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Academic freedom has constitutional protection, though scholars disagree about whether it is a distinct right, and if so, whether it belongs to the teacher, the university, or both. The premise of this article is that the Supreme Court has never recognized a distinct constitutional right of academic freedom. To date, teachers have been subject to the same first amendment protection as other public employees, but after *Garcetti v. Ceballos*, it is imperative the Court establish a discrete legal basis for individual academic freedom. "Institutional" academic freedom is not a positive "right," but rather a qualified immunity, a policy of judicial deference to the academic community, based upon a cultural tradition of granting intellectual leeway to the thinkers and dreamers.

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THE EVOLUTION OF AFFIRMATIVE ACTION AND THE NECESSITY OF TRULY INDIVIDUALIZED ADMISSIONS DECISIONS

DAVID J. GARROW*

Affirmative action was an unexpected, but also inevitable, byproduct of the Black freedom struggle of the 1960s. It was unexpected by the presidents, legislators, and activists who shaped the initial civil rights policy responses of the federal government between 1961 and 1965. But it also was an inevitable result of the fair employment policies that those actors fervently sought. Once the major building block of their efforts—Title VII of the Civil Rights Act of 1964¹—became law, the absence of any clear consensus on the outer parameters of how to define racial discrimination guaranteed that a gradual and often subtle evolution in the implementation of federal anti-discrimination policies would eventually give the word “affirmative” a substantive import far beyond what its earliest uses had suggested.

The most thorough historical accounts of the earliest origins of affirmative action trace its roots to the efforts of Interior Secretary Harold L. Ickes and his aides in the 1930s to insure that Public Works Administration contractors hired some percentage of Black employees in areas that had an “appreciable Negro population.”² The actual phrase itself first appeared in a nonracial context in the Wagner National Labor Relations Act of 1935,³ and was then first used with regard to race in New York’s 1945 Law Against Discrimination.⁴

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1. Pub. L. No. 88-352, Title VII, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e-4, et seq. (2000)).

2. An Act of January 3, 1935, ch. 372, § 1, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151, et seq. (2000)). See TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 12, 46 (2004).

3. ANDERSON, *supra* note 2, at 15; HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY* 33 (1990). See also PAUL D. MORENO, *FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA 1933-1972* (1997).

4. 1945 N.Y. Laws 457; GRAHAM, *supra* note 3, at 34, 487–88. See also MORROE BERGER, *EQUALITY BY STATUTE: THE REVOLUTION IN CIVIL RIGHTS* (1967); Arthur Earl Bonfield, *The Origin and Development of American Fair Employment Legislation*, 52 *IOWA L.*

Many summary accounts, however, understandably date the birth of affirmative action as March 6, 1961, when President John F. Kennedy issued Executive Order 10,925.⁵ The 4,500-word Order created the President's Committee on Equal Employment Opportunity and directed the committee to "consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination"⁶ in government employment. It also mandated that all federal contracts henceforth include a provision binding each contractor to "not discriminate against any employee or applicant for employment because of race, creed, color, or national origin."⁷ In addition, each "contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."⁸

Hobart Taylor, Jr., a young Black attorney from Texas who Vice President Lyndon B. Johnson recruited to help draft the Order, recalled in a 1969 oral history interview that he "was searching for something that would give a sense of positiveness to performance under that executive order, and [he] was torn between the words 'positive action' and the words 'affirmative action.'"⁹ He chose "'affirmative' because it was alliterative," Taylor explained.¹⁰

Historians of affirmative action have rightly highlighted how modest a meaning those words carried at the time of Kennedy's Order. The late Hugh Davis Graham, noting that the phrase appeared only once and "rather casually" in the lengthy Order, observed that right "from its inception the notion of affirmative action in civil rights was ambiguous."¹¹ On one hand, it represented "classic nondiscrimination," for the suggestive sentence, Graham emphasized, stated that "affirmative action was required to ensure that citizens were treated *without regard* to race, color, or creed."¹² But in using "positive new rhetoric," the Order also "seemed self-defined to require more aggressive recruitment in hiring, and special training for minorities to encourage their advancement."¹³

Graham recognized that "from the beginning the concept of affirmative action

REV. 1043, 1071-73 (1967).

5. Exec. Order No. 10,925, 26 C.F.R. 1977 (1961), *available at* <http://www.eeoc.gov/abouteeoc/35th/thelaw/eo-10925.html>.

6. *Id.*

7. *Id.*

8. *Id.* See also Anthony Lewis, *Kennedy Orders Equal Job Rights In Federal Work*, N.Y. TIMES, Mar. 7, 1961, at 1, 27; Bonfield, *supra* note 4, at 1081-82.

9. ANDERSON, *supra* note 2, at 60-61.

10. *Id.* See Interview by Stephen Goodell with Hobart Taylor, Jr. (Jan. 6, 1969). See also GRAHAM, *supra* note 3, at 33; *Hobart Taylor Jr., 60, Past Trade Bank Head And Law Firm Partner*, N.Y. TIMES, Apr. 4, 1981, at 20.

11. GRAHAM, *supra* note 3, at 28. See also Stacy K. Sewell, *The 'Fashionable' End to Discrimination: The Development of Affirmative Action in the Kennedy-Johnson White House*, 4 WHITE HOUSE STUD. 355, 358 (2004) (calling the phrase "flexible, vague, and ill-defined").

12. GRAHAM, *supra* note 3, at 42.

13. *Id.* See also W.S. Price, *The Affirmative Action Concept of Equal Employment Opportunity*, 16 LAB. L.J. 603 (1965). Price observed that "the affirmative action requirement" in the Order "represents a significant departure from" previous federal anti-discrimination efforts. *Id.* at 603.

was somewhat open-ended,”¹⁴ but Terry Anderson, in his comprehensive history of the policy, likewise agreed that at the time of Kennedy’s 1961 Order, “all the administration seemed to be advocating was racially neutral hiring to end job discrimination.”¹⁵ A second Kennedy mandate, Executive Order 11,114 of June 22, 1963, also declared that it was federal policy “to encourage by affirmative action the elimination of discrimination” in all federally-funded activities,¹⁶ and a third such decree, Executive Order 11,246, issued by President Lyndon B. Johnson on September 24, 1965, “used the exact same words as Kennedy had in 1961” in again invoking the phrase “affirmative action.”¹⁷

Johnson’s 1965 Order, Anderson explains, “became the standing rule for affirmative action for future decades,”¹⁸ but fourteen months prior to Johnson’s repetition of Kennedy’s (or Hobart Taylor’s) enigmatic declaration, the new president had signed into law the landmark Civil Rights Act of 1964.¹⁹ Title VII enacted into statutory law the anti-discrimination commands of Kennedy’s Executive Orders, expanded their reach to all employers with twenty-five or more employees, and created the Equal Employment Opportunity Commission as a new executive branch enforcement agency.²⁰ Yet as Anderson correctly underscores, Section 703(j) of Title VII also mandated that “[n]othing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group” on account of “race, color, religion, sex, or national origin.”²¹ Thus, the new law prohibited discrimination but also appeared to bar any government-ordered preferential action on behalf of “any group who had suffered discrimination.”²²

But the most important indicator of what would happen with federal anti-discrimination policy implementation in the mid- to late-1960s came not in any statute or Executive Order, but in a commencement address that President Johnson delivered at historically Black Howard University in Washington D.C. on June 4, 1965. “We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result,” Johnson declared toward the halfway point of his address.²³

14. GRAHAM, *supra* note 3, at 34.

15. ANDERSON, *supra* note 2, at 61.

16. *Id.* at 72; Exec. Order No. 11,114, 28 C.F.R. 6485 (1963), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=59053>. See also Marjorie Hunter, *Negroes Inform Kennedy Of Plan For New Protests*, N.Y. TIMES, June 23, 1963, at 63; Tom Wicker, *Kennedy Prohibits Job Discrimination At Federal Projects*, N.Y. TIMES, June 5, 1963, at 22.

17. ANDERSON, *supra* note 2, at 92; Exec. Order No. 11,246, 30 C.F.R. 12319 (1965), available at <http://www.eeoc.gov/abouteeoc/35th/thelaw/eo-11246.html>. See also *Johnson Orders Reorganization of Federal Civil Rights Program*, N.Y. TIMES, Sept. 25, 1965, at 1.

18. ANDERSON, *supra* note 2, at 92.

19. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000, et seq. (2000)).

20. Pub. L. No. 88-352, Title VII, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e-4, et seq. (2000)).

21. ANDERSON, *supra* note 2, at 92.

22. *Id.*

23. President Lyndon B. Johnson, Address at Howard University: To Fulfill These Rights (June 4, 1965), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/>

That latter pair of phrases would in time become the most quoted passage of Johnson's speech, but further along the president added, in words that qualified if not undercut his first invocation of "opportunity," that "equal opportunity is essential, but not enough, not enough."²⁴ What had to happen for Black Americans, Johnson continued, was "to move beyond opportunity to achievement."²⁵

The uncertainties and indeed confusion over what "opportunity," "equality," and "affirmative action" all might mean or require were brought home even more starkly by Edward C. Sylvester, Jr., the first director of the Johnson Administration's newly-created Office of Federal Contract Compliance. Speaking at an early 1967 conference, Sylvester frankly acknowledged that "[t]here is no fixed and firm definition of affirmative action. I would say that in a general way, affirmative action is anything that you have to do to get results. But this does not necessarily include preferential treatment. The key word here is 'results.'"²⁶

Sylvester was echoing President Johnson's own word-choice, but it is crucial for 21st-century readers and policy-makers to appreciate just how deeply obscure and muddled was the 1960s' emergence of "affirmative action" as a civil rights policy concept. Historian Thomas Sugrue rightly notes that "between 1963 and 1969, affirmative action moved from obscurity to become the single most important federal policy for dealing with employment discrimination."²⁷ Indeed it was only at the very close of the Johnson years, and in the earliest months of the new administration of the ostensibly conservative Republican President Richard M. Nixon, that the tangible implications of Johnson's and Sylvester's formulations suddenly came to full flower.

Equally important, though, is how this slow progression and emergence of federal policy took place at what in truth was a considerably great distance from the protest activism of the era's most important African American freedom fighters. Dr. Martin Luther King, Jr., the 1960s' most heralded civil rights activist, observed in early 1964 that "[s]ome kind of compensatory crash program" was needed "to bring the standards of the Negro up and bring him into the mainstream of life."²⁸ King previously had called publicly for "some concrete, practical preferential program, . . . a crash program of special treatment," but, following the advice of Clarence B. Jones, one of his top Black advisors, King soon explained that what he desired was in no way racially exclusive.²⁹ King wrote,

Any "Negro Bill of Rights" based upon the concept of compensatory

650604.asp.

24. *Id.*

25. *Id.*

26. ANDERSON, *supra* note 2, at 103 (quoting REPORT OF THE 1967 PLANS FOR PROGRESS FIFTH NATIONAL CONFERENCE 73-74 (1967)).

27. Thomas J. Sugrue, *The Tangled Roots of Affirmative Action*, 41 AM. BEHAV. SCIENTIST, 886, 895 (1998). *See also* Price, *supra* note 13, at 603 (noting presciently in 1965 that the "significance" of the affirmative action concept "extends well beyond the sphere of employment.").

28. DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 310 (1986).

29. *Id.* at 680 n.20.

treatment as a result of the years of cultural and economic deprivation resulting from racial discrimination . . . must give greater emphasis to the alleviation of economic and cultural backwardness on the part of the so-called “poor white.” It is my opinion that many white workers whose economic condition is not too far removed from that of his black brother, will find it difficult to accept a “Negro Bill of Rights” which seeks to give special consideration to the Negro in the context of unemployment, joblessness, etc.³⁰

The simple truth of the matter is that federal anti-discrimination policy developed and evolved inside a handful of government office buildings in downtown Washington, D.C., not in the streets of Birmingham or Chicago or within the movement’s own councils.³¹ The lack of close or detailed contact between the movement’s own leaders and activists, on the one hand, and relevant executive branch officials like Edward Sylvester, on the other, may seem somewhat surprising. However, anyone who can fully appreciate just how frantically busy the pace of daily life was for activists like King in those years must also understand that the absence of any substantive policy input from the movement to government officials was simply one more inevitable result of the nonstop challenges and demands those leaders confronted.³²

It may seem historically underwhelming or disappointing that federal anti-discrimination policies were much more the handiwork of little-remembered officials like Ed Sylvester than marquee names like Martin Luther King, Jr., but that fact underscores the extent to which meaningful political change is the result of efforts by a wide variety and large number of historical actors, heralded and unheralded.³³ As Roger Wilkins, a knowledgeable student of the movement who worked in the Johnson Administration observed at the time of Ed Sylvester’s death, “We were allies of the civil rights movement,” and “[p]art of what we did

30. *Id.* at 312. See JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION* 31–33 (1996) for similar analysis of the thinking of Whitney M. Young, executive director of the National Urban League. See also NANCY J. WEISS, *WHITNEY M. YOUNG, JR. AND THE STRUGGLE FOR CIVIL RIGHTS* (1989) (giving background on Young).

31. See Thomas J. Sugrue, *Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945-1969*, 91 J. AM. HIST. 145, 173 (2004). “The protesters,” Sugrue writes, “were not, in a strict sense, the architects of affirmative action. They did not draft executive orders and federal regulations.” Instead, he acknowledges, “Affirmative action was the distinctive product of Johnson and Nixon administration policy makers.” *Id.* See also PAUL BURSTEIN, *DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL* 90 (1985); JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* 5, 329 (2002); Mark Brilliant, “*Without Anyone Noticing At All*”: *The (Silent) Minority Rights Revolution*, 33 REV. AM. HIST. 278, 284 (2005) (concluding that Skrentny’s book highlights “the central role that federal policy makers played in advancing the minority rights revolution”).

32. See David J. Garrow, *Where Martin Luther King, Jr. Was Going: Where Do We Go From Here and the Traumas of the Post-Selma Movement*, 75 GA. HIST. Q. 719, 734 (1991) for King’s difficulty in generating a specific and substantive policy agenda.

33. See BURSTEIN, *supra* note 31, at 68, 94–96, 122–24, 180–81, 186. See also TIMOTHY J. MINCHIN, *HIRING THE BLACK WORKER: THE RACIAL INTEGRATION OF THE SOUTHERN TEXTILE INDUSTRY, 1960-1980* (1999).

was carry out the legislation that the civil rights movement had started.”³⁴ Sometimes, as with affirmative action, “carry out” carried with it a significant, and indeed dramatic degree of initiative and innovation.

The most important and influential turning point in the history of federal anti-discrimination policy came in 1968–69 with a decisive battle over what was called “the Philadelphia Plan.”³⁵ Federal regional administrators intent upon integrating several virtually all-white building trade unions crafted the initial approach in late 1967.³⁶ “Although affirmative action is criticized as ambiguous, the very lack of specific detail and rigid guideline requirements permits the utmost in creativity, ingenuity, and imagination,” the lead official wrote.³⁷ The goal, he explained, was to “achieve equal opportunity results”—three familiar words, but now conjoined.³⁸

In practice, as Terry Anderson recounts, “[t]he ‘Philadelphia Plan’ demanded that contractors’ bids ‘must have the *result of producing minority group representation* in all trades and in all phases” of each federally-funded construction project.³⁹ This step forward in giving tangible meaning to “affirmative action” certainly advanced the “result” that President Johnson had called for in 1965. But as Anderson observes, a focus upon results, “even if that meant hiring *with regard* to race,” “clashed with the original intent of Title VII, which only demanded employment *without regard* to race.”⁴⁰

Opposition from the General Accounting Office and the Comptroller General stymied any actual implementation of the Philadelphia Plan throughout the waning months of the Johnson Administration. The decision thus passed to Johnson’s successor, Richard M. Nixon, and more particularly to Nixon’s new Secretary of Labor, George P. Shultz, who strongly endorsed the policy.⁴¹ After several months of highly incongruous legislative tussling in which utterly unlikely alliances had most liberal Democrats lining up alongside organized labor in opposition to the Philadelphia Plan, and most congressional Republicans siding with their president in support of a policy that Shultz and his top aides energetically championed, the program won an unexpected vote of confidence from both houses of Congress in December 1969.⁴²

34. Matt Schudel, *Labor, Hill Official Edward Sylvester Dies*, WASH. POST, Feb. 18, 2005, at B6. See also GRAHAM, *supra* note 3, at 284–87 (describing Sylvester’s role in the 1960s).

35. See GRAHAM, *supra* note 3, at 287–90.

36. *Id.*

37. *Id.* at 290 (citation omitted). For a unique and rich background on the administrative roots of the Philadelphia Plan, the essential source is James E. Jones, Jr., *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341, 359–61, 364–73, 378–79, 381–96 (1970).

38. GRAHAM, *supra* note 3, at 290.

39. ANDERSON, *supra* note 2, at 105. See also SKRENTNY, *MINORITY RIGHTS*, *supra* note 31, at 89, 132.

40. ANDERSON, *supra* note 2, at 108.

41. See Paul Delaney, *Shultz Defends Minority Hiring*, N.Y. TIMES, Aug. 7, 1969, at 23; *U.S. Plans Formula to Get Contractors to Hire Minorities*, N.Y. TIMES, June 28, 1969, at 61. See also Donald Janson, *Construction Job Rights Plan Backed at Philadelphia Hearing*, N.Y. TIMES, Aug. 27, 1969, at 24.

42. See ANDERSON, *supra* note 2, at 108–09, 115–24; GRAHAM, *supra* note 3, at 290–97, 322–40; GARY ORFIELD, *CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE* 84–87 (1975); SKRENTNY, *THE IRONIES*, *supra* note 30, at 137–39, 177–78, 193–209; Jones, *supra*

The evolution toward an executive branch focus on “results” may have been an inescapable progression during the Kennedy and Johnson years, but nothing could have been more politically unexpected than for a conservative Republican administration to embrace and champion the most aggressively demanding pursuit of results yet articulated. Once again, the story of how this came to pass is a densely-complicated, inside-Washington piece of policy history with strikingly few connections whatsoever to the most publicized aspects of the Black freedom struggle.⁴³

The upshot of this unexpected turn of events, however, was that “[t]he Philadelphia Plan eclipsed Title VII and became the official policy of the U.S. government.”⁴⁴ Then, in relatively quick succession, two further significant policy events reinforced and expanded the reach of this decisive shift. First came the U.S. Supreme Court’s 1971 ruling in *Griggs v. Duke Power Co.*⁴⁵

Prior to the enactment of Title VII, Duke Power had explicitly limited the job prospects of its Black employees.⁴⁶ Once the 1964 law was enacted, however, the company added new education and testing requirements for any employee seeking transfer to a better job.⁴⁷ Those preconditions held back Blacks who had endured segregated schools, and when their challenge to the new prerequisites reached the Supreme Court, the Justices unanimously agreed.⁴⁸

Title VII, the Court observed, “does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.”⁴⁹ Instead, the opinion continued, “[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”⁵⁰

“[T]ests or criteria for employment or promotion may not provide equality of opportunity,”⁵¹ the Court observed, and Title VII requires that “the posture and condition of the job-seeker be taken into account.”⁵² In other words, the law “proscribes not only overt discrimination but also practices that are fair in form,

note 37, at 396–98; Dean J. Kotlowski, *Richard Nixon and the Origins of Affirmative Action*, 60 HISTORIAN 523 (1998); Sugrue, *Affirmative Action from Below*, *supra* note 31, at 170–72. See also J. Larry Hood, *The Nixon Administration and the Revised Philadelphia Plan for Affirmative Action: A Study in Expanding Presidential Power and Divided Government*, 23 PRESIDENTIAL STUD. Q. 145 (1993).

43. See Terry H. Anderson, *The Strange Career of Affirmative Action*, 22 S. CENT. REV. 110, 116–19 (2005); Hugh Davis Graham, *The Origins of Affirmative Action: Civil Rights and the Regulatory State*, 523 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 57–59 (1992).

44. ANDERSON, *supra* note 2, at 124.

45. 401 U.S. 424 (1971).

46. *Id.* at 426–27.

47. *Id.* at 427–28.

48. *See id.*

49. *Id.* at 430–31.

50. *Id.* at 431.

51. *Id.*

52. *Id.*

but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”⁵³

Griggs gave judicial endorsement to the enforcement policies that had evolved within the executive branch agencies and, as such, “defined affirmative action for the next two decades.”⁵⁴ Terry Anderson asserts that in practice, *Griggs* “basically made fair employment more a group than an individual right,”⁵⁵ a development that could be seen as wholly in keeping with the explicit demand for “results” that reached back to Lyndon Johnson’s 1965 speech at Howard University.⁵⁶

But the second major occurrence that followed in the wake of the Philadelphia Plan’s acceptance involved the wholesale extension of the anti-discrimination policies that had developed for the industrial workforce to the new arena of educational institutions. Given how much of the nationwide debate about affirmative action would revolve in later years around hiring practices and admissions policies in higher education, it is utterly amazing how little scholarly attention has ever focused on the 1972 decision by the federal Office for Civil Rights (OCR) to expand equal employment enforcement efforts to colleges and universities holding federal contracts.

The earliest and most influential entreaties seeking to broaden enforcement to encompass higher education came from women’s groups spurred by repeated reports of deep and widespread sex discrimination in faculty hiring.⁵⁷ Public debate and controversy over the incipient federal expansion burgeoned rapidly in late 1971 and early 1972,⁵⁸ and in the spring of 1972, the Department of Health, Education, and Welfare (“HEW”) Secretary Elliot L. Richardson, whose cabinet department encompassed OCR, publicly upbraided unhappy academics by reminding them that colleges and universities, as federal contractors and employers, “incur the obligations of other contractors and other employers.”⁵⁹

Richardson told reporters that “the primary responsibility for finding methods to increase the numbers of women and minorities must come from the universities themselves,”⁶⁰ but at the very same time that his department was preparing to issue a formal mandate, Congress passed and President Nixon signed into law the Equal Employment Opportunity Act of 1972, which amended Title VII in such a way as

53. *Id.*

54. ANDERSON, *supra* note 2, at 129.

55. *Id.*

56. *Id.* See also SKRENTNY, *THE IRONIES*, *supra* note 30, at 166–71.

57. See Linda Greenhouse, *Columbia Accused of Bias on Women*, N.Y. TIMES, Jan. 11, 1970, at 55; Harold Orlans, *Affirmative Action in Higher Education*, 523 ANNALS AM. ACAD. POL. & SOC. SCI. 144, 150 (1992); SKRENTNY, *MINORITY RIGHTS*, *supra* note 31, at 242–49; ANDERSON, *supra* note 2, at 142–45.

58. See, e.g., Paul Seabury, *HEW and the Universities*, COMMENT., Feb. 1972, at 28.

59. Elliot L. Richardson, *To the Editor of Commentary*, COMMENT., May 1972, at 10. A similar letter from OCR’s assistant director for public affairs stated that “in order to overcome the discrimination of the past, we have no alternative at this point in time but to use the race factor as a means of restoring equal opportunity.” Robert E. Smith, *To the Editor of Commentary*, COMMENT., May 1972, at 10, 11.

60. Joyce Heard, *Richardson: Women and the Ivory Tower*, HARV. CRIMSON, Apr. 24, 1972, available at <http://www.thecrimson.com/article.aspx?ref=495266>.

to make all colleges and universities, not just those holding government contracts, subject to federal anti-discrimination policies.⁶¹

Initial press coverage of the new statute was spotty and incomplete,⁶² but within a few weeks word quickly spread about what a significant increase in the scope of enforcement the unheralded new statute promised.⁶³ But OCR was moving forward irrespective of the statutory change, and on October 1, 1972, OCR Director J. Stanley Pottinger formally issued the office's Higher Education Guidelines.⁶⁴

"The premise of the affirmative action concept," Pottinger explained, "is that unless positive action is undertaken to overcome the effects of systemic institutional forms of . . . discrimination, a benign neutrality in employment practices will tend to perpetuate the 'status quo ante' indefinitely."⁶⁵ Then, echoing clearly and directly the Supreme Court's language in *Griggs*, the document stated that

the affirmative action concept does not require that a university employ or promote any persons who are unqualified. The concept does require, however, that any standards or criteria which have had the effect of excluding women and minorities be eliminated, unless the contractor can demonstrate that such criteria are conditions of successful performance in the particular position involved.⁶⁶

That mandate brought federal anti-discrimination enforcement into the world of higher education with dramatic effect. Some leading colleges and universities had already initiated race-conscious admissions policies with an acknowledged goal of increasing the number of racial minority students,⁶⁷ but even as early as the fall of 1971, the first legal ruling disallowing those policies was handed down by a Washington state trial court.⁶⁸ Oddly, that case was brought by a rejected law school applicant who sought preferential treatment for in-state as opposed to out-of-state applicants.⁶⁹ The trial court ordered his admission after uncovering racially-disparate admissions standards, but by the time the case reached the U.S.

61. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e, et seq. (2000)).

62. See, e.g., *Job Unit Widens Women's Rights*, N.Y. TIMES, Mar. 31, 1972, at 1, 17. See also ORFIELD, *supra* note 42, at 88–90.

63. *College Group to Tell Members of New Hiring-Bias Regulations*, N.Y. TIMES, Apr. 9, 1972, at 44.

64. Nondiscrimination Under Federal Contracts—Higher Education Guidelines, 37 Fed. Reg. 24,686 (Nov. 18, 1972).

65. *Id.* at 24,687.

66. *Id.* See also J. Stanley Pottinger, *The Drive Toward Equality*, CHANGE, Oct. 1972, at 24, 26–29; Seth A. Goldberg, *A Proposal for Reconciling Affirmative Action with Nondiscrimination Under the Contractor Antidiscrimination Program*, 30 STAN. L. REV. 803, 811–21 (1978); SKRENTNY, MINORITY RIGHTS, *supra* note 31, at 249–51.

67. See Joseph O. Jewell, *An Unfinished Mission: Affirmative Action, Minority Admissions, and the Politics of Mission at the University of California, 1868–1997*, 69 J. NEGRO EDUC. 38, 43 (2000); SKRENTNY, MINORITY RIGHTS, *supra* note 31, at 166–73.

68. See David J. Garrow, *Lessons From Affirmative Action's Past*, L.A. TIMES, Mar. 31, 2003, at B11.

69. *Id.*

Supreme Court, the law student was on the verge of graduating, thus allowing the Justices to dismiss the case as moot.⁷⁰

Dissenting from that judgment, liberal icon Justice William O. Douglas wrote that admissions decisions must be made “on the basis of individual attributes, rather than according a preference solely on the basis of race.”⁷¹ Each applicant, Douglas said, “had a constitutional right to have his application considered on its individual merits in a racially neutral manner.”⁷²

But “racially neutral” did not mean simply “colorblind.” Instead, Douglas explained, distinct treatment based on race or a similar attribute could pass legal muster if “[t]he reason for the separate treatment of minorities as a class is to make more certain that racial factors do not militate *against an applicant or on his behalf*.”⁷³ Douglas was envisioning how to counterbalance factors such as standardized tests which might disadvantage entire groups of applicants, and instead evaluate each applicant’s individual merits, including racial and ethnic identity, without according such identities any systematic advantage.

Four years later, in *Regents of the University of California v. Bakke*,⁷⁴ the preferential admissions issue again reached the Supreme Court. Speaking for a closely-divided Court, Justice Lewis F. Powell, Jr. found that the challenged admissions program at the Medical School of the University of California at Davis had indeed used an unconstitutional racial quota. At the same time, however, Powell stated that admissions officers could properly consider applicants’ racial identities pursuant to colleges’ and universities’ First Amendment right to select student bodies that possess “genuine diversity.”⁷⁵ That compelling interest, Powell explained, “is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups.”⁷⁶ Instead, true diversity “encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”⁷⁷

In admissions decisions, Powell wrote, “race or ethnic background may be deemed a ‘plus’” for “particular” applicants, “without the factor of race being decisive.”⁷⁸ Policies had to be “flexible enough to consider all pertinent elements of diversity,” and “on the same footing.”⁷⁹ So long as “race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process,” affirmative action admissions could pass constitutional muster.⁸⁰

70. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

71. *Id.* at 332 (Douglas, J., dissenting).

72. *Id.* at 337.

73. *Id.* at 336.

74. 438 U.S. 265 (1978).

75. *Id.* at 315.

76. *Id.*

77. *Id.*

78. *Id.* at 317.

79. *Id.*

80. *Id.* at 318.

Justice Harry A. Blackmun, one of the four colleagues who voted with Powell to authorize race-conscious admissions policies, nonetheless confessed, “I yield to no one in my earnest hope that the time will come when an ‘affirmative action’ program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most.”⁸¹ He quickly added that the history of school desegregation suggested “that that hope is a slim one,” but he went on to say:

At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.⁸²

Powell’s one-Justice, but nonetheless definitive, opinion served as a practical matter to remove affirmative action admissions from the political front-burner for most of the ensuing two decades. But soon after *Bakke* was decided, it became clear that some readers were quite unwilling to accord Powell’s statement that race could serve only as “simply one element”⁸³ in a multifaceted evaluation of student diversity “without . . . being decisive”⁸⁴ the plain meaning of those words.

Paul J. Mishkin, the senior author of the University of California’s Supreme Court brief, observed in 1983 that “[t]he experience following the *Bakke* decision was that the vast range of race-conscious programs of special admission to universities continued in full force and effect.”⁸⁵ Mishkin thought that was wholly in keeping with what he believed was the underlying meaning of Powell’s opinion. He praised Powell’s decision as “a wise and politic resolution,”⁸⁶ a “masterful stroke of diplomacy,”⁸⁷ but at the same time he asserted that Powell’s position could not be “supported by articulated principle.”⁸⁸

That was because, in Mishkin’s view, Powell’s “academic diversity justification once accepted could, and should, sustain all forms of special admissions programs designed to achieve that objective,” including the very one that the *Bakke* ruling had held unconstitutional.⁸⁹ In other words, all Powell’s opinion had articulated was “a matter of form over substance,”⁹⁰ and in no way really precluded admissions officers from continuing to admit minority students in whatever numbers they might choose. Using Powell’s “plus,” programs considering “the size of the plus will set that size in terms of the number of minority students likely

81. *Id.* at 403 (Blackmun, J., concurring in part and dissenting in part).

82. *Id.*

83. *Id.* at 318 (majority opinion).

84. *Id.* at 317.

85. Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 922 (1983).

86. *Id.* at 929.

87. *Id.* at 930.

88. *Id.* at 929.

89. *Id.* at 929 n.78.

90. *Id.* at 926.

to be produced at the level set.”⁹¹

Mishkin passingly acknowledged that Powell’s opinion “tended to equate race with other variables,”⁹² but otherwise Mishkin did not address Powell’s seeming effort to describe “genuine diversity” as encompassing a host of nonracial elements “on the same footing.”⁹³ Instead, Mishkin opined that “wise and effective government may at times require indirection and less-than-full-candor” so as to “avoid such visibility in its operations.”⁹⁴

If that was a forced and indeed troubling way in which to parse Powell’s opinion, Mishkin’s strategic interpretation received a decisive boost a decade later when John C. Jeffries Jr., a former Powell clerk, propounded that same reading in his authorized biography of the Justice. Baldly asserting that “diversity was not the ultimate objective but merely a convenient way to broach a compromise,”⁹⁵ Jeffries contended that Powell had been guilty of “pure sophistry”⁹⁶ in concluding that there was any meaningful difference between the admissions process he condemned and the admissions policies he embraced.⁹⁷ The multifaceted approach Powell described and approved, Jeffries claimed, was “in reality” no different than the program he held void except “without fixed numbers.”⁹⁸ Powell’s real meaning, Jeffries said, “simply penalized candor. . . . [T]he message amounted to this: ‘You can do whatever you like in preferring racial minorities, so long as you do not say so.’”⁹⁹

A decade later, Jeffries implicitly abandoned much of his position and admitted the need “to curtail or eliminate racial ‘plus’ factors as soon as possible.”¹⁰⁰ But in the interim, other influential voices adopted his and Mishkin’s claims. Commenting on this development in 1996, Akhil Reed Amar and Neal Kumar Kaytal tellingly observed that “[a]t some point, when a racial plus looms so much larger than other diversity factors, an admissions scheme would, it seems, violate the letter and spirit of *Bakke*.”¹⁰¹ Their acute criticism was echoed by others who noted how readings of *Bakke* that “ignored key aspects” of Powell’s analysis allowed proponents to advance “racial preferences that were plainly inconsistent with the very language in Justice Powell’s opinion” and thus “defied the Court *sub silentio*.”¹⁰²

The realization that widespread dishonesty and disobedience had characterized much of the implementation, or nonimplementation, of Powell’s standard did not,

91. *Id.*

92. *Id.* at 924.

93. *Id.* at 926 n.70 (quoting *Bakke*, 438 U.S. at 315).

94. *Id.* at 928.

95. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 500 (1994).

96. *Id.* at 484.

97. *Id.*

98. *Id.*

99. *Id.*

100. John C. Jeffries, Jr., *Bakke Revisited*, 2003 SUP. CT. REV. 1, 20 (2003). See also David J. Garrow, *How Much Weight Can Race Carry?*, N.Y. TIMES, May 19, 2002, § 4, at 4.

