²²

Under the Cohort Default Rate Rule, students of institutions that produce a sufficiently egregious proportion of graduates (and drop-outs) who fail to repay their loans are ineligible for Title IV programs.²³ The restriction operates by tracking the average rate at which former students of an institution become delinquent on remitting monthly payments to their loan servicers.²⁴ Where more than twenty-five percent of a particular institution's former students default for three continuous years,²⁵ or where more than forty percent default in any given year, the Secretary of Education can usually revoke the eligibility of students at that institution to participate in Title IV funding.²⁶ This is said to discourage "diploma mills"—institutions that produce graduates without marketable skills or with false expectations of gainful employment.²⁷ "[S]chools receive the

STUD. 203, 219 (2010).

21. Beaver, *supra* note 10, at 277.

22. The Cohort Default Rate Rule, the misrepresentation prohibition, and the ban on performance-based pay incentives apply to all colleges and universities that participate in Title IV, while the 90/10 Rule applies only to proprietary institutions. Compare 20 U.S.C. §§ 1085(a), 1094(a)(20), 1094(c)(3)(A) (2012), with 20 U.S.C. § 1094(a)(24) (2012).

23. 20 U.S.C. § 1085(a) (2012); 34 C.F.R. § 668.187 (2012).

24. *Id.*

25. *Id.* at § 668.187(a)(2).

26. *Id.* at § 668.187(a)(1) (revocation of eligibility to participate in Title IV is stayed during pendency of an appeals process).

27. Amanda Harmon Cooley & Aaron Cooley, *From Diploma Mills to For-Profit Colleges and Universities: Business Opportunities, Regulatory Challenges, and Consumer Responsibility in Higher Education*, 18 S. CAL. INTERDISC. L.J. 505, 508

benefit of accepting tuition payments from students receiving federal financial aid, regardless of whether those students are ultimately able to repay their loans. Therefore, Congress codified statutory requirements in the HEA to ensure against abuse by schools.”²⁸

Under the 90/10 Rule, students of FPIs that are not sufficiently funded by sources other than those provided by Title IV are ineligible to participate in Title IV programs. This statutory restriction, which was originally the “85/15 Rule,” was modeled after a similar rule that was in place to protect the integrity of veterans’ educational benefits programs.²⁹ Like the veterans’ benefits rule,³⁰ the HEA rule was imposed by Congress in response to “problems in the proprietary sector.”³¹ As the Government Accountability Office explained, “[t]he rationale behind this provision . . . is that schools providing a quality educational product should be able to attract a reasonable percentage of their revenues from sources other than Title IV.”³² Supporters of the provision said “it was intended to ‘weed out’ the ‘bad’ proprietary schools.”³³ They argue that if an FPI cannot pass a “modest market test” then it is likely to be engaged in fraudulent and deceitful practices.³⁴ In application, the rule requires that no FPI derive more than ninety percent of its revenue from Title IV programs.³⁵ As

(“These enterprises often centered around a motive of profiting from deception and a complete disregard for the ‘quality’ of the education they provided.”). *See also* Ass’n of Private Colls. & Univs. v. Duncan, 870 F. Supp. 2d 133, 147 (D.D.C. 2012) [hereinafter *Duncan II*] (“If [an educational program at a for-profit college or university] does not in fact lead to jobs for any of its students, it is reasonable to conclude that those students were not truly prepared.”).

28. Ass’n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 435 (D.C. Cir. 2012) [hereinafter *Duncan I*].

29. REBECCA R. SKINNER, CONG. RESEARCH SERV., RL32182, INSTITUTIONAL ELIGIBILITY AND THE HIGHER EDUCATION ACT: LEGISLATIVE HISTORY OF THE 90/10 RULE AND ITS CURRENT STATUS 4 (2005).

30. 38 U.S.C. § 3680A(d) (2012) (generally withholding funding for any given program if “the Secretary finds that more than 85 percent of the students enrolled in the course are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs”).

31. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HEHS-97-103, PROPRIETARY SCHOOLS: POORER STUDENT OUTCOMES AT SCHOOLS THAT RELY MORE ON FEDERAL AID 3 (1997), available at <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-HEHS-97-103/pdf/GAOREPORTS-HEHS-97-103.pdf>.

32. *Id.* at 1.

33. *Id.*

34. WILLIAM G. TIERNEY & GUILBERT C. HENTSCHE, NEW PLAYERS, DIFFERENT GAME: UNDERSTANDING THE RISE OF FOR-PROFIT COLLEGES AND UNIVERSITIES 174 (2007). “Since for-profit entities, by definition, set their prices above their costs, we are particularly concerned that student-aid funds will be used to pay the profit margin of business.” *Id.* (quoting David Warren, President of the National Association of Independent Colleges and Universities).

35. 20 U.S.C. § 1094(a)(24) (“In the case of [an FPI], such institution will derive not less than ten percent of such institution’s revenues from sources other than funds provided under [Title IV]”); 34 C.F.R. § 668.14(b)(16).

discussed in Part IIB, *infra*, it is significant that there is no provision that restricts the type of sources from which an FPI might derive the remaining ten percent of its revenue.³⁶

The statutory misrepresentation prohibition bans institutions from communicating any “substantial misrepresentation” regarding “the nature of its educational program, its financial charges, or the employability of its graduates.”³⁷ Through this ban, Congress intended to provide the Department of Education with “the necessary tools to keep unethical individuals from engaging in unlawful conduct and sharp practice in the name of helping financially disadvantaged students obtain the education necessary to succeed.”³⁸ Since the HEA does not define the term “substantial misrepresentation,” Congress left it to the Department of Education to shape the contours of this regulation.³⁹ Prior to 2011, the Department had construed “misrepresentation” to mean “[a]ny false, erroneous or misleading statement an eligible institution makes to a student enrolled at the institution, to any prospective student, to the family of an enrolled or prospective student, or to the Secretary.”⁴⁰ The Department construed a “substantial” misrepresentation to be one “on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person’s detriment.”⁴¹

The restriction on performance-based incentives for recruitment staff is part of an agreement into which institutions are required to enter as a condition precedent to participation in Title IV funding programs under the HEA. Each school must agree not to “provide *any* commission, bonus, or other incentive payment based *directly or indirectly* on success in securing enrollments or financial aid to any persons or entities engaged in *any* student recruiting or admission activities.”⁴² Congress appreciated that if recruiters were compensated on a performance basis then they might have an incentive to “enroll students who could not graduate or could not find employment after graduating.”⁴³ Nevertheless, the Department of Education departed from the broad rule implied by the statutory text, instead promulgating regulations with three exceptions, or “safe harbors,”

36. For example, tuition payments made by the Department of Veterans Affairs on behalf of a student veteran enrolled at an FPI is included in calculating the 10% of non-Title IV revenue. BENEFITTING WHOM?, *supra* note 15, at 7–8. *See also infra*, notes 85–100 and accompanying text.

37. 20 U.S.C. § 1094(c)(3)(A).

38. H.R. REP. NO. 94-1086, at 13 (1976).

39. Ass’n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 452 (D.C. Cir. 2012) (“The HEA prohibits institutions from engaging in ‘substantial misrepresentation,’ a phrase which is not defined in the statute.”).

40. 34 C.F.R. § 668.71(b) (2010).

41. *Id.*

42. 20 U.S.C. § 1094(a)(20) (2012) (emphasis added).

43. *Duncan I*, 681 F.3d at 436.

to the general rule against performance-based incentives. First, institutions can adjust recruiter compensation twice per year so long as the adjustment was not based *solely* on the number of students recruited.⁴⁴ Second, performance-based compensation is permitted if it is “based upon students successfully completing their educational programs, or one academic year of their educational programs, whichever is shorter.”⁴⁵ Third, performance-based compensation of “managerial or supervisory employees who do not directly manage or supervise employees who are directly involved in recruiting” is permissible.⁴⁶

Prior to 2008, the HEA existed in concert with relatively inert permutations of veterans’ educational benefits programs.⁴⁷ Thus, the HEA regulations could be conceptualized without regard to the presence of student veterans at FPIs.⁴⁸ Regulation of the for-profit higher education industry did not present a need to take account of other educational benefits programs until 2008, when a plentiful source of alternative federal funding emerged. The discussion in the following subpart will focus on the 2008 expansion of veteran-specific federal funding sources before shifting in Part II to an analysis of the interplay between these funding sources and the HEA.

B. The Post-9/11 GI Bill Act of 2008

The Post-9/11 Veterans Education Assistance Act of 2008 (“Post-9/11 GI Bill”) is the current, foundational legislative vehicle for the provision of federal educational assistance for veterans of the United States military.⁴⁹ Recognizing that “[s]ervice on active duty in the Armed Forces has been especially arduous for the members of the Armed Forces since September 11, 2001,” Congress endeavored to ameliorate the “difficult challenges involved in readjusting to civilian life after wartime service” by funding the educational pursuits of qualified veterans.⁵⁰ Unlike previous incarnations of the GI Bill, which disbursed benefits payments directly to the student veteran, the benefits available under the Post-9/11 GI Bill are paid by disbursing tuition payments directly to a college or university on behalf of an enrolled student veteran.⁵¹ Living allowance and book stipend

44. 34 C.F.R. § 668.14(b)(22)(ii)(A) (2011).

45. *Id.* at § 668.14(b)(22)(ii)(E).

46. *Id.* at § 668.14(b)(22)(ii)(G).

47. *See generally* BENEFITTING WHOM?, *supra* note 15.

48. Stated more generally, the pecuniary influence of the 90/10 Rule on FPI behavior could be analyzed in isolation from other federal legislation because no alternative source of federal funds was extant to uncouple regulatory causes from observable effects.

49. Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. No. 110-252, 112 Stat. 2357 (codified as amended in 38 U.S.C. §§ 3301–24).

50. *Id.* §§ 5002(2–5), 122 Stat. at 2358.