101. Akhil Reed Amar & Neal Kumar Kaytal, *Bakke’s Fate*, 43 UCLA L. REV. 1745, 1777 n.142 (1996).

102. Alan J. Meese, *Bakke Betrayed*, 63 LAW & CONTEMP. PROBS. 479, 482 (2000).

however, end all efforts to extend the interpretive argument that Paul Mishkin had pioneered. Indeed, writing in 2007, prominent Yale law professor Robert Post and a younger colleague reviled “the eccentric and slippery logic of Powell’s distinction between constitutional and unconstitutional affirmative action programs.”¹⁰³ Powell had only propounded a “largely fictional system of ‘individualized consideration,’” Post claimed, which “would produce virtually the same ‘net operative results’ as the explicit ‘set-aside’ plan” *Bakke* had struck down.¹⁰⁴

But Post, like Mishkin before him, was laboring on behalf of an ultimately futile cause. Historian Terry Anderson terms the years from 1969 to 1980 “the zenith of affirmative action,” for soon after *Bakke* the winds began to change.¹⁰⁵ In 1980, in *Fullilove v. Klutznick*,¹⁰⁶ the Supreme Court narrowly upheld Congress’ power to include a ten percent set-aside provision for minority business enterprises in the Public Works Employment Act of 1977,¹⁰⁷ perhaps the ultimate political high watermark for the sort of race-conscious “results” President Johnson had called for in 1965.¹⁰⁸

But, as Anderson notes, “public support was always tenuous” for affirmative action.¹⁰⁹ The presidential administrations of Ronald Reagan and George H. W. Bush signaled a major shift in executive branch attitudes. By the end of the 1980s the Supreme Court too changed directions, essentially reversing *Griggs v. Duke Power Co.*¹¹⁰ in *Wards Cove Packing Co. v. Atonio*.¹¹¹ Congressional passage of the Civil Rights Act of 1991¹¹² appeared to entail an indirect endorsement of affirmative action, but the Act’s purposeful vagueness hamstrung its influence.¹¹³

Far more important, especially for the long-term future of affirmative action, was Ward Connerly’s 1995 embrace of the California Civil Rights Initiative,¹¹⁴ an anti-affirmative action measure proposed by two conservative white state academics. A Black member of the University of California Board of Regents, Connerly proved influential in leading the Regents to end admissions preferences

103. Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. (forthcoming 2007) (manuscript at 32).

104. *Id.* at 30. “Net operative results” was a phrase Mishkin himself had employed in *The Uses of Ambivalence*, *supra* note 85, at 928.

105. ANDERSON, *supra* note 2, at 157.

106. 448 U.S. 448 (1980).

107. Pub. L. No. 95-28, 91 Stat. 116 (1977) (codified as amended at 42 U.S.C. § 6701 (2000)).

108. ANDERSON, *supra* note 2, at 147.

109. *Id.* at 160.

110. 401 U.S. 424 (1971).

111. 490 U.S. 642 (1989). See ANDERSON, *supra* note 2, at 203–04.

112. Pub. L. No. 102-166, Title I, 105 Stat. 1074, 1077 (1991) (codified as amended at 42 U.S.C. § 2000e, et seq. (2000)).

113. See ANDERSON, *supra* note 2, at 213; SKRENTNY, THE IRONIES, *supra* note 30, at 227; Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896 (1993).

114. 1996 Cal. Legis. Serv. Prop. 209 (West) (codified at CAL. CONST. art. 1, § 31 (West 2002)) [hereinafter Prop. 209].

even before the statewide popular vote on what came to be called Proposition 209 went on the ballot in November 1996.¹¹⁵

Connerly believed that a serious misreading of what Lewis Powell had said in *Bakke* was a key problem. “We are relying on race and ethnicity not as one of many factors but as a dominant factor to the exclusion of all others,” he complained.¹¹⁶ Proposition 209 would amend the California Constitution to prohibit public institutions from giving preferential treatment on the basis of race, sex, or ethnicity.¹¹⁷ On November 5, 1996, California voters approved it by a margin of better than fifty-four to forty-six percent,¹¹⁸ and looking back at that vote almost a decade later, historian Terry Anderson termed the outcome “the demise of affirmative action.”¹¹⁹

The impact of the measure’s disallowance of racially-preferential admissions on the number of Black and Latino students at California’s top public universities was immediate and drastic. Within one year the percentage of undergraduates at the University of California at Berkeley who were Black, Latino, or Native American dropped from twenty-three percent to ten percent.¹²⁰ At Berkeley and UCLA law schools, Black admissions declined by more than 80 percent, and Latino admissions declined by half.¹²¹

But California’s revolutionary change would spread further. Just two years later, in November 1998, voters in Washington, another generally liberal, West Coast state, approved Initiative 200, a statutory ban on affirmative action modeled on Proposition 209, by a margin of more than fifty-eight percent of the vote.¹²² In late 1999, Florida governor Jeb Bush announced his intent to eliminate race-based admissions at all state public universities, and his “One Florida Initiative” was

115. See B. Drummond Ayres Jr., *Conservatives Forge New Strategy to Challenge Affirmative Action*, N.Y. TIMES, Feb. 16, 1995, at A1 [hereinafter Ayres, Jr., *Conservatives Forge New Strategy*]; B. Drummond Ayres Jr., *California Board Ends Preferences in College System*, N.Y. TIMES, July 21, 1995, at A1; Richard Bernstein, *Moves Under Way in California to Overtake High Education’s Affirmative Action Policy*, N.Y. TIMES, Jan. 25, 1995, at B7. See also John Aubrey Douglass, *Anatomy of Conflict: The Making and Unmaking of Affirmative Action at the University of California*, 41 AM. BEHAV. SCIENTIST 938, 947–52 (1998).

116. Ayres, Jr., *Conservatives Forge New Strategy*, *supra* note 115, at 22.

117. See Prop. 209, *supra* note 114.

118. Robert Pear, *In California, Foes of Affirmative Action See a New Day*, N.Y. TIMES, Nov. 7, 1996, at B7.

119. ANDERSON, *supra* note 2, at 256. See also B. Drummond Ayres Jr., *Fighting Affirmative Action, He Finds His Race an Issue*, N.Y. TIMES, Apr. 18, 1996, at A1; Barry Bearak, *Questions of Race Run Deep for Foe of Preferences*, N.Y. TIMES, July 27, 1997, at A1; Pear, *supra* note 118.

120. ANDERSON, *supra* note 2, at 258. See also David Leonhardt, *The New Affirmative Action*, N.Y. TIMES, Sept. 30, 2007, § 6 (Magazine), at 76 (reporting on the University of California’s new admissions practices).

121. *Id.* Anderson adds that “the real winners of the affirmative action battles at select public universities were Asian Americans.” *Id.* at 260. See also Timothy Egan, *Little Asia on the Hill*, N.Y. TIMES, Jan. 7, 2007, § 4A, at 24 (reporting that thirty-seven percent of undergraduates at California’s nine top university campuses are now Asian).

122. Steven A. Holmes, *Victorious Preference Foes Look for New Battlefields*, N.Y. TIMES, Nov. 10, 1998, at A25. See ANDERSON, *supra* note 2, at 261.

approved and implemented early in 2000.¹²³

The California, Washington, and Florida prohibitions, however, served only as scene-setters for the Supreme Court's landmark reconsideration of Justice Powell's *Bakke* opinion when two challenges to undergraduate and law school admissions programs at the University of Michigan reached the Supreme Court in 2003.¹²⁴ Notwithstanding all of the derisory attacks on Powell's analysis, twenty-five years after he articulated the fundamental distinction between race-determinative and race-conscious admissions practices, the Supreme Court unanimously embraced his standard while nonetheless disagreeing about particular applications of it.¹²⁵

In a decision that did not surprise most careful observers,¹²⁶ the Court struck down Michigan's undergraduate admissions policy because of the twenty-point bonus that the program automatically awarded to every Black, Hispanic, or Native American applicant.¹²⁷ But in the second, more closely-contested case, challenging admissions practices at Michigan's law school, Justice Sandra Day O'Connor led a five-Justice majority in upholding the program pursuant to Powell's 1978 standard.¹²⁸

"[T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions," O'Connor wrote.¹²⁹ "[O]utright racial balancing," she emphasized, "is patently unconstitutional."¹³⁰ Instead, "truly individualized consideration demands that race be used in a flexible, nonmechanical way."¹³¹ O'Connor explained,

When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.¹³²

O'Connor's standard was as strong and stark a vindication of the clear meaning of Powell's opinion as could be imagined. In the case at hand, she said, Michigan Law School's admissions program

seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this flexible approach, the Law School sufficiently takes into

123. *Florida Ends Use of Race in College Admissions*, N.Y. TIMES, Feb. 23, 2000, at A14; Sue Anne Pressley, *Florida Plan Aims to End Race-Based Preferences*, WASH. POST, Nov. 11, 1999, at A15. See FLA. ADMIN. CODE ANN. r. 6C-6.002(7) (2004).

124. *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

125. See *Gratz*, 539 U.S. at 270–72; *Grutter*, 539 U.S. at 325.

126. See, e.g., Jeffries, *Bakke Revisited*, *supra* note 100, at 14 n.55 (terming the outcome "clearly foreseeable"). See also David J. Garrow, *The Path to Diversity? Different Differences*, N.Y. TIMES, Sept. 2, 2001, § 4, at 4.

127. *Gratz*, 539 U.S. at 275–76.

128. *Grutter*, 539 U.S. at 343–44.

129. *Id.* at 325.

130. *Id.* at 330.

131. *Id.* at 334.

132. *Id.* at 336–37.

account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body.¹³³

Michigan Law School, O'Connor said, "considers race as one factor among many,"¹³⁴ echoing how Powell had identified the crucial distinction a quarter-century earlier. But the O'Connor majority went on to emphasize another point, one reminiscent of Harry Blackmun's anguished comments back in *Bakke*. O'Connor declared,

[R]ace-conscious policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all "race-conscious programs must have reasonable durational limits."¹³⁵

The majority opinion closed by making that "sunset" point most explicit. "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity,"¹³⁶ O'Connor observed. "Since that time, the number of minority applicants with high grades and test scores has indeed increased. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."¹³⁷

The pair of majority opinions in *Gratz* and *Grutter* may have utterly vindicated Justice Powell's clear yet nuanced opinion in *Bakke*, but affirmative action opponents like Ward Connerly were far from satisfied with Sandra Day O'Connor's signal that the clock inexorably was ticking down. Connerly promised to mount a Michigan campaign for a statewide popular vote just like those he previously had won in California and Washington.¹³⁸ When that measure, Proposition 2, came before voters in November 2006, it won approval by a margin of more than fifty-eight percent of the vote.¹³⁹

University of Michigan authorities unwisely responded to the popular vote outcome by declaring they would examine every possible legal avenue for avoiding implementation of the measure, but were met with a storm of editorial censure and soon changed their tune.¹⁴⁰ Yet the next challenge is whether

133. *Id.* at 338–39.

134. *Id.* at 340.

135. *Id.* (quoting Brief of Respondent Bollinger at 32).

136. *Id.* at 343.

137. *Id.*

138. Karen W. Arenson, *Ballot Measure Seen in Wake of Court Ruling*, N.Y. TIMES, July 10, 2003, at A17.

139. Tamar Lewin, *Michigan Rejects Affirmative Action, and Backers Sue*, N.Y. TIMES, Nov. 9, 2006, at P16.

140. See *id.*; Steve Chapman, *University of Michigan vs. The People*, CHI. TRIB., Nov. 23, 2006, § 1, at 19; Editorial, *A New Diversity at Michigan*, CHI. TRIB., Jan. 14, 2007, § 1, at 4; Tamar Lewin, *University to Comply With Ruling*, N.Y. TIMES, Jan. 11, 2007, at A27; *U-M Files for Delay on Prop 2: MSU, Wayne State Also Seek to Retain Policies for 2007 Admissions*, ANN

Michigan's public universities respond honestly and forthrightly to Proposition 2, or, like the evasive, Mishkin-style response to Powell in *Bakke*, choose evasion, dissembling, and deceit instead.

Dissenting in *Gratz v. Bollinger*,¹⁴¹ Justice Ruth Bader Ginsburg stated that “fully disclosed” racially decisive admissions policies were certainly “preferable to achieving similar numbers through winks, nods, and disguises.”¹⁴² Cynical readers of Ginsburg's dissent, or perhaps readers with long experience in U.S. academia, might think that Ginsburg's comment was based upon a belief that college and university leaders will indeed choose artifice and mendacity over good-faith implementation of legal standards with which they personally disagree. This is not a new issue to students of the Black freedom struggle, but most prior iterations of the question occurred in the segregationist South in the decades after *Brown*, not at top-flight national colleges and universities.

Some news reports, however, suggest that Michigan's public colleges and universities may indeed choose the path of disobedience and dissembling, whether by means of favoring students who attest that they have overcome prejudice and discrimination, or specially advantaging all applicants from the heavily Black city of Detroit.¹⁴³ Some students of U.S. constitutional history might think that latter policy option an ironic reversal of sorts of *Milliken v. Bradley*;¹⁴⁴ others might instead ponder its relationship to *Gomillion v. Lightfoot*.¹⁴⁵

The distinguished liberal constitutional commentator Michael Dorf already has warned that “one could well imagine a court saying that an admissions essay question that asks applicants to identify discrimination or prejudice they have overcome is merely a disguised affirmative action program.”¹⁴⁶ Indeed, Dorf says, all evasive policies “may be vulnerable to the charge that they are merely covert forms of race-based affirmative action, and thus invalid on that basis.”¹⁴⁷

In the not-so-long run, such tactics are indeed destined to fail. In addition, Ward Connerly and his allies are moving forward with additional new ballot initiatives in up to five states—Arizona, Colorado, Nebraska, Oklahoma, and probably Missouri—with bright prospects for November 2008 victories in each state.¹⁴⁸ But the writing is on the wall, and some of it has been there a very long

ARBOR NEWS, Dec. 12, 2006, at A1.

141. 539 U.S. 244 (2003).

142. *Id.* at 305 (Ginsburg, J., dissenting).

143. See, e.g., Tamar Lewin, *Colleges Regroup After Voters Ban Race Preferences*, N.Y. TIMES, Jan. 26, 2007, at A1.

144. 418 U.S. 717 (1974) (holding that a multidistrict remedy cannot be ordered for segregation in a single school district without evidence that the other districts were also intentionally segregated), *aff'd*, 433 U.S. 267 (1977).

145. 364 U.S. 399 (1960) (holding that a complaint properly alleged discrimination in violation of the Due Process and Equal Protection Clauses where a municipality redrew city boundaries and consequently excluded all but a handful of Blacks but no Whites from voting in the district).

146. Michael C. Dorf, *Universities Adjust to State Affirmative Action Bans: Are the New Programs Legal? Are They a Good Idea?*, FINDLAW, Jan. 29, 2007, <http://writ.news.findlaw.com/dorf/20070129.html>.

147. *Id.*

148. See Leslie Fulbright, *Connerly Gearing Up for Wider Crusade: Affirmative Action Foe*

time. From Martin Luther King, Jr. in the 1960s, through William O. Douglas, Lewis Powell and Harry Blackmun in the 1970s, to Sandra Day O'Connor and her more liberal colleagues in *Grutter* in 2003, the call for truly individualized consideration of persons who have suffered social or economic disadvantage has been profoundly consistent. The sad truth may be that large colleges and universities refuse to accept that lesson not out of any reparative principle or belief, but simply because of the administrative costs and inconveniences that such an approach to admissions policies undeniably will entail.

Yet the path forward is clear and well-lit. “[A]ny selection process that does in fact consider the entire individual will be time-consuming, labor-intensive, and expensive,” observed an impressive report issued in the wake of *Grutter* and *Gratz* by Educational Testing Service.¹⁴⁹ “Institutions that shy away from an admissions regime whose components reflect the seriousness of the task reveal a very great deal about the true nature of their commitment,” the ETS report most tellingly noted.¹⁵⁰ If, instead, “we are honest about our objectives, and those goals involve considered decisions reflecting a desire to assemble a truly diverse student body, we must also be willing to pay the costs associated with them.”¹⁵¹ That conclusion is loyal not only to the rulings of Lewis Powell and Sandra Day O'Connor, but also to the sacrifices and efforts of all the Martin Luther Kings and Ed Sylvesters, both famous and forgotten.

Considers Launching Campaigns in 9 States, S.F. CHRON., Dec. 14, 2006, at A1; Peter Schmidt, *4 States Named as New Targets in Affirmative-Action Fight*, CHRON. PHILANTHROPY (Wash., D.C.), May 4, 2007, at 34; Peter Schmidt, *5 More States May Curtail Affirmative Action*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 19, 2007, at 1; Matthew Hansen, *Vote Sought on Affirmative Action Ban—A UNL Professor, Backed By a California Group, Files a Ballot Petition in Nebraska*, OMAHA WORLD-HERALD, Nov. 14, 2007, at 1A.

149. MARK R. KILLENBECK, EDUCATIONAL TESTING SERVICE, AFFIRMATIVE ACTION AND DIVERSITY: THE BEGINNING OF THE END? OR THE END OF THE BEGINNING? 25–26 (2004).

150. *Id.* at 26.

151. *Id.*

ACADEMIC STUDENT DISMISSALS AT PUBLIC INSTITUTIONS OF HIGHER EDUCATION: WHEN IS ACADEMIC DEFERENCE NOT AN ISSUE?

JOSEPH M. FLANDERS*

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INTRODUCTION

An academic dismissal from an institution of higher education can have a profound negative impact on the career and life of a student.¹ Indeed, students at both public and private colleges and universities often spend increasingly large amounts of money in the pursuit of their education, and a dismissal would undoubtedly affect many students' already fragile financial stability.² As such, all students, whether undergraduate or graduate, have a keen interest in ensuring they are not arbitrarily deprived of their hard-earned and costly education. However, colleges and universities undoubtedly have an equally vital interest in protecting their integral academic standards as well as their autonomy to set those standards. Consequently, a question arises: When do a college or university's academic standards and guidelines, which are signals of its professional autonomy and discretion, prevail over arguments of students interested in maintaining their enrollment at a given institution? In other words, when is a student's academic failure or misconduct of such an egregious nature that it warrants dismissal, ensuring that courts will review a school's decision with academic deference? Many administrators and faculty members may espouse that the answer is clear: Academic deference must be afforded to matters concerning academic decisions. Yet, this deference leaves little opportunity for those students who are facing the burdens of academic dismissal such as financial strain, humiliation, loss of time, no degree, and the opportunity cost associated with foregoing work opportunities to enroll in school. In short, the consequences of such a dismissal are undoubtedly immense.

Recognizing students' interest in ensuring a job-producing and personally edifying education, courts throughout the United States have consistently assumed that students enjoy a protected property or liberty interest in continuing their post-secondary education under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.³ Because students are assumed to have a

1. See Hazel Glenn Beh, *Student Versus University: The University's Implied Obligation of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 183 (2000) ("The stigma of [dismissal] may dog [a student] for the rest of [his] life; [a student] will probably have to disclose [his] failure to every potential employer with whom [he] seek[s] work.").

2. COLLEGE BOARD, TRENDS IN HIGHER EDUCATION SERIES: TRENDS IN COLLEGE PRICING 5 (2006) available at http://collegeboard.com/prod_downloads/press/cost06/trends_college_pricing_06.pdf. The average tuition for the 2006–2007 academic year was \$5,836 at public four-year colleges and universities and \$22,218 at private nonprofit four-year institutions. *Id.* at 5. See Elizabeth L. Pendlay, Note, *Procedure for Pupils: What Constitutes Due Process in a University Disciplinary Hearing?*, 82 N.D. L. REV. 967, 967 (2006) (discussing the increasing trend of rising tuition for students at public and private colleges and universities and its effect on students facing disciplinary dismissals).

3. U.S. CONST. amend. XIV, § 1. See, e.g., *Greenhill v. Bailey*, 519 F.2d 5, 7 (8th Cir. 1975); *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975); *Stoller v. Coll. of Med.*, 562 F. Supp. 403, 412 (M.D. Pa. 1983) (discussing students' property interest and the necessity of due process in university dismissal decisions); *Hall v. Univ. of Minn.*, 530 F. Supp. 104, 107 (D. Minn. 1982). *But see* *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (declining to hold specifically that college and university students have a protected property interest in pursuing their education but nonetheless assuming that one likely exists due to students' potential reliance on manifestations made by the state in which they reside and in which they go to school); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978). For brevity's sake, this article

protected interest in their education, they are provided rights protecting against arbitrary dismissal decisions made by school faculty or administrators.⁴ Furthermore, although the United States Supreme Court has held there is no constitutional right to an education,⁵ the Court has recognized that providing education is a key function of state and local governments⁶ and that having an educated body of citizens is a cornerstone of democracy.⁷

Unfortunately, for many students facing dismissals based on academic grounds, courts are hesitant to second-guess decisions made by college and university administrators and faculty,⁸ because courts view themselves as inappropriate arbiters of academic decisions. “A graduate or professional school is, after all, the best judge of its students’ academic performance and their ability to master the required curriculum.”⁹ Consequently, the notion of “academic” or “judicial”

is only concerned with academic, as opposed to disciplinary, dismissals from public colleges and universities.

4. *See* Bd. of Regents v. Roth, 408 U.S. 564, 569 (1972) (holding that the requirements of procedural due process apply only to deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property).

5. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (declining to hold that the right to education is a fundamental right under the Fourteenth Amendment’s Due Process Clause).

6. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (“Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.”). Although the decision in *Brown* dealt with kindergarten through twelfth-grade, higher education has also been recognized as vital to the well-being of both individuals and society as a whole. For a discussion of the value of higher education, see generally CARDINAL JOHN HENRY NEWMAN, *THE IDEA OF A UNIVERSITY* (Oxford ed. 1976) (discussing the need for higher education to develop a literate and functioning society); *see also* Connick v. Myers, 461 U.S. 138, 145 (1983) (explaining the limits of First Amendment protection of speech afforded public employees at institutions of higher education); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (discussing the need for academic freedom in institutions of higher education); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986) (discussing a professor’s First Amendment right to use profane language in the classroom).

7. *Brown*, 347 U.S. at 493. *See* JEAN-JACQUES ROUSSEAU, *A DISCOURSE ON POLITICAL ECONOMY* (1755) (G.D.H. Cole trans., J. M. Dent and Sons, Ltd., 1913) (providing that “[p]ublic education . . . under regulations prescribed by the government . . . is one of the fundamental rules of popular or legitimate government”). It is important to note that courts and lawmakers have traditionally supported policy-making that promotes everyone’s right to a public education but not necessarily everyone’s right of access to higher education institutions beyond kindergarten through high school.

8. *See* Regents of Univ. of Mich. V. Ewing, 474 U.S. 214 (1985) (providing the standard upon which the lower courts have discussed whether judicial review should be granted to consider academic decision-making); Bd. Of Curators of Univ. of Mo. V. Horowitz, 435 U.S. 78 (1978); *see also* Thomas A. Schweitzer, “Academic Challenge” Cases: Should Judicial Review Extend to Academic Evaluations of Students?, 41 AM. U. L. REV. 267, 272–73 (1992) (reviewing academic dismissal case law and literature and concluding that judicial review should not be extended to most academic dismissal cases). *See generally* John Friedl, *Punishing Students for Non-Academic Misconduct*, 26 J.C. & U.L. 701, 703 (2000) (providing a lucid discussion of the topic of non-academic or “disciplinary” dismissals at higher education institutions).

9. *Horowitz*, 435 U.S. at 86 n.2. The court also stated:

Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires

deference has become an accepted maxim of both the American judiciary and institutions of higher education.¹⁰ On a doctrinal level, “academic deference” can be defined as deference the judiciary grants to public colleges and universities out of respect for the academic decision-making of faculty and administrators because courts disclaim the necessary expertise to intelligently review purely academic judgments.¹¹ Despite the seemingly clear doctrine for academic dismissals, the elements behind judicial deference for academic decision-making and the conditions that indicate when academic deference should be applied are not always apparent.¹²

Necessarily connected with the issue of academic deference is the doctrine of “academic freedom.”¹³ Academic freedom has been defined as the “independent and uninhibited exchange of ideas among teachers and students.”¹⁴ It has also been explained as the autonomous decision-making of the academy itself.¹⁵ An

an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

Id. at 90.

10. “Academic deference” applies to a wide range of situations where the judiciary chooses not to second-guess the judgment of a college or university. *See* Scott A. Moss, *Against “Academic Deference”: How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1 (2006) (discussing “academic deference” in tenured faculty decisions). Professor Moss notes that “defendant[] [institutions] and sympathetic courts have asserted that ‘of all fields . . . the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.’” *Id.* at 2 (quoting *Faro v. N. Y. Univ.*, 502 F.2d 1229, 1231–32 (2d Cir. 1974)).

11. Moss, *supra* note 10, at 2–5. Academic dismissals are not the only area of academic decision-making granted deference. Professor Moss explains that, in the context of academic deference being granted to faculty tenure disputes, most judges ask: “How can courts evaluate a professor’s scholarship on Beowulf in the original Old English, or on competing theories of cosmology? Even if judges understood the relevant writings, how can they decide whether the plaintiff’s theories of the unknowable are ‘better’ than those of rival professors?” *Id.* at 5–6. This anecdote helps to conceptualize the concerns judges face with academic dismissal disputes.

12. *See* Fernand N. Dutille, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?*, 29 J.C. & U.L. 619, 619–21 (2003) (arguing that, in many student dismissal cases, the line between academic and disciplinary dismissals is often very fine where facts may be argued persuasively to support either position).

13. *See generally* John A. Beach, *The Management and Governance of Academic Institutions*, 12 J.C. & U.L. 301, 328 (1985). Professor Beach discusses the traditional principles governing judicial deference to academic decision-making in cases of academic dismissals:

The courts declare themselves unqualified to review academic decisions, but will insist on fundamental fairness or due process in behavioral decisions. The duality of course is strained when behavior is intertwined within academic performance. Thus where plagiarism or cheating is alleged, or where clinical performance of the student is being evaluated, *the wiser courts are neither doctrinaire in abstaining from judgment, nor heavy-handed in regulating conduct.*

Id. at 328 (emphasis added).

14. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985).

15. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (discussing academic admissions policies at public colleges and universities and the academic freedom schools enjoy in setting those policies); *see also Gratz v. Bollinger*, 539 U.S. 244 (2003); *Gutter v. Bollinger*, 539 U.S. 306 (2003) (setting the new standard on issues pertaining to academic freedom and public college and university admissions policies).

institution's discretion to determine, on academic grounds, who may be admitted to study or be dismissed has been described as one of the four essential freedoms of a college or university.¹⁶ In the seminal case of *Sweezy v. New Hampshire*,¹⁷ Justice Frankfurter, in his concurrence, set out the four essential academic freedoms: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."¹⁸ Rightly or wrongly, these essential freedoms are repeatedly raised and used by courts to explain their deference to academic decision-making.¹⁹ Further echoing Justice Frankfurter's concurring opinion, the American Association of University Professors (AAUP) set out what is now a widely accepted definition of the term in its *1940 Statement on the Principles of Academic Freedom* ("1940 Statement").²⁰ In sum, the *1940 Statement* grants freedom of research and publication to college and university professors, freedom to teach and discuss in the classroom their expert knowledge of their particular subject, and freedom from institutional censorship.²¹ Given these broad rights of academic freedom and integrity, it is no surprise that judges often see themselves as inappropriate proxies of academic

16. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (discussing the standards of academic freedom the Court has utilized in numerous opinions).

17. *Id.*

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

19. When confronting many types of academic decision-making issues, courts often explicitly assert their own lack of competence in assessing academic judgments. See, e.g., *Univ. of Pa. v. EEOC*, 493 U.S. 182, 199 (1990) ("[C]ourts have stressed the importance of avoiding second-guessing of legitimate academic judgments.") (quoted in *Urofsky v. Gilmore*, 216 F.3d 401, 433 (4th Cir. 2000) (Wilkinson, C.J., concurring)); *Huang v. Bd. of Governors of the Univ. of N.C.*, 902 F.2d 1134, 1142 (4th Cir. 1990) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment.") (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. at 225). See also Beach, *supra* note 13 (discussing the reluctance shown by courts to second-guess academic decisions).

20. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (AAUP), 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE. The AAUP defines academic freedom as:

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

Id. at 3–4.

21. *Id.*

decision-making.²²

Additionally, due in large part to academic freedom concerns, courts often grant higher levels of judicial deference to college and university decision-makers by requiring lower levels of due process in student *academic* dismissals.²³ However, lower levels of judicial deference and slightly higher levels of due process may be required by courts in student *disciplinary* dismissals.²⁴ This distinction occurs because disciplinary dismissals do not traditionally involve purely academic issues, where academic freedom is the foremost concern.²⁵ On the one hand, disciplinary dismissals are often concerned with student misconduct such as vandalism, sexual harassment, rape, other criminal activity, and, at times, cheating.²⁶ On the other

22. See Schweitzer, *supra* note 8, at 272 n.20 (“Freedom to determine who may be admitted to study obviously includes freedom to determine who may be permitted to remain a student and necessarily implies the freedom to dismiss students who have failed to measure up in a relevant fashion.”). See generally Jeffrey C. Sun, *Trumping the Faculty: The Creep Effect of Institutional Academic Freedom and its Impact on the Professoriate*, Address Before the American Educational Research Association (Apr. 11, 2006) (transcript on file with author) (arguing that academic freedom and academic deference are two distinct issues that should be analyzed accordingly).

23. Schweitzer, *supra* note 8, at 274. See WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 985 (4th ed. 2006) (“Since courts attach markedly different due process requirements to academic sanctions than to disciplinary sanctions, it is crucial to be able to place particular cases in one category or the other.”).

24. See *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 87 (1978)

Since the issue first arose 50 years ago, state and lower federal courts have recognized that there are distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter. *Id.*

See generally Friedl, *supra* note 8, at 703 (discussing the judicial standards involved in disciplinary dismissals). Professor Friedl notes that “[e]ven when the conduct in question is not academic, courts nevertheless tend to grant substantial deference to university administrators, as long as minimal procedural safeguards are provided to students.” *Id.* at 709.

25. Friedl, *supra* note 8, at 709. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). In *Keyishian*, the United States Supreme Court explained the necessity of protecting academic freedom at American universities:

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.’

Id. at 603 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

26. See, e.g., *Gorman v. Univ. of R.I.*, 837 F.2d 7 (1st Cir. 1988) (verbal abuse and harassment); *Winnick v. Manning*, 460 F.2d 545 (2d Cir. 1972) (disruption); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573 (E.D. Va. 1996) (sexual harassment); *Jackson v. Ind. Univ. of Penn.*, 695 A.2d 980 (Pa. Commw. Ct. 1997) (weapons); see also Beach, *supra* note 13, at 329 (discussing the paradigm of “conduct” versus “academic” issues in the United States Supreme Court’s decision in *Horowitz*, 435 U.S. at 86). Professor Beach notes that:

Whether [the paradigm] creates an axis properly characterized as having “academic matters” at one pole and “conduct” or “disciplinary matters” at the other was the basis for most of the bickering.

Justice Marshall believed that the student’s clinical performance, while related to her potential to be a good doctor and thus “academic” in that sense, was nevertheless

hand, academic dismissals are consistently viewed by the courts as an area over which college and university administrators and faculty members have unfettered control to decide whether a student's poor academic performance warrants dismissal. Finally, since the academic deference cases deal primarily with constitutional matters, the focus of this article is on public institutions. In the case of private institutions, courts are more likely to apply contract-related doctrines to student academic dismissal cases.²⁷ This is because private colleges and universities are not "state actors," and their relationship with enrolled students is much more contractual in nature.²⁸ Accordingly, the discussion in this article will pertain only to academic deference and its application to public institutions of higher education.

Despite the traditional deference given to academic decision-making in academic student dismissals, drawing the line between academic decisions deserving judicial deference and those decisions that courts consider arbitrary, capricious, or made in bad faith, is an issue that has not been sufficiently analyzed in higher education scholarly literature. Further, despite the reluctance of courts to second-guess academic decisions, there are circumstances where courts have dispensed with the necessity of academic deference.²⁹ Accordingly, this article highlights scenarios where academic deference *has not* been applied to academic student dismissals. Part I discusses the Fourteenth Amendment's due process standards and the applicable case law on academic dismissals from the United States Supreme Court. Part II explores relevant case law where administrator and faculty decisions regarding academic dismissals were not granted judicial deference. That section will also offer guidelines that colleges and universities should consider in the case of an academic dismissal. Finally, this article concludes by considering the proper balance between academic freedom and academic deference. Overall, the article aims to educate administrators and faculty

"conduct" and amenable to third-party hearing-type review. The majority, and Justice Powell, showed less interest in dissecting the components of academic performance if the end were to enlarge judicial review

Beach, *supra* note 13, at 329. See generally Friedl, *supra* note 8, at 703 (discussing the "disciplinary" or "conduct" versus "academic" dismissal issues); see discussion *infra* Section II (B) (addressing case law involving whether "cheating" is considered an academic or a disciplinary cause for dismissal).

27. See Beh, *supra* note 1, at 197–224 (providing exhaustive coverage of academic dismissal cases involving contract claims). Much of the discussion in this article focuses on decisions made by public as opposed to private institutions due to the application of less contractual and more constitutional protections for academically dismissed students. *But see* Schweitzer, *supra* note 8, at 361 (arguing that private colleges and universities should not be treated differently from public institutions in academic dismissal cases).

28. See *NCAA v. Tarkanian*, 488 U.S. 179, 191–99 (1988) (discussing the "state action" requirement in the Fourteenth Amendment and its application to public and private entities). In that case, the Court held that the National Collegiate Athletic Association was a private entity and it did not become a "state actor" simply because of its dealings with athletic programs at public institutions of higher education. *Id.* *But cf.* *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001) (finding that the organization's activities were found to be state actions because the state was so intertwined with the private organization).

29. See *infra* Section II (discussing case law examples where academic deference was not granted to academic dismissals).

members at public institutions of higher education on the legal issues pertaining to academic dismissals and to stimulate debate around traditional understandings of academic freedom and judicial deference.

I. THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE: CONSTITUTIONAL PROTECTIONS OF PUBLIC HIGHER EDUCATION STUDENTS

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."³⁰ As previously noted, the United States Supreme Court, various federal courts, and state courts have assumed that students at public institutions of higher education have a protected property or liberty interest in continuing their education.³¹ However, students' protected interests do not arise from the U.S. Constitution itself.³² Instead, students' interests are protected by an invocation of state law.³³ In order for the Due Process Clause to apply to student dismissals, a state-funded school must have deprived a student of life, liberty, or property in some way.³⁴

When the Fourteenth Amendment is properly invoked by a student, courts throughout the United States may find that student has a protected property or liberty interest and, therefore, is guaranteed at least some form of due process.³⁵ If a school wishes to dismiss a student for alleged academic failures, the school must provide the student with a flexible level of due process which includes "an 'informal give-and-take' between the student and the [college or university] dismissing him that would, at least, give the student 'the opportunity to characterize his conduct and put it in what he deems the proper context.'"³⁶ This "informal give-and-take" should include the institution providing written notice to the student that documents and explains the student's alleged academic failures.³⁷ Further, this notice should inform the student that he will have the opportunity to meet with school officials, however informally, to explain or contest his failing

30. U.S. CONST. amend. XIV, § 1.

31. See *supra* note 3 and accompanying text.

32. See *Powe v. Miles*, 407 F.2d 121 (6th Cir. 1971) (defining the proper distinction between federal and state law in higher education cases involving state actions). See generally JOSEPH BECKHAM & DAVID DAGLEY, CONTEMPORARY ISSUES IN HIGHER EDUCATION LAW 35 (2005).

33. See *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (discussing the relationship between the federal Constitution and individual state rights). In *Roth*, the Court held that property interests protected by due process are "defined by existing rules or understandings that stem from an independent source such as state law." *Id.*

34. *Id.* at 570–71 (stating that procedural due process applies only to the deprivation of those interests that are protected by the Fourteenth Amendment as liberty or property).

35. See *Greenhill v. Bailey*, 519 F.2d 5, 8 (8th Cir. 1975) (invoking a student's protected liberty interest); *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975) (invoking a student's protected property interest); see also Schweitzer, *supra* note 8, at 314–15 (discussing students' due process liberty and property interests).

36. *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 85–86 (1978) (citing *Goss v. Lopez*, 419 U.S. 565, 584 (1975)).

37. *Id.* at 85.

grades.³⁸ However, how much process is actually due in the academic dismissal context remains somewhat questionable and may vary according to state law.³⁹ In two landmark decisions in the field of higher education, *Board of Curators of the University of Missouri v. Horowitz*⁴⁰ and *Regents of University of Michigan v. Ewing*,⁴¹ the Supreme Court set the legal framework upon which all instances of academic dismissal are governed.

A. *Board of Curators of the University of Missouri v. Horowitz*

In *Horowitz*, the United States Supreme Court was faced with a decision by the University of Missouri-Kansas City Medical School to dismiss Horowitz, a medical student, for her failure to meet the university's academic standards.⁴² After conducting her third-year rotations in pediatrics and surgery at the medical school, Horowitz's performance was considered unsatisfactory and she was put on academic probation for her fourth and final academic year.⁴³ As required by the school's written policies, every medical student's academic progress was to be evaluated on a periodic basis by the Council on Evaluation ("Council").⁴⁴ The Council's decisions were reviewed by a faculty coordinating committee and ultimately approved or rejected by the school's dean.⁴⁵ In Horowitz's case, the Council expressed dissatisfaction with her clinical performance during her rotations.⁴⁶ One reviewing doctor "emphasized that plaintiff's problem was that she thought she could learn to be a medical doctor by reading books, and he advised her [that] the clinical skills were equally as important for obtaining the M.D. degree."⁴⁷ The Council also questioned her attendance at clinical sessions and her personal hygiene.⁴⁸ It concluded that if Horowitz did not show adequate clinical progress, she should not be allowed to graduate.⁴⁹ Moreover, without a show of "radical improvement," the Council recommended she be dismissed from the program.⁵⁰

To remedy her deficiencies, Horowitz was permitted to appeal the Council's

38. See *Greenhill*, 519 F.2d at 9 (providing that an academically dismissed student must be "accorded an opportunity to appear personally to contest the allegations of academic deficiency").

39. See also *infra* Section II(B) (discussing specific case law examples where state law has given an academically dismissed student a somewhat higher level of due process). See also *Horowitz*, 435 U.S. at 84–86. In *Horowitz*, the Court discussed the dichotomy between academic and disciplinary dismissals, and explained that somewhat lower levels of due process (such as no formal hearing) will be applied to academic dismissals. "The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct." *Id.* at 86.

40. 435 U.S. 78 (1978).

41. 474 U.S. 214 (1985).

42. *Horowitz*, 435 U.S. at 79.

43. *Id.* at 81.

44. *Id.* at 80.

45. *Id.*

46. *Id.* at 80–81.

47. *Id.* at 95 n.4 (alteration in original).

48. *Id.* at 81.

49. *Id.*

50. *Id.*

decisions by undergoing oral and practical examinations under the supervision of seven practicing physicians.⁵¹ While the school was not legally obligated to grant Horowitz this level of due process, doing so certainly insulated it from Horowitz's complaint.⁵² After completing the appeal, two of the physicians recommended her for graduation, three recommended continued probation, and the final two recommended immediate dismissal.⁵³ Due to continuing negative evaluations, the Council reaffirmed its position that Horowitz should be dismissed.⁵⁴ The Council's decision was affirmed by both the faculty review committee and by the school's dean.⁵⁵ Subsequently, Horowitz was dismissed from the medical school during her fourth-year rotations.⁵⁶

Horowitz appealed to the Provost for Health Sciences who upheld her dismissal.⁵⁷ After being notified of this decision, Horowitz appealed the university's decision to the United States District Court for the Western District of Missouri.⁵⁸ She claimed she had been discriminated against in violation of 42 U.S.C. § 1983 and that her due process rights under the Fourteenth Amendment had been violated.⁵⁹ After conducting a full trial, the district court dismissed her complaint.⁶⁰ The court held that Horowitz had been afforded due process, finding she had been given an adequate opportunity to remedy her deficiencies and respond to allegations of academic failure.⁶¹ Subsequently, the United States Court of Appeals for the Eighth Circuit reversed and remanded the case.⁶² The Eighth Circuit held that Horowitz had not been afforded due process because the school failed to provide her with a full hearing where she could "defend her academic ability and performance."⁶³

The Supreme Court granted certiorari to determine what procedures must be granted to students who may have a liberty or property interest under the Fourteenth Amendment against governmental intrusion into their rights as higher education students.⁶⁴ In its decision, the Court assumed Horowitz had a liberty or

51. *Id.*

52. *Id.* at 85. It should be noted that although the school may have insulated itself from liability, it did not insulate itself from the expenses of Horowitz's subsequent lawsuit.

53. *Id.* at 81.

54. *Id.* at 82.

55. *Id.*

56. *Id.*

57. *Id.* at 82.

58. *Id.* at 79–80.

59. *Id.*

60. *Id.* at 80.

61. *Id.*

62. *Id.*

63. *Id.* at 85 n.2.

64. *Id.* at 80. Because the Fourteenth Amendment's protections only extend to state actions, private colleges and universities are not subject to the provisions of federal constitutional law unless it can be proven that the institution engaged in "state actions." *See Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968) (discussing the application of the "state action doctrine"); *see also* BECKHAM & DAGLEY, *supra* note 32, at 35–36 (explaining that students at private colleges and universities are barred from bringing claims against their respective colleges or universities unless they have engaged in state actions). Beckham and Dagley state: "A claim that a private college or

property interest.⁶⁵ Because of this assumption, the Court reviewed whether Horowitz was afforded the procedural protections guaranteed to every student under the Due Process Clause of the Fourteenth Amendment.⁶⁶

Ultimately, the United States Supreme Court found no violation of Horowitz's procedural due process rights.⁶⁷ The Court held that Horowitz had "been awarded at least as much due process as the Fourteenth Amendment requires."⁶⁸ The Court concluded that Horowitz had been given more than adequate notice of the faculty's dissatisfaction with her academic standing and that her deficiencies were endangering her ability to graduate.⁶⁹ The school's decision to grant Horowitz a faculty review by seven physicians evidenced the school's effort to comply with her due process rights.⁷⁰ The Court ultimately determined that the faculty's decision to dismiss Horowitz had been "careful and deliberate" because "[t]he school fully informed [Horowitz] of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment."⁷¹

Quoting *Goss v. Lopez*,⁷² the Court found that students must be given "oral or written notice of the charges against [them] and, if [they] deny the charges], an explanation of the evidence the authorities have and an opportunity to present [their] side of the story."⁷³ Elaborating, the Court explained that in *Cafeteria*

university was engaged in state action will depend on the nature and degree of contacts between the private institution and state government." *Id.* at 36.

65. *Horowitz*, 435 U.S. at 84–85.

66. *Id.* Procedural due process requirements in academic dismissal cases often include written or oral notice of the charges against them and an "informal give-and-take" where the student has a chance to present his or her side of the story. *Id.* at 85–86.

67. *Id.* at 92.

68. *Id.* at 85.

69. *Id.* The Supreme Court explained that the Eighth Circuit Court of Appeals had overturned the District Court's decision because the Eighth Circuit believed Horowitz's dismissal had been "effected without the hearing required by the fourteenth amendment [sic]." *Id.* at 85 n.2. The Supreme Court disagreed, finding that no formal hearing was required. *Id.* The Court explained that "[a] graduate or professional school is, after all, the best judge of its students' academic performance and ability to master the required curriculum." *Id.*

70. *Id.* at 85.

71. *Id.* The Supreme Court agreed with the District Court's ruling that the school "went beyond" the necessary procedural due process requirements because the school afforded Horowitz the additional opportunity of being reviewed by seven qualified physicians. *Id.*

72. 419 U.S. 565 (1975).

73. *Horowitz*, 435 U.S. at 85 (quoting *Goss*, 419 U.S. at 581). The Court explained in *Horowitz* that all the *Goss* decision required was "an 'informal give-and-take' between the student and the administrative body dismissing him that would, at least, give the student 'the opportunity to characterize his conduct and put it in what he deems the proper context.'" *Id.* (citing *Goss*, 419 U.S. at 584). See also Fernand N. Dutilleul, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 FL. COASTAL L.J. 243 (2001). Dutilleul explains the Supreme Court's rationale, stating:

At bottom, three rationales seemed to underlie the Court's efforts to distance *Horowitz* from *Goss*: 1) the flexibility needed by educational institutions to deal with a panoply of situations; 2) the supposed greater subjectivity involved in "academic" decisions, a subjectivity not given to effective judicial review; and 3) the decreased adversariness typifying the teacher-student relationship in "academic" matters.

Workers v. McElroy,⁷⁴ it was held that “[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”⁷⁵ The Court found that, especially in academic dismissal cases, “[c]ourts are particularly ill-equipped to evaluate academic performance. The factors discussed . . . with respect to procedural due process speak *a fortiori* here and warn against any such judicial intrusion into academic decision-making.”⁷⁶ Consequently, the Supreme Court concluded that academic dismissal cases require “far less stringent procedural requirements” than do disciplinary dismissals.⁷⁷

Despite requiring less procedural due process for academic dismissals, the Court’s decision indicates that at least some procedural due process is needed in such situations. The Supreme Court was careful to note that students must be afforded a flexible amount of due process allowing the student “the opportunity to characterize his conduct and put it in what he deems the proper context.”⁷⁸ Furthermore, in dicta, the Supreme Court noted that a student’s investment of large amounts of time and money into her professional education is a factor that courts may consider when analyzing the extent of a student’s property or liberty interests.⁷⁹ The Court stated that “a relevant factor in determining the nature of the requisite due process is ‘the private interest that [was] affected by the official action.’”⁸⁰ As is considered later in this article, a professional student’s educational investment has been discussed by numerous courts as being an important factor in denying academic deference to a school’s academic dismissal decision.⁸¹

Finally, the Court noted that colleges and universities are obligated to provide students with minimal amounts of due process, and it found the academic decision makers at the University of Missouri had provided Horowitz with at least the minimal requirements of due process.⁸² She had received ample notice via several letters that explained the school’s concern about her academic failures, she had been afforded a panel of seven physicians to review her performance, and she had been given several chances to remedy her poor performance.⁸³ In fact, the Court stated that “the school went beyond [constitutionally required] procedural due process by affording [Horowitz] the opportunity to be examined by seven independent physicians.”⁸⁴ In effect, the Supreme Court evoked the concept of academic deference and found that courts should not second-guess the decisions of college or university faculty and administrators, when (1) the decisions relate to

Id. at 249–50.

74. 367 U.S. 886 (1961).

75. *Horowitz*, 435 U.S. at 86 (citing *Cafeteria Workers*, 367 U.S. at 895).

76. *Id.* at 92.

77. *Id.* at 86.

78. *Id.*

79. *Id.* at 86 n.3.

80. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (alteration in original).

81. See *infra* Section II(A–F) (discussing, in particular, students’ liberty interests and their right to continue their educational investments).

82. *Horowitz*, 435 U.S. at 85.

83. *Id.*

84. *Id.*

the evaluation of actual academic content, and (2) the school provides the student his or her due process rights.⁸⁵ Arguably, the Court's decision in *Horowitz* provided college and university administrators and faculty insulation from judicial intrusion into their decision-making processes.⁸⁶ Despite this relatively clear framework, the Supreme Court again felt the need to elucidate this standard in its 1985 decision in *Ewing*.

B. *Regents of University of Michigan v. Ewing*

In *Ewing*, the United States Supreme Court faced a similar fact pattern to that presented in *Horowitz*. In 1975, Scott Ewing enrolled as a medical student in the University of Michigan's "Inteflex" program, a six-year program combining undergraduate and medical school curricula.⁸⁷ Beginning in 1975, Ewing had difficulties handling the workload that the Inteflex program required.⁸⁸ He had low, failing, or incomplete grades in biology, chemistry, Freshmen Seminar, and psychology.⁸⁹ His poor academic performance resulted in the university placing him on academic leave.⁹⁰ While on leave, he took several physics courses at Point Loma College in California.⁹¹ In 1977, he reentered the Inteflex program, repeated Chemistry, and eventually passed his Introduction to Patient Care course.⁹²

Despite having been readmitted into the program, Ewing's difficulties continued.⁹³ He received low or failing grades in Clinical Studies 400, Microbiology, Gross Anatomy, Genetics, and Microanatomy 410.⁹⁴ He retook several exams in these courses and appealed his Microanatomy and General Pathology grades.⁹⁵ Ewing then requested to be placed on an "irregular program" with a lessened course-load, but the Promotion and Review Board denied his requests.⁹⁶ Subsequently, he continued through the program, eventually passing

85. *Id.* at 92 ("Courts are particularly ill-equipped to evaluate academic performance. The factors discussed . . . with respect to procedural due process speak *a fortiori* here and warn against any such judicial intrusion into academic decisionmaking."). See Dutile, *supra* note 12, at 625–26 ("The Court seems to have assumed that [academic versus disciplinary] situations fall easily into one category or the other. But does the distinction survive scrutiny? Or is it, as Justice Marshall said, futile to attempt 'a workable distinction between "academic" and "disciplinary" dismissals'?" (quoting *Horowitz*, 435 U.S. at 104 n.18 (Marshall, J., concurring in part and dissenting in part))).

86. See KAPLIN & LEE, *supra* note 23, at 987–88 ("*Horowitz* also supports the broader concept of academic deference, or judicial deference to the full range of an academic institution's academic decisions. Both trends help insulate postsecondary institutions from judicial intrusion into their academic evaluations of students by members of the academic community.").

87. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 215 (1985).

88. *Id.* at 217–19.

89. *Id.* at 217–18 n.4.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

enough coursework to enable him to take the National Board of Medical Examiners (“NBME”) Part I exam in 1981.⁹⁷ Ewing took the exam and received the lowest score in the history of the program.⁹⁸ A passing score on the NBME Part I exam was a 345 and Ewing’s total score was a 235.⁹⁹

After failing the exam, the medical school’s Promotion and Review Board again convened and considered Ewing’s academic record in detail.¹⁰⁰ The nine member board unanimously decided to dismiss Ewing from the Inteflex program.¹⁰¹ A week later, Ewing submitted a written request for the Board to reconsider its decision.¹⁰² Ewing appeared before the Board and attempted to clarify why he failed the exam.¹⁰³ He explained that, aside from his inadequate preparation for the exam which caused him to panic, eighteen months prior to taking the exam his mother had suffered a heart attack, his girlfriend had broken up with him six months earlier, he was spending an exorbitant amount of time on an essay for a contest, and he had a makeup exam in Pharmacology which was administered just before the NBME Part I.¹⁰⁴ Not persuaded by Ewing’s arguments, the Review Board again unanimously affirmed his dismissal.¹⁰⁵ Ewing then appealed the Board’s decision to an Executive Committee that upheld the dismissal.¹⁰⁶ Subsequently, Ewing applied for reinstatement twice more, but his appeals were denied by the university.¹⁰⁷ Ewing then commenced his suit in the United States District Court for the Eastern District of Michigan.¹⁰⁸

At the district court level, Ewing argued that he had the right to retake the exam because he had a property interest in his continued education and enrollment in the program.¹⁰⁹ Ewing further alleged that his dismissal was arbitrary and capricious and was in violation of his substantive due process rights under the Fourteenth Amendment of the United States Constitution.¹¹⁰ While it determined Ewing had a protected interest in continuing his education, the district court found no violation of his due process rights given his long history of academic failure and the school’s attempt to provide him with notice and ample time to remedy his deficiencies.¹¹¹ On appeal, the United States Court of Appeals for the Sixth Circuit reversed, holding that Ewing’s due process rights had been violated

97. *Id.* at 216. The NBME Part I is “a 2-day written test administered by the National Board of Medical Examiners.” *Id.*

98. *Id.*

99. *Id.* The Supreme Court also noted that a score of 380 is required for state licensure and the national mean is 500. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 216 n.2.

105. *Id.* at 216.

106. *Id.*

107. *Id.* at 217.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 220.

ostensibly because he was a “qualified” student and was not allowed to retake the NBME examination.¹¹² On appeal, the United States Supreme Court granted certiorari and reversed and remanded the case.¹¹³

In a unanimous opinion, the Court assumed that Ewing had a protected property interest but held his dismissal was not arbitrary or capricious.¹¹⁴ Although Ewing felt the university had “misjudged his fitness” to remain enrolled as a student, the Supreme Court held that the faculty had conscientiously made their decision after careful deliberation over Ewing’s entire academic record.¹¹⁵ Accordingly, the Court found that the school’s judgment must be respected.¹¹⁶ Discussing its prior ruling in *Horowitz*, the Supreme Court reiterated that courts should not second-guess the academic decisions of college or university administrators and faculty.¹¹⁷ The Court noted that it was “reluct[ant] to trench [our decision] on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, ‘a special concern of the First Amendment.’”¹¹⁸ The Court concluded that judges “may not override [the faculty’s decision] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”¹¹⁹

As the United States Supreme Court’s opinions in *Horowitz* and *Ewing* demonstrate, the scope of judicial review for academic decision-making is narrow. Courts are to respect the content evaluation of academics,¹²⁰ and are warned

112. *Id.* at 221.

113. *Id.* at 221, 228.

114. *Id.* at 223 (“We therefore accept the University’s invitation to ‘assume the existence of a constitutionally protectible property right in [Ewing’s] continued enrollment’”) (first alteration in original).

115. *Id.* at 225, 227–28.

116. *Id.* at 227–28.

117. *Id.* at 225 n.11 (“University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.”) (quoting *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring)).

118. *Id.* at 226 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). The Court also explained:

If a “federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies,” *Bishop v. Wood*, 426 U.S. 341, 349 (1976), far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require “an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.”

Id. (citing *Horowitz*, 435 U.S. at 78, 89–90) (internal citation omitted) (second alteration in original).

119. *Id.* at 225.

120. The academic setting is not the lone setting where courts often grant deference to expert opinions. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (setting the standard for judicial deference to administrative agency decision-making which was made based on congressional mandates). In *Chevron*, the Court stated: “We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer” *Id.* at 844. See also *Moss*, *supra* note 10, at 8–12

against overriding a school's academic decisions.¹²¹ Without a finding that an administrator or faculty member failed to exercise professional judgment or acted arbitrarily and capriciously, courts presume the administrators and faculty members have acted within the bounds of their academic freedom, and, therefore, will grant the decision-makers academic deference.¹²² Consequently, in the academic dismissal context, it has routinely been found that the level of due process may be considerably lower than in a disciplinary dismissal.¹²³

However, despite the presumption of academic deference, courts have often held that students are entitled to notice of the institution's dissatisfaction with them, an opportunity to rebut the charges against them, and the chance to redress their poor academic performance.¹²⁴ Additionally, although a *formal* hearing is not necessarily constitutionally required,¹²⁵ an institution would be wise to provide some form of hearing for the potentially dismissed student, even if that hearing is only an informal one.¹²⁶ Colleges and universities are also advised to practice

(discussing judicial deference to a university's "expert" academic opinion in regard to granting tenure and tenure review of school faculty members); James Leonard, *Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of the Americans With Disabilities Act*, 75 NEB. L. REV. 27, 66-67 (1996) ("The threshold for deference to [disability] decisions is remarkably low. In *Doe*, for example, the Second Circuit called for deference to academic evaluations unless there is proof that the institution's standards serve no purpose other than to exclude a disabled person from an educational program.") (citing *Doe v. N.Y. Univ.*, 666 F.2d 761, 776 (2d Cir. 1981)). See generally Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 941-45 (1999) (highlighting certain dubious constitutional civil rights cases, such as *Koremotsu v. United States*, 323 U.S. 214 (1944), where judicial deference to equal protection decisions made by bureaucratic branches of the United States government was later shown to be morally and ideologically reprehensible).

121. See generally Schweitzer, *supra* note 8.

122. *Id.*

123. See *Horowitz*, 435 U.S. at 89 ("Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement."); see also *Harris v. Blake*, 798 F.2d 419, 423 (10th Cir. 1986) (requiring only "minimal procedures" for university academic dismissals); *Reilly v. Daly*, 666 N.E.2d 439, 444 (Ind. Ct. App. 1996) (holding that only the "barest procedural protections" are needed for academic dismissals); *Frabotta v. Meridia Huron Hosp. Sch. of Nursing*, 657 N.E.2d 816, 819 (Ohio Ct. App. 1995) (stating that because the plaintiff's dismissal was a purely academic decision, she had to show that the decision was arbitrary and capricious).

124. See *Disesa v. St. Louis Cmty. Coll.*, 79 F.3d 92, 95 (8th Cir. 1996) (finding that due process was met when a student was allowed to make up several quizzes and then given an administrative review of her grades); see also *Dutile*, *supra* note 73, at 264-88 (discussing the due process requirements that courts throughout the United States have generally required of institutions of higher education).

125. See *Horowitz*, 435 U.S. at 86 n.3 ("We conclude that considering all relevant factors, including the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations, a hearing is not required by the Due Process Clause of the Fourteenth Amendment."); see also *Miller v. Hamline Univ. Sch. of Law*, 601 F.2d 970, 972 (8th Cir. 1979); *Cobb v. Rector of Univ. of Va.*, 84 F. Supp. 2d 740, 749 (W.D. Va. 2000) (stating that no formal hearing was necessary).

126. See *Horowitz*, 435 U.S. at 86 ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."); see also *Goss v. Lopez*, 419 U.S. 565, 579 (1975) ("At the very minimum . . . students facing suspension and the

preventative measures by granting higher levels of due process to students facing a potential academic dismissal. Because at least minimal due process is required of colleges and universities in academic dismissal cases, it is important for faculty and administrators to remember their obligation to treat every student equally when considering a potential dismissal. Treating a student in a significantly different manner from his peers may result in a due process violation and invite closer scrutiny by the judiciary.¹²⁷ Ultimately, although the United States Supreme Court has seemingly provided colleges and universities with wide discretion on the content evaluation of academic dismissals, administrators and faculty members are not given *carte blanche* to wantonly dismiss students without following internal institutional procedures.¹²⁸ Internal institutional procedures and professional ethics codes should include a written school policy detailing the necessary procedural steps to be taken in every case of an academic dismissal. Further, a school should be prepared to give fair warning or notice to the student, provide the student with a chance to reform his or her behavior, allow a neutral panel or committee to review the student's case to ensure protection against potentially biased administrators or faculty members, and offer the student a chance to present his or her side of the story.¹²⁹ Failing to follow these minimal safeguards may result in courts dispensing with academic deference.

II. CASE LAW REVIEW: WHEN DOES ACADEMIC DEFERENCE NOT APPLY?

Given that the Supreme Court's decisions in *Horowitz* and *Ewing* require only minimal due process for academic dismissals, the limited number of cases on the subject matter is not surprising. At the outset of this article, it was noted that a large majority of academic dismissal cases are decided in favor of public colleges and universities, and the cases in which the courts have not granted judicial deference to academic decisions are also very rare.¹³⁰ As previously noted, the

consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing."); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 636 (6th Cir. 2005) ("It is always wise to produce some sort of record of the proceedings . . . though a record may not always be constitutionally required."). *See, e.g., Rossomando v. Bd. of Regents of Univ. of Neb.*, 2 F. Supp 2d 1223, 1229 (D. Neb. 1998) (stating that the hearing does not have to be recorded).

127. *See infra* section II(D) (discussing case law where students were dismissed for academic reasons while their peers were not dismissed for similar reasons). In these situations, absent an academic justification, courts may closely scrutinize why the dismissed student was treated differently.

128. *See* KAPLIN & LEE, *supra* note 23, at 988 ("But just as surely, these trends emphasize the institution's own responsibilities to deal fairly with students . . . and to provide appropriate internal means of accountability regarding institutional academic decision making.").

129. *See Horowitz*, 435 U.S. at 85 (stating that students facing academic dismissals are entitled to "'oral or written notice of the charges against [them] and, if [they] den[y the charges], an explanation of the evidence the authorities have and an opportunity to present [their] side of the story'" (quoting *Goss v. Lopez*, 419 U.S. 565, 581 (1975))); *see also* Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289 (1999) (discussing the need for clearly written and defined institutional procedural policies).

130. *See Schweitzer*, *supra* note 8, at 269 n.10 (providing an excellent perspective on the history of academic dismissal cases, often brought by graduate and professional school students, including a survey of cases in which courts have granted academic deference to higher education

overwhelming body of academic dismissal case law has been decided under the assumption that courts are reluctant to overturn the content of academic decisions.¹³¹ Taking this general rule into consideration, the discussion in this section is meant to isolate the cases in which administrators and faculty members have either made arbitrary decisions¹³² or have failed to act in good faith when considering whether to dismiss, or, in some cases, readmit a student.¹³³ It is important to keep in mind that these cases are currently the exception to the rule. The purpose of discussing these cases is to illustrate and analyze academic decisions that were not granted academic deference and, by doing so, to modify the doctrinal parameters surrounding academic deference and inform academic decision-makers of acceptable practices within the law.

Throughout the cases, seven established norms and practices are discussed. First, administrators and faculty members at public institutions of higher education must remember that although many courts will defer to their academic judgments, those courts may not grant them summary judgment if academic as well as disciplinary issues are present.¹³⁴ The administrators and faculty members must not fail to work with a student by undertaking the necessary procedural and

institutions). Professor Schweitzer points out:

Most academic challenge cases are likely to be unsuccessful for the foreseeable future. There may be no foolproof way to guarantee that professors will be fair and objective in making those decisions which are so important for their students' future, but society no doubt believes that this is their job and that it is emphatically not the province of judges to intervene in routine cases.

Id. at 366. See generally *State ex. rel. Mercurio v. Bd. of Regents of Univ. of Neb.*, 329 N.W.2d 87, 91 (Neb. 1983) (disagreeing with the trial court's order that defendant university remove a failing grade from a dismissed student's transcript because there was no evidence of "bad faith, malice, or fraud" on the part of the university); *Johnson v. Cuyahoga County Cmty. Coll.*, 489 N.E.2d 1088, 1090 (Ohio Ct. Com. Pl. 1985) (granting the defendant university's motion for summary judgment and finding that judicial economy supports judicial deference to school's academic decision-making).

131. See generally Dutile, *supra* note 73, at 283 (explaining that courts have "consistently set a rather low threshold for institutions" in academic dismissal cases). See, e.g., *Paulsen v. Golden Gate Univ.*, 602 P.2d 778, 783 (Cal. 1979) (holding for the defendant law school); *Enns v. Bd. of Regents of Univ. of Wash.*, 650 P.2d 1113, 1117 (Wash. Ct. App. 1982) (holding for the university where a student had repeatedly failed numerous examinations necessary to achieve a degree and where the university had provided ample notice of his deficiencies); *Marquez v. Univ. of Wash.*, 648 P.2d 94, 97-99 (Wash. Ct. App. 1982) (affirming summary judgment for a university after a law student was dismissed for failing to maintain the required grade point average).

132. See *Harvey v. State*, 458 P.2d 336, 338 (Okla. Civ. App. 1969) (defining abuse of discretion by a trial court as: "unreasonable, unconscionable [or] arbitrary action taken without proper consideration of the facts and law pertaining to the matter submitted").

133. Although several of the cases pre-date the *Horowitz* and *Ewing* opinions, every case follows similar legal frameworks to those espoused by the United States Supreme Court in their seminal opinions regarding higher education academic dismissals.

134. See *Bergstrom v. Buettner*, 697 F. Supp. 1098, 1102 (D.N.D. 1987) (acknowledging that students face an extremely difficult challenge in contesting an academic dismissal: "Ms. Bergstrom is engaged in a war which cannot be won. If the medical school faculty has in fact determined that she should not be a graduate of the school, no performance level on the remaining courses will prove to be satisfactory. No coerced unilateral resolution appears possible.").

substantive safeguards when dismissing him or her for academic reasons.¹³⁵ Second, schools should never conduct independent fact-finding without a student's knowledge.¹³⁶ The goal in any due process proceeding is to keep the student as informed as possible as to the steps taken that may lead to his or her dismissal. Failure to do so may lead to a court overturning a school's academic dismissal.¹³⁷ Third, especially in disputes with professional schools, such as law schools or medical schools, courts may find that, given the proper fact pattern, students may have a protected right to continue their education. Arguably, courts may be more willing to review a student's dismissal from a professional school than from other institutions, because professional students, as opposed to undergraduate students, have often invested larger amounts of time and money in their education.¹³⁸ Fourth, if a school allows some students to raise or fix grades, or to retake examinations, the school may be required, under a proper invocation of federal *or* state law, to allow other students the same rights.¹³⁹ Fifth, schools must be very careful to abide by the language contained within the school's student handbooks, catalogs, and guidelines.¹⁴⁰ Failing to abide by written school guidelines may

135. *See infra* Section II(A).

136. *See infra* Section II(B).

137. *Id.* *See Morrison v. Univ. of Or. Health Scis. Ctr.*, 685 P.2d 439, 440–42 (Or. Ct. App. 1984) (providing that off-the-record fact-finding or inappropriate *ex parte* communication without the other side's knowledge is, at the most, against the law, and, at the least, casts suspicions on university administrator or faculty decision-making). In *Morrison*, the Oregon Court of Appeals said state law “requires that in contested cases: All evidence shall be offered and made a part of the record in the case, and except for matters stipulated to . . . no other factual information or evidence shall be considered in the determination of the case.” *Id.* at 441 (citing OR. REV. STAT. § 183.450(2) (1984)) (alteration in original); *see also Swank v. Smart*, 898 F.2d 1247, 1253–55 (7th Cir. 1990) (holding that *ex parte* presentation of evidence during an employee's discharge hearing was an unconstitutional violation of that employee's procedural due process rights).

138. *See infra* Section II(C). *See also Soglin v. Kauffman*, 295 F. Supp. 978, 988 (W.D. Wis. 1968) (stating that an expulsion from an institution of higher education amounts to a very serious penalty for the dismissed student). It is arguable that a law or medical student, due to his or her education's focus on specific purposes and outcomes—for example, professional licensure—is more likely than another type of graduate student to have his or her interests protected. *See generally* Enid L. Veron, *Due Process Flexibility in Academic Dismissals: Horowitz and Beyond*, 8 J.L. & EDUC. 45, 53 (1979) (arguing that dismissals have the greatest consequences “for graduate and professional schools, clinical programs and other courses where evaluation procedures lack anonymity, where they involve the so-called gray areas between academic performance and behavior, and where academic requirements are vague or ambiguous”).

139. *See infra* Section II(D). *But see Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (finding that, given the particular facts of Ewing's case—his general academic failure as a whole—the school's decision not to allow him to retake the NBME examination was not an unlawful academic decision. If Ewing's academic performance, however, was not an academic outlier, he would have likely had the same opportunities to retake the exam). In *Ewing*, the Supreme Court explained in dicta: “We recognize, of course, that ‘mutually explicit understandings’ may operate to create property interests [to retake tests]. . . . [b]ut such understandings or tacit agreements must support ‘a legitimate claim of entitlement’ under ‘an independent source such as state law.’” *Id.* at 224 n.9 (citing *Perry v. Sindermann*, 408 U.S. 593, 601, 602 n.7 (1972)).

140. *See infra* Section II(E).

result in a court applying contract law principles and dispensing with academic deference altogether.¹⁴¹ Sixth, under a fiduciary duty analysis, colleges and universities may be bound by advice or recommendations given to students by administrators and faculty members. If administrators or faculty members advise a student that completing a certain course or courses will ultimately lead to obtaining a degree, and the student relies on that advice to his or her detriment, the college or university could be bound because it appeared to the student that the administrator or faculty member had the apparent authority to act on behalf of the institution.¹⁴² Finally, these categories do not cover every situation where academic dismissal decisions may not be granted academic deference. However, what the cases do offer is an in-depth look at factual scenarios where courts did not grant academic deference due to a school's failure to protect the dismissed student's liberty or property interests under state law or the Fourteenth Amendment of the federal Constitution.¹⁴³

A. Schools Should Not Rely on Courts Granting Summary Judgment in Deference to the School's Decision-Making Processes

In *Connelly v. University of Vermont and State Agricultural College*,¹⁴⁴ the United States District Court for the District of Vermont was presented with a case involving a third-year medical student, Thomas Connelly, Jr., who was dismissed from the College of Medicine in the midst of a twelve-week pediatrics-obstetrics rotation.¹⁴⁵ After missing from May 11 to June 7 of the rotation, Connelly received a failing grade.¹⁴⁶ He claimed that he made up the missed time during the month of July.¹⁴⁷ It was school policy that no student could advance to the fourth year if he or she failed more than twenty-five percent of his or her courses.¹⁴⁸

Connelly believed his grades in previous rotations prior to his missed time were an 82 in pediatrics and an 87 in obstetrics.¹⁴⁹ After his dismissal, Connelly alleged that, due to the time he missed, his instructor for the pediatrics-obstetrics rotation would not grant him a passing grade in the rotation regardless of prior class work and the quality of his work during the make-up period.¹⁵⁰ Because of failing that

141. *Id.*

142. *See infra* Section II(F) (providing a discussion of case law where colleges and universities claimed a student was dismissed for academic performance issues, but courts found instead that faculty and administrators had acted arbitrarily and capriciously and were responsible for those actions).