51. Katherine Kiemle Buckley & Bridgid Cleary, *The Restoration and*

payments, on the other hand, are still disbursed to the student veteran's personal bank account.⁵²

Student veterans must meet two requirements to be eligible for benefits under the Post-9/11 GI Bill. First, the veteran must have completed at least 90 days of active duty service after September 10, 2001.⁵³ Second, the veteran must not have been dishonorably discharged.⁵⁴ Unlike previously enacted educational benefit programs, which precluded eligibility for benefits unless the service member made financial contributions to the program while serving on active duty, the current GI Bill omits this requirement.⁵⁵ After separating from active duty, a veteran generally must utilize educational benefits under the Post-9/11 GI Bill within ten years, or else he or she permanently forfeits the benefit.⁵⁶ Alternatively, an active duty service member may, prior to separation, elect to transfer entitlement to a spouse.⁵⁷ This election is no longer available once a service member has separated from active duty.⁵⁸

The benefits provided by the Post-9/11 GI Bill are generous and give veterans or their spouses broad discretion with regard to choice of institution and program pursued. While a number of options are available, veterans commonly elect to pursue a bachelor's degree at an institution of higher education.⁵⁹ Importantly, the Post-9/11 GI Bill does not distinguish between public, private non-profit, and private for-profit institutions.⁶⁰ The maximum tuition payment that the Department of Veterans Affairs would disburse to private institutions was initially capped at a rate equal to the costliest tuition rate of a bachelor's degree program at a public institution of the state in which an FPI was located.⁶¹ Subsequent legislation fixed the maximum at a uniform national figure.⁶²

Colleges and universities that charge tuition rates in excess of the nationally uniform maximum may elect to avail themselves of the Yellow

Modernization of Education Benefits Under the Post-9/11 Veterans Assistance Act of 2008, 2 VETERANS L. REV. 185, 187, 217 (2010).

52. *Id.*

53. *Id.* at 204–05 (there is a minimum of 30 days, rather than 90, if the veteran is medically discharged).

54. 38 U.S.C. § 3311(c)(1) (2012).

55. *Compare* 38 U.S.C. § 3011(b)(1) (2012), *with* 38 U.S.C. §§ 3311(a)–(b) (2012).

56. 38 U.S.C. § 3321 (2012).

57. 38 U.S.C. § 3319(a)–(c) (2012).

58. *Id.* at § 3319(f).

59. Michael Sewall, *Veterans Use New GI Bill Largely at For-Profit and 2-Year Colleges*, CHRON. HIGHER EDUC. (Jun. 13, 2010), <http://chronicle.com/article/Veterans-Use-Benefits-of-New/65914/>.

60. 38 U.S.C. §§ 3313(b), 3452(c).

61. Buckley & Cleary, *supra* note 51, at 204–05.

62. Post-9/11 Veterans Educational Assistance Improvements Act of 2010, Pub. L. No. 111-377, tit. I, § 102, 124 Stat. 4108 (codified as amended in 38 U.S.C. § 3313).

Ribbon GI Education Enhancement Program (“Yellow Ribbon Program”).⁶³ Under this voluntary program, a college or university may enter into an agreement with the Secretary of Veterans Affairs to share equally the cost of an enrolled student veteran’s unfunded tuition expenses.⁶⁴ The terms of the agreement must obligate the college or university to make contributions equal to half of an eligible student veteran’s unmet tuition expenses so long as the student remains in good standing and the college or university participates in the program.⁶⁵ The agreement must also declare a maximum number of participants that the school is willing to obligate itself to subsidize.⁶⁶

Rather than implement independent program integrity measures, Congress aligned the regulatory exigencies of the Post-9/11 GI Bill with the measures already in place under the HEA. For example, the task of policing predatory and deceptive educational practices is left to the Department of Education through its Title IV enforcement mechanisms.⁶⁷ Similarly, requiring accreditation by recognized authorities discourages fraud.⁶⁸ It is not clear whether, in doing this, Congress realized that the Department of Education might not have been sufficiently equipped to shoulder this added responsibility⁶⁹ or that accreditation entities might not have proper incentives to effectively guard against abuse.⁷⁰

II. ADVERSE INCENTIVES TO EXPLOIT STUDENT VETERANS

Congress and the Department of Education have endeavored to curtail abuse of Title IV funding in the for-profit education market.⁷¹ However,

63. 38 U.S.C. § 3317(b).

64. *Id.* at § 3317(a).

65. 38 C.F.R. § 21.9700(d)(2) (2009).

66. *Id.* at § 21.9700(d)(1)–(4) (students may claim this benefit on a first come, first served basis).

67. BENEFITTING WHOM?, *supra* note 15, at 4 (“... [T]he Department of Veterans Affairs primarily [relies] on the Department of Education and accreditation agencies to approve eligible educational programs for servicemembers and veterans.”).

68. *See, e.g.*, Beaver, *supra* note 10.

69. *See, e.g., id.* at 278 (“In the early 1990s, the Inspector General told Congress that he would need a 60-70% increase in staff to adequately address fraud and abuse, which of course never happened.”).

70. *See, e.g.*, FAILURE TO SAFEGUARD, *supra* note 8, at 123 (“The self-reporting and peer-review nature of the accreditation process exposes it to manipulation by companies that are more concerned with their bottom line than academic quality and improvement.”).

71. *See, e.g.*, Tierney & Hentschke, *supra* note 34, at 174 (discussing “rampant fraud and abuse of taxpayer money” by FPIs); Melanie Hirsch, *What’s In A Name? The Definition of an Institution of Higher Education and its Effect on For-Profit Postsecondary Schools*, 9 N.Y.U.J. LEGIS. & PUB. POL’Y 817, 822 (2005); Kelly Field, *Government Scrutinizes Incentive Payments for College Recruiters*, CHRON. HIGHER EDUC. (Aug. 1, 2010), <http://chronicle.com/article/Government-Scrutinizes/123728/> (“Congress passed the incentive-compensation ban in 1992, as part of a broader effort

following passage of the Post-9/11 GI Bill, the HEA's statutory rules and the Department of Education's clumsy regulations were undermined by a number of FPIs that sought to circumvent them by capturing the new benefits exclusively available to the growing multitude of veterans disorged by a downsizing United States military.⁷² The distinction between student veterans and ordinary students had relatively less regulatory significance in the context of Title IV before the enactment of the Post-9/11 GI Bill.⁷³ Until 2008, the Department of Veterans Affairs administered a series of predecessor statutes to the Post-9/11 GI Bill.⁷⁴ These programs channeled funds into the hands of the individual recipients and were, therefore, less susceptible to capture by FPIs. The unintended side effect of the Post-9/11 GI Bill was that the new tuition payments, which are disbursed directly to colleges and universities, enabled a number of FPIs to manipulate the rules and regulations of the HEA.⁷⁵

Since the Post-9/11 GI Bill relies upon the HEA's existing framework of rules and industry self-regulation, recipients of educational benefits under the HEA are protected almost entirely by the Act's oversight and enforcement tools.⁷⁶ The four regulatory mechanisms that are relevant to this discussion are the Cohort Default Rate Rule, the 90/10 Rule, the misrepresentation prohibition, and the incentive pay restriction.⁷⁷ The efficacy of these tools as they existed prior to the enactment of the Post-9/11 GI Bill is a topic that lies beyond the scope of this Note; what follows is an analysis of the pernicious incentives created by the interplay between the Cohort Default Rate Rule, the 90/10 Rule, and the Post-9/11 GI Bill.⁷⁸ Specifically, the focus will be upon certain loopholes through which FPIs might seek to subvert HEA restrictions by exploiting student veterans, and the ineffective safeguards found in the misrepresentation prohibition and the incentive pay restriction.

to crack down on unscrupulous trade schools that were milking the federal student-aid system.”).

72. *BENEFITTING WHOM?*, *supra* note 15, at 7 (discussing the FPI practice of subverting HEA regulations by aggressively recruiting student veterans).

73. *Id.* at 8 (arguing that interplay between regulations under the HEA and benefits afforded by the Post 9/11 GI Bill “incentivizes [FPIs] to aggressively recruit and market to veterans and servicemembers”).

74. 38 U.S.C. § 3014 (2012).

75. *BENEFITTING WHOM?*, *supra* note 15, at 8 (“Not only does the failure to count military educational benefits as federal financial aid subvert the intent of a regulation focused on limiting for-profit schools from being entirely dependent on federal dollars, it actually incentivizes these companies to aggressively recruit and market to veterans and servicemembers.”).

76. *Id.* at 4.

77. *See supra* notes 23–46 and accompanying text.

78. *See generally Abuses in Federal Student Grant Programs Proprietary School Abuses: Hearing Before the Permanent Subcommittee on Investigations of the S.Comm. on Governmental Affairs*, 104th Cong. (1995).

A. The Cohort Default Rate Rule

At first glance, the Cohort Default Rate Rule seems to be a robust and benign legislative effort to rein in some of the abusive practices of a number of unsavory colleges and universities. In the process, however, Congress ultimately created an incentive to aggressively recruit student veterans—often into poor quality programs—for reasons beyond merely capturing the educational benefits available to them under the Post-9/11 GI Bill.⁷⁹ The rationale behind this rule is to incentivize colleges and universities to invest in the quality of their educational programs to the extent that their students graduate with marketable skills.⁸⁰ This incentive exists because graduates who do not possess sufficiently marketable skills are less likely to obtain gainful employment and thus, without the post-graduation income they might reasonably have expected to be earning, are more likely to default on their educational loans.⁸¹ If more than twenty-five percent of a college or university's former students default on their loans, the school risks losing the eligibility of its students to participate in Title IV funding. Private for-profit colleges and universities have a particularly strong aversion to the Cohort Default Rate Rule because their graduates tend to draw upon substantially larger loans than their peers at public and private non-profit institutions.⁸²

Since FPIs are beholden to private interests, they have a disincentive to invest in the quality of their programs; they can retain their revenue as profit.⁸³ By recruiting a large proportion of student veterans, for whom benefits are available under the Post-9/11 GI Bill, an FPI can shirk some of the expense of investing in the quality of its educational programs without

79. BENEFITTING WHOM?, *supra* note 15, at 7.

80. "The idea was that abnormally high default rates would signify a low-quality institution that was failing to prepare students for work and life, and that holding colleges accountable for the rates at which their students defaulted on loans . . . would weed out fraudulent schools . . ." Doug Lederman, *A More Meaningful Default Rate*, INSIDE HIGHER ED (Nov. 30, 2007), <http://www.insidehighered.com/news/2007/11/30/defaults>.

81. J. Fredericks Volkwein, Bruce P. Szelest, Alberto F. Cabrera & Michelle R. Napierski-Pran, *Factors Associated with Student Loan Default among Different Racial and Ethnic Groups*, 69 J. HIGHER EDUC. 206 (1998).

82. Rebecca Hinze-Pifer & Richard Fry, *The Rise of College Student Borrowing*, PEW RESEARCH CENTER (Nov. 23, 2010), <http://www.pewsocialtrends.org/2010/11/23/the-rise-of-college-student-borrowing/>.