143. Although due process is predominantly enforced via the Fourteenth Amendment of the federal Constitution, colleges and universities should be mindful that their state's constitution may provide distinct due process protection. *See infra* Section II(B). At times, the state constitution may require more or less due process than does the Fourteenth Amendment in academic dismissal proceedings. *Id.*

144. 244 F. Supp. 156 (D. Vt. 1965).

145. *Id.* at 158.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

rotation, Connelly could not advance to his fourth year because he had failed twenty-five percent of his coursework.¹⁵¹ Facing dismissal, Connelly appealed to the school's Committee on Advancement for permission to repeat his third year of medical school.¹⁵² His appeal was denied and he was dismissed from the school.¹⁵³ Connelly then challenged the school's decision before the United States District Court for the District for Vermont.¹⁵⁴ He claimed his work in medical school was of passing quality and that the school's decision to dismiss him was "wrongful, improper, arbitrary, summary and unjust."¹⁵⁵

At the federal district court, the school filed a motion to dismiss Connelly's complaint and, in the alternative, a motion for summary judgment.¹⁵⁶ The court did not grant either motion; instead, it held that issues of material fact remained to be decided and, therefore, that summary judgment was improper.¹⁵⁷ The court held that Connelly had properly alleged that the professor who gave him a failing grade in his pediatrics rotation may have done so in an arbitrary, capricious, or unreasonable manner.¹⁵⁸ The court noted that "to the extent that the plaintiff has alleged his dismissal was for reasons other than the quality of his work, or in bad faith, he has stated a cause of action."¹⁵⁹ The court did not pass judgment on whether the school's decision was, in fact, arbitrary; instead, it set the case for a hearing because there existed a disputed issue and a jury could decide whether the professor had indeed violated Connelly's due process rights.¹⁶⁰

Discussing its proper role in academic dismissal cases, the court explained that:

Where a medical student has been dismissed for a failure to attain a proper standard of scholarship, two questions may be involved; the first is, was the student in fact delinquent in his studies or unfit for the practice of medicine? The second question is, were the school authorities motivated by malice or bad faith in dismissing the student, or did they act arbitrarily or capriciously? In general, the first question is not a matter for judicial review. However, a student dismissal motivated by bad faith, arbitrariness or capriciousness may be actionable.¹⁶¹

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 157–58.

157. *Id.* at 161.

158. *Id.*

159. *Id.* The court explained that if the medical school had dismissed Connelly for solely academic reasons, the court would not intervene. *Id.* at 160–61. The court stated:

The rule of judicial nonintervention in scholastic affairs is particularly applicable in the case of a medical school. A medical school must be the judge of the qualifications of its students to be granted a degree; courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine.

Id.

160. *Id.* at 161.

161. *Id.* at 159.

This passage clearly illustrates the academic deference principle. If the issue is wholly cognitive and academic in nature, academic freedom principles are correctly applied. However, should the school act in such a capricious matter that any academic issues are secondary or non-existent, academic deference should not be granted. Further, seemingly academic or cognitive issues may become so hopelessly intertwined with disciplinary or traditionally non-cognitive issues that courts may question granting automatic academic deference.¹⁶²

In another highly discussed academic dismissal case, *Greenhill v. Bailey*,¹⁶³ the Eighth Circuit Court of Appeals overturned the University of Iowa College of Medicine's decision to dismiss a medical student for alleged academic failures, because the school failed to provide the student with the minimal level of due process while relying on an erroneous assumption of academic deference.¹⁶⁴ The medical student, Bernard Greenhill, was dismissed by the school "due to Poor Academic Standing."¹⁶⁵ He had been denied admission to the school on two prior occasions and, as a result, had attended and completed two years of medical education at the College of Osteopathic Medicine and Surgery where he passed his coursework but was ranked at the bottom of his class.¹⁶⁶ After passing Part I of the NBME, Greenhill applied for and was finally admitted as a junior-year medical student in advanced standing at the College of Medicine.¹⁶⁷ During his junior year, Greenhill participated in clerkships in various medical fields.¹⁶⁸ Through the course of the year, he missed two clerkship rotations and failed two additional clerkships in the fields of obstetrics-gynecology and internal medicine.¹⁶⁹ At the end of the year, the Junior Promotions Committee convened to determine whether to promote each medical student to his or her senior year of study.¹⁷⁰ Viewing the entirety of Greenhill's academic record, the Committee voted to suspend Greenhill, and the Medical Counsel and Executive Committee of the College of Medicine voted unanimously to support the Promotions Committee's recommendations.¹⁷¹

Under school policy, Greenhill was not permitted to appear before either of the committees to contest his case.¹⁷² Instead, he was allowed to appeal the school's decision by letter.¹⁷³ In the letter, Greenhill admitted his deficiencies and sought to re-enroll in the school at essentially the same level as a second-semester sophomore.¹⁷⁴ Additionally, Greenhill's father, a licensed dermatologist, wrote a

162. See Dutile, *supra* note 12, at 651-52 (arguing courts should dispense with the cumbersome and often unhelpful distinction between allegedly academic versus disciplinary student dismissals).

163. 519 F.2d 5 (8th Cir. 1975).

164. *Id.* at 9-10.

165. *Id.* at 7.

166. *Id.* at 6.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 7.

174. *Id.*

letter to the school on his son's behalf asking the school to remove the suspension.¹⁷⁵ The school ultimately rejected the appeal, and the Assistant Dean sent a Change of Status Form to the Liaison Committee on Medical Education of the Association of American Medical Colleges, located in Washington, D.C.¹⁷⁶ The Assistant Dean's letter indicated that Greenhill had been dismissed "due to Poor Academic Standing" apparently caused by "[l]ack of intellectual ability or insufficient preparation."¹⁷⁷

Following the school's actions, Greenhill brought suit before the United States District Court for the Southern District of Iowa, alleging that he had been denied both procedural and substantive due process because he was not given notice or an opportunity for a hearing and because the faculty had wrongfully judged his academic performance based on non-objective standards.¹⁷⁸ Like the lower court in *Connelly*, the District Court of Iowa dismissed Greenhill's complaint, finding the Fourteenth Amendment's procedural safeguards have no application to an academically dismissed student.¹⁷⁹ Greenhill subsequently appealed this decision to the Eighth Circuit Court of Appeals.¹⁸⁰

Although the Eighth Circuit acknowledged that "courts will ordinarily defer to the broad discretion vested in public school officials and will rarely review an educational institution's evaluation of the academic performance of its students,"¹⁸¹ the court found that Greenhill's liberty interest had been violated and remanded the case for an administrative hearing.¹⁸² Explaining its ruling, the court stated that "[n]otwithstanding this customary 'hands-off' policy, judicial intervention in school affairs regularly occurs when a state educational institution acts to deprive an individual of a significant interest in either liberty or property."¹⁸³ Discussing Greenhill's liberty interest in continuing his costly and time-consuming medical education, the Eighth Circuit found that Greenhill's dismissal "admittedly 'imposed on him a stigma or other disability that foreclose[s] his freedom to take advantage of other . . . opportunities.'"¹⁸⁴ The court explained that a person may be deprived of a liberty interest where officials at a state-funded institution "make[] 'any charge against him that might seriously damage his standing and associations in his community.'"¹⁸⁵

The court also explained its reasoning, stating that it was most concerned about

175. *Id.*

176. *Id.*

177. *Id.* (alteration in original).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* (citing *Keys v. Sawyer*, 353 F. Supp. 936 (S.D. Tex. 1973); *Connelly v. Univ. of Vt. and State Agric. Coll.*, 244 F. Supp. 156 (D. Vt. 1965); *Foley v. Benedict*, 55 S.W.2d 805 (Tex. 1932); *Wong v. Regents of Univ. of Cal.*, 93 Cal. Rptr. 502 (Cal. Ct. App. 1971)).

182. *Id.* at 8–9.

183. *Id.* at 7 (citing *Goss v. Lopez*, 419 U.S. 565 (1975); *Perry v. Sindermann*, 408 U.S. 593 (1972)).

184. *Id.* at 8 (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972)) (alterations in original).

185. *Id.* at 8 n.8. (quoting *Roth*, 408 U.S. at 573).

the Assistant Dean's letter to the Liaison Committee of the Association of American Medical Colleges which alleged Greenhill lacked intellectual ability and noted the school had "all but conceded" that, with this information available to all other accredited medical schools, Greenhill "will be foreclosed from pursuing his education not only at Iowa but everywhere else as well."¹⁸⁶ The court went on to hold that "the action by the school in denigrating Greenhill's intellectual ability, as distinguished from his performance, deprived him of a significant interest in liberty," because of the long stigma it would impose upon him for the duration of his career (or lack thereof).¹⁸⁷ Because the court found that Greenhill was denied due process, it held that "at the very least, Greenhill should have been notified in writing of the alleged deficiency in his intellectual ability . . . and should have been accorded an opportunity to appear personally to contest such allegation."¹⁸⁸ The court, however, did not require that the school grant Greenhill "full trial-type procedures," but rather an "informal give-and-take" between him and the school body dismissing him.¹⁸⁹

Much like the *Connelly* court's ruling, the Eighth Circuit, in *Greenhill*, did not pass judgment on the school's substantive evaluation of Greenhill's academic qualifications. Instead, it remanded the case to the trial court for a hearing on its merits and was careful to note that "[a] graduate or professional school is, after all, the best judge of its students' academic performance and their ability to master the required curriculum."¹⁹⁰ Again, it is important to note that academic deference is certainly the norm, and courts, given their admitted lack of expertise, will not pass judgment on the academic nature of a particular school's decisions. However, a court will dispense with academic deference and scrutinize the process afforded a student if a school's decision is arbitrary.

As the *Connelly* and *Greenhill* rulings demonstrate, summary judgment is not always an appropriate remedy in academic dismissal cases—especially when facts exist supporting a student's assertion that his or her dismissal may have been for non-academic reasons or was based on arbitrary judgments made by an institution's administrators or faculty members.¹⁹¹ Although summary judgment is

186. *Id.* at 8.

187. *Id.*

188. *Id.* at 9.

189. *Id.* The court stated: "The purpose of the hearing, as set forth in an appropriate notice, shall be to provide Greenhill with an opportunity to clear his name by attempting to rebut the stigmatizing material made available to other schools. Procedural due process under these facts requires no more." *Id.* at 10.

190. *Id.*

191. See *Clements v. County of Nassau*, 835 F.2d 1000, 1005 (2d Cir. 1987) (finding that summary judgment in academic dismissal cases is unwarranted where state of mind is the critical issue and "solid circumstantial evidence exists to prove plaintiff's case") (citing *Wakefield v. Northern Telecom, Inc.*, 813 F.2d 535, 540–41 (2d Cir. 1987)); see also *Dutile*, *supra* note 12, at 626 (noting that the academic versus disciplinary distinction is, at best, confusing and difficult to properly distinguish). *Dutile* observes that "[t]he [United States Supreme] Court seems to have assumed that situations fall easily into one category or the other. But does the distinction survive scrutiny? Or is it, as Justice Marshall said, futile to attempt 'a workable distinction between "academic" and "disciplinary" dismissals'?" *Id.* at 625–26 (quoting *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 104 n.18 (Marshall, J., concurring in part and dissenting in part)).

certainly common in the majority of academic dismissal cases,¹⁹² schools should not rely on courts simply giving a perfunctory resuscitation of the “academic deference” standard and then summarily dismissing a student’s lawsuit. When facing a potential academic dismissal, schools are advised to consider the facts of every student’s case, and, when doing so, decide what level of due process should be afforded to the student. For instance, a school should ask itself: Was the decision behind the student’s failing grade(s) or dismissal made in a reasonable manner or was there potentially extenuating circumstances—such as illness—that might explain the student’s failures? Were there facts outside of the student’s low academic performance that might have also lead to the student’s dismissal?¹⁹³ Could the student persuasively argue that his dismissal was for nonacademic or disciplinary reasons? If any of these questions are affirmatively answered, colleges and universities must be cognizant of the potential issues created and have procedures in place to ensure that the student facing potential dismissal is afforded due process.

Finally, as the Eighth Circuit noted in *Greenhill*, courts are “well aware” of the long-standing history of distinguishing between academic and disciplinary cases.¹⁹⁴ The court stated: “Our holding today is not an effort to blur that distinction but rather an acknowledgment that the dictates of due process, long recognized as applicable to disciplinary expulsion (and suspensions of significant length), may apply in other cases as well”¹⁹⁵ As the court’s language illustrates, for better or worse, a dichotomy has been developed by the courts between non-cognitive, or disciplinary, student offenses and cognitive, or academic, issues.¹⁹⁶ For example, failing to meet a specified minimal grade point average appears unquestionably cognitive. Likewise, issues of vandalism, underage drug and alcohol abuse, or rape appear to be disciplinary issues. Nonetheless, many issues are not easily defined as cognitive or disciplinary. For instance, where does the issue of cheating belong?¹⁹⁷ Further, as many of the cases discussed herein demonstrate, the issues in every student’s case can be

192. See *Steere v. George Washington Univ. Sch. of Med. & Health Scis.*, 439 F. Supp. 2d 17, 25–26 (D.D.C. 2006) (granting summary judgment for medical school after student failed to evidence a disability explaining his long history of academic failure); *Davis v. George Mason Univ.*, 395 F. Supp. 2d 331, 332 (E.D. Va. 2005) (granting school summary judgment); see also *Mauriello v. Univ. of Med. and Dentistry of N.J.*, 781 F.2d 46, 51 (3d Cir. 1986) (“[A] student bears a heavy burden in persuading the courts to set aside a faculty’s judgment of academic performance.”).

193. See *Dutile*, *supra* note 12, at 630 (discussing case law where disciplinary and academic actions often appear indistinct).

194. *Greenhill*, 519 F.2d at 8.

195. *Id.* at 8–9.

196. *Dutile*, *supra* note 12, at 619.

197. See Aron E. Goldschneider, *Cheater’s Proof: Excessive Judicial Deference Toward Educational Testing Agencies May Leave Examinees No Remedy to Clear Their Names*, 2006 BYU EDUC. & L.J. 97 (2006) (discussing the use of standardized testing by colleges and universities and the ramifications to students seeking admissions to increasingly competitive institutions of cheating on those tests). Goldschneider argues: “[I]t is unduly burdensome for a test-taker to pursue a worthy claim under existing ‘testing law,’ due to the excessive deference paid to testing services by the courts, the difficulties in bringing equitable actions, and the limited legal avenues available to plaintiffs.” *Id.* at 100.

muddled at best, and the discovery process is meant to unearth issues that a school or a student may not have recognized.

As Professor Fernand N. Dutile argues, “[N]o manageably clear line separates the disciplinary matter from the academic one and, further, . . . the courts’ pronouncements that different constitutional rules should apply to each fail to persuade.”¹⁹⁸ Indeed, in his dissenting opinion in *Horowitz*, Justice Marshall noted that the academic/disciplinary distinction places “undue emphasis on words rather than functional considerations.”¹⁹⁹ In sum, colleges and universities must keep in mind that contested facts, where academic and disciplinary issues are intermingled, may lead to a full trial on the merits of a student’s case against his or her respective school, a scenario that schools would be wise to avoid.²⁰⁰ Whether or not the academic-versus-disciplinary line is clear, the United States Supreme Court in *Horowitz* held that a student is entitled to some type of informal hearing and that a school’s decision must be “careful and deliberate.”²⁰¹ Should a school fail to provide these measures, an issue of fact may arise that a court might send to a jury to consider.

B. Schools Should Not Conduct Independent Fact-Finding Without the Dismissed Student’s Knowledge

In a 1995 case, *University of Texas Medical School v. Than*,²⁰² the Texas Supreme Court found that a medical student who was dismissed “for academic dishonesty” from the University of Texas Medical School was denied procedural due process.²⁰³ *Than* is also notable because the facts of the case precariously straddle the line between academic and disciplinary dismissals. The student, Than, was dismissed for allegedly cheating on his NBME examination for surgery.²⁰⁴ During the exam, two school proctors alleged that they witnessed Than repeatedly looking at another student’s answer sheet.²⁰⁵ The proctors reported what they had witnessed, and the university requested the NBME conduct a statistical analysis of Than and the other students’ exams.²⁰⁶ After comparing their joint wrong answers, the NBME found that the students gave the same wrong answer on eighty-eight percent of the questions.²⁰⁷ After receiving this data, the school gave Than a failing grade on the exam and commenced proceedings against him.²⁰⁸

198. Dutile, *supra* note 12, at 619.

199. Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 104 (1978) (Marshall, J., dissenting).

200. *Id.* at 106. Although there are always contested facts in academic dismissal disputes, colleges and universities must be wary of assuming that their decisions will be granted judicial deference. Therefore, colleges and universities are advised to utilize their own methods of internal investigation to assess the truth of each student’s assertions.

201. *Id.* at 85.

202. 901 S.W.2d 926 (Tex. 1995).

203. *Id.* at 928.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 928–29.

The school gave Than oral and written notice of the charges against him, including notice of several pieces of evidence that would be used against him at his dismissal hearing.²⁰⁹ A full hearing was conducted with Than present and representing himself.²¹⁰ At the hearing, the school called the two proctors as witnesses and Than cross-examined them extensively.²¹¹ Than also called two student witnesses who testified on his behalf.²¹² At the end of the proceedings, the hearing officer and Dr. Margaret McNeese, the associate dean of the medical school, viewed the room where Than took the NBME.²¹³ Than requested to be allowed into the room with the hearing officer and Dr. McNeese but was not allowed to do so.²¹⁴ After inspecting the room and sitting in the seat where Than took his exam, the hearing officer recommended expulsion and Than was expelled for academic dishonesty.²¹⁵

Subsequently, Than retained counsel and brought suit against the university.²¹⁶ He claimed a violation of his procedural due process rights and asked for a temporary injunction against the school.²¹⁷ Both the trial and appellate courts granted Than an injunction to be reinstated as a student, but the school refused to provide him with a certificate necessary to participate in a residency program.²¹⁸ Subsequently, the university was found in contempt of court and appealed its case to the Texas Supreme Court.²¹⁹ The Texas Supreme Court sustained the lower court's rulings and agreed that Than had not been afforded "due course of law" protection under the Texas Constitution,²²⁰ because the school had violated his constitutionally protected liberty interest by unjustly depriving him, without due

209. *Id.* at 928.

210. *Id.* It is common that university academic dismissal proceedings will be conducted without the presence of an attorney representing the student. *See* Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 86 n.2 (1978) ("The presence of attorneys or the imposition of rigid rules of cross-examination at a hearing for a student . . . would serve no useful purpose, notwithstanding that the dismissal in question may be of permanent duration.") (alteration in original).

211. *Than*, 901 S.W.2d at 928.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 928, 932.

216. *Id.* at 928.

217. *Id.*

218. *Id.* at 928–29.

219. *Id.* at 929.

220. *Id.* at 932. As the Texas Supreme Court noted, the Texas Constitution provides that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." *Id.* at 929 (quoting TEX. CONST. art. I, § 19). The court also stated that "[t]he Texas due course clause is nearly identical to the federal due process clause" of the Fourteenth Amendment to the United States Constitution, which provides that "[n]o State shall . . . deprive any person of life, liberty or property without due process of law." *Id.* (quoting U.S. CONST. amend. XIV, § 1). "While the Texas Constitution is textually different in that it refers to 'due course' rather than 'due process,' we regard these terms as without meaningful distinction." *Id.* (citing *Mellinger v. City of Houston*, 3 S.W. 249, 252–53 (Tex. 1887)).

process, of his right to an education.²²¹ The Court modified but affirmed the permanent injunction by requiring the “F” on Than’s transcript and any records of his expulsion be removed. However, the court remanded the case for a new hearing.²²²

Citing both Texas constitutional law and federal law, the Court found Than had a liberty interest in continuing his education.²²³ Defining Than’s liberty interest, the Court stated that “where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of due process must be satisfied.”²²⁴ The Court also explained that a medical student who is charged with academic dishonesty “faces not only serious damage to his reputation but also the loss of his chosen profession as a physician.”²²⁵

The university argued that Than’s dismissal was not solely for disciplinary reasons, but also for academic reasons which require less stringent due process.²²⁶ Disagreeing with the school’s argument that the cheating issue was more academic, the Court stated that “[t]his argument is specious. Academic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct.”²²⁷ According to the Texas Supreme Court, Than’s dismissal for cheating was not an academic but rather a disciplinary decision; therefore, the decision required heightened due process.²²⁸

With this analysis in place, the Court found Than was afforded a “high level of due process” by the university.²²⁹ However, because the hearing officer and Dr. McNeese viewed the examination room by themselves and denied Than’s request to accompany them to the room, Than’s due process rights were violated.²³⁰ Because of this, the Court held that the school must remove the “F” on his transcript for the NBME examination and remove all records of Than’s expulsion.²³¹ Finally, the Court held that Than was entitled to another hearing, but that the original injunction issued by the trial court “exceed[ed] the proper remedy” and had to be removed.²³²

This case stands for a number of key propositions. First, medical students like

221. *Id.* at 929.

222. *Id.*

223. *Id.* at 930. Because the Court found that Than had a liberty interest, it stated that it was not necessary to consider whether he also had a property interest. *Id.* at 930 n.1.

224. *Id.* at 930 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972)).

225. *Id.* See Warren A. Seavey, *Dismissal of Students: “Due Process,”* 70 HARV. L. REV. 1406, 1407 (1957).

226. *Than*, 901 S.W.2d at 931.

227. *Id.* (citing *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86–87 (1977)).

228. *Id.* Whether cheating qualifies as an academic or disciplinary cause for dismissal is not readily apparent. However, as the Texas Supreme Court’s decision in *Than* indicates, courts may be willing to view cheating as a disciplinary issue and, therefore, a court will grant less deference to a school’s decision to dismiss a student for cheating. See Friedl, *supra* note 8, *passim*.

229. *Than*, 901 S.W.2d at 931.

230. *Id.* at 932.

231. *Id.* at 934.

232. *Id.*

Than have a significant liberty interest in being awarded a professional license by proceeding through their education. As the Texas Supreme Court noted, a medical student's time, money, and integrity are clearly at stake should a student face the possibility of an academic dismissal.²³³ Second, given the level of interest a professional student has in continuing his or her education, even if a school grants a student a high level of due process, the school cannot rely on cheating as being solely an academic issue that entitles it to academic deference from the courts.²³⁴ Instead, a school must realize that an allegation of cheating may be viewed by courts as misconduct relating to discipline and not academics. Third, the case serves as an example of when courts may be willing to expand the typical deference granted to state universities when a school arbitrarily deprives a student of the right to an education without allowing the student to take part in the fact-finding that leads to dismissal. In sum, courts may be more willing to apply a liberty interest analysis to professional student cases because "[t]he stigma is likely to follow the student and preclude him from completing his education at other institutions."²³⁵ Schools should be careful when attempting to dismiss professional students who have much invested in their costly and time consuming education.²³⁶ Whether professional students have higher liberty and/or property interests than undergraduate students is debatable; still, in *Than*, the Texas Supreme Court determined that "Than's interest in continuing his medical education and preserving his good name was substantial."²³⁷

In another case where an institution claimed a student's academic failure as the reason for treating the student differently, *Ezekwo v. New York City Health & Hospitals Corporation*,²³⁸ the United States Court of Appeals for the Second Circuit held that a medical resident had a protected property interest in taking her turn as the Chief Resident of a hospital.²³⁹ In *Ezekwo*, a third-year resident, Dr. Ifeoma Ezekwo, alleged that she was denied her opportunity to serve as Chief Resident at Harlem Hospital Center (HHC) due in large part to difficulties with her supervising physician, Dr. Farris.²⁴⁰ In an HHC recruiting brochure, the Chief

233. *Id.* at 930.

234. *Id.* at 931. The Texas Supreme Court explained that cheating is a disciplinary issue, stating that "[a]cademic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct." *Id.*

235. *Id.* at 930. *See also* *Greenhill v. Bailey*, 519 F.2d 5, 8 (8th Cir. 1975) (discussing the potential career-ending stigma medical students face when dismissed from a college or university for their alleged academic failures).

236. *See* *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 n.3 (1977) ("[A] relevant factor in determining the nature of the requisite due process is 'the private interest that [was] affected by the official action.'" (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (second alteration in original).

237. *Than*, 901 S.W.2d at 932.

238. 940 F.2d 775 (2d Cir. 1991).

239. *Id.* at 783. The case serves as an example of the nexus between education and employment law issues. Often, especially in professional school cases, courts are faced with legal issues that do not fit neatly into the academic versus disciplinary dismissal paradigm. *See* *Dutile*, *supra* note 12, *passim* (discussing the challenges courts face when dealing with academic and disciplinary dismissal cases at colleges and universities).

240. *Ezekwo*, 940 F.2d at 777.

Resident position at the hospital was to be granted, on a rotational basis, to all third-year students.²⁴¹ The Chief Resident position carried with it additional administrative and organizational responsibilities and its designation had significant future professional value to employers.²⁴²

During her three-year residency, Dr. Ezekwo had many conflicts with Dr. Farris which resulted in Dr. Ezekwo writing numerous memoranda and submitting them to the HHC's medical directors.²⁴³ In one, Dr. Ezekwo alleged that Dr. Farris and other attending physicians had poor management and motivational skills, had unfairly evaluated her, had failed to show up at meetings and lectures, were poor teachers, and had discriminated against her due to her race.²⁴⁴ Dr. Ezekwo also filed complaints with the Committee of Interns and Residents (CIR) and the equal employment opportunity officer (EEO) alleging that Dr. Farris had fabricated information in her file and engaged in "smear tactics" aimed at damaging her career.²⁴⁵

Shortly after learning of Dr. Ezekwo's complaints to the CIR and EEO, Dr. Farris, in unrecorded and undocumented meetings, began discussions with other supervising physicians about not making Dr. Ezekwo Chief Resident and even about the possibility of dismissing her from the program altogether.²⁴⁶ In the private meetings, Ezekwo's "academic performance, her medical skills, and her memo writing campaign were the focus of discussion."²⁴⁷ Nearly two weeks after Dr. Farris began these discussions with other resident faculty, Dr. Ezekwo was to assume her position as Chief Resident, as per the original, scheduled rotation. However, under Dr. Farris' supervision, the HHC Chief Resident Policy was changed from a rotational system to a "merit based" system.²⁴⁸ Under this new system, the residents would be awarded the position of Chief Resident on the bases of their demonstrated leadership ability, residency training evaluations, and performance on the "national examination administered by the American Academy of Ophthalmology known as the OKAP examination."²⁴⁹ The hospital had never used this academic performance system before Dr. Farris' various meetings with the residency faculty.²⁵⁰

Dr. Ezekwo was never named Chief Resident, but she continued through her residency program and graduated.²⁵¹ After her graduation, she brought suit against HHC.²⁵² She argued that HHC had violated her protected property and liberty due process rights by denying her the opportunity to serve as Chief Resident without

241. *Id.*

242. *Id.*

243. *Id.* at 777-78.

244. *Id.*

245. *Id.* at 778.

246. *Id.*

247. *Id.*

248. *Id.* at 778-79.

249. *Id.* at 779.

250. *Id.*

251. *Id.*

252. *Id.*

due process.²⁵³ The district court concluded that Dr. Ezekwo had a protected property interest, but dismissed her suit because HHC's decision was academic, not disciplinary, and she was not entitled to further due process.²⁵⁴

The Second Circuit granted Dr. Ezekwo's appeal and reversed the trial court's finding that she was not entitled further due process.²⁵⁵ The Second Circuit held that HHC's decision was not necessarily purely academic, and, regardless of its terminology, academic decisions are entitled to at least "some modicum of process."²⁵⁶ The court also noted that although a medical residency program is largely academic, it is also an employment situation.²⁵⁷ Because of this categorization, the court found that Dr. Ezekwo was entitled to be notified of HHC's change in the Chief Resident Policy and that she should have been allowed to demonstrate her past performance and persuade the decision-makers as to her worth.²⁵⁸ Explaining its holding, the court stated that "the injection of entirely new selection criteria at the eleventh hour casts some doubt on the truly 'academic' nature of the decision."²⁵⁹

As shown in the Texas Supreme Court's decision in *Than*, courts may be more apt to find a due process violation when a clear liberty or property interest is at stake and when that interest is taken away by administrators or faculty conducting independent fact-finding without the student's knowledge.²⁶⁰ The rulings in *Than* and *Ezekwo* also illustrate that academic deference may be dispensed with if higher education institutions make arbitrary and capricious decisions under the guise of an academic judgment. In *Horowitz*, the United States Supreme Court discussed the balancing act that courts must perform when considering students' liberty and property interests and institutions' interests in maintaining academic autonomy.²⁶¹ As summarized in the three-part test invoked in *Mathews v. Eldridge*,²⁶² the

253. *Id.* at 782.

254. *Id.* at 777.

255. *Id.* at 786.

256. *Id.* at 784.

257. *Id.* at 785.

258. *Id.*

259. *Id.* at 784.

260. Furthermore, one must consider that, in *Ezekwo*, the court premised parts of its analysis on the duality created by the educational/employment relationship where Ezekwo's position as Chief Resident was effectively protected twice by due process safeguards pertaining to her liberty and property interests. This issue differentiates *Ezekwo* from *Than* because, in *Than*, the Texas Supreme court was concerned with the relationship between conduct (relating to discipline) and academics.

261. *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 n.3 (1978) ("[A] relevant factor in determining the nature of the requisite due process is 'the private interest that [was] affected by the official action.'") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)) (second alteration in original); *see also Carr v. St. John's Univ.*, N.Y., 231 N.Y.S.2d 410, 413 (N.Y. App. Div. 1962) ("The University cannot take the student's money, allow him to remain and waste his time in whole or in part . . . and then arbitrarily expel him or arbitrarily refuse, when he has completed the required courses, to confer on him that which it promised, namely, the degree . . .").

262. *Mathews*, 424 U.S. at 319. The three principal factors that are to be considered in all due process interest cases are:

First, the private interest that will be affected by the official action; second, the risk of

Supreme Court stated that “a relevant factor in determining the nature of the requisite due process is ‘the private interest that [was] affected by the official action.’”²⁶³ The Court recognized that “the deprivation to which [Horowitz] was subjected—dismissal from a graduate medical school—was more severe than the 10-day suspension” to which several high school students had been subjected in *Goss v. Lopez*.²⁶⁴ However, while noting the significance of many students’ interests in maintaining their education, the Court concluded that academic deference should be afforded to higher education institutions if their decisions are not arbitrary or capricious.²⁶⁵ Again, to ensure that all students’ interests are protected, schools must be extremely careful to provide students with all relevant information, however insignificant it seems, to ensure that courts will not view the school’s decision-making with skepticism. As shown in *Than* and *Ezekwo*, although courts are always aware of academic freedom concerns, when administrators or faculty members make decisions not based on facts or which show evidence of even slight impartiality or bias, courts may scrutinize those failures and potentially dispense with academic deference.

In one final case where a university conducted wrongful independent fact-finding, *Morrison v. University of Oregon Health Sciences Center*,²⁶⁶ an Oregon appeals court reversed and remanded the dismissal of a dental student at the University of Oregon School of Dentistry.²⁶⁷ In *Morrison*, a faculty review committee dismissed a dental student for academic reasons stemming from the student’s alleged lack of professional skills development and lack of adequate clinical performance.²⁶⁸ The dismissed student, John Morrison, contested the findings that his performance was deficient under Oregon statutory law.²⁶⁹ According to the applicable statutes, the dismissal was a “contested case,” entitling Morrison to certain procedural protections.²⁷⁰

an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

263. *Horowitz*, 435 U.S. at 86 n.3 (quoting *Mathews*, 424 U.S. at 335) (alteration in original).

264. *Id.* at 86 n.3 (citing *Goss v. Lopez*, 419 U.S. 78 (1975)).

265. *Id.* at 91–92.

266. 685 P.2d 439 (Or. Ct. App. 1984).

267. *Id.* at 441.

268. *Id.*

269. *Id.*

270. *Id.* at 440–41 (citing OR. REV. STAT. §§ 183.450(2), 183.480(1)). Section 183.480(1) provides:

Any person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order, whether such order is affirmative or negative in form. A petition for rehearing or reconsideration need not be filed as a condition of judicial review unless specifically otherwise provided by statute or agency rule.

Id. at 441 n.3. Section 183.450(2) provides that, in contested cases: “All evidence shall be offered and made a part of the record in the case, and except for matters stipulated to . . . no other factual information or evidence shall be considered in the determination of the case.” *Id.* at 441

In the case, the university faculty review committee met in a closed proceeding without the student's knowledge and included non-committee members in the decision-making process.²⁷¹ Much of the meeting involved discussion between various faculty members and "relevant factual information" which was discussed and considered for the first time.²⁷² The student had no opportunity to respond or object to any of the information discussed at the meeting.²⁷³ Because the review committee conducted independent fact-finding and failed to involve the student, the fairness of the hearing may have been impaired, so the appeals court reversed the school's decision and remanded the case.²⁷⁴ The court stated that, under Oregon statutory law,²⁷⁵ students must at least be apprised of facts that are asserted against them and must be made aware of the decision-making process of the university when it considers dismissing them.²⁷⁶

Again, like the decisions in *Than* and *Ezekwo*, the Oregon court's decision in *Morrison* demonstrates that schools should be careful when conducting meetings or fact-finding sessions without apprising the accused student of the existence of those sessions. If the information is relevant to a student's defense, it must be disclosed to the student. All three cases stand for the proposition that students must be afforded the proper level of procedural access, thereby ensuring a fair review of all relevant information. Further, because each case had an academic aptitude component and a non-cognitive disciplinary component, the courts in all three cases recognized the basis for each school's decision was based on a non-cognitive disciplinary component, which in turn requires a slightly higher standard of due process. As such, when both academic aptitude and non-cognitive acts are involved in the fact patterns, the courts will opt for the higher standard of due process.