83. See Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L. J. 835, 844 (1980) ("The nonprofit producer, like its for-profit counterpart, has the capacity to raise prices and cut quality in such cases without much fear of customer reprisal; however, it lacks the incentive to do so because those in charge are barred from taking home any resulting profits."). Figures seem to suggest that many FPIs aim to retain an attractive brand name, despite the diminished quality of their programs, through extensive marketing efforts; "Recent reports indicate that the typical for-profit spends 30% of revenues on marketing, compared to less than 5% at non-profits." Beaver, *supra* note 10, at 277.

jeopardizing the Title IV eligibility of its students.⁸⁴ Since the Department of Veterans Affairs funds some or all of their tuition and school-related expenses, student veterans are less likely to borrow in order to fund their educational pursuits. With their lower debt burdens, veteran graduates are more likely to meet their educational loan obligations, even if they lack marketable skills and are forced to accept lower post-graduation incomes than they might otherwise have expected.⁸⁵ Thus, by aggressively recruiting student veterans, FPIs are able to invest less in their educational programs—while producing graduates with fewer marketable skills—without running afoul of the Cohort Default Rate Rule.⁸⁶

B. The 90/10 Rule

The 90/10 Rule creates another incentive for FPIs to aggressively recruit student veterans. Recall that under this rule, an FPI jeopardizes the eligibility of its students to participate in Title IV programs if it does not derive at least ten percent of its revenue from sources other than Title IV funding.⁸⁷ In creating this restriction, Congress intended to prevent waste and abuse by withholding funds from any FPI that was unable to draw at least ten percent of its revenue from the competitive market.⁸⁸ Inability to derive funding from the private sector is thought to be a signal of an institution's poor quality.⁸⁹ In this way, Congress sought to avoid the undesirable result of sustaining sub-standard FPIs that were unable to compete with other colleges and universities in the private market.⁹⁰

Student veterans are entitled to benefits under the Post-9/11 GI Bill, which is not a Title IV program.⁹¹ When an FPI receives tuition reimbursement from the Department of Veterans Affairs (“VA”) on behalf of an enrolled student veteran, the sum can be included in the required ten

84. Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J.C. & U.L. 45, 71 (2011) (“Excessively high tuition rates at FPIs indicate rent-seeking behavior in the industry.”).

85. BENEFITTING WHOM?, *supra* note 15, at 13.

86. This argument comports well with empirical observation: The GAO reports that the quality of the educational programs at for-profit institutions is lower than those at public and not-for-profit colleges and universities. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-143, POSTSECONDARY EDUCATION: STUDENT OUTCOMES VARY AT FOR-PROFIT, NONPROFIT, AND PUBLIC SCHOOLS 5-7 (2011).

87. 20 U.S.C. § 1094(a)(24); 34 C.F.R. § 668.28.

88. H.R. REP. NO. 82-1943, at 30 (1952) (“This . . . is believed to be a real safeguard to assure sound training for the veteran, at reasonable cost, by seasoned institutions.”).

89. SKINNER, *supra* note 29, at 3 (“[P]roprietary institutions that were overly dependent on Title IV revenue were considered institutions that were not providing a high quality education . . .”).

90. *Id.* at 4 (“[I]t was concluded that these institutions should not be subsidized by federal dollars.”).

91. BENEFITTING WHOM?, *supra* note 15, at 8.

percent of non-Title IV funding.⁹² Therefore, an FPI can circumvent the 90/10 Rule and derive potentially all of its revenue from federal sources by drawing, for example, ten percent of its revenue from the VA via tuition payments on behalf of enrolled student veterans and the remaining ninety percent from Title IV funding programs.⁹³ It might come as no surprise, then, that by November of 2010, members of the House of Representatives “raised concerns that treating VA and [Department of Defense (“DoD”)] funds differently than federal student aid undermined the intent of the 90/10 Rule.”⁹⁴ Worse, the loophole created by this interplay between the 90/10 Rule and the Post-9/11 GI Bill creates an even *stronger* incentive for *sub-standard* FPIs to aggressively recruit student veterans into their poor-quality programs; sub-standard programs are less likely than high-quality programs to successfully compete for private sector revenue, consequently relying more heavily on federal funding.⁹⁵ To put it differently, every dollar of revenue derived from the VA as a tuition payment on behalf of an enrolled student veteran enables an FPI to collect nine more dollars from non-veteran students under Title IV without running afoul of the 90/10 Rule. In this way, one student veteran can be as valuable to an FPI as nine non-veteran students.

It is reasonable to infer that Congress did not contemplate this result. Recall that the predecessor to the 90/10 Rule was modeled after a similar rule—the VA Rule—pertaining to the eligibility of students enrolled at FPIs to receive veterans’ educational benefits.⁹⁶ The VA Rule withheld funding if more than 85% of an FPI’s students received educational benefits from VA sources.⁹⁷ In crafting this requirement, Congress used the familiar reasoning that an FPI that could not draw at least 15% of its revenue from non-VA sources was unlikely to provide its graduates with a quality education.⁹⁸ When the VA Rule was created, funding sources under Title IV programs did not yet exist.⁹⁹ Thus, the requirement that an institution derive at least 15% of its revenue from non-VA sources effectively meant that at least 15% of an institution’s revenue had to flow from non-federal sources, which generally meant the competitive private

92. *Id.*

93. *Id.*

94. *Id.* at 8 n.12.

95. *Id.* at 8.

96. SKINNER, *supra* note 29.

97. Act of Jul. 16, 1952, Pub. L. No. 82-550, § 226, 66 Stat. 663, 667 (1952). This requirement is absent from the Post-9/11 GI Bill.

98. SKINNER, *supra* note 89 at 3 (“[P]roprietary institutions that were overly dependent on Title IV revenue were considered institutions that were not providing a high quality education . . .”).

99. The VA Rule was created in 1952, Pub. L. No. 82-550, while the HEA was not created until 1965, Pub. L. No. 89-329.

market.¹⁰⁰ Congress discouraged waste and abuse by excluding FPIs that were unable to compete for at least 15% of their students.¹⁰¹ Given that the predecessor to the 90/10 Rule is modeled after the VA Rule, it is likely that Congress intended that the eligibility of an FPI's students to participate in Title IV programs depends upon an FPI's ability to draw at least 10% of its revenue from non-federal sources.¹⁰²

C. The For-Profit Higher Education Market Reacts to the Post-9/11 GI Bill

The result of distorted incentives created by the interplay between HEA restrictions and the Post-9/11 GI Bill was as swift as it was predictable. A number of FPIs quickly developed a competency for aggressively recruiting student veterans.¹⁰³ Some FPIs developed large recruitment staffs "to bring in veterans, service members and their spouses."¹⁰⁴ Abusive and predatory recruitment of student veterans became commonplace.¹⁰⁵ In one example, a veteran was told that an FPI was accredited and that his credits would transfer if he wanted to pursue a master's degree.¹⁰⁶ However, when he attempted to transfer to a public, non-profit institution, he learned that none of his credits would transfer. As the misrepresentation regulations currently exist, this particular FPI could argue that no sanctionable misrepresentation had been made. If challenged, the FPI could argue that, if this particular student veteran had completed a bachelor's degree program with the FPI, he would subsequently have been able to enroll in a master's

100. "By ensuring that a modest amount of such schools' revenue come from non-Title IV sources, the 85-15 rule will re-introduce a measure of free market control and force prices to reasonable levels relative to the value of the training offered, without direct federal price controls." 140 CONG. REC. 15100 (1994) (letter of Hon. James B. Thomas, Jr., Inspector General, Department of Education).

101. See H.R. REP. NO. 82-1943, at 32 (1952).

102. The congressional subcommittees that were considering the National Vocational Student Loan Insurance Act, intended "that the 'fly-by-night' [vocational schools] of the post-World War II era be explicitly eliminated from eligibility." S. REP. NO. 89-758, at 12 (1965). Congress merged the programs under the National Vocational Student Loan Insurance Act with the HEA and replaced the phrase "vocational school" with "proprietary institution of higher education." Higher Education Amendments of 1968, Pub. L. No. 90-575, § 116(a); Higher Education Amendments of 1992, § 481, Pub. L. No. 102-325 (codified as amended at 20 U.S.C. § 1088(b) (2012)).

103. "[There is a] very heavy, aggressive pursuit of veterans by for-profit colleges. They go to military fairs for former military; they attend conventions of veterans' groups; they advertise in military publications and on the Web to go after veterans as students." *Interview with Daniel Golden. Educating Sergeant Pantzke*, FRONTLINE (Apr. 15, 2007), available at <http://www.pbs.org/wgbh/pages/frontline/educating-sergeant-pantzke/dan-golden/>.

104. BENEFITTING WHOM?, *supra* note 15, at 8.

105. *Id.* at 8-9.

106. *Id.* at 13.

degree program elsewhere. In such a case, the statement made to the veteran was merely confusing, but was not a misrepresentation, strictly speaking, because it was not untrue.¹⁰⁷

In the years following passage of the Post-9/11 GI Bill, payments flowing from the VA to FPIs grew dramatically. An investigation conducted by the Senate Health, Education, Labor, and Pensions Committee (“HELP Committee”) revealed in 2012 that, at twenty for-profit schools, “the combined VA and DoD total military educational benefits increased from \$66.6 million in 2006 to a projected \$521.2 million in 2010, an increase of 683 percent.”¹⁰⁸ Worse, this data did not include funds collected by the largest for-profit school.¹⁰⁹

III. DEPARTMENT OF EDUCATION PROMULGATES REGULATIONS

Graduates of FPIs, both veteran and non-veteran, increasingly found themselves struggling in a tightening job market and holding degrees that proved to be worth less than they had been led to expect.¹¹⁰ The Department of Education responded in 2009 by announcing its intent “to develop proposed regulations to maintain or improve program integrity in the Title IV, HEA programs,” relating, *inter alia*, to “[s]atisfactory academic progress,” “[i]ncentive compensation paid by institutions to persons or entities engaged in student recruiting or admission activities,” “[g]ainful employment in a recognized occupation,” and “[v]erification of information included on student aid applications.”¹¹¹

A. The Employment Regulations

“Concerned about inadequate programs and unscrupulous institutions, the Department [of Education] has gone looking for rats in ratholes”¹¹² by

107. For example, admission to the Two-Year MBA Program offered by the University of Notre Dame Mendoza College of Business does not depend on transferability of individual credits; the admissions criteria require merely that, “applicants . . . hold a bachelor’s degree or its international equivalent from an accredited college or university in any area of concentration.” *Admissions & Financial Aid*, UNIVERSITY OF NOTRE DAME MENDOZA COLLEGE OF BUSINESS, http://business.nd.edu/mba/admissions_and_financial_aid/apply/

108. BENEFITTING WHOM?, *supra* note 15, at 9.

109. *Id.* at 9, n.17. This data was compiled from financial records voluntarily disclosed by FPIs in response to a HELP Committee inquiry. *Id.* The University of Phoenix, the largest such entity, was among the five institutions that refused to cooperate with the inquiry. *See id.*

110. *See, e.g.*, Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34,386 (June 13, 2011) (discussing instances where FPIs “leave large numbers of students with unaffordable debts and poor employment prospects”).