Furthermore, in both *Than* and *Morrison*, the students likely benefited from state statutes or laws that arguably provided the students with more due process protection.²⁷⁷ Administrators and faculty members, as well as their legal counsel, must always consider the protections afforded to students under state law as well

(alterations in original).

271. *Id.* at 441, 444.

272. *Id.* at 444.

273. *Id.* This case again shows the necessity that colleges and universities have clear, written guidelines that must be followed when considering dismissing a student for academic failure. *See* Berger & Berger, *supra* note 129, at 359–64 (providing a "proposed model guideline" for higher education student dismissals).

274. *Morrison*, 685 P.2d at 443–44. According to the court, state law provided: "The court shall remand the order for further agency action if it finds that either the fairness of the proceeding or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure." *Id.* at 443 (quoting OR. REV. STAT. § 183.482(7)).

275. Because the school was bound by the mandates of OR. REV. STAT. § 183.480, the court applied administrative review standards to the university's decision-making. *Id.*

276. *Id.*

277. *See* Bd. of Regents v. Roth, 408 U.S. 564, 576–77 (1972) (discussing the relationship between the federal Constitution and individual state rights). In *Roth*, the United States Supreme Court held that property interests protected by due process are "defined by existing rules or understandings that stem from an independent source such as state law." *Id.* at 577.

as federal constitutional law. Indeed, as was seen in *Morrison*, Oregon statutory law provided more specified protection to the dismissed student than she would otherwise have received from a traditional Fourteenth Amendment due process analysis. Should the state provide more protection than the federal Constitution, it is much more likely that, combined with professional students' heightened interest in continuing their costly education, a court will grant less deference to an academic dismissal.

C. Students May Have a Protected Right to the Continuation of Their Educational Investment

In *Evans v. West Virginia Board of Regents*,²⁷⁸ the Supreme Court of Appeals of West Virginia found that a medical student who had a physical and mental illness was entitled to reinstatement at the West Virginia University School of Osteopathic Medicine.²⁷⁹ The dismissed student, Eugene Evans, came before the state's highest court because the appellate court had refused to consider his petition seeking reinstatement and a hearing wherein the university would be required to explain its refusal to readmit him.²⁸⁰ The school had dismissed Evans without granting him a hearing,²⁸¹ prompting Evans to bring his case to the West Virginia judiciary.²⁸²

Evans maintained a "B" average during his initial two and one-half years at the medical school.²⁸³ However, due to a serious urological infection which caused him substantial physical pain and mental anguish, Evans was forced to receive medical treatment, causing him to miss one year of school.²⁸⁴ Evans applied for, and was granted, a one-year leave of absence.²⁸⁵ Fourteen months after taking his leave of absence, Evans applied for readmission, but the university denied him.²⁸⁶ Evans was not given any hearing or reasons for the school's decision not to readmit him.²⁸⁷ He exhausted his administrative remedies with the school and was twice denied readmission by the Admissions Committee without its "proffering any explanation whatsoever for the denial."²⁸⁸

The West Virginia Supreme Court found that Evans had a "sufficient property interest" in continuing and completing his education to justify affording him minimal procedural due process protections.²⁸⁹ Furthermore, given his two and one-half years of academic success, the court held that Evans should be able to complete his education "absent a showing that specific conditions and circumstances had developed since his original admission which would prevent him from successfully completing the remainder of his education."²⁹⁰ Like many of the cases discussed previously, the West Virginia Supreme Court was clearly foremost concerned with Evan's ability to fulfill the academic requirements of the school. The court stated that "nothing appears of record even remotely suggesting

278. 271 S.E.2d 778 (W. Va. 1980).

279. *Id.* at 780–81.

280. *Id.* at 779.

281. *Id.* at 780.

282. *Id.* at 779–80.

283. *Id.* at 780.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

his unfitness or inability to complete the remainder of his education.”²⁹¹ The court also noted that Evans had been successful before his leave of absence and, because there was no suggestion of his inability to successfully fulfill the remainder of his education, his case was significantly different from that of the medical student in *Horowitz*.²⁹²

In *Evans*, it appears that the court was concerned with the *procedures* employed and not the *academic record* upon which the school based its decision not to readmit Evans. This is important because, unlike several of the cases discussed previously, here the court protected a student’s right to at least minimal due process—a standard clearly expressed by the United States Supreme Court in *Horowitz*²⁹³—but at times either ignored or forgotten by administrators and faculty members at public colleges and universities. The Supreme Court in *Horowitz* clearly stated that students must be given “oral or written notice of the charges against [them], and if [they] den[y] the charges, an explanation of the evidence the authorities have and an opportunity to present [their] side of the story.”²⁹⁴ By failing to meet this standard, the medical school in *Evans* was found to have violated the student’s due process rights.

Another example of a school’s failure to provide both a proper level of process and academic content is presented in the case of *Alcorn v. Vaksman*.²⁹⁵ In *Vaksman*, a case decided only a year before *Than*, a Texas appellate court upheld a trial court’s decision that a professional graduate student had been wrongfully dismissed for alleged academic failures.²⁹⁶ Vaksman, a Russian immigrant, enrolled in the University of Houston’s doctoral program in American History in 1982.²⁹⁷ By 1984, Vaksman had attained “ABD,” or “all but dissertation,” status by completing all necessary requirements, including course work, teaching assignments, and comprehensive oral examinations, which were necessary to receive his doctorate.²⁹⁸ Vaksman was assigned three separate dissertation advisors by the school.²⁹⁹

During his time at the university, Vaksman was outspoken about certain university policies and political issues.³⁰⁰ To express his views, Vaksman utilized an array of media outlets, including newspaper articles and editorials, a radio talk

291. *Id.*

292. *Id.*

293. Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 85–86 (1978).

294. *Id.* at 85 (citing *Goss v. Lopez*, 419 U.S. 565, 581 (1975)). In *Horowitz*, The United States Supreme Court explained that all the *Goss* decision requires is “an ‘informal give-and-take’ between the student and the administrative body dismissing him that would, at least, give the student ‘the opportunity to characterize his conduct and put it in what he deems the proper context.’” *Id.* at 86.

295. 877 S.W.2d 390 (Tex. App. 1994).

296. *Id.* at 406. See generally Steven G. Olswang, *Academic Abstention Stronger Than Ever, Despite Vaksman*, 26 J.L. & EDUC. 91 (1997) (arguing that the Texas appellate court decision in *Vaksman* was perhaps wrongly decided and did not herald a new trend of lower academic deference in academic dismissal cases).

297. *Vaksman*, 877 S.W.2d at 393.

298. *Id.*

299. *Id.*

300. *Id.*

show, lectures, and university seminars.³⁰¹ Much of Vaksman's outspokenness was directed toward communist issues relating to the Soviet Union, as well as issues relating directly to the history department and the athletics department at the University of Houston.³⁰² Specifically, Vaksman was highly critical of the university's alleged political agendas with respect to the Soviet Union and also the university's failure to adequately fund academic departments while significantly increasing funding for athletics.³⁰³

During this time, Vaksman also authored a book, entitled *Ideological Struggle*, which was published by an academic press after it passed the process of peer review.³⁰⁴ However, the book was criticized by faculty members at the University of Houston.³⁰⁵ In 1986, after Vaksman's book was published, he requested the graduate committee allow him to change fields from American History to European history and also allow him to submit *Ideological Struggle* as his dissertation.³⁰⁶ In early October of 1986, the graduate committee met to consider Vaksman's requests.³⁰⁷ Rather than approve or deny his requests, the committee unanimously voted to dismiss Vaksman from the university.³⁰⁸ Vaksman had never been notified that the committee was considering his dismissal.³⁰⁹

After the meeting, the university notified Vaksman by a hand-delivered letter that he would be dismissed from the university.³¹⁰ Despite being asked to meet to consider a department switch and whether he could submit his book as a dissertation, the committee ignored his requests, stating that:

The Graduate Committee (all members present) met on October 28, 1986 to consider your request that you be permitted to change your major field of graduate study from American history to European history, with a concentration on Russian/Soviet history. As you know this was the second time this fall that the Graduate Committee has held a special meeting to consider a request by you, the first meeting occurring earlier this month to review your renewed request for financial assistance.

These two meetings have given the Graduate Committee an opportunity to review your progress and performance to date in the Ph.D. program. We have been deeply troubled by what we have learned from this review, for your graduate record *reveals a pattern of academic problems* that in our judgment cannot be ignored.

I regret to inform you that the Graduate Committee, after discussing your record thoroughly, decided in its meeting yesterday to turn down

301. *Id.*

302. *Id.* at 393–94.

303. *Id.*

304. *Id.* at 399.

305. *Id.* at 394.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

your request for permission to switch fields from American history to European history. In addition, and far more seriously, the Graduate Committee voted unanimously to dismiss you from our graduate program, effective immediately.³¹¹

The letter delivered to Vaksman also outlined three reasons why the committee had unanimously voted to dismiss him.³¹² First, the committee stated that Vaksman had failed to make “satisfactory progress toward completing the requirements of [his] degree” because, although he passed comprehensive examinations two years earlier, he had made no progress on his dissertation.³¹³ Second, the committee informed Vaksman that his teaching did not meet a requisite professional level, and his student evaluations, combined with faculty assessments of his graduate teaching assistantship, indicated he viewed teaching as a combative arena which could be manipulated to further his own ideological agenda.³¹⁴ Third, the committee reasoned that Vaksman’s outspokenness against the history department and refusal to accept academic criticism further justified his dismissal from the program.³¹⁵ The committee wrote, “In our judgment, you are unteachable.”³¹⁶ Finally, the letter informed Vaksman that he was entitled to appeal the committee’s decision to the department chairperson who would “explain your rights.”³¹⁷

In May of 1987, Vaksman followed the university’s administrative appeals process, and produced written documentation, including favorable letters written by twelve of his students praising his teaching.³¹⁸ However, Vaksman’s appeals were denied by the university.³¹⁹ Subsequently, he filed suit in federal court against the school officials who dismissed him, alleging they deprived him of his protected property and liberty interests without affording him due process of the law.³²⁰

At the trial court, three of Vaksman’s professors appeared on his behalf.³²¹ Each professor testified that the university wrongfully dismissed Vaksman, the committee had not made its decision on academic grounds, and the dismissal letter contained false statements about Vaksman’s academic failures.³²² In a tidal wave of persuasive testimony,³²³ the professors further asserted that Vaksman was an

311. *Id.* at 394 (emphasis added).

312. *Id.* at 394–95.

313. *Id.* at 394.

314. *Id.* at 395.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* Vaksman also alleged a violation of his First Amendment right to free speech. *Id.*

321. *Id.* at 397.

322. *Id.* at 397–98.

323. A partial list of the professors’ testimony includes:

[I]t would be a “shock” for a committee to respond to a student’s request to take another exam and enter a different study area by dismissing him from school; and [S]tudents “over and over” take two and one-half years or more to pick a dissertation

effective classroom teacher, and, after he had attained ABD status, there was no reason to expel him.³²⁴ Further, they testified that many students don't complete their dissertations for many years after graduation, and, in one case, they knew of a student who had not completed his dissertation until fourteen years after obtaining ABD.³²⁵ The professors also testified that before Vaksman's dismissal, no faculty member had ever spoken to him about concerns that his progress in the program was not satisfactory.³²⁶ Finally, Vaksman himself testified that one of his professors told him that "the history faculty was 'terrified' of a Texas senator's probe of its spending practices, a probe that had been generated by Vaksman's criticism."³²⁷ Perhaps most damaging to the university's case was that, although Vaksman produced documentary evidence and three professors who supported his case, the university presented no witnesses to rebut Vaksman's evidence.³²⁸ Rather, the university relied solely on documentary evidence, most of which proved only that Vaksman had been outspoken against the school at times and that he had failed to complete his dissertation within two years after achieving ABD.³²⁹

Finding that the university had violated Vaksman's liberty interest and had breached an implied contract with him, the trial court awarded Vaksman \$32,500 in actual damages and \$90,000 in attorney's fees.³³⁰ The court also ordered the university to reinstate Vaksman in the doctoral program.³³¹ On appeal, the Texas Court of Appeals found Vaksman was indeed entitled to due process because the court had determined in an earlier case that "when a student is dismissed from a state university, the requirements of procedural due process apply."³³²

After determining Vaksman was entitled to due process protection, the court found his dismissal was academic in nature,³³³ thus calling for "far less stringent

topic.

....

[S]ome history faculty members espouse Marxist views and believe that those who differ with their views, as Vaksman did openly, are "morally wrong as well as academically wrong;"

....

Vaksman "may have presented an embarrassing challenge to the current academic dogma and, perhaps more crucially, to the posturings of our history department in the academic pecking order-it is clear that an outspoken, anti-Soviet, anti-Marxist Soviet emigree/doctoral candidate is a deficit in the status seeking academic board game

Id. at 398.

324. *Id.* at 398-99.

325. *Id.* at 398.

326. *Id.*

327. *Id.* at 400.

328. *Id.*

329. *Id.*

330. *Id.* at 395.

331. *Id.*

332. *Id.* at 396 (quoting *Univ. of Tex. Med. Sch. v. Than*, 834 S.W.2d 425, 432 (Tex. App. 1992), *aff'd*, 901 S.W.2d 926 (Tex. 1995)).

333. *Id.* at 397. Although the facts presented in this case would seem to support a reading that Vaksman's alleged violations were based on conduct and therefore more disciplinary in nature, at the trial court, the University of Houston did not dispute that the dismissal was academic. *See generally id.* This is not surprising given that the school was likely advised to

procedural requirements' than a dismissal for disciplinary reasons."³³⁴ The court relied on an Eighth Circuit opinion that "[a]n actionable deprivation in an academic dismissal case is proved . . . if the decision was motivated by bad faith or ill will unrelated to academic performance."³³⁵ The court then affirmed the trial court's holding that the university officials dismissed Vaksman in bad faith, thus denying him due process.³³⁶ The appellate court explained that the trial court judge had determined Vaksman's dismissal "was in and of itself outrageous and extreme" and was "totally anathema to free academic environs."³³⁷ These statements, according to the appellate court, constituted findings of bad faith.³³⁸ Therefore, "[i]f evidence supports that finding, the appellants are not entitled to the deferential standard of review used in cases of good faith academic dismissals."³³⁹ Stressing that a trial court's holding that a school had made a decision in bad faith was not to be overturned "unless no reasonable minds could have found as the judge or jury did,"³⁴⁰ the appellate court granted no deference to the University of Houston's "prerogatives" because its decision was made in bad faith and was arbitrary and capricious.³⁴¹

The *Vaksman* case is notable because, although the Texas appellate court found it to be an academic dismissal, the facts of the case indicate a convoluted pattern, which a different court may have found as a back-handed strategy to deal with student discipline.³⁴² Clearly, Vaksman's alleged violations of university

argue that Vaksman's dismissal was academic and not disciplinary because lower levels of due process would be required. It does not appear from the appellate court's decision that Vaksman attempted to argue that the case was disciplinary.

334. *Id.* (quoting *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978)).

335. *Id.* (quoting *Clements v. County of Nassau*, 835 F.2d 1000, 1005 (2d Cir. 1987)) (alteration in original).

336. *Id.* at 400–01.

337. *Id.* at 397.

338. *Id.*

339. *Id.*

340. *Id.* (citing *Ikpeazu v. Univ. of Neb.*, 775 F.2d 250, 255 (8th Cir. 1985)). The appellate court also noted that the trial judge found that the university had intentionally harmed Vaksman "solely because of personal disagreements or grievances wholly apart from academic considerations." *Id.*

341. *Id.* The appellate court also stated:

The trial judge, sitting as the trier of fact, found that the defendants "intentionally harm[ed] [Vaksman] solely because of personal disagreements or grievances wholly apart from academic considerations." He found that Vaksman was "summarily expelled for alleged, if not fabricated, academic insufficiencies," and because of "matters of personality and speech," and that his dismissal was "well beyond the limits" proscribed for "learned professionals."

Id. (alterations in original).

342. See *Dutile*, *supra* note 12, at 642 ("In many other cases . . . the manifestly academic finds itself enmeshed, to varying extents, with other aspects such as a failure to pay tuition, irritating outspokenness, or other 'nonacademic' matters." (citing *Vaksman*, 877 S.W.2d 390)); *Nussbaum v. Univ. of Tex. Med. Branch at Galveston*, 2000 WL 1864048, at *3 (Tex. App. 2000) (referring to *Vaksman* as a case in which a student was dismissed for *disciplinary* reasons, and holding that a student who received a failing grade did not have due course of law rights under either the Texas or federal Constitution). In *Nussbaum*, the court stated: "Nussbaum was not dismissed; she was merely given a failing grade. Thus, she would be entitled to even less

regulations appear to be conduct-related issues. For instance, his outspokenness and criticism of the history department's spending practices are most certainly not academic. However, it is also true that Vaksman had failed to pick a thesis topic two years after achieving ABD status and had expressed a wish to change departments only after completing all necessary course work in that department. These issues look less conduct-related and more academic in nature. Moreover, it would appear that the key factor for the appellate court was that the University of Houston specifically called Vaksman's dismissal academic, and no doubt did so with knowledge that academic dismissals carry with them less due process requirements and higher levels of academic deference. In the end, whether the court or the school properly characterized the issues as academic or disciplinary may be irrelevant. In either case, the school acted in an arbitrary manner and clearly provided Vaksman with little procedural due process. In most cases, a failure such as that evidenced in *Vaksman* will ultimately result in courts dispensing with academic deference because students are assumed to have protected interests under the Due Process Clause of the Constitution. Finally, it must be pointed out that the school also failed to defend its case adequately at the trial court level, presenting no witnesses, perhaps because it erroneously relied on the court to defer to its decision and dismiss the case.³⁴³

As *Than*, *Morrison*, and *Vaksman* illustrate, administrators and faculty should be aware that, given the right fact pattern, even a student that takes over a year off from school may have a protected interest in readmission or continued enrollment. Deference will only apply to a college or university's academic decision-making if a student is dismissed purely for academic reasons and in good faith. It would appear that, much like the schools in *Connelly* and *Greenhill*, the schools in *Evans* and *Vaksman* believed that their decisions not to grant adequate levels of due process would be protected by academic deference, and that a court would simply grant the school summary judgment. However, as discussed previously, such blatant disregard of a student's due process rights will not invoke deference, but, instead, provoke a court to apply a higher level of judicial scrutiny.

protection. No court has held that a student has a protected liberty interest in her grades, and we likewise decline to so hold." *Id.*

343. See *supra* Section II(A).

D. Raised or Fixed Grades and Other Students' Ability to Retake Examinations Must be Considered by a School's Dismissal Committee

In *Maitland v. Wayne State University Medical School*,³⁴⁴ the Court of Appeals of Michigan upheld a trial court's ruling that Wayne State University Medical School had acted arbitrarily and capriciously in its decision to dismiss the plaintiff, student Conrad Maitland.³⁴⁵ Maitland was a second year medical student at the university.³⁴⁶ The school's grading and testing system required him to take and pass an exam at the end of each year of medical school in order to move on to the next year of study.³⁴⁷ Maitland passed his first year exam, but twice failed to pass his second year exam.³⁴⁸

Despite Maitland's failure, there were several discrepancies in how the exam was administered and scored the second time Maitland took it.³⁴⁹ At the time of the testing, the proctors of the room where Maitland was taking a portion of the exam had given out the wrong section of the test to many students.³⁵⁰ Those students had approximately five to twenty minutes to look over this portion of the timed exam.³⁵¹ Fortunately, Maitland was not one of the students who received the wrong examination.³⁵² Upon completing the test, Maitland was given a score of 426.³⁵³ A passing score on the exam was 453.³⁵⁴ Due to his failure to earn a passing score, the school's Promotions Review Committee (PRC) voted to dismiss Maitland from the school.³⁵⁵ However, shortly after informing Maitland of his dismissal, the school discovered an error in the exam scoring, and Maitland's score was adjusted to 446.³⁵⁶ Maitland then appealed the PRC's decision to dismiss him, but the PRC again recommended dismissal.³⁵⁷ Finally, despite dismissing Maitland, the PRC allowed several other students to retake the exam.³⁵⁸

Soon after his second appeal to the PRC, Maitland brought an action before a Michigan district court.³⁵⁹ The district court held that the university had acted arbitrary and capriciously and overturned Maitland's dismissal.³⁶⁰ The district court held that "the review committees failed to adequately investigate the possibility that the irregularities in administering the final exam could have

344. 257 N.W.2d 195 (Mich. Ct. App. 1977).

345. *Id.* at 199-200.

346. *Id.* at 197.

347. *Id.*

348. *Id.*

349. *Id.* at 197-98.

350. *Id.* at 197.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.* at 197-98.

356. *Id.* at 198.

357. *Id.*

358. *Id.* at 200.

359. *Id.* at 198.

360. *Id.*

affected the pass/fail point to [Maitland's] detriment,"³⁶¹ and that it was "significant that several students who scored lower than the plaintiff on the original test were allowed to take the retake exam, some without having to appeal."³⁶² The university appealed the district court's ruling to a Michigan appellate court.³⁶³

Agreeing with the district court, the appeals court upheld the district court's findings.³⁶⁴ The appeals court stated: "While we appreciate that many factors beyond bare numerical scores go into the decision to allow a student to retake an exam or year of study, we do not find erroneous the trial court's [ruling]."³⁶⁵ The appeals court was careful to note that courts should generally grant judicial deference to academic decisions; however, the facts of the case at hand showed a clear instance of arbitrary dismissal.³⁶⁶ Maitland was given very little due process, and, unlike other students, was not afforded the chance to retake an examination that appeared faulty.³⁶⁷ Finally, the court noted that the preferred remedy would be to refer this type of case back to the school for a full hearing on the matter.³⁶⁸ However, the court stated it was not "logically or equitably" advisable to remand the case for an administrative hearing by the school because it was clear Maitland was progressing through his medical education without any further problems.³⁶⁹ The court stated that "[t]o now order a belated decision on his qualifications to continue strikes this Court as exalting procedure over substance."³⁷⁰ Instead, the court advised schools to hold a hearing for each student who is involved in an academic dismissal, thereby creating a proper record which may be reviewed by the courts.³⁷¹

The court's conclusion—that the proper remedy for an arbitrarily dismissed student is a hearing—departs from the majority of case law, which holds that in an academic dismissal context no formal hearing is required.³⁷² As the decision indicates, it behooves schools to practice preventative measures which allow students a chance to present evidence and contest their cases. Schools must ask whether the time and cost potentially associated with conducting a full hearing is worth the trouble compared to the possibility of a costly lawsuit by the dismissed student and, perhaps, a reversal of the school's decision. At the very least, schools should consider implementing comprehensive staff-review policies which enable neutral and independent parties to review the academic dismissal decisions made

361. *Id.* at 199.

362. *Id.* at 200.

363. *Id.* at 198.

364. *Id.* at 200.

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *See Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978) (stating that no formal hearing is required in academic as opposed to disciplinary dismissal cases); *Greenhill v. Bailey*, 519 F.2d 5, 9 (8th Cir. 1975) (holding for the student, but finding that no full trial-type hearing is required in academic dismissal cases).

by administrators and faculty members. Further, when issues of testing procedures arise, and the student has sufficient evidence to make the issue questionable, an informal hearing is bound to bring those issues to light. As discussed previously, holding a hearing (even if only an informal one) may tend to insulate a school, because the student is thereby afforded more process than is arguably constitutionally due. Furthermore, a full record of the proceedings will be created upon which the school may defend its position before a court.

In *Lightsey v. King*,³⁷³ the United States District Court for the Eastern District of New York discussed issues factually similar to those presented in *Maitland*. *Lightsey* dealt with a naval midshipman, Thomas Lightsey, who was accused of cheating on one of his exams at the American Merchant Marine Academy and whose failing score was not corrected after he was exonerated of the charge.³⁷⁴ Because Lightsey was accused of cheating and received a zero on his exam, he was not eligible to take the Third Mates Licensing Examination to join the Coast Guard.³⁷⁵ Lightsey was allegedly observed by his teacher, Lieutenant J. Dennis Gay, filling in answer blanks on his exam after the allotted test-taking time had expired.³⁷⁶ When Lt. Gay observed Lightsey filling in the answer blanks, he asked Lightsey what he was doing and took the exam away from him.³⁷⁷ Lightsey responded that he was simply transferring his answers from the test sheet to the answer sheet.³⁷⁸ After this encounter, Lt. Gay submitted a petition to the Academy's honor review board alleging that Lightsey had cheated on his exam.³⁷⁹ However, despite Lt. Gay's belief that Lightsey had cheated, the honor review board exonerated him on the charge of cheating and reinstated his score of "75" on the exam.³⁸⁰ Nevertheless, the Academy ignored the review board's ruling and did not change Lightsey's grade.³⁸¹

Lightsey appealed the Academy's decision to the United States District Court for the Eastern District of New York.³⁸² Finding that Lightsey had a protected liberty interest in maintaining his good name, reputation, and honor, the district court held that the Academy must adhere to its own established rules, committing it to abide by the honor review board's decisions.³⁸³ The district court also found the matter to be disciplinary and not academic, despite arguments to the contrary by the Academy.³⁸⁴ By ignoring the honor board's decision, the Academy violated Lightsey's due process rights and acted arbitrarily and capriciously.³⁸⁵

373. 567 F. Supp. 645 (E.D.N.Y. 1983).

374. *Id.* at 645.

375. *Id.*

376. *Id.* at 646.

377. *Id.*

378. *Id.*

379. *Id.* at 647.

380. *Id.* at 646.

381. *Id.* at 647.

382. *Id.* at 645.

383. *Id.* at 648 (citing *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972)).

384. *Id.*

385. *Id.* at 649, 650.

Ultimately, in a similar ruling to that issued by the Michigan appeals court in *Maitland*, the *Lightsey* court stated that remanding the case for a further hearing would be futile, given the Academy's failure to adhere to its own administrative standards.³⁸⁶ Instead, the court instructed the Academy to correct Lightsey's test score and to abide by the honor board's decision.³⁸⁷

Like the court in *Maitland*, the court in *Lightsey* was concerned with a school's failure to act in good faith and not in an arbitrary or capricious manner when considering derailing a student's academic future. Again, both *Maitland* and *Lightsey* present fact patterns where a school would have been better served by conducting an administrative hearing where both the school and the student could present their arguments and a succinct record could be created and used by a court. Although not constitutionally required, formal hearings would also help colleges and universities that are presented with a case where the line between academic and disciplinary matters is unclear. As we have previously seen in *Maitland* and *Than*, courts may not be willing to agree that issues such as cheating are purely academic issues. Indeed, as the Texas Supreme Court stated in *Than*, such an argument "is specious [because] [a]cademic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct."³⁸⁸ Finally, as the cases demonstrate, it is important that a school adhere to its own procedures, especially those that are recorded in student handbooks and other university material.³⁸⁹ Whether the initial dispute involves cheating allegations, a failure to allow students to retake an exam, or problems with the testing process itself, administrators and faculty need to be conscious of the school's procedural policy and must be prepared to administer those policies.³⁹⁰

386. *Id.* at 650. Interestingly, the court also held that even if the Academy had not violated the student's constitutional rights (which it did) it also violated the terms of the federal Administrative Procedure Act, 5 U.S.C. §§ 701-06, by failing to follow its own procedures as mandated by the school's own written regulations. *Id.* at 649.

387. *Id.*

388. *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 931 (Tex. 1995).

389. See Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 BYU EDUC. & L.J. 1, 24 (2003) (arguing that public institutions of higher education should draft and abide by student academic conduct codes).

390. *Id.* at 4.

E. Schools Must Know and Carefully Follow Written Constraints in Their Catalogs, Handbooks, Bulletins, and Guidelines

Despite the fact that catalogs, bulletins, and school guidelines do not follow traditional contract principles—such as bargained-for offer and acceptance—courts may enforce these documents as binding contracts between colleges or universities and their students.³⁹¹ As a result, both the school and the student will be held to have knowledge of the document's terms and conditions. Therefore, when a school has clearly not followed the provisions of its own catalog, courts are much more likely to dispense with academic deference and, instead, decide the case on contract principles.³⁹²

One case where a court applied contract principles rather than grant academic deference is *University of Texas Health Science Center at Houston v. Babb*.³⁹³ A case akin to *Lightsey*, where the school failed to adhere to its own written policies, *Babb* involved a student nurse, Joy Ann Babb, who brought an action against the University of Texas Health Science Center after she was dismissed from the school's nursing program for alleged academic failure.³⁹⁴ Babb was admitted under the school's 1979 catalog.³⁹⁵ In the fall of 1979, Babb was notified that she was failing one of her courses.³⁹⁶ Her academic counselor then advised her to withdraw from the semester program and reapply to the school as was standard procedure under the provisions of the 1979 catalog.³⁹⁷ Babb complied with this request and was re-admitted to the nursing program,³⁹⁸ but her readmission was

391. See *Sharick v. Se. Univ. of Health Scis., Inc.*, 780 So. 2d 136 (Fla. Dist. Ct. App. 2000) (involving a student contract claim where the jury found the school had acted arbitrarily by dismissing the student for failing one class in his fourth year of medical school in violation of the implied-in-fact contract between the student and the university); *Babcock v. New Orleans Baptist Theological Seminary*, 554 So. 2d 90 (La. Ct. App. 1989) (overturning a disciplinary dismissal from seminary school, but discussing academic issues as well); *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302 (N.Y. 1980) (overturning private school disciplinary dismissal on contract grounds). Many academic scholars have contributed exhaustive coverage of the catalog-as-contract relationship which is most often seen in the case of private colleges and universities. See Beh, *supra* note 1, at 183; David Davenport, *The Catalog in the Courtroom: From Shield to Sword?*, 12 J.C. & U.L. 201 (1985); Bach, *supra* note 389, at 6–10.

392. See Beh, *supra* note 1, at 215–24 (discussing the duty of universities to bargain with students in good faith and to practice contractual principles of fair dealing). Beh observes:

Increasingly, higher education is viewed and views itself as a business with education as its product. For many years, postsecondary schools regarded themselves as above the marketplace, serving lofty and important societal interests, unconcerned with competition for students or pandering to student interests. As a result of the institution's elevated societal status, courts traditionally have accorded postsecondary schools broad discretion and latitude to educate and to treat students as they deem appropriate.

Id. at 185–86.

393. 646 S.W.2d 502 (Tex. App. 1982).

394. *Id.* at 504.

395. *Id.* at 503–04.

396. *Id.* at 504.

397. *Id.*

398. *Id.*

under the school's new academic catalog, which stated that any student with more than two "D"s would be required to withdraw from the institution.³⁹⁹

Over the following two year period, Babb completed a total of six three-hour courses.⁴⁰⁰ However, she received two "D"s in her courses and still had a "WF" (withdrew failing) grade for her Fall 1979 grades.⁴⁰¹ Subsequently, she received notification from the school that she was again to be terminated from the program because of the school's policy that any student with a total of three "D"s, "F"s, or "WF"s must withdraw from the program.⁴⁰² Babb attempted to appeal her case to the dean of the school, but was repeatedly denied an interview.⁴⁰³ As a result, she brought suit in a Texas district court.⁴⁰⁴

Babb asked the district court for a temporary injunction to permit her to resume classes so that she could complete her degree.⁴⁰⁵ She argued that the catalog creating the degree requirements was a contract.⁴⁰⁶ The district court granted the injunction,⁴⁰⁷ and the university appealed.⁴⁰⁸

The Texas Court of Appeals upheld the district court's ruling.⁴⁰⁹ The court found that Babb could maintain a suit against the university for injunctive relief based on contract law principles.⁴¹⁰ Although the school maintained that the injunction was "overly broad and exaggerated," because it would prevent the university from exercising its own discretion in deciding whether to dismiss a student for academic reasons, the court found that the injunction was "clear and precise and adequately inform[ed] the appellants of acts they are restrained from doing."⁴¹¹ More importantly, the court found that a contract existed between the nursing school and Babb.⁴¹² The contract was created under the 1979 catalog and not the 1981 catalog because the 1979 catalog was in force when Babb first enrolled in the school.⁴¹³ Therefore, the school could not dismiss her for her two "D"s under the second catalog, but was required to follow its dismissal procedures as mandated by the 1979 contract.⁴¹⁴

Finally, the school argued that in order for Babb to have an action for improper dismissal, she would have to allege and show arbitrary and capricious conduct in the school's decision to dismiss her.⁴¹⁵ The court disagreed because Babb never

399. *Id.*

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.* at 505–06.

407. *Id.* at 504.

408. *Id.*

409. *Id.* at 506.

410. *Id.* at 505.

411. *Id.*

412. *Id.* at 506 (citing *Tex. Military Coll. v. Taylor*, 275 S.W. 1089 (Tex. Civ. App. 1925)).

413. *Id.*

414. *Id.*

415. *Id.*

claimed the university's standards were unreasonable, but only that her grades should be reviewed under the earlier catalog.⁴¹⁶ Accordingly, she was not required to prove that the school acted arbitrarily or capriciously.⁴¹⁷

The court's decision is notable because it sheds light on the interesting, if not often combative, relationship between Fourteenth Amendment due process issues and contract law issues as related to higher education. As shown in *Babb*, if a student demonstrates he or she had a contract with a school that explicitly or inferentially provides certain procedural rights, the student may not have to bear the burden of proving that the school's decision was arbitrary or capricious.⁴¹⁸ If a student can demonstrate a college or university did not comply with its own contractual procedures—a subject that is within a court's area of expertise—then courts will likely never reach the issue of academic deference. Indeed, at times courts have held institutions to a stricter standard of judicial scrutiny in disputes over issues that require little or no academic judgment, such as fees.⁴¹⁹

However, applying contract law to academic student dismissal cases can be frustrating because most courts do not assign any consistent contract principles to suits brought by students against public higher education institutions.⁴²⁰ Instead, the area of law around student contract claims has been largely a subject of private college and university cases and has been described by at least one court as a “patchwork” of holdings.⁴²¹ In disputes over academic matters such as grades, test-taking, or cheating, courts are much more likely to utilize due process principles and will not entertain contract-related arguments as long as the public institution has followed its own institutional procedural requirements.⁴²² Although the literature on contract claims between students and institutions is certainly large and often perplexing, *Babb* suggests that a school may be liable to students if it

416. *Id.*

417. *Id.*

418. See Beh, *supra* note 1, *passim* (providing exhaustive coverage of student contract cases in the higher education realm). Beh notes:

Courts have only reluctantly and begrudgingly employed contract principles to adjudicate claims by disappointed students when institutions of higher education fail to abide by their promises or to meet student expectations; courts often complain that contract law is too inflexible either to capture the complexity of the student-university relationship or to provide sufficient latitude to institutional decision making.

Id. at 184 (citing *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626–27 (10th Cir. 1975); *Marquez v. Univ. of Wash.*, 648 P.2d 94, 96 (Wash. Ct. App. 1982)).

419. See Davenport, *supra* note 391, at 216 n.136 (citation omitted):

Courts apply varying degrees of scrutiny to different categories of contract terms. In litigation over fees, the rule is that courts will enforce whatever the university published statements prescribe. In disputes over grading or curricula, courts have usually avoided any action on their part which might be construed as judicial interference with academic judgments, unless arbitrary or unreasonable conduct can be shown.

420. See *id.* at 204–25.

421. *Neel v. Ind. Univ. Bd. of Trs.*, 435 N.E.2d 607, 611 (Ind. Ct. App. 1982) (cited in Davenport, *supra* note 391, at 207 n.55).

422. Davenport, *supra* note 391, at 216. But see *Mangla v. Brown Univ.*, 135 F.3d 80, 84 (1st Cir. 1998) (considering numerous contractual claims raised by the plaintiff but finding that Brown had no contractual obligation to admit him into its Master's program).

fails to adhere to its written agreements. Effectively, a court may invoke a promissory estoppel claim rather than the *Horowitz* due process analysis. Should a school advertise in its catalog or bulletins that it will follow certain procedures when dismissing a student, and the student reads and relies on those procedures, a court may apply contract-related principles rather than traditional academic deference.

F. Schools May be Held Responsible for the Fiduciary Actions Taken by Administrators and Faculty Members Whose Apparent Authority Causes Students to Detrimentially Rely on Those Actions

The final issue that colleges and universities should keep in mind when considering dismissing a student for academic reasons is the ability of the school's administrators and faculty members to bind the school by making promises to students.⁴²³ For example, should an academic advisor or other administrator tell a student that taking a certain amount or type of classes will ultimately lead to the student being assured of graduation, and, if that student is later denied graduation despite reliance upon that advice, the student may have a claim against the school based on the advisor's apparent authority to bind the school.⁴²⁴ In two illustrative cases, *Healy v. Larsson*⁴²⁵ and *Blank v. Board of Higher Education of the City of New York*,⁴²⁶ the courts were presented with similar fact patterns where administrators and faculty members acted under apparent authority and advised the students involved that completing certain course work would lead to graduation.

In *Blank*, the New York Supreme Court overturned, based on a fiduciary duty analysis, a decision by Brooklyn College to dismiss the petitioning student, Errol Blank, for academic reasons.⁴²⁷ Blank was accepted and enrolled in the school's Bachelor of Arts program.⁴²⁸ Brooklyn College's bulletin required all students to complete a total of 128 credits which consisted of a minimum of 56 credits in

423. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (defining agency as: "[T]he fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."); see also Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153, 176-80 (2002) (discussing academic freedom and the fiduciary relationship between administrators and faculty members and their students at public institutions of higher education). Weeks and Haglund observe: "Fiduciary relationships may also be created informally, when, for example, one party places trust in another party, obligating the recipient of trust to act in the best interests of the party reposing the trust." *Id.* at 155.

424. See RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006) (defining apparent authority as: "[T]he power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."); see also *id.* § 1.03 ("A person manifests assent or intention through written or spoken words or other conduct.").

425. 323 N.Y.S.2d 625 (N.Y. Sup. Ct. 1971), *aff'd*, 348 N.Y.S.2d 971 (N.Y. App. Div. 1974), *aff'd*, 318 N.E.2d 608 (N.Y. 1974).

426. 273 N.Y.S.2d 796 (N.Y. Sup. Ct. 1966).

427. *Id.* at 803.

428. *Id.* at 798.

prescribed courses and 36 credits in the student's major.⁴²⁹ In addition to the bulletin's prescriptions, the school had issued a three-page bulletin entitled "Information for Pre-Law Students" which was authored by the school's Office of Pre-Law Counseling.⁴³⁰ Within this second bulletin, the college offered a "Professional Option Plan" where a student who:

[L]acks not more than 32 credits in free electives, and who has, in addition, completed one year's work, full time, in an approved law school, is "eligible" for the degree "*provided that the courses offered in fulfillment of the requirements for the degree, including courses completed in the law school, constitute, in the opinion of the Dean of Faculty, an acceptable program for the AB degree.*"⁴³¹

In light of the language contained within the pre-law bulletin, Blank alleged he twice discussed his intention to enter law school with Professor Georgia Wilson, a pre-law advisor at the school, and that he was advised by Professor Wilson that he could complete his Associate of Arts degree through the Professional Option Plan.⁴³²

After receiving this advice, Blank completed another year's worth of credit at Brooklyn College and prepared to enter Syracuse Law School.⁴³³ However, he again consulted with a school administrator, Mr. Brent, at the Office of Counseling and Guidance in regard to his completing four psychology courses which he lacked.⁴³⁴ Blank needed to take the classes in order to complete the thirty-six credits of his major under the Professional Option Plan.⁴³⁵ Mr. Brent referred Blank to Dr. Evelyn Raskin who was head of the Department of Psychology at Brooklyn College.⁴³⁶ Dr. Raskin advised him that he would have to complete the classes at Brooklyn College.⁴³⁷ However, after completing two psychology classes, Dr. Raskin advised Blank that he could complete the remaining two psychology classes without attending any actual class sessions if he obtained approval from the professors teaching the courses.⁴³⁸ Relying on Dr. Raskin's advice, Blank obtained permission from the professors of both courses to complete the classes without attending them.⁴³⁹ Thereafter, Blank registered for the courses, arranged for the professors to provide him with all reading assignments and other necessary material, and, after taking the final examinations, passed each of the courses with a "B."⁴⁴⁰ After completing the courses, a total of three credits for each course were entered on his official transcript.⁴⁴¹

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.* at 798-99.

439. *Id.* at 799.

440. *Id.*

441. *Id.*

Two years later, after satisfactorily completing his first two years at Syracuse Law School, Blank received a written notice from Brooklyn College that he was to attend the school's summer commencement to obtain his undergraduate degree.⁴⁴² He was also advised to obtain his cap and gown, told he was required to and did undergo a pre-graduation physical examination, and received official tickets for the graduation exercises.⁴⁴³ Finally, in anticipation of receiving his undergraduate degree, he applied for and received a position with the City of New York, contingent on his receiving his degree from Brooklyn College.⁴⁴⁴ On the day of graduation, Blank attended the ceremonies with his parents, his grandmother, his brother, and several friends.⁴⁴⁵ Despite being invited to and completing all pre-graduation exercises, Blank was unable to find his name on the list of graduates in the commencement program.⁴⁴⁶ Several days after graduation day, he learned that Brooklyn College had denied him his Bachelor of Arts degree because he had not taken the two psychology courses while "in attendance."⁴⁴⁷ Subsequently, Blank appealed through the necessary administrative channels at the school.⁴⁴⁸ However, his attempts were unsuccessful.⁴⁴⁹ Thereafter, he appealed to the Supreme Court of New York.⁴⁵⁰

The court was quick to note that Brooklyn College did not deny any of Blank's factual allegations.⁴⁵¹ However, the school objected to his failing to obtain the necessary permission from the Dean of Faculty to complete the two courses without attending them.⁴⁵² Brooklyn College argued that none of the administrators and faculty members that Blank spoke to had authority to advise him that he could meet the requirements of the Professional Option Plan by completing two courses without attending them.⁴⁵³ Notably, Blank alleged that he had indeed attempted to contact the Dean of the Faculty's office but was referred to Mr. Brent in the Office of Guidance and Counseling.⁴⁵⁴ The court found this fact compelling, stating that it "has no reason to doubt the petitioner . . . , as what he says occurred would appear to be standard procedure in an academic institution with more than 10,000 students."⁴⁵⁵ The court also noted that although Brooklyn

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.* at 797-98.

451. *Id.* at 799.

452. *Id.*

453. *Id.* at 800. Brooklyn College also attempted to argue that the school's most current bulletin required all students to complete all courses "in residence," therefore making attendance an absolute requirement. *Id.* The court found this argument was not compelling for several reasons: First, the new bulletin was not in effect when the student initially enrolled in the school, and, second, the new bulletin would not be workable with students enrolled in the Professional Option Plan because the plan's very nature dictates students will not be "in residence." *Id.*

454. *Id.* at 801.

455. *Id.*

College objected to Blank's taking but not attending the two courses, it could not argue *after the fact* that it had no knowledge of the wrongful advice given to Blank because it was the school's responsibility, not Blank's, to monitor official records and transcripts.⁴⁵⁶

Ultimately, the court applied equitable measures and a fiduciary duty analysis to find that the administrators and faculty members who advised Blank were agents of the university and could thereby bind the school.⁴⁵⁷ Because the administrators and faculty members were agents of the university, and because Blank detrimentally relied on their apparent authority to advise him that he could complete the two psychology classes while not in attendance, Brooklyn College was bound by their actions.⁴⁵⁸ The court explained: "The authority of an agent is not only that conferred upon him by his commission, but also as to third persons that which he is held out as possessing. The principal is often bound by the act of his agent in excess or abuse of his actual authority."⁴⁵⁹ Therefore, the court found the Dean of the Faculty was estopped from arguing that Brooklyn College was not bound by the actions of its administrators and faculty members.⁴⁶⁰ Explaining, the court noted that "[i]t is called an estoppel", said Lord Coke, "because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."⁴⁶¹ Because Blank relied on the manifestations of the administrators and faculty members under their apparent authority to bind Brooklyn College, the court ordered the school to "approve, authorize and confer" upon him the degree of Bachelor of Arts.⁴⁶²

Four years after the decision in *Blank, Healy v. Larsson*⁴⁶³ afforded another lower court in New York the opportunity to review the *Blank* analysis and ruling. In *Healy*, the student involved, Richard Healy, was enrolled in Schenectady County Community College as a full-time student attempting to obtain an Associate of Arts degree.⁴⁶⁴ Before entering the community college, Healy was enrolled in two other schools and had credits from the schools transferred to Schenectady County Community College.⁴⁶⁵ He met with the dean, the director of admissions, the acting president, his guidance counselor, and the chairman of the mathematics department of the school to try to establish a course of study that would enable him to meet the school's degree requirements and to graduate.⁴⁶⁶ At

456. *Id.* at 802. The court stated that Blank "expended money, time and effort in taking the courses to satisfactory completion, without fair warning that it would later be the sense of the Dean of Faculty to deny him his degree solely because he was not in attendance at the said courses." *Id.* at 802.

457. *Id.* at 802-03.

458. *Id.* at 803.

459. *Id.* at 802-03 (citing *Walsh v. Hartford Fire Ins. Co.*, 73 N.Y. 5, 10 (1878)).

460. *Id.* at 803.

461. *Id.* (quoting *White v. La Due & Fitch, Inc.*, 100 N.E.2d 167, 169 (N.Y. 1951)).

462. *Id.*

463. *Healy v. Larsson*, 323 N.Y.S.2d 625 (N.Y. Sup. Ct. 1971), *aff'd*, 348 N.Y.S.2d 971 (N.Y. App. Div. 1974), *aff'd*, 318 N.E.2d 608 (N.Y. 1974).

464. *Id.* at 626.

465. *Id.*

466. *Id.*

the time of Healy's initial enrollment, the school was in its first year of operation and, as a result, he was unable to take courses in many of the subjects required for his degree.⁴⁶⁷ He completed as many courses as he could in light of the subject availability.⁴⁶⁸ However, after Healy took as many classes as he could, he was denied graduation by the school because it believed that he had failed to take the proper credits to achieve an Associate of Arts degree.⁴⁶⁹

In a sparse opinion, the trial court held that the school's administrators who advised Healy about his course of study were authorized representatives of the college, so the school was bound by their actions.⁴⁷⁰ Therefore, like Brooklyn College in *Blank*, the community college in *Healy* was "estopped from denying the acts of [its] agents."⁴⁷¹ The court found that the facts here were similar to those in *Blank*, so it was appropriate to apply the *Blank* analysis again.⁴⁷² The court reiterated that "the authority of an agent is not only that conferred upon him by his principal, but also as to third persons, that authority which he is held out as possessing."⁴⁷³ Because the administrators at the community college bound the institution through their apparent authority upon which Healy relied, the court found that he had satisfactorily completed his course of study at the community college and was entitled to receive his Associate of Arts degree.⁴⁷⁴

Both *Healy* and *Blank* provide clear factual scenarios where students relied on the advice and manifestations of faculty and administrators at their respective public college or university. It is important to keep in mind that courts will find that colleges and universities have a fiduciary obligation to students when the school's employees make representations to students that taking and passing certain courses will ultimately lead to obtaining a degree.⁴⁷⁵ Therefore, colleges and universities should set out clear guidelines in their student handbooks and bulletins, communicate all information clearly with both the students and the chain-of-command in the administration, and be prepared to be bound by advice given by guidance counseling, admissions, and enrollment administrators. As seen in *Babb*, catalogs and bulletins may also create fiduciary obligations on the part of a school and failure to meet those obligations may result in a court overturning a school's dismissal decision based on a combination of contractual and fiduciary duty grounds.

467. *Id.*

468. *Id.*

469. *Id.* The facts of the case as contained in the Supreme Court's opinion leave something to be desired. The court's opinion leads one to wonder whether the school's lack of sufficient funding essentially prevented the school from granting sufficient degrees.

470. *Id.* at 627.

471. *Id.* Interestingly, the court appeared to apply some contract law theory to the case, stating that "when a student is duly admitted by a private university, there is an implied contract between the student and the university that if he complies with the terms prescribed by the university he will obtain the degree which is sought. . . . There is no reason why this principle should not apply to a public university or community college." *Id.* at 626 (citing *Carr v. St. John's Univ.*, N.Y., 231 N.Y.S.2d 410 (N.Y. App. Div. 1962), *aff'd*, 187 N.E.2d 18 (N.Y. 1962)).

472. *Id.* at 626–27.

473. *Id.* at 627.

474. *Id.*

475. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

The trial courts' holdings in both *Blank* and *Healy* are indicative of many of the cases previously discussed where the judiciary refused to apply traditional academic deference principles due to arbitrary and capricious decisions made by school administrators and faculty members. The fiduciary responsibilities to students taken on by faculty and administrators have long been a hallmark of higher education legal scholarship.⁴⁷⁶ As Harvard Professor Warren A. Seavey noted in 1957, “[s]ince schools exist primarily for the education of their students, it is obvious that professors and administrators act in a fiduciary capacity with reference to the students. One of the duties of the fiduciary is to make full disclosure of all relevant facts in any transaction between them.”⁴⁷⁷ Indeed, courts may be more willing to dispense with the norm of academic deference if they believe an education official has somehow breached his or her fiduciary duties to a student.⁴⁷⁸ Certainly, if the situation is egregious—as was the situation in *Blank*—academic deference is much less likely to appear in a court opinion. Arguably, since the fiduciary relationship between administrators or faculty members and students will often be one based on conjectural facts, courts may be more likely to hear the case on its merits and let a jury decide the parameters of the fiduciary relationship.⁴⁷⁹ Additionally, it has been argued that imposing the legal obligations of fiduciaries on college and university administrators does not hinder academic freedom issues. Instead, some argue that academic freedom “pertains mainly to the content of faculty members’ work, in written material as well as classroom presentation[s]. Fiduciary obligations, on the other hand, provide standards by which conduct toward the fiduciary is measured by the law.”⁴⁸⁰ Therefore, it is important for administrators and faculty members to remember that, given the proper fact pattern, their actions may create a fiduciary relationship with a student, and failing to adhere to the special bounds of that relationship in an academic dismissal context may result in a court not granting academic deference.

Finally, whether it is for summary judgment, admissions or readmissions, independent fact-finding, contract, insufficient hearings, or fiduciary duty violations, it is clear that there are situations where courts are willing to review academic decisions made by public higher education institutions. While the general standard is “arbitrary” or “capricious” behavior, or absence of “good faith” on the part of the public institution of higher education, given the proper fact scenario, courts are sometimes willing to find alternative routes leading to less academic deference. Ultimately, although most courts will apply the *Horowitz* and *Ewing* decisions to decide that courts should not substitute their judgments in place

476. See Seavey, *supra* note 225, at 1407–10 (serving as an early example (1957) of legal scholarship analyzing fiduciary relationships and student academic dismissals).

477. *Id.* at 1407 n.3.

478. See Weeks & Haglund, *supra* note 423, at 159–76 (analyzing cases where courts have found or have refused to find fiduciary relationships between institutions and their students). *But see* *Zumbrun v. Univ. of S. Cal.*, 101 Cal. Rptr. 499, 506 (Cal. Ct. App. 1972) (“The mere placing of a trust in another person does not create a fiduciary relationship. . . . [A]n agreement to communicate one’s knowledge, exercising his special knowledge and skill in the area of learning concerned, does not create a trust but only a contractual obligation.”).

479. *Lash v. Cheshire County Sav. Bank, Inc.*, 474 A.2d 980, 981 (N.H. 1984).

480. Weeks & Haglund, *supra* note 423, at 176.

of a school's, these cases demonstrate that academic deference to college and university decision-making is not an absolute or incontrovertible rule.

CONCLUSION

As public higher education institutions consider dismissing students for alleged academic failure, they must be aware of the latent risks involved and have procedures in place to decrease those risks or, at the very least, to deal with the consequences.⁴⁸¹ As the *Horowitz* and *Ewing* cases illustrate, and the large majority of academic dismissal cases support,⁴⁸² judicial deference to academic decision-making is the current norm in the American judiciary.⁴⁸³ Courts will respect the academic freedom of public colleges and universities to decide when to dismiss a student for academic failures.⁴⁸⁴ If colleges and universities proceed in a professional manner while adhering to the proper level of due process, they should have little problem having their dismissal decisions upheld. However, as the case law discussed in this article demonstrates, should colleges and universities behave in an arbitrary or capricious manner when deciding to dismiss a student for alleged academic failures, courts may entertain legal arguments that a student was wrongfully dismissed.⁴⁸⁵

Perhaps one contributing factor to a college or university's (or a court's) confusion is that it is difficult for administrators and faculty members to know the proper legal distinction between an academic dismissal and a disciplinary

481. See Scott D. Makar, *Litigious Students and Academic Disputes*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 8, 2002, at A1.

482. See, e.g., *Mauriello v. Univ. of Med. and Dentistry of N.J.*, 781 F.2d 46, 51 (3d Cir. 1986) (“[A] student bears a heavy burden in persuading the courts to set aside a faculty’s judgment of academic performance.”); *Harris v. Blake*, 798 F.2d 419, 424–25 (10th Cir. 1986) (upholding dismissal of a graduate student who was dismissed for insufficient performance on the student’s medical practicum); *Steere v. George Washington Univ. Sch. of Med. & Health Scis.*, 439 F. Supp. 2d 17, 25–26 (D.D.C. 2006) (granting summary judgment for medical school after student failed to show he was disabled, so as to explain his long history of academic failure); *Davis v. George Mason Univ.*, 395 F. Supp. 2d 331, 337 (E.D. Va. 2005) (dismissing student’s case, finding that he had no property interest in continued enrollment at a public university and that the university Catalog did not create a binding legal contract), *aff’d*, 193 F. App’x 248 (4th Cir. 2006); *State ex rel. Mercurio v. Bd. of Regents of Univ. of Neb.*, 329 N.W.2d 87, 92 (Neb. 1983) (vacating lower court’s ruling for student because the court found no evidence of arbitrary or capricious behavior); *Chusid v. Albany Med. Coll. of Union Univ.*, 550 N.Y.S.2d 507, 507 (N.Y. App. Div. 1990) (upholding dismissal of a medical student due to the student’s low grades).

483. Schweitzer, *supra* note 8, at 364. Professor Schweitzer argues:

Justice Rehnquist in *Horowitz* was on solid ground when he stated that a professor’s decision as to “the proper grade for a student in his course” requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking. Needless to say, a third party without knowledge or expertise in the subject matter of the course is generally incapable of assessing a student’s performance on an examination in that course.

Id. (citing *Bd. of Regents of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978)).

484. See generally *Dutile*, *supra* note 73, at 283 (explaining that courts have “consistently set a rather low threshold for institutions” in academic dismissal cases).

485. See *Trs. of Columbia Univ. v. Jacobsen*, 148 A.2d 63 (N.J. Super. Ct. App. Div. 1959) (arguing that statements made on a building’s facades by university officials should be included as part of the school’s contract with the student).

dismissal. They may be confused on how much process is due to the student and may wrongly classify the issues behind the dismissal as more academic when, to a legally trained mind, the issues appear more disciplinary, or vice versa. Creating a workable distinction between academic and disciplinary dismissals may be a losing battle. As Professor Dutile argues, academic deference can be equally unhelpful in either dismissal situation:

[T]he deference point as it relates to the academic seems overstated. The fact of the matter is that courts have deferred to educational officials in disciplinary cases as well. . . . Even the academic notion that universities, through their diplomas, vouch for their graduates applies as well to the disciplinary side. Very few American universities would suggest that their credential implies nothing regarding the conduct of the student.⁴⁸⁶

As this passage illustrates, the academic versus disciplinary distinction may create unnecessary confusion and, as we have seen, courts may be better served by declaring the distinction moot. It has been argued that a more logical solution would be to require the same levels of due process in both the academic and disciplinary dismissal context.⁴⁸⁷

Whether or not one accepts this argument, perhaps the most prudent route would be for the courts carefully to consider the “mixed” nature of the facts of each case, where academic (cognitive) and disciplinary (non-cognitive) issues are intertwined. Once a court considers these “mixed” facts, it should parse them and duly consider the disciplinary (non-cognitive) issues that are more suitable to the court’s area of expertise. Then, the court may defer to the academic decision-making of the college or university on the academic (cognitive) issues. As to the potential defendants in student dismissal cases, faculty and administrators at public colleges and universities should review their own judgments carefully to ensure that they do not open themselves up to judicial scrutiny. Further, faculty committees or deans who have been involved with many aspects of a student’s case should not be the final arbiters on an academic dismissal dispute; instead, a neutral and independent entity—one who is far removed from the controversy—should review all decisions in an objective manner.

Providing additional support for these recommendations, it has been observed that public and private colleges and universities are becoming more business-like, and, therefore, the traditional deference granted to academic decision-making may wane. Consequently, courts may be more receptive to students’ arguments that much of their financial and spiritual well-being is at stake and, as a result, courts may be more willing to dispense with academic deference.⁴⁸⁸ As Hazel Beh, an

486. Dutile, *supra* note 12, at 651.

487. *Id.*

488. See Seavey, *supra* note 225, at 1407. Professor Seavey discusses the adverse effect a dismissal would likely have on a professional student:

[T]he harm to the student may be far greater than that resulting from the prison sentence given to a professional criminal. A student thus dismissed from a medical school not only is defamed without the opportunity to demonstrate his innocence but is probably barred from becoming a physician. A law-school student dismissed for cheating will not be admitted to practice even if he is able to complete his legal

assistant professor at the University of Hawaii, notes, “The deeply rooted hostility toward student claims and judicial deference to university conduct toward students becomes increasingly less defensible as bottom-line, commercial concerns motivate university actions and students seek a more consumer friendly product.”⁴⁸⁹ A question then arises as to whether courts, as neutral party independent fact-finders, would be more suitable to review dismissal decisions with “mixed” facts in light of increasingly commercial colleges and universities. As one administrator recently pointed out, many students at both public and private universities have become “consumers and not students.”⁴⁹⁰ However, students might argue that many college and university professors feel their schools have become too market driven. A professor recently lamented that “[t]he only agenda around here seems to be enrollment and how to increase it It has tainted a lot of things at the school.”⁴⁹¹ While the increasingly commercial nature of higher education is certainly not the best reason for courts not to grant academic deference, it does shed light on the changing nature of academic institutions. “Regardless of how courts choose to analyze students’ claims—as purely contractual or as including an element of fiduciary duty [or due process]—universities should be ‘much more scrupulous about their self-interested behavior than mere contracting parties.’”⁴⁹²

Unfortunately, the answers to every academic dismissal case are often unclear and the best that may be hoped for is a combination of conscientious college and university administrators and well-informed students. Professors and administrators must decide issues rationally and in good faith, and their actions toward students certainly should not be arbitrary or capricious. In *Horowitz*, the Supreme Court described the minimal standard that all schools must meet, holding that students are entitled to “oral or written notice of the charges against [them] and, if [they] deny the charges], an explanation of the evidence the authorities have and an opportunity to present [their] side of the story.”⁴⁹³ Failing to meet

education.

Id.

489. Beh, *supra* note 1, at 196.

490. *Id.* at 213 (quoting *Andre’ v. Pace Univ.*, 618 N.Y.S.2d 975, 979 (N.Y. City Ct. 1994)). See generally Berger & Berger, *supra* note 129, at 322 (discussing contract theory in the higher education context, and the adhesion problems in this kind of contract formation). Berger and Berger note:

Although contract theory presupposes that the student reads all that she receives, . . . in reality she does not. She barely glances at much of the bulletin Moreover, the school would rather the applicant read the promotional matter . . . than pore over the requirements for graduation or the Rules of University Conduct.

Id.

491. Stephanie Banchemo, *Governors State Lacked Approval to Give Degree*, CHI. TRIB., Apr. 3, 1999, § 1, at 2 (quoting Bob Leftwich, a 22-year veteran nursing professor). See generally Davenport, *supra* note 391, at 223 (“In addition, the age of consumerism may bring greater challenges to the accuracy of university catalogs. Although the risk of litigation based upon errors and oversights has been minimal, future challenges to inaccurate course and faculty listings, program descriptions and schedules may be expected to increase.”).

492. Weeks & Haglund, *supra* note 423, at 186 (quoting D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1410 (2002)).

493. *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 85 (1978) (quoting *Goss v.*

this threshold standard in either a disciplinary or academic context will undoubtedly result in courts dispensing with academic deference. As many of the cases discussed in this article illustrate, college and university administrators and faculty are encouraged to implement more extensive academic dismissal policies where conscientious fact-finding and reliance on expert judgment are the norm.⁴⁹⁴ Further, as several of the cases show, courts may not be willing to acquiesce to a college or university's arguments that certain issues, such as cheating, are purely academic issues. Situations involving mixed fact patterns such as fabrication of research, plagiarism, or failure to attend classes may be ripe for courts to find them more disciplinary and less academic.⁴⁹⁵ Without extensive policies in place, and administrators and faculty members who carefully follow these policies, courts are more likely to dispense with academic deference to college and university decision-making.

Lopez, 419 U.S. 565, 581 (1975)).

494. See Beh, *supra* note 1, at 218 (arguing that using the "good faith and fair dealing" standard can provide "a bridge between institutional autonomy and flexibility and student vulnerability"); see also Weeks & Haglund, *supra* note 423, at 181 ("Good faith and fair dealing can provide a framework to adjudicate student claims that is not unduly intrusive in that gray area where student claims are less specific but reasonable expectations seem clear.").

495. See Berger & Berger, *supra* note 129, at 334 (discussing the difference between "academic failure" cases where academic decision-making ought to be respected, and cases involving "academic crime[s]," such as fraud or copyright infringement, where courts should not grant schools the same level of deference).

STUDENT DEBT AND THE FUTURE OF HIGHER EDUCATION

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“The empires of the future are the empires of the mind.”

—Sir Winston Churchill,
Speech at Harvard University,
September 6, 1943

INTRODUCTION

The United States' higher education system is arguably the most comprehensive in the world. There are 4,276 American postsecondary institutions providing educational opportunities to citizens with a broad range of interests, aptitudes, and abilities.¹ For the 17,487,475 students enrolled in colleges and universities, access to postsecondary education is perhaps the one best hope for personal fulfillment, vocational success, social mobility, and economic security.²

One of the centerpieces of American higher education is the availability of financial aid to underwrite the cost of a college or university education. In addition to scholarships, grants, and work-study positions, financial aid often takes the form of private and government loans to both students and parents. Historically, student loans have lower interest rates than other types of loans. Also, they come with an added incentive of tax deductible interest payments.³ In a real sense, student loans and other types of financial aid have facilitated the democratization of American higher education, and services to the masses can only continue if federal financial aid programs remain solvent and accessible.

This paper explores the rise of student loan programs over the past fifty years; legislative changes and court decisions impacting student borrowers;

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1. *The 2007-08 Almanac*, CHRON. HIGHER. EDUC., Aug. 31, 2007, at 3.

2. *Id.*

3. 26 U.S.C. § 221(a) (2000 & Supp. 2005).

characteristics of undergraduate and graduate borrowers and issues they face; and recommendations for enhancing the programs' effectiveness. The past success of federal student loan programs has played a major role in moving the nation towards universal access to higher education; however, with the increased demand, colleges and universities have attempted to meet the needs of all students, which has led to growth that continually outpaces inflation. To pay for added costs, institutions are forced to increase tuition; therefore, students have been required to increase their reliance upon student loans. If the system remains unchecked, the student loan programs and higher education may face a breaking point where the debt burden creates an undue hardship for students and effectively kills the dream of universal access to higher education.

RISE OF FEDERAL STUDENT LOANS

In response to the public desire to increase access to higher education for the masses and a real need to strengthen national defense policy, Congress created the National Defense Student Loan ("NDSL") program in 1958 as part of the National Defense Act.⁴ This program, also known as the Perkins Loan Program,⁵ continues today, and assists borrowers who plan on careers in public service, the military, or education. Prompted by the success of NDSL, Congress enacted the Guaranteed Student Loan Program ("GSLP") in 1965 as a part of the Higher Education Act.⁶ Guaranteed Student Loans, also known as Stafford loans and subsidized loans,⁷ were created to increase access to higher education for students from the lowest income levels. Strict income qualifications on aid recipients created a dilemma for students from middle-income families: parental income precluded them from receiving a loan, yet they did not have the money to pay for higher education expenses. These students and their parents began lobbying for federal loan aid as well. In response, Congress passed the Middle Income Student Assistance Act of 1978, which relaxed income requirements and enabled more students to qualify for loan assistance.⁸ Within three years of this act, disbursements under the federal student loan programs tripled.⁹

Further expanding the programs, Congress passed the Higher Education Amendments of 1992, which added the Unsubsidized Stafford Program to the

4. National Defense of Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958) (repealed 1970).

5. U.S. Dep't of Educ., Federal Perkins Loan Program, <http://www.ed.gov/programs/fpl/index.html> (last visited Sept. 29, 2007).

6. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended in scattered sections of 20 U.S.C.).

7. Subsidized loans are loans on which the federal government pays the interest while a student is enrolled in school at least part-time. The student is responsible for all interest on unsubsidized loans, but payments are not required while a student is enrolled in school at least part-time.

8. Middle Income Student Assistance Act, Pub. L. No. 95-566, 92 Stat. 2402 (1978) (codified as amended in scattered sections of 20 U.S.C.).

9. U.S. DEP'T OF EDUC., FY 2007 FFELP GUARANTY AGENCY LOAN DATA, <http://www.ed.gov/finaid/prof/resources/data/07q3ffelpga.xls> (last visited Oct. 21, 2007).

GSLP.¹⁰ These expansions to the GSLP have taken form in the Federal Family Education Loan Program (“FFELP”), which now encompasses subsidized and unsubsidized loans, PLUS loans for parents (established in 1981),¹¹ and loan consolidations.¹² The loans under FFELP are available through lenders that contract with the federal government. The third loan program available to students falls under the Federal Direct Loan Program.¹³ This program offers the same loans as the FFELP, but the loans come directly from the federal government and are available only to the neediest students.¹⁴ These programs are all used by the Department of Education (“ED”) to provide loans to students who meet the need standards established for each respectively.

The addition of unsubsidized loans to the FFELP led to another significant increase in the number of student loans from 1992 to 1994,¹⁵ and student debt increased proportionately. From 2002 to 2006, the FFELP, the largest of the three loan programs, distributed 50.9 million loans valued at \$222.75 billion, more than 39% of the total loans (\$567.34 billion) distributed by the FFELP over the lifetime of the program.¹⁶ At present, the higher education enterprise is expanding rapidly because of increasing student enrollment, expenditures, and inflationary costs. For the majority of postsecondary institutions that do not have endowments to supplement their budgets, the added costs are passed on to students in the form of tuition and fee increases. Because grants, scholarships, and savings have not kept pace with escalating costs, students are borrowing increasing amounts from all sources (federal and private loans) in order to complete degree requirements in a reasonable period of time.

The FFELP and Direct Loan Programs reported outstanding student loans of \$320 billion in 2005.¹⁷ Outstanding loans are those in repayment and not in default or deferment. As the number of student loans accelerated rapidly in the 1970s and 1980s, the number of student defaults increased commensurately.¹⁸ In 1978, Congress made discharging student-debt in bankruptcy extremely difficult

10. Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (1992) (codified as amended in scattered sections of 20 U.S.C.).