111. Negotiated Rulemaking Committees; Establishment, 74 Fed. Reg. 24,728, 24,728 (May 26, 2009).

112. *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133, 148 (D.D.C. 2012).

promulgating new regulations concerning the rate of gainful employment obtained by graduates of FPIs (“Employment Regulations”).¹¹³ These regulations, which took effect July 1, 2011, were founded upon statutory language, which, until then, had been legally inert. For instance, a seemingly long-overlooked provision of the HEA imposes an eligibility requirement upon FPIs mandating that, in order to draw funds under Title IV, they must offer a program that will “prepare students for gainful employment in a recognized occupation.”¹¹⁴ Another provision uses similar language, defining an “eligible program of training” as one that “prepare[s] students for gainful employment in a recognized profession.”¹¹⁵ Thus, the Department of Education had a statutory foundation upon which to promulgate regulatory benchmarks that measured FPI performance against objective metrics of their graduates’ employment prospects. Since only a narrow exception exists for certain FPI baccalaureate programs, the term “gainful employment program” is a useful label that captures the educational programs that fall under these new regulations.¹¹⁶ The Employment Regulations enforced compliance with this reanimated statutory language by imposing a Debt Measure Rule,¹¹⁷ a Reporting and Disclosure Rule,¹¹⁸ and a new Program Approval Rule.¹¹⁹

1. The Debt Measure Rule

The Debt Measure Rule established maximum and minimum standards for the debt-to-income and loan repayment rates of students who graduate from gainful employment programs offered by FPIs. Under the debt-to-income standard, FPIs whose graduates typically have annual debt service payments that are twelve percent or less of their average annual earnings or thirty percent or less of their discretionary income would continue to qualify for Title IV funds.¹²⁰ Under the loan repayment standard, which “measure[d] . . . whether program enrollees are repaying their loans, regardless of whether they completed the program,” an FPI would fail unless:

113. The Employment Regulations apply to vocational certificate, associate degree programs, and certain baccalaureate programs; they do not pertain to baccalaureate programs offered by accredited FPIs that have offered such programs after January 1, 2009. 20 U.S.C. § 1002(b)(1)(A)(ii) (as amended by Pub. L. 110-315).

114. 20 U.S.C. §§ 1001(b)(1), 1002(b)(1)(A)(i), 1002(c)(1)(A) (2012).

115. *Id.* at § 1088(b)(1)(A)(i).

116. *See, e.g., Duncan II*, 870 F. Supp. 2d at 141.

117. Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34,386 (June 13, 2011) (to be codified at 34 C.F.R. § 668.7).

118. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,835–44, 66,948–49 (Oct. 29, 2010) (to be codified at 34 C.F.R. § 668.6).

119. Program Integrity: Gainful Employment—New Programs, 75 Fed. Reg. 66,665 (Oct. 29, 2010) (amending 34 C.F.R. §§ 600.10, 600.20).

120. Program Integrity Issues: Gainful Employment, 75 Fed. Reg. 43,616, 43,618 (July 26, 2010).

[S]tudents who attended the program (and are not in a military or in-school deferment status) repay their Federal loans at an aggregate rate of at least [35] percent. . . . A loan would be counted as being repaid if the borrower (1) made loan payments during the most recent fiscal year that reduced the outstanding principal balance, (2) made qualifying payments on the loan under the Public Service Loan Forgiveness Program, as provided in 34 CFR 685.219(c), or (3) paid the loan in full.¹²¹

Were an FPI to fall short of these standards, it would be required to notify its current and prospective students of that failure and of any corrective action that the FPI would take to improve its performance.¹²² An FPI that failed in two out of the previous three years would have to include “[a] clear and conspicuous statement that a student who enrolls or continues in the program should expect to have difficulty repaying his or her loans.”¹²³ Failure in three of the previous four years would jeopardize the school’s Title IV eligibility for at least three years.¹²⁴

2. The Reporting and Disclosure Rule

Under the Reporting and Disclosure Rule, FPIs were required to provide the Department of Education with information needed to verify compliance with the Debt Measure Rule.¹²⁵ FPIs were also required to provide prospective students with information regarding the occupation that they would be prepared to enter, the rate at which students graduate on-time at the institution, the tuition and fees charged, the job placement of graduates of the institution, and the median loan burden borne by graduates of the program.¹²⁶

3. The Program Approval Rule

The Program Approval Rule required FPIs to “notify the Secretary [of Education] at least 90 days before the first day of class when it intends to add an educational program that prepares students for gainful employment in a recognized occupation.”¹²⁷ The Secretary had discretion to decide whether or not to scrutinize the program by requiring “program approval.”¹²⁸ The Secretary would then evaluate four factors to determine whether the program should be approved:

121. *Id.* at 43,618–19. The 35% figure is from 76 Fed. Reg. at 34,395 (describing 34 C.F.R. § 668.7(a)(1)).

122. 34 C.F.R. § 668.7(j)(1) (2011).

123. *Id.* at § 668.7(j)(2)(i)(D).

124. *Id.* at §§ 668.7(i), 668.7(l)(2)(ii).

125. 34 C.F.R. § 668.6(a) (2010).

126. *Id.* at § 668.6(b).

127. 34 C.F.R. § 600.10(c)(1) (2010).

128. *Id.* at § 600.20(d)(1)(ii)(B).

- (1) The institution's demonstrated financial responsibility and administrative capability in operating its existing programs.
- (2) Whether the additional educational program is one of several new programs that will replace similar programs currently provided by the institution, as opposed to supplementing or expanding the current programs provided by the institution.
- (3) Whether the number of additional educational programs being added is inconsistent with the institution's historic program offerings, growth, and operations.
- (4) Whether the process and determination by the institution to offer an additional educational program that leads to gainful employment in a recognized occupation is sufficient.¹²⁹

B. The Abusive Recruitment Regulations

The Department of Education, slowed by procedural requirements under the APA,¹³⁰ eventually promulgated another set of regulations under the HEA that were aimed at curbing abusive recruitment practices ("Abusive Recruitment Regulations").¹³¹ The Department "had determined that the existing regulations were too lax, allowing schools to circumvent the proscriptions of the HEA and threaten the integrity of Title IV programs."¹³² After a notice and comment period, the Department promulgated the Abusive Recruitment Regulations.¹³³ The new regulations, *inter alia*, eliminated a regulatory safe-harbor for performance based pay incentives¹³⁴ and broadened the scope of the misrepresentation prohibition.¹³⁵ They also expanded the definition of "misrepresentation" to include:

Any false, erroneous or misleading statement an eligible institution, [. . .] organization, or person with whom the eligible institution has an agreement to provide educational programs, or

129. *Id.* at § 600.20(d)(1)(ii)(E).

130. Despite its negotiated rulemaking committee failing to reach a consensus, the Department of Education ultimately moved forward with proposed regulations. Program Integrity Issues, 75 Fed. Reg. 34,806, 34,807–08 (June 18, 2010).

131. Negotiated Rulemaking Committees; Establishment, 74 Fed. Reg. 24,728 (May 26, 2009); 34 C.F.R. § 668.71(c) (2011).

132. *Ass'n of Private Sector Colls. & Univs., v. Duncan*, 681 F.3d 427, 436 (D.C. Cir. 2012). "For example, following an investigation, agency officials found that the University of Phoenix had 'systematically engage[d] in actions designed to mislead the [Department] and to evade detection of its improper incentive compensation system for those involved in recruiting activities.'" *Id.* (quoting Letter from Donna M. Wittman, Institutional Review Specialist, to Todd S. Nelson, President, Apollo Grp., Inc. (Feb. 5, 2004)).

133. 34 C.F.R. § 668.71(c) (2011).

134. *See supra* notes 42–46 and accompanying text.

135. *See supra* notes 37–41 and accompanying text.

to provide marketing, advertising, recruiting or admissions services makes directly or indirectly to a student, prospective student or any member of the public, or to an accrediting agency, to a State agency, or to the Secretary. A misleading statement includes any statement that has the likelihood or tendency to deceive or confuse. A statement is any communication made in writing, visually, orally, or through other means.¹³⁶

Ideally, these regulations should discourage offending FPIs from using misleading recruitment techniques, both directly and indirectly. Directly, recruiters would be constrained by the new regulations such that they could no longer seek to capitalize on deliberately confusing, but technically accurate representations. Indirectly, tightened restrictions on compensation-based incentives would bar offending FPIs from promoting abusive recruitment behavior by way of compensation.¹³⁷

The Association of Private Colleges and Universities filed two complaints in the United States District Court for the District of Columbia, the first in January¹³⁸ of 2011 and the second in July¹³⁹ of 2011. The complaints separately challenged the validity of both the Employment Regulations and the Abusive Recruitment Regulations. The White House acted before the outcome of the above cases could be determined.

IV. EXECUTIVE ORDER 13607

In April of 2012, President Obama responded to the mounting public outcry over “reports of aggressive and deceptive targeting of service members, veterans, and their families” by issuing Executive Order 13607.¹⁴⁰ This directive instructed the Departments of Education, Defense, and Veterans Affairs, *inter alia*, to implement a voluntary honor code, referred to as the “Principles of Excellence.”¹⁴¹ The purpose of this code was to:

[E]nsure that [...] educational institutions provide meaningful information to service members, veterans, spouses, and other family members about the financial cost and quality of educational institutions to assist those prospective students in

136. 34 C.F.R. § 668.71(c) (2011).

137. 34 C.F.R. § 668.14(b)(22)(iii)(C)(2) (2011).

138. Ass’n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 436 (D.C. Cir. 2012). *See infra*, Part V.

139. Ass’n of Private Sector Colls. & Univs. v. Duncan, 870 F. Supp. 2d 133, 155 (D.D.C. 2012). *See infra*, Part VI.

140. Establishing Principles of Excellence for Educational Institutions Serving Service Members, Veterans, Spouses, and Other Family Members, 77 Fed. Reg. 25,861, 25,861 (Apr. 27, 2012). *See also* Daniel Golden, *Online Colleges Target Veterans*, BLOOMBERG BUS. WK. (Nov. 4, 2010), available at http://www.businessweek.com/magazine/content/10_46/b4203026910225.htm.