11. U.S. Dep’t of Educ., PLUS Loans (Parent Loans), <http://www.studentaid.ed.gov/PORTALSWebApp/students/english/parentloans.jsp> (last visited Oct. 8, 2007).

12. U.S. Dep’t of Educ., Federal Family Education Loan (FFEL) Program, <http://www.ed.gov/programs/ffel/index.html> (last visited Sept. 30, 2007).

13. U.S. Dep’t of Educ., William D. Ford Federal Direct Loan Program, <http://www.ed.gov/programs/wdffdl/index.html> (last visited Sept. 30, 2007).

14. U.S. Dep’t of Educ., Direct Loans: The William D. Ford Federal Direct Loan Program, <http://www.ed.gov/offices/OSFAP/DirectLoan/index.html> (last visited Sept. 11, 2007).

15. FY 2007 FFELP GUARANTY AGENCY LOAN DATA, *supra* note 9. The calculated increase was 56.6%.

16. *Id.*

17. U.S. DEP’T OF EDUC., FISCAL YEAR 2006 BUDGET SUMMARY—FEB. 7, 2005, <http://www.ed.gov/about/overview/budget/budget06/summary/edlite-section2d.html> (last visited Oct. 8, 2007).

18. U.S. Dep’t of Educ., National Student Loan Default Rates, <http://www.ed.gov/offices/OSFAP/defaultmanagement/defaultrates.html> (last visited Sept. 25, 2007). The default rates are figured on a cohort basis to create comparable data for each year.

by instituting a requirement of “undue hardship.”¹⁹ Then in 1992 and 1996, Congress expanded the authority of the federal government to collect on defaulted loans by removing any federal or state statutory, regulatory, or administrative limitation on loan collections and authorizing the garnishment of wages and Social Security benefits.²⁰

Since this time, the federal government has increased its efforts regarding the collection of student loans to ensure the viability of the loan programs. The federal student loan programs were implemented to help all citizens, regardless of economic background, achieve the American dream through postsecondary education. Loans are used to help cover the cost of education when scholarships and personal income do not meet a student’s total financial need. Universal access to postsecondary education has been a priority in the United States for a long time, and the federal student loan programs are a primary means to that end. However, this ideal does not prevent negative events that can lead to student loan defaults and bankruptcies.

BANKRUPTCY: STUDENT LOANS

When a former student who still has student loans to pay off declares bankruptcy, the implications have a legal and economic impact that affects both the debtor and future beneficiaries of the student loan programs. Legally, student debt, primarily in the form of federal loans, arises in bankruptcy courts when students attempt to discharge student loans along with other debt. The Bankruptcy Act of 1898 established the policy of (1) providing honest debtors with a fresh start, free from oppressive debt (“fresh start” policy), and (2) ensuring equal and fair treatment for all debtors and creditors.²¹ This “fresh start” policy remained unchanged in the 1978 code, and the current bankruptcy code embodies this policy by providing two primary methods of debt relief through filing either Chapter 7 or Chapter 13 bankruptcy.²²

In Chapter 7 bankruptcies, the debtor receives an immediate fresh start after the proceeds generated from a liquidation of all non-exempt assets are applied to outstanding debts.²³ Chapter 13 is more stringent because it requires a debtor to submit a debt repayment plan specifying the portion of income to be used to pay debts.²⁴ A court then discharges any uncollectible debt balance after approving the final repayment agreement plan.²⁵ For obvious reasons, Chapter 7 is considered to be “debtor friendly” while Chapter 13 provides more protection for creditors.

19. 11 U.S.C. § 523(a)(8) (2000 & Supp. 2005).

20. 20 U.S.C. § 1091(a)(3), 1095(a) (2000 & Supp. 2005); 31 U.S.C. § 3716(c)(3)(A) (2000 & Supp. 2004).

21. LAWRENCE P. KING & MICHAEL L. COOK, CREDITORS’ RIGHTS, DEBTORS’ PROTECTION, AND BANKRUPTCY 1113 (3d ed. 1997).

22. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended in scattered sections of 11, 20, & 28 U.S.C.).

23. Robert C. Cloud, *When Does Repaying a Student Loan Become an Undue Hardship?*, 186 EDUC. L. REP. 783, 786 (2004).

24. *Id.*

25. *Id.*

While other debtors can opt for Chapter 7 or Chapter 13 relief to discharge debt, student debtors cannot discharge education loans under these two chapters of bankruptcy. The Bankruptcy Reform Act of 1978 established a five-year time period from the point that repayment begins (or should begin) to the point a student debtor can declare bankruptcy under “undue hardship.”²⁶ Prior to this act, “educational loans were treated like any other form of unsecured debt in bankruptcy and were generally dischargeable.”²⁷ Then, in 1990, Congress extended the time period to seven years making it a longer process for student loans to be discharged.²⁸ Finally, with the Higher Education Amendments of 1998, the time limitation was completely removed from legislation.²⁹ Without the time limitation, the government can pursue the collection of a defaulted student loan at anytime, including retirement. Thus, the standard for discharge of student loans became equal to that of debts arising from tax evasion, fraud, embezzlement, child support, alimony, and willful and malicious injury.³⁰ This level of protection for federal student loans is inconsistent with the historical purpose of bankruptcy.

Discharge of all types of student loans is difficult, if not impossible, to achieve under the congressionally-created discharge standard of “undue hardship.” In the enabling legislation, Congress created the “undue hardship” discharge standard, but failed to define the term. The current code under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) states:

(a) A discharge under section 727, 1141, 1228 (a), 1228 (b), or 1328 (b) of this title [11 USCS § 727, 1141, 1228(a), 1228(b), or 1328(b)] does not discharge an individual debtor from any debt— . . . (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents, for— (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a government unit or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986 [26 USCS § 221(d)(1)], incurred by a debtor who is an individual.³¹

26. Richard Fossey, “*The Certainty of Hopelessness: Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?*,” 26 J.L. & EDUC. 29, 32–33 (1997).

27. B.J. Huey, Comment, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge Section 523(a)(8) of the Bankruptcy Code?*, 34 TEX. TECH L. REV. 89, 97 (2002) (citing Education Amendments of 1976, Pub. L. No. 94-482, § 127, 90 Stat. 2081, 2141 (codified as amended in scattered sections of 20 U.S.C.)).

28. Cloud, *supra* note 23, at 786.

29. *Id.*

30. Fossey, *supra* note 26, at 33.

31. 11 U.S.C. § 523(a)(8). It is important to note Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, and President Bush signed it into law on April 20, 2005. Pub. L. 109-8, 119 Stat. 23 (codified in scattered sections of 11, 18 & 28 U.S.C.). This law updated the definition of what constitutes a loan. *Id.* The act encompassed the most far reaching changes to the Bankruptcy Code since 1978. See John C. Anderson, *Highlights of the*

This new legislation expanded the definition of what constitutes a student loan for bankruptcy purposes; however, Congress failed to provide consumers with a clear definition of its intent with regard to “undue hardship.” In the absence of a congressional definition, courts have developed a number of judicial tests to determine whether a debtor can reasonably be expected to repay a student loan. However, student debtors are not ensured the same bankruptcy protection as other bankruptcy debtors even though both may have made poor financial decisions, lost their jobs, failed to find suitable employment, or experienced debilitating health problems. Decades of case law have failed to create a universally accepted test that can be used to determine whether a given student debtor is, in fact, entitled to loan discharge. Currently, four judicial tests are used to determine “undue hardship:”³² (1) the *Johnson Test*,³³ (2) the *Totality of Circumstances Test*,³⁴ (3) the *Bryant Poverty Test*,³⁵ and (4) the *Brunner Test*.³⁶

The *Johnson Test*, the first of the four “undue hardship” tests, was first adopted and implemented by the U.S. District Court for the Eastern District of Pennsylvania in 1979.³⁷ Under this test, a student’s debt may be discharged if he or she meets three sub-tests: (1) a mechanical test, (2) a good faith test, and (3) a section 439A policy test.³⁸ The *Johnson* case presented a good starting place for determining “undue hardship,” but it is burdensome to administer and has since been superseded in most courts by one of the other three tests.³⁹ Two years after the first use of the *Johnson Test*, the Eighth Circuit, developed a second test that

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005—Part 1— Consumer Cases, 33 S.U. L. REV 1 (2005).

32. This article will give a brief summary of the different tests. For an in-depth review of these tests, see Cloud, *supra* note 23; Edward Paul Canterbury, Comment, *The Discharge of Student Loans in Bankruptcy: A Debtor’s Guide to Obtaining Relief*, 32 OHIO N.U. L. REV. 149 (2006).

33. Pa. Higher Educ. Assistance Agency v. Johnson (*In re Johnson*), 5 Bankr. Ct. Dec. 532 (Bankr. E.D. Pa. 1979).

34. Andrews v. S.D. Student Loan Assistance Corp. (*In re Andrews*), 661 F.2d 702 (8th Cir. 1981).

35. Bryant v. Pa. Higher Educ. Assistance Agency, 72 B.R. 913 (Bankr. E.D. Pa. 1987).

36. Brunner v. N.Y. State Higher Educ. Serv. Corp. (*In re Brunner*), 831 F.2d 395 (2d Cir. 1987).

37. *In re Johnson*, 5 Bankr. Ct. Dec. 532.

38. *Id.* at 535–59.

39. Oyler v. Educ. Credit Mgmt. Corp. (*In re Oyler*), 397 F.3d 382 (6th Cir. 2005); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302 (10th Cir. 2004); Ekenasi v. Educ. Res. Inst. (*In re Ekenasi*), 325 F.3d 541 (4th Cir. 2003); U.S. Dept. of Educ. v. Gerhardt (*In re Gerhardt*), 348 F.3d 89 (5th Cir. 2003); O’Hearn v. Educ. Credit Mgmt. Corp. (*In re O’Hearn*), 339 F.3d 559 (7th Cir. 2003); Hemar Ins. Corp. of Am. v. Cox (*In re Cox*), 338 F.3d 1238 (11th Cir. 2003); United Student Aid Funds, Inc. v. Pena (*In re Pena*), 155 F.3d 1108 (9th Cir. 1998); Pa. Higher Educ. Assistance Agency v. Faish (*In re Faish*), 72 F.3d 298 (3d Cir. 1995); *In re Roberson*, 999 F.2d 1132 (7th Cir. 1993); Brunner v. N. Y. State Higher Educ. Serv. Corp. (*In re Brunner*), 831 F.2d 395 (2d Cir. 1987); Andrews v. S.D. Student Loan Assistance Corp. (*In re Andrews*), 661 F.2d 702 (8th Cir. 1981); Bryant v. Pa. Higher Educ. Assistance Agency, 72 B.R. 913 (Bankr. E.D. Pa. 1987). Nine of the eleven “numbered” circuit courts have adopted the *Brunner Test*. The two other courts, the Armed Forces Circuit and the Federal Circuit, would not hear cases in this matter due to their limitations for appeals.

attempts to analyze all factors impacting a student debtor's ability to repay a loan.⁴⁰

The *Totality of Circumstances Test*⁴¹ requires that "the facts and circumstances surrounding" an individual case be evaluated to determine whether student debt is dischargeable.⁴² Emphasis is placed on three prevailing considerations: "1) the debtor's past, present, and reasonably reliable future financial resources; 2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and 3) any other relevant facts and circumstances surrounding each particular bankruptcy case."⁴³ This test is viewed as the least restrictive of the four because of its case-by-case determination of "undue hardship." While other courts apply this test, it has been used primarily in the Eighth Circuit.⁴⁴

The *Bryant Poverty Test*⁴⁵ was created due to "the complicated nature" of the *Johnson Test* and the desire of the U.S. Bankruptcy Court for the Eastern District of Pennsylvania to base its rulings on "objective simplicity."⁴⁶ The *Bryant Test* begins by focusing on "the income and resources of the debtor . . . in relation to federal poverty guidelines established by the United States Bureau of the Census."⁴⁷ This court compared the definition of "undue hardship" to the definition of "minimal standard of living."⁴⁸ The court reasoned that people cannot maintain a minimal standard of living if they are already below the federal poverty line before trying to repay a loan; however, it did acknowledge the possibility for people to live above the poverty line and yet not reach a minimal standard of living.⁴⁹ If debtors do not fall below the poverty guideline, the court decided to "look at the totality of circumstances to ascertain the existence of 'unique' or 'extraordinary' circumstances."⁵⁰ Therefore, the court created a two-tier system for testing. First, it considers whether a debtor lives below the poverty line.⁵¹ If so, the debt can be discharged. If the debtor does not live below the poverty line, the court then considers the individual student's total financial circumstances before ruling on discharge of the loan.⁵²

The *Brunner Test*, developed by a district court in 1985 and adopted by the

40. *In re Andrews*, 661 F.2d at 703-04.

41. *Id.*

42. *Wegfehrt v. Ohio Student Loan Comm'n (In re Wegfehrt)*, 10 B.R. 826, 830 (Bankr. N.D. Ohio 1981).

43. *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003) (citing *Andresen v. Nebraska Student Loan Program, Inc. (In re Andresen)*, 232 B.R. 127, 132 (8th Cir. 1999)).

44. *Id.*

45. *Bryant v. Pa. Higher Educ. Assistance Agency (In re Bryant)*, 72 B.R. 913 (Bankr. E.D. Pa. 1987).

46. *Id.* at 915 n.2.

47. *Id.* at 915.

48. *Id.* at 916.

49. *Id.* at 917.

50. *Id.* at 918.

51. *Id.* at 916.

52. *Id.*

Second Circuit in 1987,⁵³ is currently used in nine Circuit Courts of Appeal.⁵⁴ *Brunner* incorporates some components of the other three tests making it the most comprehensive of the four “undue hardship” tests. The test is a three-pronged review of a debtor’s circumstances, and all parts must be proven true for a student’s debt to be discharged. The first prong addresses whether the debtor has the capability, based on current income and expense, to maintain “a ‘minimal’ standard of living for herself and her dependents if forced to repay the loans.”⁵⁵ The second prong examines whether “this state of affairs is likely to persist for a significant portion of the repayment period of the student loans.”⁵⁶ The final prong assesses whether “the debtor has made good faith efforts to repay the loans.”⁵⁷ Student debtors have a difficult time satisfying all three prongs of this test even if extenuating circumstances make repayment burdensome. The *Brunner Test* has become the most widely used test making it the closest operational definition of “undue hardship.”

“Because of its popularity, the federal student loan program has enjoyed enthusiastic, generous, and bipartisan support from Congress for almost fifty years, and congressional support for the program will likely continue.”⁵⁸ However, Congress and the federal courts have become increasingly adamant about the discharge of student loans in recent years. “Congress expects student borrowers to repay their loans on time and in good faith to ensure the integrity and solvency of the loan program.”⁵⁹ A number of laws have been enacted since 1978 to accomplish that goal, including: Section 523(a)(8)(B)⁶⁰ of the Bankruptcy Code (which addressed undue hardship); the Debt Collection Act of 1982;⁶¹ and the Higher Education Technical Amendments of 1991.⁶² The result of these changes is that federal law now empowers the federal government to use all legal means to

53. *Brunner v. N.Y. State Higher Educ. Serv. Corp. (In re Brunner)*, 831 F.2d 395 (2d Cir. 1987).

54. *See Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382 (6th Cir. 2005); *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302 (10th Cir. 2004); *Ekenasi v. Educ. Res. Inst. (In re Ekenasi)*, 325 F.3d 541 (4th Cir. 2003); *U.S. Dept. of Educ. v. Gerhardt (In re Gerhardt)*, 348 F.3d 89 (5th Cir. 2003); *O’Hearn v. Educ. Credit Mgmt. Corp. (In re O’Hearn)*, 339 F.3d 559 (7th Cir. 2003); *Hemar Ins. Corp. of Am. v. Cox (In re Cox)*, 338 F.3d 1238 (11th Cir. 2003); *United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108 (9th Cir. 1998); *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298 (3d Cir. 1995); *In re Roberson*, 999 F.2d 1132 (7th Cir. 1993); *Brunner v. N. Y. State Higher Educ. Serv. Corp. (In re Brunner)*, 831 F.2d 395 (2d Cir. 1987); *Andrews v. S.D. Student Loan Assistance Corp (In re Andrews)*, 661 F.2d 702 (8th Cir. 1981); *Bryant v. Pa. Higher Educ. Assistance Agency*, 72 B.R. 913 (Bankr. E.D. Pa. 1987).

55. *In re Brunner*, 831 F.2d at 396.

56. *Id.*

57. *Id.*

58. Robert C. Cloud, *Offsetting Social Security Benefits to Repay Student Loans: Pay Us Now or Pay Us Later*, 208 ED. LAW. REP. 11, 21 (2006).

59. *Id.*

60. 11 U.S.C. § 523(a)(8)(B) (2000 & Supp. 2005).

61. Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749 (1982) (codified as amended in scattered sections of 5, 18, 21, 28, & 31 U.S.C.).

62. Higher Education Technical Amendments of 1991, Pub. L. No. 102-26, 105 Stat. 123 (1991) (codified as amended in scattered sections of 20 U.S.C.).

collect defaulted student loans, no matter how old or delinquent the debt, and federal courts have consistently approved governmental efforts to recover these debts. For example, in *Lockhart v. United States*,⁶³ the United States Supreme Court ruled that the federal government “can offset Social Security benefits to collect overdue student loans and that there are no time limits on those collection efforts.”⁶⁴

LOCKHART V. UNITED STATES: SOCIAL SECURITY & DEFAULTS

In the midst of the discussion about the efficacy of bankruptcy tests, the federal government has started using a new approach to ensure repayment of student loans. In 2001, the Bush administration started garnishing Social Security benefits to recover at least a portion of defaulted student loans.⁶⁵ This led to the recent Supreme Court case of *Lockhart v. United States*.⁶⁶ In its unanimous ruling, the Court upheld the government’s right to garnish or offset Social Security payments to individuals who have failed to repay student loans.⁶⁷ Certiorari was granted in this case to resolve a conflict between the Eighth and Ninth Circuits.⁶⁸ The Eighth Circuit found, in *Lee v. Paige*,⁶⁹ that the garnishment of Social Security payments was contrary to the regulations in the Federal Debt Collection Act of 1982 (“DCA”).⁷⁰ Conversely, the Ninth Circuit upheld such garnishment in the *Lockhart* case.⁷¹ These opposing opinions led the Supreme Court to consider the issue in 2005.

Lee v. Paige focused on the DCA, which authorized the garnishment “by administrative offset” of unpaid debts from some federal payments.⁷² The DCA, however, did not allow the offset of Social Security benefits, despite the Social Security’s enabling legislation leaving open the possibility of garnishment of Social Security payments.⁷³ Also, the DCA instituted a ten year statute of limitation on all federal loan collections, which remained unchanged in subsequent revisions to the DCA.⁷⁴ The Department of Education (“ED”), arguing in favor of garnishment, pointed to the removal of this ten year statute of limitation in the Higher Education Amendments of 1991 (“HEA”) with regard to educational loans.⁷⁵ The Debt Collection Improvement Act of 1996 (“DCIA”) also authorized

63. 546 U.S. 142 (2005).

64. Cloud, *Offsetting Social Security Benefits*, *supra* note 58, at 21.

65. Stephen Burd, *Supreme Court Hears Dispute Over Student-Loan Repayments*, CHRON. HIGHER EDUC., Nov. 11, 2005, at A25.

66. *Lockhart*, 546 U.S. at 142.

67. *Id.*

68. *Id.*

69. *Lee v. Paige*, 376 F.3d 1179 (8th Cir. 2004), *abrogated by* *Lockhart v. United States*, 546 U.S. 142 (2005).

70. *Id.* at 1180.

71. *Lockhart v. United States*, 376 F.3d 1027 (9th Cir. 2004), *aff’d*, 546 U.S. 142 (2005).

72. 31 U.S.C. § 3711(a) (2000); 31 U.S.C. § 3716(a) (2000).

73. 42 U.S.C. § 407(a) (2000).

74. 31 U.S.C. § 3716(e)(1) (2000).

75. *Lee v. Paige*, 376 F.3d 1179, 1180 (8th Cir. 2004) (citing 20 U.S.C. § 1091(a) (2000)).

the garnishment of federal loan debts from Social Security payments.⁷⁶ However, the DCIA perhaps unintentionally did not repeal the ten year limitation from the DCA, prompting Lee to contend that the time limitation still stood on garnishment of Social Security.⁷⁷ These opposing federal codes led the district court, and later the Eighth Circuit, to reason:

A better reading of [the Debt Collection Improvement Act of 1996] and [the Higher Education Act of 1991] would be the following: Congress declared in [the 1991 Act] that there would [sic] no limitations on when student loans could be collected. This statute controls the time for collecting past due amounts. In [the 1996 Act], Congress allowed for Education to reach various sources as a means of offsetting past due claims, but provided that Social Security benefits could not be offset for claims over ten years old. This statute controls the sources of funds to which Education can look to satisfy its claim. [The 1996 Act] . . . limits Education's ability to look to Social Security benefits for repayment. In short, Education is still entitled to pursue it's the [sic] collection of Lee's student loans. It may not however, look to Lee's Social Security benefits to collect. Due to the age of its claims against Lee, Education is not authorized, in this case, to satisfy its claim by offsetting Lee's Social Security benefits.⁷⁸

Subsequently, the Ninth Circuit heard the case of James Lockhart, a sixty-seven year-old disabled man with significant medical expenses.⁷⁹ Lockhart owed \$85,000 in student loans, which were in default, and his income consisted of \$874 in Social Security benefits and \$10 in food stamps each month.⁸⁰ In 2001, the ED authorized the withholding of \$93, or 10.64%, a month from his Social Security benefits, prompting Lockhart to file suit under the Debt Collection Act of 1982 to prevent the offsets.⁸¹ His attorneys argued that because his loans were received between 1984 and 1989, they fell under the ten year statute of limitation on Social Security offset.⁸² The facts and arguments in this case were similar to that of the *Lee* case, but the Ninth Circuit came to the opposite conclusion, affirming the district court's decision and concluding:

A puzzle has been created by the codifiers. But it seems clear that in 1996, Congress explicitly authorized the offset of Social Security benefits, and that in the Higher Education Act of 1991, Congress had overridden the 10-year statute of limitations as applied to student loans. That the codifiers failed to note the impact of the 1991 repeal on [the Debt Collection Improvement Act of 1996] does not abrogate the repeal. Because the Debt Collection Act's statute of limitation is

76. 31 U.S.C. § 3716(c)(3)(A) (2000).

77. *Lockhart v. United States*, 546 U.S. 142, 146 (2005).

78. *Lee v. Paige*, 276 F. Supp. 2d 980, 984 (W.D. Mo. 2003), *aff'd*, 376 F.3d 1179 (8th Cir. 2004).

79. *Burd*, *supra* note 65, at A25.

80. *Id.*

81. *Id.*

82. *Lockhart*, 546 U.S. 142, 143–44 (2005).

inapplicable here, the government's offset is not time-barred.⁸³

On November 5, 2005, the Supreme Court heard arguments in *Lockhart v. United States*.⁸⁴ The unanimous opinion of the Court, written by Justices O'Connor and Scalia, authorized the offset of Social Security benefits to repay student debt.⁸⁵ The Court considered the legality of offsetting Social Security benefits to collect student loans outstanding for more than ten years.⁸⁶ While the DCA did give authority to government agencies to garnish federal payouts "by administrative offset,"⁸⁷ it instituted a statute of limitation of ten years.⁸⁸ As the Court noted, Social Security benefits under the Social Security Act are not "subject to execution, levy, attachment, garnishment, or other legal process."⁸⁹ As stated in the Social Security Act, "[n]o other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section."⁹⁰ However, in 1991, Congress "sweepingly eliminated time limitations as to certain loans" including the student loans at issue here.⁹¹ While this legislation did remove time restrictions, it did not eliminate the restriction on garnishing Social Security benefits, but in 1996 the DCIA expressly referenced the Social Security Act for removing protection on Social Security benefits.⁹² The DCIA did not expressly reference the ten year limitation raising this issue to the courts. *Lockhart*, of course, argued that Congress intended for the statute of limitation to remain on Social Security in spite of conflicting with the HEA.⁹³ However, the Supreme Court refuted this argument and opined that "the Higher Education Technical Amendments retain their effect as a limited exception to the Debt Collection Act time bar in the student loan context."⁹⁴ Consequently, the Supreme Court affirmed the Ninth Circuit's ruling in *Lockhart* and abrogated the Eighth Circuit's decision in *Lee*, paving the way for offsetting Social Security benefits to pay unsettled student debt.⁹⁵

Lockhart leads one to ask why the ED is pursuing new collection strategies on defaulted loans. The answer is found in the size of the federal student loan program, private student loan industry, and the anticipated growth of the federal loan program. As the program grows, the federal funding required to meet the demand will increase drastically. This can already be seen in the amount of new

83. *Lockhart v. United States*, 376 F.3d 1027, 1030 (9th Cir. 2004), *aff'd*, 546 U.S. 142 (2005).

84. *Lockhart*, 546 U.S. at 142.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. 42 U.S.C. § 407(a) (2000).

90. 42 U.S.C. § 407(b) (2000).

91. *Lockhart v. United States*, 546 U.S. 142, 144 (2005).

92. *Id.* at 145.

93. *Id.*

94. *Id.* at 146.

95. *Id.* at 147.

loans and total loans disbursed from 2002 to 2006.⁹⁶ These changes make it necessary for the ED to focus on keeping the default rate low and finding new ways to collect defaulted loans. *Lockhart* shows that the ED will pursue all loans that have not officially been declared in default ensuring that students will either “pay us now or . . . pay us later.”⁹⁷ To this end, it is important to look at the characteristics of those who borrow and the financial issues they currently face and are likely to face in the future. Public policy must reflect the needs of these students and their institutions while at the same time ensuring the solvency of the loan program for generations yet unborn.

CURRENT PICTURE OF UNDERGRADUATE STUDENTS

In 2003, the National Center for Education Statistics (“NCES”) studied the characteristics of undergraduate student borrowers during 1999–2000.⁹⁸ The study divided borrowers into four categories: high, medium, low, and non-borrowers. At the time of the NCES report, 29% of all undergraduates borrowed money to attend an institution of higher education.⁹⁹ That number subsequently increased to 35% during 2003–04.¹⁰⁰ The report defined borrowers as “undergraduate students who have obtained loans from federal, state, institutional, and other sources, including private commercial loans (but excluding federal Parent Loans for Undergraduate Students (‘PLUS’) and loans from family or friends).”¹⁰¹ Most borrowers were part-time students working full-time while pursuing associate degrees at two-year institutions where their educational costs were less than \$5,000 per year.¹⁰² Ironically, data from the NCES Report indicate that nonborrowers have many of the same characteristics as high borrowers (discussed below), including financial independence and having dependents other than a spouse.¹⁰³ Nonborrowers, by definition, do not borrow money to pursue their education; therefore, they do not face the same repayment concerns as borrowers once they graduate or dropout.¹⁰⁴ This group consists primarily of students who have chosen

96. FY 2007 FFELP GUARANTY AGENCY LOAN DATA, *supra* note 9.

97. Robert C. Cloud, *Offsetting Social Security Benefits to Repay Student Loans: Pay Us Now or Pay Us Later*, 208 ED. LAW REP. 11 (June 15, 2006).

98. NAT’L CTR. FOR EDUC. STATISTICS, CHARACTERISTICS OF UNDERGRADUATE BORROWERS: 1999–2000 (Jan. 2003), <http://nces.ed.gov/pubs2003/2003155.pdf> [hereinafter CHARACTERISTICS: 1999–2000]. While the data in the NCES report are important, readers need to note that considering increases in cost of attendance since the 1999–2000 year leads to an understatement of these statistics for students attending institutions of higher education in 2006–2007.

99. *Id.* at 3.

100. NAT’L CTR. FOR EDUC. STATISTICS, 2003–2004 NATIONAL POSTSECONDARY STUDENT AID STUDY 5 (June 2005), <http://nces.ed.gov/pubs2005/2005163.pdf>.

101. CHARACTERISTICS: 1999–2000, *supra* note 98, at 3.

102. *Id.* at 5.

103. *Id.* at 5–6.

104. It is not the scope of this paper to debate whether spreading the cost of education out over more than four years or attaining an associate degree is a better way to attend and pay for higher education. The authors assume administrators, students and parents want to know and are concerned with the implications and issues of attaining a degree in a four-year institution.

to take longer to complete their degrees rather than incur student debt.¹⁰⁵

The NCES report divided the remaining three borrower classifications by the maximum Stafford borrower limits for one year at that time.¹⁰⁶ Low borrowers were defined as those borrowing less than \$2,625 in 1999–2000, which was the maximum amount that dependent student borrowers could receive as a freshman.¹⁰⁷ Medium borrowers received loans between \$2,625 and \$6,625 in loans during the 1999–2000 academic year.¹⁰⁸ The high amount, \$6,625, was the maximum an independent freshman could receive in combined subsidized and unsubsidized loans.¹⁰⁹ High borrowers were defined as those who took out loans above \$6,625.¹¹⁰

The borrowing limits used for this report changed for the first time since 1992 when the Higher Education Reconciliation Act of 2005 (“HERA”) became effective on July 1, 2007.¹¹¹ Before HERA, loan limits for first-year students remained static since 1986.¹¹² HERA adjusted subsidized loans for first year undergraduates from \$2,625 to \$3,500, and second year students received an increase from \$3,500 to \$4,500.¹¹³ Unsubsidized loans increased for graduate/professional students from \$10,000 to \$12,000, preparatory work for enrollment into graduate/professional programs from \$5,000 to \$7,000, and teacher certification from \$5,000 to \$7,000.¹¹⁴ These changes will no doubt be helpful to all student borrowers, but the artificially low limits in recent years have compelled some students to seek additional loans outside the federal program.¹¹⁵ In addition, these changes have not been in effect long enough to determine the impact, if any, on the characteristics of borrowers.

**Annual Borrowing Limits
for Dependent
Undergraduate Students:**

**Annual Borrowing Limits for
Independent Students:**

105. CHARACTERISTICS: 1999–2000, *supra* note 98, at 5–6.

106. *Id.* at 4.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Higher Education Reconciliation Act of 2005, Pub. L. No. 109-71, 120 Stat. 4, 158–60 (2005) (codified as amended in scattered sections of 20 U.S.C.).

112. LAURIE WOLF, DEP’T OF EDUC., REAUTHORIZATION OF THE HIGHER EDUCATION ACT OF 1965 (2003), <http://www.ed.gov/policy/highered/reg/hearulemaking/2002/reauthhearing/f-laurie-wolf.html?exp=0> (last modified Sept. 22, 2003).

113. Higher Education Reconciliation Act of 2005, 120 Stat. 4, 158 (2005).

114. *Id.* at 159.

115. U.S. DEP’T OF EDUC., FUNDING EDUCATION BEYOND HIGH SCHOOL: THE GUIDE TO FEDERAL STUDENT AID (2007–2008), *available at* http://studentaid.ed.gov/students/attachments/siteresources/FundingEduBeyondHighSchool_0708.pdf. The following charts are shown to create a picture of what a borrower can take in student debt at each level of education each year and in aggregate. The loan amounts changed as of July 1, 2007, but in the author’s opinion, this does not negate the validity of the NCES report.

Grade Level	Combined Subsidized & Unsubsidized Maximum
Freshman	\$3,500
Sophomore	\$4,500
Junior	\$5,500
Senior	\$5,500

Grade Level	Subsidized Maximum	Combined Subsidized & Unsubsidized Maximum
Freshman	\$3,500	\$7,500
Sophomore	\$4,500	\$8,500
Junior	\$5,500	\$10,500
Senior	\$5,500	\$10,500
Graduate	\$8,500	\$20,500

Aggregate (Lifetime) Borrowing Limits:

Student Type	Subsidized Maximum	Combined Subsidized & Unsubsidized Maximum
Dependent Undergraduates	\$23,000	\$23,000
Independent Undergraduates	\$23,000	\$46,000
Graduate Students	\$65,500	\$138,500

Low and medium borrowers made up 28% and 51%, respectively, of all borrowers and had loans totaling less than \$6,625 in student loans in the 1999–2000 academic year.¹¹⁶ These two groups can be combined because they are similar in almost every area, according to the study, except that low borrowers were more likely to attend a two-year institution.¹¹⁷ These borrowers were young, dependent, single, and attended a college or university full-time.¹¹⁸ They tended to work one to twenty hours per week, and they were likely to complete a four-year college or university degree.¹¹⁹ Also, the low borrowers often attended institutions costing below \$10,000 per year, whereas, 20.3% of the medium borrowers attended institutions costing more than \$20,000 a year.¹²⁰ Few of the students in these two categories obtained private loans to finance their education.¹²¹ Medium

116. CHARACTERISTICS: 1999–2000, *supra* note 98, at 4.

117. *Id.* at 5–6.

118. *Id.*

119. *Id.*

120. *Id.* at 6.

121. *Id.* at 18.

borrowers were able to fund their expenses at higher-cost institutions because of additional financial aid from grants or scholarships.¹²²

The NCES report found that high borrowers, generally, were independent and 24 years-old or older.¹²³ High borrowers made up 21% of all borrowers¹²⁴ and received an average of \$9,680 in loan aid in 1999–2000.¹²⁵ Dependent students were more likely to borrow relatively more money when they pursued their baccalaureate degree at a four-year, public or private institution as opposed to a two-year college.¹²⁶ The NCES study found high borrowers in all types of institutions were more likely to drop out if they had four or more retention risk factors.¹²⁷ This group had more than the maximum subsidized and unsubsidized Stafford loans for freshmen. Thus, 27% of high borrowers were also likely to pursue financial aid in the form of private loans.¹²⁸ They were more likely than other borrowers to have subsidized, unsubsidized, and private loans.¹²⁹ At the same time, they had lower amounts of other financial aid (e.g., grants and scholarships) than low and medium borrowers.¹³⁰

122. *Id.*

123. *Id.* at iv.

124. *Id.* at 4.

125. *Id.* at 17.

126. *Id.* at 21.