141. *Id.*

making choices about how to use their Federal educational benefits; prevent abusive and deceptive recruiting practices that target the recipients of Federal military and veterans education benefits; and ensure that educational institutions provide high-quality academic and student support services to active-duty service members, reservists, members of the National Guard, veterans, and military families.¹⁴²

The language of the order incorporated several of the Abusive Recruitment Regulations by direct reference. Importantly, section 2(c) provides that the Principles of Excellence should, to the extent permitted by law, require educational institutions receiving funding pursuant to federal military and veteran education benefits to “end fraudulent and unduly aggressive recruiting techniques on and off military installations, as well as misrepresentation, [. . .] *consistent with the regulations issued by the Department of Education* (34 C.F.R. 668.71–668.75, 668.14, and 600.9) . . .

. . .¹⁴³

Executive Order 13607, *strongly encouraged* schools that participate in Title IV to *voluntarily* conform to the Principles. Section 5 expressly says that nothing in the order “shall be construed to impair or otherwise affect [. . .] the authority granted by law to an executive department, agency, or the head thereof.”¹⁴⁴ The order’s power to incentivize FPI’s compliance rests upon section 3(a),¹⁴⁵ which provides that “[t]he Department of Veterans Affairs shall [. . .] notify all institutions participating in the Post-9/11 GI Bill program that they are strongly encouraged to comply with the Principles and shall post on the Department’s website [a list of] those that do.”¹⁴⁶ Presumably, any FPIs that refused to conform to the Principles of Excellence would have difficulty recruiting student veterans because those students might be reluctant to trust an institution that was not listed on the VA’s website.

The American Council on Education (“ACE”), a for-profit education industry trade organization, responded to Executive Order 13607 with an open letter addressed to the Directors of the Departments of Defense, Education, and Veterans Affairs, and to the Director of the Consumer Financial Protection Bureau. In the letter, the ACE took the position that the language of section 2(c) parallels “HEA requirements” to which most “member institutions . . . are already subject” as participants in Title IV

142. 77 Fed. Reg. at 25,861. These principles apply to all institutions that participate in Title IV.

143. *Id.* at 25,862 (emphasis added). As discussed above, it might have been difficult to predict the result of tying the functional nuances of the Principles of Excellence to regulations that were recently promulgated and were the subject of two pending cases.

144. *Id.* at 25,864.

145. *Id.* at 25,862.

146. *Id.*

programs.¹⁴⁷ The Department of Education indicated that this understanding was correct.¹⁴⁸ This response shows that Executive Order 13607 does no more to prevent misrepresentation by FPIs than that which was already accomplished by the Department of Education's Abusive Recruitment Regulations.

V. ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES V.
DUNCAN – JUNE 5, 2012

A. The Decision

The legal framework of protections afforded to student veterans gained another layer of complexity with the D.C. Circuit's decision in *Association of Private Sector Colleges and Universities v. Duncan* ("Duncan I") on June 5, 2012.¹⁴⁹ The controversy in that case centered on the validity of the Department of Education's Abusive Recruitment Regulations.¹⁵⁰ The ASPCU argued, *inter alia*, that the restriction on compensation-based incentives for recruitment professionals¹⁵¹ and the newly expanded scope of the ban on misleading and confusing statements¹⁵² exceeded the Department's authority under the HEA, and were arbitrary and capricious.¹⁵³ Ultimately, the D.C. Circuit invalidated several portions of the regulations that were integral components of the Department's efforts to curb predatory recruitment of student veterans by for-profit colleges and universities.¹⁵⁴

The court held that the restriction on compensation-based incentives was invalid on procedural grounds.¹⁵⁵ Applying a *Chevron*¹⁵⁶ analysis, the court

147. Letter from Am. Council on Educ. to Leon E. Panetta, U.S. Sec'y of Def.; Arne Duncan, Sec'y of Educ.; Eric K. Shinseki, Sec'y of Veterans Affairs; and Richard Cordray, Dir. of Consumer Prot. Bureau (Jun. 22, 2012) (on file with author), *available at* <http://www.acenet.edu/news-room/Documents/Letter-to-Obama-Administration-on-Principles-of-Excellence-for-Service-Members,-Veterans-Education.pdf> (re: Executive Order 13607).

148. See Letter from David A. Bergeron, Acting Assistant Sec'y for Postsecondary Educ. to "Colleague" on Executive Order 13607 (Jul 13, 2012) (on file with author), *available at* <http://ifap.ed.gov/dpceletters/attachments/GEN1210PEO13607.pdf> (EO 13607 Information Working Group discussing compliance requirements for FPIs).

149. *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427 (D.C. Cir. 2012). This case was heard on appeal following a proceeding in the United States District Court for the District of Columbia wherein the Association of Career Colleges, *inter alia*, brought a challenge under the Administrative Procedure Act to certain regulations promulgated by the Department of Education under the HEA. See *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 796 F. Supp. 2d 108 (D.D.C. 2011).

150. See *supra* notes 129–136 and accompanying text.

151. *Duncan I*, 681 F.3d at 442, 447.

152. *Id.* at 449.

153. *Id.* at 440.

154. *Id.* at 435.

155. *Id.* at 448–49.

found that the new compensation regulations did not exceed the Department's statutory authority under the HEA.¹⁵⁷ The court was, however, unsatisfied by the reasoning provided by the Department for the elimination of a regulatory "safe harbor" and the perfunctory manner with which it replied to certain comments about minority outreach compensation incentives.¹⁵⁸ The court remanded this particular issue with instructions to allow the Department an opportunity to provide sufficient reasoning behind its new regulations.¹⁵⁹

The court also held that the expanded scope of the Abusive Recruitment Regulations pertaining to misrepresentations exceeded the statutory authority under the HEA.¹⁶⁰ The court decided that the Abusive Recruitment Regulations impermissibly broadened both the scope and the definition of "misrepresentation."¹⁶¹ With regard to scope, the HEA prescribed sanctions for misrepresentation of the "nature of [an institution's] educational program, its financial charges, or the employability of its graduates," while the new regulations provided sanctions for institutions that made misrepresentations "regarding the eligible institution, including about the nature of its educational program, its financial charges, or the employability of its graduates."¹⁶²

As a matter of definition, the HEA prohibits institutions from engaging in "substantial misrepresentation," while the new regulations redefined the term "misrepresentation" to include "any statement that has the likelihood or tendency to deceive or confuse."¹⁶³ Since the term "misrepresentation" was originally qualified by the adjective "substantial," the court reasoned that Congress did not intend to capture terms that are likely to confuse, but which are "both truthful and nondeceitful," within the definition of "misrepresentation."¹⁶⁴ Thus, according to the court, the Department's new prohibition on "confusing" representations had exceeded the intention of Congress when it enacted the HEA and its subsequent amendments.¹⁶⁵

It is possible that the court misunderstood congressional intent with regard to what the prohibition on misrepresentation should encompass. Legislative history reveals that Congress included the Misrepresentation Rule because it sought to provide the Department of Education with "the necessary tools to keep unethical individuals from engaging in unlawful

156. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

157. *Duncan I*, 681 F.3d at 442–47.

158. *Id.* at 447–50.

159. *Id.*

160. *Id.* at 452–53.

161. *Id.*

162. *Id.* at 439.

163. *Id.*

164. *Id.* at 452–53.

165. *Id.*

conduct and *sharp practice*.”¹⁶⁶ The use of the term “sharp practice” is indicative of a broader congressional intent because it describes “[u]nethical action and trickery.”¹⁶⁷ Since unethical action and trickery do not rise to the level of “substantial misrepresentations” as that phrase was construed by the *Duncan I* court,¹⁶⁸ the court likely erred when it concluded that Congress intended to exclude “confusing” representations from the definition of “misrepresentation.”

Regrettably, the *Duncan I* decision indirectly stymied Executive Order 13607, thereby stunting presidential efforts to reduce predatory behavior by FPIs toward student veterans. The force of Executive Order 13607, with respect to its goal of protecting student veterans from predatory recruitment practices, derives from language embedded in the text of section 2(c). This section elaborates upon what is expected of FPIs that conform to the Principles of Excellence. Specifically, this section requires FPIs to “end fraudulent and *unduly aggressive* recruiting techniques . . . as well as misrepresentation, [and] payment of incentive compensation, . . . consistent with the regulations issued by the Department of Education (34 C.F.R. 668.71–668.75, 668.14, and 600.9).”¹⁶⁹ The plain language clearly contemplates a prohibition on *unduly aggressive*¹⁷⁰ recruiting techniques, as well as misrepresentation, even if they do not rise to the level of misrepresentation.¹⁷¹ Moreover, the order makes reference to section 668.71, which directs FPIs to refrain from making communications that are likely to confuse, even where no misrepresentation is made, strictly speaking. By invalidating section 668.71, the *Duncan I* court curtailed the scope of the Principles of Excellence; no conduct is denounced now that was not already prohibited by regulations prior to Executive Order 13607. At best, Executive Order 13607 is now practically ineffectual; at worst, the Principles of Excellence may have the perverse effect of exacerbating the hazard faced by student veterans.

B. The Perverse Effect of *Duncan I* on Executive Order 13607

Executive Order 13607 and the Principles of Excellence have been distorted by the *Duncan I* decision so much so that they are likely to

166. H.R. REP. NO. 94-1086, at 13 (1976) (emphasis added).

167. BLACK'S LAW DICTIONARY 1501 (9th ed. 2009).

168. See *supra* notes 152–156 and accompanying text.

169. Exec. Order 13607, 77 Fed. Reg. 25,862, § 2 (Apr. 27, 2012) (emphasis added).

170. “Undue” is defined as “unsuited to the time, place, or occasion.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Philip Babcock Gove et al eds., 1986). “Aggressive” is defined as “combative readiness or bold determination.” *Id.*

171. The phrase “as well as” demonstrates a prohibition of distinct categories of conduct—the first category is “unduly aggressive recruiting techniques” and the second category is “misrepresentations.”

exacerbate predatory recruitment practices.¹⁷² Without section 668.71's prohibition on confusing statements, FPIs may abide by the Principles of Excellence without significantly altering recruitment practices that were in place before President Obama intervened¹⁷³—the very same recruitment practices that prompted the order.¹⁷⁴ Moreover, student veterans, who are unlikely to be sufficiently familiar with the legal nuances implicated by *Duncan I* to appreciate that Executive Order 13607 has no independent legal force, might rely on the assurances implied by the Principles of Excellence.¹⁷⁵ For example, the University of Phoenix, Devry, and Kaplan University are listed participants in the Principles of Excellence.¹⁷⁶ These same institutions are among those criticized by Senator Harkin's report on abuses in for-profit higher education.¹⁷⁷ The list of conforming institutions is prominently advertised on the VA's website.¹⁷⁸ It is reasonable to presume that at least some student veterans might view conformity with the Principles of Excellence as an official endorsement of an FPI's quality and trustworthiness. In this way, the Principles of Excellence might lull some student veterans into a false sense of confidence in FPIs that are listed on the Department of Veteran's Affairs's official website.

VI. ASSOCIATION OF PRIVATE SECTOR COLLEGES AND UNIVERSITIES V.
DUNCAN – JUNE 30, 2012

Shortly after the *Duncan I* court reached its June 5, 2012 decision, the United States District Court for the District of Columbia decided *Association of Private Colleges and Universities v. Duncan* (“*Duncan II*”).¹⁷⁹ The ASPCU filed this complaint almost six months after it filed the complaint in *Duncan I*, affording *Duncan I* the time to rise to the appellate

172. “At its simplest, the definition of a predatory educator might be one who, in pursuit of profit, takes advantage of students by unfair, although not necessarily unlawful, means.” James, *supra* note 84, at 69.

173. See Bergeron, *supra* note 149.

174. Exec. Order 13607, 77 Fed. Reg. 25,862 (Apr. 27, 2012).

175. “[T]he quality of education can be assessed neither in advance nor upon initial inspection These obstacles to assessment are only compounded by information asymmetry.” James, *supra* note 84, at 76.

176. See, e.g., California Principles of Excellence Schools, U.S. DEP’T OF VETERANS AFFAIRS, http://www.benefits.va.gov/gibill/resources/education_resources/principles_of_excellence/2012/states/ca.asp (last visited Jan. 13, 2014).

177. FAILURE TO SAFEGUARD, *supra* note 8, at 20–21. See also Golden, *supra* note 140 (“At Kaplan University, only 30 percent of two-year students and 33 percent of four-year students graduate.”); Stephen Burd, *More Scrutiny Needed of the University of Phoenix’s Recruiting Practices*, HIGHER ED WATCH (Feb. 19, 2009), <http://www.newamerica.net/blog/higher-ed-watch/2009/more-scrutiny-needed-university-phoenix-10193>.

178. See *supra* note 174.

179. Ass’n of Private Colleges and Universities v. Duncan, 870 F. Supp. 2d 133, 155 (D.D.C. 2012).

level before *Duncan II* was decided in district court. The issue in *Duncan II* centered on whether the Department of Education had exceeded the scope of its authority under the HEA, or acted arbitrarily or capriciously, when it promulgated the Employment Regulations of 2011.¹⁸⁰ After rejecting the ASPCU's argument that the Department had exceeded its authority under the HEA, the court invalidated most of the Department's Employment Regulations (the Debt Measure Rule, Disclosure Requirements, and a Program Approval Rule) for lack of reasoned decision-making.¹⁸¹ More specifically, the court held that one portion of the Debt Measure Rule was arbitrary and capricious,¹⁸² and vacated most of the remaining provisions of the Employment Regulations of 2011 because they were not severable from the invalidated Debt Measure Rule.¹⁸³

The court invalidated only one component of the Employment Regulations, a debt repayment standard, on the grounds that it was the product of arbitrary and capricious rulemaking.¹⁸⁴ It also declared invalid the Debt Measure Rule, of which the debt repayment standard was a component, because its individual components could not be severed from the invalidated debt repayment standard.¹⁸⁵ The court partially vacated another component, the disclosure requirement, because, without the Debt Measure Rule, it was "not in accordance with" 20 U.S.C. § 1015c."¹⁸⁶

180. *Id.* at 144–45 (citing 5 U.S.C. § 706(2)(A) (2012)).

181. *Id.* at 155.

182. *Id.* at 154. The debt repayment standard of the Debt Measure Rule was the only portion of the Employment Regulations of 2011 that the court found to be arbitrarily and capriciously promulgated; the rest of the Regulations, with the exception of a disclosure requirement, were invalidated because they were not severable from the debt repayment standard. *Id.* at 154, 158.

183. *Id.* at 158.

184. The threshold repayment rate of thirty-five percent, below which an institution would jeopardize its Title IV eligibility, was "chosen because approximately one quarter of gainful employment programs would fail a test set at that level." *Id.* at 153. "That this explanation could be used to justify any rate at all demonstrates its arbitrariness." *Id.* at 154.

185. *Duncan II*, 870 F. Supp. 2d at 154. A court must vacate an entire rule, rather than just an invalid portion of the rule, when the portions of the rule are "intertwined" such that there is "a substantial doubt that a partial affirmance would comport with the [agency's] intent." *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 50 (D.C. Cir. 1994). The relevant test is "whether . . . there is substantial doubt that the agency would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted." *North Carolina v. FERC*, 730 F.2d 790, 795–96 (D.C. Cir. 1984).

186. *Duncan II*, 870 F.Supp. 2d at 155. The court left in place the requirement that FPIs offering gainful employment programs disclose to prospective students information on "the occupation that the program prepares students to enter, the on-time graduation rate for students completing the program, the tuition and fees charged, and the placement rate and median loan debt for students completing the program." *Id.* at 155–56 (citing 34 C.F.R. § 668.6(b)). *See also Ass'n of Private Colleges and Universities v. Duncan*, 2013 WL 1111438 (D.D.C. Mar. 19, 2013) (denying Department of Education's motion to amend on the ground that the vacated reporting

Finally, the court vacated the Program Approval Rule, because it was no longer “animate[d]” by the Debt Measure Rule.¹⁸⁷

The court invalidated the debt repayment standard because it was not the product of reasoned decision making.¹⁸⁸ Despite an acknowledgement that “[t]he debt to income standards were the product of a ‘rational connection between the facts found and the choice made,’”¹⁸⁹ the court vacated the entire debt measure rule because “the Department has repeatedly emphasized the ways in which the debt repayment and debt-to-income tests were designed to work together,” and were therefore “obviously ‘intertwined.’”¹⁹⁰ The opinion did not elaborate on the *Duncan II* court’s conclusion that there is “substantial doubt that a partial affirmance [of the debt repayment test] would comport with the . . . [agency’s] intent.”¹⁹¹

VII. LEGISLATIVE ACTION

Given that the *Duncan* decisions stymied efforts by the White House and the Department of Education to protect veterans from the predatory recruitment practices of certain unscrupulous FPIs, legislative action appears to be the best hope for a solution. Encouragingly, Congress passed the Dignified Burial and Other Veterans’ Benefits Improvement Act of 2012¹⁹² (“Other Veterans’ Benefits Improvement Act”) and the Improving Transparency of Education Opportunities for Veterans Act of 2012¹⁹³ (“Improving Transparency Act”). President Obama signed both bills into law on January 10, 2013.

A. The Dignified Burial and Other Veterans’ Benefits Improvement Act of 2012

The Other Veterans’ Benefits Improvement Act is composed of several sections, but contains only two that are relevant to the for-profit higher education industry. The first provides that the Secretary of Labor is to provide the Transition Assistance Program, which currently exists as an on-base service that is provided for all service members nearing the end of

requirements were necessary to the proper operation of the upheld disclosure requirements).

187. *Duncan II*, 870 F. Supp. 2d at 158.

188. *Id.* at 153–54.

189. *Id.* (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

190. *Id.* at 154 (citing Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34,386, 34,394–400 (Jun. 13, 2011)).

191. *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 50 (D.C. Cir. 1994) (citing *North Carolina v. FERC*, 730 F.2d 790, 796 (D.C. Cir. 1984)).

192. Dignified Burial and Other Veterans’ Benefits Improvement Act of 2012, Pub. L. No. 112-260, 126 Stat. 2417 (2013).

193. Improving Transparency of Education Opportunities for Veterans Act of 2012, Pub. L. No. 112-249, 126 Stat. 2398 (2013).

their service contracts, as well as their spouses,¹⁹⁴ “to [veterans and their spouses] at locations other than military installations to assess the feasibility and advisability of providing such program . . . at locations other than military installations.”¹⁹⁵ The second relevant section provides that the Secretary is to “ensure that the training provided . . . generally follows the content of the Transition Assistance Program.”¹⁹⁶ The program is to be implemented in no less than three and no more than five states.¹⁹⁷ There are no modifications to the content of the training to be provided. The disappointing feature of this legislation is that it appears to be nothing more than a repetitive offering of training that properly discharged veterans are already required to receive.

B. The Improving Transparency of Education Opportunities for Veterans Act of 2012

The Improving Transparency Act also contains two sections that implement reforms to veterans’ educational benefits programs. Section 1 directs the Secretary of Veterans Affairs “to develop a comprehensive policy to improve outreach and transparency to veterans . . . through the provision of information on institutions of higher learning.”¹⁹⁸ Section 2 includes a provision that would withhold eligibility to participate in Post-9/11 GI Bill funding from institutions that provide certain recruiter incentive payments.¹⁹⁹

Pursuant to section 1, the Secretary’s comprehensive policy is to include “effective and efficient methods” of informing veterans of educational and vocational counseling services that are available to them.²⁰⁰ Additionally, the policy must create a “centralized mechanism for tracking and publishing feedback from students and State approving agencies regarding the quality of instruction, recruiting practices, and post-graduation employment placement of institutions of higher learning.”²⁰¹ The Secretary’s policy must also include the “merit of and the manner in which

194. 10 U.S.C. § 1144(a) (2012).

195. Pub. L. No. 112-260, § 301(a)–(b), 126 Stat. 2417, 2424 (2013). Under the Transition Assistance Program, “attendees learn about job searches, career decision-making, current occupational and labor market conditions, and resume and cover letter preparation and interviewing techniques. Participants also are provided with an evaluation of their employability relative to the job market and receive information on the most current veterans’ benefits.” VETS Fact Sheet 1, U.S. DEP’T OF LABOR, http://www.dol.gov/vets/programs/tap/tap_fs.htm (last visited May 17, 2013).

196. § 301(d).

197. § 301(c).

198. Pub. L. No. 112-249, § 1, 126 Stat. 2398, 2398 (2013).

199. § 2, 126 Stat. at 2401.

200. § 1, 126 Stat. at 2398 (to be codified at 38 U.S.C. § 3698).

201. *Id.* (feedback will only be published if it satisfies criteria for relevancy, which are to be determined by the Secretary, and only after institutions are allowed to verify and address the information).

a State approving agency shares” its evaluations with recognized accrediting agencies.²⁰² Lastly, the Secretary is to implement “effective and efficient methods” to inform student veterans of available postsecondary education opportunities.²⁰³ Specifically, the different types of accreditation are to be explained to them, along with the various Federal student aid programs.

The Secretary is also directed to ensure that student veterans receive specific information about “each institution of higher learning” that offers veterans “postsecondary education and training opportunities.”²⁰⁴ They are to receive such information as “whether the institution is public, private nonprofit, or proprietary for-profit,” and “information regarding the institution’s policies related to transfer of credit from other institutions.”²⁰⁵ They are also entitled to information regarding each institution’s median debt burden from Title IV loans and the cohort default rates of recent graduates, “as determined from information collected by the Secretary of Education.”²⁰⁶

It is encouraging that the Improving Transparency Act aims to reduce information asymmetry by establishing a centralized program for tracking and publishing student feedback. However, the language of the statute needlessly injects uncertainty into the particularities of this program’s structure. For example, the feedback regarding quality of instruction, recruiting practices, and employment prospects can be published only if it “conforms with criteria for relevancy” and only after colleges and universities “verify feedback and address issues.”²⁰⁷ While the statute does not clearly indicate how the Secretary is to determine appropriate “criteria for relevancy,” it stipulates that the Secretary is to ensure that “the comprehensive policy is consistent with any requirements and initiatives resulting from Executive Order No. 13607.”²⁰⁸ Recall that Executive Order 13607 compels institutions to “end fraudulent and unduly aggressive recruiting techniques . . . as well as misrepresentation, payment of incentive compensation, and failure to meet State authorization requirements, consistent with the regulations issued by the Department of Education.”²⁰⁹ Recall also that these are the same regulations that were vacated by the

202. *Id.* at 2398–400.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* This language seems to cast doubt on the court’s reasoning in *Duncan II*, where the Department of Education was barred from requiring that this type of information be disclosed to the government.

207. Pub. L. No. 112-249, §1, 126 Stat. 2398, 2398. (to be codified at 38 U.S.C. § 3698(b)(2)(A)).

208. §1, 126 Stat. at 2400 (to be codified at 38 U.S.C. § 3698(d)(1)).

209. Exec. Order 13607, 77 Fed. Reg. 25,862, §2 (Apr. 27, 2012). *See supra* notes 139–146 and 170–176 and accompanying text.

District of Columbia Circuit's holding in *Duncan I*.²¹⁰ If the "criteria for relevancy" are to mirror the *modus operandi* of Executive Order 13607, then feedback of abusive recruitment practices might be censored as irrelevant, provided that recruiters are careful to capitalize on recruitment tactics that tend to confuse their targets (permissible) without going too far by making assertions that amount to substantial misrepresentations (impermissible). This is because, in the wake of *Duncan I*, the requirements of Executive Order 13607 now refer to HEA regulations as they existed before 2011; thus, the requirements do not touch upon the type of abusive conduct that the Department of Education sought to mitigate by promulgating the ill-fated Abusive Recruitment Regulations.

The second relevant section of the Improving Transparency Act imposes a familiarly phrased restriction on certain types of compensation-based recruitment incentives. To wit, the Secretary is directed to withhold approval of programs offered by institutions that pay "any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance."²¹¹ This language appears to be a verbatim copy of section 487(a)(20) of the HEA—the very same provision upon which the Department of Education drew when it eliminated regulatory safe harbors for certain compensation programs.²¹² Frustratingly, the Improving Transparency Act's subsequent provision provides that "the Secretary shall carry out . . . [the preceding subsection] in a manner that is consistent with the Secretary of Education's enforcement of section 487(a)(20) of the Higher Education Act of 1965."²¹³ Recall that the *Duncan I* rationale prevented the Department of Education from eliminating safe harbors for compensation-based pay incentives. Thus, rather than strengthen regulatory protection for student veterans, this language almost guarantees that FPIs will continue to offer the type of compensation-based pay incentives that *Duncan I* preserved.

CONCLUSION

The interplay between the HEA and the Post-9/11 GI Bill incentivizes predatory behavior by FPIs. The Cohort Default Rate Rule and the 90/10 Rule make tempting prey out of former service members, and deceptive recruiters working under lax regulations readily capture those former service members' lucrative entitlements. A frustrating history of ineffective

210. See *supra* notes 148–163 and accompanying text.

211. Pub. L. No. 112-249, § 2, 126 Stat. 2398, 2401 (to be codified at 38 U.S.C. § 3696(d)).

212. See *supra* notes 42–46, 133, 151–157 and accompanying text.

213. Pub. L. No. 112-249, § 2, 126 Stat. 2398, 2401 (to be codified at 38 U.S.C. § 3696(d)).

regulation demonstrates that a comprehensive legislative solution is needed. Modifications to the 90/10 Rule would be a step in the right direction. However, some FPIs have demonstrated a clever tenacity to circumvent regulations. So long as *any* incentive to exploit student veterans remains,²¹⁴ there will continue to be a risk of predatory recruitment.

A legislative solution must strengthen the Department of Education's ability to enforce fair and honest recruitment practices. As repeat players in the higher education market, FPIs are likely to enjoy continued advantages over prospective students in the form of an information asymmetry favoring the former and an unsophisticated bargaining position endemic to the latter.²¹⁵ The for-profit model creates a motive for FPIs to maximize returns for equity owners, which can diminish investment in the quality of educational programs. Since prospective students can be ill-suited to the task of appraising the quality of educational programs, FPIs are likely to have an incentive to exploit the market advantages that exist between themselves and student veterans. The *Duncan II* holding curtailed the Department's ability to prevent abuses by FPIs under the current statutory framework of the HEA. Therefore, abusive recruitment is likely to continue until more effective regulatory tools are available.

The Principles of Excellence established under Executive Order 13607 should be eliminated or revised. Under the current scheme, FPIs are able to participate in Title IV funding programs without altering any of the practices that prompted the issuance of the order. The White House intended to implement a plan that would enhance the ability of student veterans to protect themselves by enabling them to quickly identify colleges and universities that conform to a standard of integrity greater than what is currently required by law.²¹⁶ The plan directed that a list of conforming institutions be maintained on the Department of Veterans Affairs website, thereby providing prospective student veterans with an official endorsement of ostensibly high-quality programs with honest recruitment staff. Unfortunately, as a consequence of *Duncan I*, the Principles of Excellence now make reference to the regulations that were in place prior to 2011, which proscribe only "substantial misrepresentations."²¹⁷ In this way, the Principles of Excellence program offers few, if any, of the protections that recipients of educational benefits might reasonably expect. Rather than protecting student veterans from "aggressive and deceptive targeting" by educational institutions, the

214. See, e.g., The Cohort Default Rate Rule, *supra* notes 79–82 and accompanying text.

215. For a discussion of information asymmetries and other distortions in the market for higher education, see Brian Pusser & Dudley J. Doane, *Public Purpose and Private Enterprise: The Contemporary Organization of Postsecondary Education*, 33 CHANGE 18, n.5 (2001).

216. Exec. Order 13607, 77 Fed. Reg. 25,861, §1 (Apr. 27, 2012).

217. 34 C.F.R. § 668.71(a) (2010).

Principles of Excellence assist unsavory FPIs by fostering a false sense of security in prospective victims. Voluntary participants in the Principles of Excellence should be held to a standard that more closely parallels the high expectations implied by the language of Executive Order 13607.

One might wonder why Congress would opt, as it did in January of 2013, for suspiciously worded legislation aimed at increasing access to information. The Senate Health, Education, Labor, and Pensions Committee has made clear that action is needed to address the incentives of FPIs to exploit student veterans. Sadly, the only proposed legislation that would at least partly address the issue of predatory recruitment continues to languish in Congress.²¹⁸ Veterans represent an honorable class of Americans with a long and unbroken tradition of fidelity and service to their country. For decades, Congress has demonstrated that it, in turn, is committed to promoting the well-being of these honored men and women on behalf of a grateful nation. It is discouraging that at a time when our veterans are in such need, and when we can agree on so little else, that our leaders seem so reluctant to act.²¹⁹

218. See, e.g., Military and Veterans Education Protection Act, H.R. 4055, 112th Cong. (2012). This proposed law would remove the incentive to exploit student veterans created by the interplay between the GI Bill and the 90/10 Rule. Specifically, it would categorize revenue received by FPIs from the Department of Veterans Affairs via GI Bill tuition payments so as to be included in the 90 percent of revenue received from Title IV programs. If passed, the proposed law would require FPIs to derive at least 10 percent of their revenue from non-federal sources, which would no longer include tuition payments pursuant to GI Bill education benefits. *Id.*

219. At the time this article was transmitted for publication, the Secretary of Education had recently circulated proposed regulations that, if promulgated, would resemble the Employment Regulations that were vacated by the *Duncan II* decision. See generally, *Draft for Discussion Purposes 11/08/2013*, U.S. DEP'T OF EDU., <http://www2.ed.gov/policy/highered/reg/hearrulemaking/2012/draft-regs-session2-11813.pdf>. Unfortunately, there is a statutory exception to the proposed regulations. *Id.* at 4 (conforming the definition of a "gainful employment program" to 34 C.F.R. § 668.8(d)). Recall that the HEA defines a "proprietary institution of higher education" as one that "provides an eligible program of training to prepare students for gainful employment in a recognized occupation." 20 U.S.C. § 1002(b)(1)(A)(i). This is the language that authorizes the Department of Education to promulgate regulations that impose standards based upon metrics of "gainful employment." See *supra* note 113. However, there is a grandfather clause that exempts any school from the proposed regulations that "provides a program leading to a baccalaureate degree in liberal arts, and has provided such a program since January 1, 2009," and which has been regionally accredited since October 1, 2007. 20 U.S.C. § 1002(b)(1)(A)(ii); 34 C.F.R. § 668.8(d)(4). Thus, many of the schools that were criticized by the Senate HELP committee's reports can claim eligibility for this exception from the proposed gainful employment rule. See *BENEFITTING WHOM?*, *supra* note 15, at 21–25 (noting that 22 of the 30 listed schools drew federal funding in 2006, necessarily implying accreditation and program offerings since at least that year).

While these proposed regulations are a welcome attempt to mitigate abusive practices in the proprietary higher education industry, they are woefully insufficient. They do not address the incentives created by the 90/10 Rule to target student veterans and they do not prevent the use of confusing statements in the recruitment process. Worse, it is

possible that they will not even apply to some of the industry's most suspect members. These measures are unlikely to effectively protect student veterans and, if nothing else, highlight the need for comprehensive legislative reform.

A LIFE'S JOURNEY: FRED D. GRAY'S *BUS RIDE TO JUSTICE*

LAVERNE LEWIS GASKINS*

Typically, history celebrates a select few when paying homage to the foot soldiers of justice in the Civil Rights Movement. Thus, while most lawyers in that struggle for equality, save for The Honorable Justice Thurgood Marshall, may have some degree of recognition, they are not household names. Fred D. Gray's autobiographical *Bus Ride to Justice*,¹ presents a unique perspective of pivotal civil rights cases, shared from a lawyer's point of view, yet in a manner that laypeople may better understand and appreciate the valuable role that attorneys played in molding America into an inclusive society. This book offers an in-depth account of the Civil Rights Movement, insightful depictions of historical figures, and a fascinating description of Gray's involvement in landmark cases, most notably those concerning higher education. While Gray never sought praise or adulation for the significant work that he did, his story of courage and humility deserves to be heard because of the monumental influence that he had on the legal landscape of the Civil Rights Movement.

Gray's autobiography provides the reader with a front seat view of his personal journey through the twists and turns of America's legal system as the country struggled to live up to the dictates of espoused democratic ideals. The book begins by chronicling Gray's childhood experiences growing up in Alabama in the 1930s and 1940s. Gray goes on to describe his forced journey outside the state of Alabama to secure a law degree, his admission to the Ohio and Alabama Bars, and his early struggles in establishing a practice.² As was typical throughout America during that era, particularly in the South, racial segregation permeated all aspects of society. Gray's reaction to experiences designed to denigrate and relegate Black Americans to a second class citizenry, served as a solid foundation upon which he vowed to "destroy everything segregated [he] could find."³

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1. FRED D. GRAY, *BUS RIDE TO JUSTICE: THE LIFE AND WORKS OF FRED D. GRAY* (2013).

2. *Id.* at 6–9.

3. *Id.* at 13.

In rich detail, the book goes on to offer a behind the scenes look into the systematic planning underlying a pivotal moment in civil rights history: the 1955 Montgomery Bus Boycott. Beginning with a discussion of his representation of Rosa Parks when she was charged with disorderly conduct,⁴ Gray divulges many of the legal strategies used by him and others, including Thurgood Marshall, then director of the NAACP, in *Browder v. Gayle*.⁵ *Browder* involved a challenge to the constitutionality of racially segregated buses.⁶ The district court, in a monumental decision that was ultimately affirmed by the United States Supreme Court,⁷ held that segregated buses were unconstitutional under the Fourteenth Amendment.⁸

Mr. Gray reveals that his victory in defeating segregation on buses did not come easy. He experienced retaliation, personal indignities that included a grand jury indictment for unlawfully filing *Browder*,⁹ and a complaint filed with the Alabama Bar Association for signing Mrs. Parks's appeal bond.¹⁰ Yet, despite, these personal battles, Mr. Gray continued his war on segregation by advancing the issue of voting rights. Following his victory in *Browder*, he challenged America to uphold the "one man, one vote theory" in the seminal case, *Gomillion v. Lightfoot*.¹¹ In his discussion of *Lightfoot*, Gray offers insight into his preparation for his oral argument before the United States Supreme Court in 1959, as well as the debates between him and his co-counsels over which arguments should be made.¹² Gray also describes the map that he used before the Supreme Court, which clearly evidenced the insidious nature of the gerrymandering in that case, and which significantly impacted the Court's decision that the Alabama legislature had violated the Fifteenth Amendment.¹³ In 1965, he once again took up the issue of voting rights when he agreed to represent those individuals brutally attacked at the Edmund Pettus Bridge on what is now referred to as "Bloody Sunday," in the case of *Williams v. Wallace*.¹⁴ The plaintiffs sought, and were granted, an order requiring police protection for marches traveling from Selma to Montgomery in protest over the right to

4. Parks v. City of Montgomery, 92 So. 2d 683 (Ala. Ct. App. 1957).

5. 142 F. Supp. 707 (M.D. Ala. 1956). Gray explains that Mrs. Parks was not a named plaintiff in *Browder* because he did not want to provide the Court with an excuse to dismiss *Browder* as a collateral attack on Mrs. Parks' prior criminal conviction for disorderly conduct. See GRAY, *supra* note 1, at 72.

6. *Id.*

7. Gayle v. Browder, 352 U.S. 903 (1956) (per curiam).

8. *Browder*, 142 F. Supp. at 717.

9. State v. Fred D. Gray, In the Circuit Court of Montgomery County, Case No. GJ202 (1956). The indictment was later dismissed.

10. GRAY, *supra* note 1, at 57.

11. 364 U.S. 339 (1960).

12. GRAY, *supra* note 1, at 117.

13. *Id.* at 118.

14. 240 F. Supp. 100 (M. D. Ala. 1965). See GRAY, *supra* note 1, at 216–220.

vote.¹⁵

Mr. Gray's most notable client, of course, was Dr. Martin Luther King. In 1960, Dr. King was indicted for perjury in connection with his income tax returns. Fortunately, an all-white jury acquitted Dr. King. Mr. Gray believes that, while the case may not have received considerable publicity, it was Dr. King's most important case because a conviction would have derailed the movement. Additionally, this case played a significant role in the modification of the law of libel as it relates to public officials. This is because actions related to the raising of money for Dr. King's defense in his tax case became the subject of *Times v. Sullivan*.¹⁶ In 1960, a committee, which included prominent Alabama ministers, placed an advertisement in the New York Times. A section of the advertisement stated, "we in the south who are struggling daily for dignity and freedom warmly endorse this appeal."¹⁷ L. B. Sullivan, then police commissioner of Montgomery, sued the ministers, alleging libel.¹⁸ While Mr. Gray's work on the case was primarily limited to the trial of the ministers, on appeal the Supreme Court held that the law applied by the Alabama courts was unconstitutional, and that in a libel action against a public official there must be a showing of actual malice.¹⁹

Gray's illustrious career also included effectuating the sound (albeit vague) declaration, "all deliberate speed," of *Brown v. Board of Education*²⁰ in Alabama. To this end, his work began in 1960, when college students from Alabama State College, following the example of students from North Carolina A&T, participated in a sit-in at the county courthouse lunch counter where they requested service.²¹ Instead of arresting the students, Montgomery courthouse officials closed the counter.²² Immediately thereafter, Governor Patterson contacted the president of Alabama State College and ordered the expulsion of the students.²³ Gray was retained to represent the students in *Dixon v. Alabama State Board of Education*²⁴ to set aside their expulsions. In seeking to overturn the expulsions, Gray argued that the students had been denied due process and deprived of the right to an education.²⁵ The district court ruled

15. *Williams*, 240 F. Supp. at 109.

16. 376 U.S. 254 (1964).

17. GRAY, *supra* note 1, at 156.

18. In fact, the three city commissioners of Montgomery filed suit against the ministers, but Sullivan's case was the first to go to trial and, ultimately, to the Supreme Court.

19. *Sullivan*, 376 U.S. at 271.

20. 349 U.S. 294 (1955).

21. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 152-53 (5th Cir. 1961).

22. GRAY, *supra* note 1, at 166.

23. *Id.* at 167.

24. *Id.*

25. *Id.* at 167.

against the plaintiffs, but the Fifth Circuit reversed, holding that students have a constitutional right to an education at a state-supported institution and have a right to due process.²⁶ Following the *Dixon* case, Gray recalled that:

[T]his ruling caused a tremendous stir among lawyers that represented colleges and universities Those lawyers decided among themselves that it was necessary for them to devise an appropriate plan as to how their particular institution would . . . satisfy the requirements of *Dixon*. The result of these informal meetings was the formation of the National Association of College and University Attorneys (NACUA).²⁷

Gray continued to play a role in the fight for integration by representing several African American students who desired to attend historically white colleges and universities. In 1963, Gray filed separate suits against the University of Alabama on behalf of Vivian Malone,²⁸ and against Auburn University on behalf of Harold Franklin,²⁹ resulting in the integration of both institutions. Gray also represented the plaintiff in *Lee v. Macon County Board of Education*.³⁰ The legacy of *Lee* is profound in that, “probably more than three hundred different opinions have been written on various aspects of the case.”³¹ *Lee* was an important case because it resulted in the integration of Alabama’s remaining segregated public schools, the integration of all institutions of higher education under the control of the Alabama State Board of Education, the merging of the African American and white high school athletic associations, and the integration of all state trade schools, junior colleges and technical schools.³²

Despite these early legal victories in desegregating colleges and universities, however, vestiges of discrimination remained in higher education for decades. Thus, in 1982, Gray agreed to represent one of the plaintiffs, Alabama State University, in *United States v. Alabama*.³³ There, the district court found that the state of Alabama had failed to dismantle the vestiges of race-based discrimination, and required the state, the governor and other named entities to submit a remedial plan.³⁴ The “Higher Education Case,” as this case is referred to, is of particular importance to Gray. In order to bring the state of Alabama in compliance with

26. *Dixon*, 294 F.2d 150.

27. GRAY, *supra* note 1, at 169.

28. *Id.* at 187–90.

29. *Id.* at 191–92.

30. 221 F. Supp. 297 (M. D. Ala. 1963), *aff’d*, 429 F.2d 1218 (5th Cir. 1970).

31. GRAY, *supra* note 1, at 211.

32. *Id.*

33. 628 F. Supp. 1137 (N.D. Ala. 1985), *rev’d*, 828 F.2d 1532 (11th Cir. 1987).

34. *Id.* at 1173.

constitutional mandates, cases prior to *Alabama* were intended to “destroy segregation, ‘root and branch.’” Yet, as Gray explains, this case indicates that “segregation thrived, root, branch, and trunk [and it] became necessary in 1982 to file . . . additional suits to destroy . . . discrimination in higher education.”³⁵

One of the most unanticipated revelations in Gray’s autobiography is his inclusion of the late Governor George C. Wallace as one of the four lawyers who impacted his legal career. It takes digesting Gray’s appealing and thorough autobiography to understand the rationale behind his inclusion of a man best known for his infamous and defiant stance on integration: “Segregation now, segregation tomorrow, and segregation forever.” When one juxtaposes Wallace’s proclamation against Gray’s vow to “destroy everything segregated,” it stands to reason that their paths would, historically, be inextricably intertwined.

Charles Hamilton Houston, a prominent civil rights attorney, and architect of *Brown v. Board of Education*, believed that a lawyer should be an agent for social change: “[a] lawyer’s either a social engineer or he’s a parasite on society.”³⁶ Gray has, without a doubt, given credence to Houston’s belief. In his 59th year of practicing law, Gray is one of the most successful civil right attorneys in the twentieth century. *Bus Ride To Justice* provides a remarkable, historical exploration of legal challenges imbedded in the author’s humility, and the wisdom of reflection slowly aged by experience and time.

35. GRAY, *supra* note 1, at 338.

36. GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHT* 84 (1983).