127. *Id.* at 16. The study, however, does not address the actual number of students leaving college or university life due to debt, but it does prove that there is increased risk of lower retention when debt is higher. The seven risk factors are delaying enrollment, attending part-time, being financially independent, having dependents other than a spouse, working full-time while enrolled, having no high school diploma, and being a single parent.

128. *Id.* at 18.

129. *Id.*

130. *Id.*

NCES Data by Borrower Classification (in percentages)¹³¹

	Non- borrower	Low Borrower	Medium Borrower	High Borrower
<i>Dependency Status</i>				
Dependent	45.0	68.6	67.1	35.9
Independent	55.1	31.4	32.9	64.1
<i>Parent Income – Dependent</i>				
Lowest Quartile	23.9	29.4	25.1	29.2
Middle Quartiles	48.2	52.7	54.1	52.2
Highest Quartile	27.9	17.9	20.8	18.6
<i>Student Income – Independent</i>				
Lowest Quartile	19.3	43.2	43.8	36.5
Middle Quartiles	50.4	48.9	48.0	51.5
Highest Quartile	30.3	7.9	8.3	12.0
<i>Attendance Status</i>				
Exclusively Full-Time	39.9	70.2	74.2	71.9
Half-Time	19.5	11.1	6.7	9.1
Less than Half-Time	24.6	3.0	2.0	1.7
Mixed	16.1	15.7	17.2	17.3
<i>Degree Program</i>				
Certificate	9.8	7.3	4.6	9.2
Associate's Degree	48.4	32.0	13.6	17.6
Bachelor's Degree	35.9	59.9	81.1	72.6
No Undergraduate Degree	5.9	0.9	0.8	0.6
<i>Type of Institution</i>				
Private not-for-profit 4-year	10.6	17.1	29.4	33.7
Public 4-year	28.4	47.1	54.7	37.5
Public 2-year	58.5	25.6	7.5	6.0
Private for-profit	2.5	10.3	8.4	22.8

The study provides evidence that students are most likely to borrow if they are attending a private, not-for-profit institution full-time and do not work while attending a higher education institution. Students who work and do not attend full-time are more likely to graduate without any loans. The difference between borrowers and nonborrowers consistently lies in and corresponds with the decision to attend a college or university full-time or part-time. Once the decision is made, the student must decide how to pay for education at the pace desired. An ever increasing number and percentage of students are opting to borrow money from the federal government (i.e., the taxpayers) to pay for their postsecondary education. For some at least, repayment of the loans is not an immediate concern, but something to be dealt with on another day, in the distant future. As Scarlett

131. *Id.* at 5–6. The table is a summary of relevant statistics from the NCES Report.

O'Hara said in the closing scene of *Gone with the Wind*, "I can't think about that now, I'll go crazy if I do. . . . I'll think about it tomorrow. . . . After all, tomorrow is another day!"¹³²

CURRENT PICTURE OF COLLEGE AND UNIVERSITY GRADUATES

One of the benefits of the federal student loan program is that students can defer loan payments while attending a college or university. This allows students to pursue their education without the immediate worry of paying on their loan when earnings are potentially low. On the other hand, the deferred payment provision can lull borrowers into a false sense of insulation from their legal responsibility to repay the loan. The following NCES data reflect the borrowing trends of undergraduates between 1992 and 2003. The data reveal that an increasing number of undergraduates are borrowing increasing amounts to cover the cost of education.

Progressive Increase in Borrowing¹³³

School Year	Percent Who Borrowed	Average Amount Borrowed
1992–1993	19.2%	\$3,186
1995–1996	25.3%	\$4,041
1999–2000	29.0%	\$5,100
2003–2004	35.0%	\$5,800

As of 2005–06, 56% of all student aid came from loans.¹³⁴ Moreover, this percentage will likely increase in the future.¹³⁵ Private loans increased significantly from \$5.6 billion to \$17.3 billion between academic years ending 2002 to 2006, respectively.¹³⁶ In the 2005 academic year, non-federal loans exceeded total Pell Grant expenditures for the first time in the history of the Pell Grant program.¹³⁷ If the current growth rate maintains, data for the 2007 academic

132. GONE WITH THE WIND (Metro-Goldwyn-Mayer 1939).

133. See U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, PERCENTAGE OF UNDERGRADUATES WHO BORROWED: ACADEMIC YEARS 1992–93 AND 1995–96, available at <http://nces.ed.gov/quicktables/Detail.asp?Key=67> (last visited Oct. 3, 2007); Lutz Berkner et al., *Student Financing of Undergraduate Education: 1999–2000*, 4 EDUC. STATISTICS Q. 3 (2003), available at http://nces.ed.gov/programs/quarterly/vol_4/4_3/4_2.asp#Figure-A (last visited Oct. 8, 2007); U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, NCES 2005–163, 2003–2004 NATIONAL POSTSECONDARY STUDENT AID STUDY 5, 10 (2005), available at <http://nces.ed.gov/pubs2005/2005163.pdf>. It is important to note that this is annualized instead of an average of a graduate.

134. COLLEGE BOARD, TRENDS IN STUDENT AID 2006, 14 (2006), available at http://www.collegeboard.com/prod_downloads/press/cost06/trends_aid_06.pdf [hereinafter COLLEGE BOARD 2006].

135. *Id.*

136. *Id.*

137. *Id.*

year will likely show that the growth of non-federal loans exceeds all federal grants and work-study programs.¹³⁸ With the increases in tuition rates, federal aid on average does not pay the same percentage of education costs today as it did five years ago. At no time in the history of the student loan program have so many students sought so many non-federal loans. These private loans have the same protections against default that federal loans have, but do not carry the same low interest rate, making them riskier and more expensive for student borrowers.¹³⁹ Therefore, it is important to know what the average graduate will face when his or her education is complete. A profile of prospective graduates will help facilitate discussion on why it is important for the public to remain concerned about the rising cost of higher education. This will help create a picture of whether or not a college or university graduate can achieve a stable average economic status within the immediate year following graduation.

According to the NCES, the average bachelor degree recipient graduates with \$19,300 in debt.¹⁴⁰ While this figure reflects the average debt burden, the debt of a particular student fluctuates based on the type of institution he or she attended. For instance, the average student at a public four-year non-doctoral institution had average debt of \$15,000, whereas a student at a private four-year doctoral school had an average debt of \$28,000.¹⁴¹ Determining the payment for student debt for professional graduates is more difficult than for undergraduate students. The median loan burden for professional students ranges from public school doctorate students with \$29,509 to medical students with \$94,932 in debt.¹⁴² Considering this range, an average for professional degree recipient graduates was \$61,800 of debt,¹⁴³ which creates a minimum payment of \$442.75 per month.¹⁴⁴

Credit cards are an added concern for student debtors. A 2004 study found that the average college or university student carried a credit card balance of \$2,169.¹⁴⁵ This credit card study reported that 76% of students had at least one credit card, and 43% had four or more credit cards.¹⁴⁶ One potential bright spot is that undergraduates have lowered their average credit card debt from \$2,748¹⁴⁷ in 2000

138. *Id.*

139. Matthew C. Welnicki, *Dischargeability of Students' Financial Obligations: Student Loans Versus Student Tuition Account Debt*, 31 J.C. & U.L. 665 (2005).

140. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, DEBT BURDEN: A COMPARISON OF 1992-93 AND 1999-2000 BACHELOR'S DEGREE RECIPIENTS A YEAR AFTER GRADUATING 6 (2005), available at <http://nces.ed.gov/pubs2005/2005170.pdf>.

141. *Id.* at 10.

142. Kenneth E. Redd, *Financing Graduate and Professional Education: 2003-2004*, MONOGRAPH, Mar. 2006, at 1, 21.

143. *Id.* The figure was determined by averaging the median debt burden for both public and private students obtaining a doctoral, law, MD, or other medical degree. This is not the perfect way to conclude on the data, but it is the best considering the discrepancies between fields and colleges and universities.

144. This calculation assumes all loans were consolidated at six percent interest rate paid over twenty years.

145. NELLIE MAY, UNDERGRADUATE STUDENTS AND CREDIT CARDS IN 2004 7 (May 2005), available at http://nelliemae.com/pdf/ccstudy_2005.pdf.

146. *Id.* at 4.

147. *Id.* at 7.

to the 2004 average of \$2,169.¹⁴⁸ The 2004 Nellie May report shows 7% of undergraduates report credit card balances greater than \$7,000.¹⁴⁹ The picture changes drastically when the study turned to graduate students. The 2006 Nellie May Report on graduate students reported 92% of graduate students had at least one credit card and carried balances averaging \$8,612 in 2006.¹⁵⁰ This is a significant increase, 75%, over the 1998 reported credit card debt of \$4,924.¹⁵¹ The undergraduate and graduate reports determined that the majority of credit card usage for both groups focused on textbooks and school supplies.¹⁵² The main difference between undergraduate and graduate accumulated credit card debt appears to be the additional time in school for graduates to accumulate the debt.

Undergraduates who stay within the average range of credit card debt should not experience major difficulties paying their debt if they keep student loans below the average amount as well. On the other hand, credit card debt exceeding the average for undergraduates and the average amounts reported by graduate students could hinder a student's ability to meet basic needs after graduation, further complicating efforts to achieve financial stability. At a minimum, student loan debt can prevent a new graduate from saving money for emergency purposes and increase the likelihood that credit card debt will continue to accumulate. In summary, college and university graduates will likely face continuing difficulties with their debt, and the mounting debt could have negative consequences for the United States economy.

ECONOMIC ASSESSMENT OF STUDENT DEBT

The major risk confronting the student loan program is defaults on current outstanding loans. Solvency of the program depends on the timely repayment of previous loans by recipients and continual federal funding. The default rate on student loans in 1990 was 22.4% with 551,208 borrowers in default out of a total population of 2,460,102.¹⁵³ Seeing the risk for increase of defaults, Congress passed the Higher Education Technical Amendments of 1991¹⁵⁴ and the Debt Collection Improvement Act of 1996¹⁵⁵ removing the previously discussed statute of limitation on debt collections. These acts helped reduce the default rate to 4.6% in 2005.¹⁵⁶ The number of student borrowers in default decreased to 161,951,

148. *Id.*

149. *Id.* at 8.

150. NELLIE MAY, GRADUATE STUDENTS AND CREDIT CARDS FALL 2006 2 (August 2007), available at http://nellimae.com/pdf/ccstudy_2006.pdf.

151. NELLIE MAY, CREDIT CARD USAGE AMONG GRADUATE STUDENTS 2003 1 (May 2004), available at http://nellimae.com/library/ccstudy_2003.pdf.

152. UNDERGRADUATE STUDENTS AND CREDIT CARDS, *supra* note 150, at 6; GRADUATE STUDENTS AND CREDIT CARDS, *supra* note 150, at 7.

153. National Student Loan Default Rates, *supra* note 18. The default rates are figured on a cohort basis to create comparable data for each year.

154. 20 U.S.C. § 1091a (2000).

155. 31 U.S.C. § 3716(c)(3)(A) (2000).

156. National Student Loan Default Rates, *supra* note 18.

while the total number of borrowers increased to 3,495,584.¹⁵⁷ The ED instituted several programs to lower the default rate including the following: increased borrower contacts, a Cohort Default Rate Guide, improved entrance/exit counseling, flexible repayment options, and strategic identification and intervention in high risk cases.¹⁵⁸ These strategic actions have reduced the default rate, strengthened the solvency of the student loan program, and increased awareness about issues facing students with loans.

However, an audit performed by the Office of Inspector General related the drop in the default rates primarily to two procedural changes in student loan policy.¹⁵⁹ First, the ED changed from a 180-day delinquency period to a 270-day period for determining that a loan has entered default.¹⁶⁰ The default rates are based on a two-year cohort period; therefore, if a student stops making payments halfway through the second year of the cohort group, the student would not be calculated in the default rate percentage. Second, the number of borrowers with loans in forbearance and deferment increased steadily from 1993 to 1999.¹⁶¹ Students with loans in forbearance or deferment do not get calculated in the cohort default rate, and the risk of their default will not be known until they begin repayment. The audit also pointed out that the dollar value of defaulted loans increased from \$18 billion in 1995¹⁶² to \$22.6 billion in 1999.¹⁶³ The accuracy of these rates is important for determining how much the federal government has to subsidize the loss of payments and related interest by adding more funds to cover the current loans. Also, defaulted loans require added resources for collection; therefore, available funds for the program are diminished.

The added cost of running the student loan program is highlighted even more by the current size and growth of the program. The Federal Family Education Loan Program (FFELP) distributed 7,921,486 loans in 2002 with a total value of \$32.75 billion.¹⁶⁴ By 2006, the program grew to 12,006,190 loans at a value of \$54.81 billion.¹⁶⁵ In a matter of five years, the ED has faced growth of 51.6% in total loans with a 67.4% monetary growth over that same time period.¹⁶⁶ This amount

157. *Id.*

158. U.S. DEP'T OF EDUC., BRIEF ON THE NATION DEFAULT RATES, (Sept. 13, 2006), <http://www.ifap.ed.gov/eannouncements/attachments/0913CDRBriefingAttach.pdf>.

159. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF EDUC., AUDIT TO DETERMINE IF COHORT DEFAULT RATES PROVIDE SUFFICIENT INFORMATION ON DEFAULTS IN THE TITLE IV LOAN PROGRAMS: FINAL AUDIT REPORT ED-OIG/A03-C0017 (Dec. 22, 2003), <http://www.ed.gov/about/offices/list/oig/auditreports/a03c0017.pdf>.

160. *Id.* at 10.

161. *Id.* at 22.

162. *Id.*

163. *Id.* at 7.

164. U.S. DEP'T OF EDUC., FEDERAL FAMILY EDUCATION LOAN PROGRAMS (FFELP) LOAN VOLUME FOR 12-MONTHS OF FY2003 & 2002, <http://www.ed.gov/finaid/prof/resources/data/03q4ffelpstate.xls> (last visited Sept. 26, 2007).

165. U.S. DEP'T OF EDUC., FEDERAL FAMILY EDUCATION PROGRAMS (FFELP) LOAN VOLUME FOR 12-MONTHS OF FY2006 & 2005, <http://www.ed.gov/finaid/prof/resources/data/06q4ffelpstate.xls> (last visited Oct. 21, 2007).

166. The percentage calculations are based on the change from 2002 to 2006.

of growth has not been seen since the first years of the FFELP, when growth could fluctuate from a low of -25.1% to a high of 222.5%.¹⁶⁷ Over this same five years, private and state loans also increased, from \$5.6 billion to \$17.3 billion, or 208.9%.¹⁶⁸ This growth greatly exceeds the increases students simultaneously have faced in tuition, fees, and cost of living. According to the *Chronicle of Higher Education*, average costs in 2002 for public and private colleges and universities were \$11,976 and \$26,070 respectively¹⁶⁹ compared to \$15,566 and \$31,916 in 2006, an increase of 30.0% and 22.4%, respectively.¹⁷⁰ This demonstrates that a larger percentage of higher education aid is now derived from loans than scholarships or grants.¹⁷¹

To understand why these changes have taken place, it is important to note the size of the higher education industry and the growth it has been experiencing. The *Chronicle of Higher Education* reported U.S. expenditures for higher education amounted to \$255.39 billion in 2001,¹⁷² an increase of 29.7% from the \$196.93 billion spent in 1997.¹⁷³ To put this in perspective, as an industry, total U.S. higher education expenditures would rank thirtieth on the international gross domestic product listing right behind Saudi Arabia and ahead of Egypt.¹⁷⁴ The growth of colleges and universities creates added expenses that have to be funded from some revenue source. Federal and state funding, scholarships, and endowments are not keeping pace with the increased cost of operations. So, institutions have turned to tuition-based funding more than any other source. This change places the burden of increased cost on the students and their parents; therefore, recent circumstances in higher education have forced students to take on more debt to help fund their education.¹⁷⁵

At the historical FFELP growth rate of 9.46% over the past twenty years, the annual loan issuance will top \$79.05 billion by 2010.¹⁷⁶ However, if the growth

167. U.S. DEP'T OF EDUC., FFELP—LOAN VOLUME (COMMITMENTS) BY GUARANTY AGENCY—1ST 9-MONTHS OF FY 2006 AND FY 2005, <http://www.ed.gov/finaid/prof/resources/data/06q3ffelpga.xls> (last visited Sept. 26, 2007).

168. COLLEGE BOARD 2006, *supra* note 134, at 6.

169. *Average College Costs, 2001-2*, CHRON. HIGHER EDUC., Aug. 30, 2002, at 36.

170. *Average College Cost, 2005-6*, CHRON. HIGHER EDUC., Aug. 31, 2007, at 33; *Average College Cost, 2001-2*, *supra* note 169.

171. COLLEGE BOARD 2006, *supra* note 134.

172. *A Brighter Financial Picture for Colleges*, CHRON. HIGHER EDUC., Aug. 27, 2004, at 3, available at <http://chronicle.com/free/almanac/2004/nation/nation.htm> (last visited Sept. 27, 2007).

173. *Average College Costs, 2001-2*, *supra* note 169, at 12.

174. "Gross domestic product based on purchasing-power-parity (PPP) valuation of country GDP, 2001." INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK DATABASE (April 2006). To access the report, follow the Data and Statistics Tab on www.imf.org. Next select the World Economic Outlook Database under the heading Global Data. Select the most recent year and select search by Country or Country Groups. Select All Countries, choose report "Gross domestic product based on purchasing-power-parity (PPP) valuation of country GDP." On report details, set the date range to include 2001. Download the report to excel and sort by GDP.

175. COLLEGE BOARD, TRENDS IN COLLEGE PRICING (2005), http://www.collegeboard.com/prod_downloads/press/cost05/trends_college_pricing_05.pdf.

176. U.S. DEP'T OF EDUC., FY 2006 FFELP GUARANTY AGENCY LOAN DATA,

rate of 14.46% over the past five years continues, the issuance could top \$98.82 billion in student loan debt by 2010.¹⁷⁷ Both of these values are above the projected Presidential budget of \$73.6 billion for 2010.¹⁷⁸ These statistics are particularly troubling when coupled with historical inflation rate averages of about 3.39%¹⁷⁹ per year, which is considerably lower than the yearly increase for individual student loans. Worse, higher education's total inflation over the past five years is 16.59%¹⁸⁰ making inflation for the higher education sector well above that of national rate. These statistics raise questions about the sustained long-term growth of the loan program and the ability of institutions to meet expenditure needs. With higher education costs accelerating at such a rate, the probability is that many students and parents will not be prepared for the costs they will face in the near future. In addition, those who are saving to attend a college or university at this time will most likely not be able to keep pace with the rapidly accelerating costs of higher education.

Without a doubt, higher education in the United States has become a major part of the economic environment, and the training that is provided to both domestic and foreign students has a worldwide impact on the economies of all countries. Student defaults rose to 4.6% in 2005 from the record low in 2003 of 4.5%, with an increase to 5.1% in 2004.¹⁸¹ There are both positive and negative signs on the horizon for the economic situation in higher education. At present, the current increase in education costs, which has led to accelerated growth in tuition, room and board, and fee expenses for students, is a cause of concern. Also, student default rate calculations have changed recently, potentially creating a lower figure than the actual future impact on the economy. It may be possible for the government to keep loan defaults low, but the rapid growth of higher education makes it very difficult for prospective students and their parents to prepare for the cost they will face to attain a college or university degree. Students will continue to borrow the money needed to pay for their educations and hope that their increased earning power will ensure a desirable standard of living and the financial means to repay all loan obligations to the federal government.

THE CONSEQUENCES OF HEAVY STUDENT DEBT

Student loans can have both positive and negative consequences. The most obvious positive consequence is that federal loans have enabled millions of Americans to complete a college or university education, practice their chosen

<http://www.ed.gov/finaid/prof/resources/data/06q1ffelpga.xls> (last visited Sept. 26, 2007) (serving to calculate the twenty year growth figure, 9.46%).

177. *Id.* (serving to calculate the five year growth figure, 14.46%).

178. U.S. DEP'T OF EDUC., STUDENT LOAN VOLUME TABLES — FY 2008 PRESIDENT'S BUDGET MID-SESSION REVIEW (2007), <http://www.ed.gov/about/overview/budget/studentloan/tables/index.html?exp=2> (last visited Oct. 20, 2007).

179. InflationData.com, Annual Inflation, http://inflationdata.com/inflation/Inflation_Rate/AnnualInflation.asp (last visited Sept. 26, 2007).

180. InflationData.com, Inflation Calculator, http://inflationdata.com/Inflation/Inflation_Rate/InflationCalculator.asp#results (last visited Sept. 26, 2007).

181. National Student Loan Default Rules, *supra* note 18.

profession, rear their families, and enjoy a quality of life that would have been impossible without an education. On the other hand, there are negative consequences related to heavy student loan debt. Students with excessive debt cannot pay for necessary living expenses or save a reasonable amount of monthly income for unforeseen emergencies.

Under current federal guidelines, student loan repayment begins six months following graduation for students who do not apply for a forbearance or economic hardship deferment.¹⁸² When repayment begins, the monthly payment must be factored into a person's budget. Most personal financial experts agree that an individual's debt-to-income payments should stay between 30–40 percent of after-tax income. Within the last ten years, studies are recommending that borrowers limit their student loan debt to eight to twelve percent of projected income.¹⁸³ Using the average undergraduate's debt of \$19,300, the minimum monthly payment would be \$214.27 and require a minimum starting salary of \$21,427 (12%) to \$32,140 (8%).¹⁸⁴ However, the lower the salary the more likely that this debt-to-income ratio will be unsustainable due to living expenses taking up a larger ratio of the income and making the monthly debt and expense payments unreachable.

As discussed previously, undergraduates have average loan debt of \$19,300, which has to be paid back with interest.¹⁸⁵ Using earlier assumptions, the total payments will result in a net pay of principal and interest over 10 years of \$25,712.¹⁸⁶ While this amount will not be a burden for most graduates, it will be a significant problem for those in social service fields, including education and social work, where starting annual salaries are often in the \$30,000 range. In addition, students who are unable to save for emergencies can be tempted into relying on credit card debt, further compounding their problems.

All debt is recorded on a person's credit report, which lenders use to rate a person's credit worthiness based on debt-to-income rates and debt types. If a payment is missed or the ratio becomes too high, the result will be higher interest rates on necessary house and car loans. The report is also used by insurance, cell phone, and other types of companies in order to determine qualifications and premium charges. As one can see, an endless cycle of despair and hopelessness can be created for those not prepared to repay their student loans.

Students with heavy debt can create an economic burden on the government and taxpayers instead of contributing to economic growth. In this event, society would have to fund defaults, bankruptcies, and retirements. This consequence is

182. U.S. Dep't. of Educ., Repaying Your Loans, <http://www.studentaid.ed.gov/PORTALSWebApp/students/english/repaying.jsp> (last visited Oct. 8, 2007).

183. Sandy Baum & Saul Schwartz, PROJECT ON STUDENT DEBT AND THE COLLEGE BOARD, *How Much Debt is Too Much? Defining Benchmarks for Manageable Student Debt* (Nov. 10, 2005), http://www.projectonstudentdebt.org/fckfiles/File/Debt_is_Too_Much_November_10.pdf.

184. Because of increases in interest rates after the past few years of historical lows, this calculation assumes \$19,300 in student-loans were consolidated at 6% interest rate paid over ten years.

185. Welnicki, *supra* note 139.

186. See Baum & Schwartz, *supra* note 183, for basis of calculation.

generated by the failure of students to pay their student loans. Both defaults and bankruptcies force the government to make up the funding necessary to carry the student loan program into the future. While the program is not now and was never intended to be self-sustaining, excessive loan defaults and discharges could reduce the funds available to future student borrowers.

Another factor to consider in the student debt issue is a person's inability to save for retirement. Currently, debates are raging on the viability of the Social Security program as the baby boomer generation reaches retirement age. All current and future college and university graduates will be contributing to the Social Security program from their income in hopes of retiring with dignity at the end of their career. However, the Social Security program has consistently not met the needs of those who solely depend on the program, forcing people and businesses to fund their own retirement programs to supplement the Social Security program. Individuals with heavy student loan debt will not be able to save adequately for retirement, thereby jeopardizing their standard of living and potentially placing more pressure on the Social Security system.

The consequences of heavy debt can affect a student and society for many years particularly if the student does not receive an economic benefit from his or her degree. Unacceptably high personal debt threatens the individual borrower and the general society alike. At the same time, a college or university degree is becoming more and more of a requirement for success in American society. Educational policy makers must deal with this dilemma for the sake of potential borrowers, the higher education community, and society as a whole.

RECENT DEVELOPMENTS IN STUDENT LOANS

Student debt continues to grow as a major concern for Congress, the administration, program lenders, and college and university officials. Recent revelations regarding conflicts of interest among college and university loan officials and private lenders have prompted numerous investigations, congressional hearings, and concerns about the Department of Education's effectiveness in supervising the federal student loan program.¹⁸⁷ The New York Attorney General's investigation on lenders and institutions, the Student Loan Sunshine Act, bill proposal S. 1561, and the College Cost Reduction and Access Act of 2007 are recent developments that will continue to have an impact on the student loan industry.

The office of New York Attorney General Andrew M. Cuomo is taking the most proactive and public role in the investigation of relationship between lenders and colleges and universities.¹⁸⁸ To date, twenty-six higher education institutions have signed Cuomo's Code of Conduct¹⁸⁹ and ten have agreed to reimburse

187. See generally, Jonathan D. Glater, *New Ties Found to Link Lenders and Colleges*, N.Y. TIMES, Sept. 5, 2007, at A21 (giving a summary of a recent Congressional report highlighting evidence of the conflicts of interest).

188. Kelly Field, *Cuomo Takes Aim at Federal Regulators and Education Department*, CHRON. HIGHER EDUC., June 15, 2007, at A20.

189. Press Release, N.Y. State Attorney Gen. Andrew Cuomo, Attorney General Cuomo Announces Agreement with Three Lenders (June 20, 2007), <http://www.oag.state.ny.us/press/>

students over \$3 million for their revenue sharing programs.¹⁹⁰ Twelve student loan companies pledged to contribute \$13.7 million to Cuomo's National Education Fund.¹⁹¹ This fund "is dedicated to educating and assisting the country's high school students and their families about the financial aid process."¹⁹² In addition, Cuomo began investigating forty college and university athletic programs with alleged agreements to receive kickbacks or revenue sharing from promoting loans through Student Financial Services, Inc.¹⁹³

Cuomo further expanded his investigations in October 2007 by subpoenaing thirty-three companies and lenders seeking information about marketing tactics toward student borrowers.¹⁹⁴ These companies have been accused of using misleading and deceptive methods to acquire the business of borrowers.¹⁹⁵ The methods include mailing phony offers written to look like they come from federal government organizations; mailing fake checks or false rebates; mailing gift cards for testimonials and applications; offering gift cards to bring the company more business; holding sweepstakes for taking loans out; and using false advertising through various mass-market medias including television, mail, and internet.¹⁹⁶ These investigations by Cuomo point toward serious abuse of the student loan program that has been vital to the success of students in higher education.

In response to Cuomo's investigation into alleged loan program improprieties, the House of Representatives passed the Student Loan Sunshine Act on May 9, 2007.¹⁹⁷ The Senate's Committee on Health, Education, Labor, and Pensions received the bill on May 10, 2007, but the bill has not been sent to the entire Senate. Subsequently, Cuomo and Bill McCollum, Florida Attorney General, along with thirty other Attorneys General requested support from the Senate leadership in quick passage of the proposed Sunshine Act.¹⁹⁸ This bill is

2007/jun/jun20a_07.html (last visited Oct. 22, 2007). The code of conduct can be viewed through the New York State Attorney General's website.

190. *Id.*

191. Press Release, N.Y. State Attorney Gen. Andrew Cuomo, Cuomo Expands College Loan Investigation: Scrutinizes Deals Between Student Loan Provider and University Athletic Departments (Aug. 1, 2007), http://www.oag.state.ny.us/press/2007/aug/aug1a_07.html (last visited Oct. 22, 2007). The National Education Fund program established by Cuomo looks like an effective use of the funds; however, the authors were unable to find any other details about the program other than funds were pledged.

192. *Id.*

193. *Id.*

194. Press Release, N.Y. State Attorney Gen. Andrew Cuomo, Attorney General Cuomo Expands College Loan Investigation to Direct Marketing Companies (Oct. 11, 2007), http://www.oag.state.ny.us/press/2007/oct/oct11a_07.html (last visited Oct. 22, 2007).

195. *Id.*

196. *Id.* The authors would like to point out these problems do not exist only in New York. These same tactics have been used against students at both Baylor University and South Texas College of Law where the authors are directly affiliated.

197. Student Loan Sunshine Act, H.R. 890, 110th Cong. (1st Sess. 2007), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR00890:@@L&summ2=m&> (last visited Oct. 22, 2007).

198. Paul Baskin, *Attorneys General Press Senate for New Student-Lending Rules*, CHRON. HIGHER EDUC., available at <http://chronicle.com/weekly/v53/i43/43a01801.htm> (last visited Sept. 29, 2007); Letter to Senators Harry Reid, Mitch McConnell, Edward M. Kennedy, and

particularly important to Cuomo because it encompasses his “College Loan Code of Conduct.”¹⁹⁹ The Cuomo Code of Conduct includes seven provisions:

1. Ban on Financial Ties. Lenders are prohibited from giving anything of value to any college in exchange for any advantage sought by the lender.
2. Ban on Payments for Preferred Lender Status. Lenders may not pay or give colleges any financial benefits whatsoever to get on a college’s preferred lender list.
3. Gift and Trip Prohibition. Lenders are prohibited from giving college employees anything of more than nominal value.
4. Advisory Board Rules. Lenders are prohibited from paying college employees anything of value for serving on the advisory boards of the lenders.
5. Call-Center and Staffing Prohibition. Lenders must ensure that employees of lenders never identify themselves to students as employees of colleges.
6. Disclosure of Range of Rates and Defaults. Lenders must disclose to any requesting school the range of rates they charge to students at the school, the number of borrowers at each rate at the school, and the lender’s historic default rate at the school.
7. Loan Resale Disclosure. Lenders shall fully and prominently disclose to students and their parents any agreements they have to sell loans to any other lender.²⁰⁰

The overwhelming passage, by a vote of 414–3,²⁰¹ of the bill in the House of Representatives gave the impression the Senate would pass it quickly; however, this bill stalled in committee after referral to the Senate. The holdup will likely lead to more students facing the same issues that Cuomo is trying to prevent.

During this same period, Congress began considering increased bankruptcy protection for student borrowers including a softening of the undue hardship provision that has made student loan discharge very difficult, if not impossible, in previous years. Responding to the Congressional discussion, Senator Dick Durbin, a Democrat from Illinois, introduced S. 1561 on June 7, 2007 to amend the bankruptcy code permitting discharge of certain student loans.²⁰² This bill provides:

Section 523(a)(8) of title 11, United States Code, is amended by striking ‘dependents, for’ and all that follows through subparagraph (B) and inserting ‘dependents, for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or an

Michael B. Enzi (June 19, 2007) (on file with author), *available at* http://www.oag.state.ny.us/family/student_lending/NY%20Multistate%20Letter%20to%20the%20Senate.pdf.

199. Press Release, N.Y. State Attorney Gen. Andrew Cuomo, *supra* 189.

200. *Id.*

201. *Id.*

202. S. 1561, 110th Cong. (1st Sess. 2007), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c110:S.1561>: (last visited Oct. 1, 2007).

obligation to repay funds received from a governmental unit as an educational benefit, scholarship, or stipend.’²⁰³

In support of his amendment, Durbin described private student loans as “incredible money-makers for loan companies” and expressed concern that teenage borrowers often “do not realize the long-term impact of their loan decisions.”²⁰⁴ Senator Durbin’s amendment would leave student loans not guaranteed or insured by the government open for discharge in bankruptcy.²⁰⁵ This amendment would have to include the deletion of subparagraph (B) for “qualified education loans” to be effective at limiting “undue hardship” just to government related loans.

A recent court decision makes the issue of “qualified educational loans” a more pressing matter.²⁰⁶ This court considered whether the issue of a loan to a student passing through a college or university merits a “qualified educational loan.”²⁰⁷ In this case, the court held that a loan should be used as “qualified higher educational expense” for the test of “undue hardship” to apply.²⁰⁸ This ruling could have two impacts on student debt bankruptcy cases. First, before courts determine the application of “undue hardship,” they will need to decide the type of loan in question: (1) a loan under 523(a)(8)(A), (2) a loan under 523(a)(8)(B), or (3) some other type of loan. This decision is essential for determining dischargeability of the loan because the code only allows, “qualified educational loans” to fall under “undue hardship” if they were used to pay for “qualified higher educational expenses.” Second, a court could characterize credit card debt as a “qualified educational loan” if used to pay for “qualified higher educational expenses” (i.e. tuition). If this is the case, the interest paid on this type of debt would also be deductible as interest on “qualified educational loans” and would only be dischargeable if “undue hardship” applies.

On September 27, 2007, the President signed the College Cost Reduction and Access Act of 2007 into law.²⁰⁹ The act garnered the most attention for its reduction in lender subsidies by \$21 billion to pay for a commensurate increase in student aid primarily through the Pell Grant.²¹⁰ The Act did much more than decrease subsidies, increase Pell Grant awards, and decrease the fixed interest rate

203. Compare *id.* with 11 U.S.C. 523(a)(8).

204. Press Release, Dick Durbin, U.S. Senate Assistant Majority Leader, Durbin Introduces Bill to Make Private Student Loans Dischargeable in Bankruptcy (June 7, 2007), <http://durbin.senate.gov/record.cfm?id=275682> (last visited Oct. 8, 2007).

205. *Id.*

206. *Rogers v. KeyBank (In re Rogers)*, No. 1-06-42049-dem, Adv. No. 1-06-01459-dem, (N.D.N.Y. Aug. 31, 2007).

207. *Id.* at 1-2.

208. *Id.* at 13.

209. College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (2007) (codified as amended in scattered sections of 20 U.S.C.). Formerly, College Cost Reduction Act of 2007, H.R. 2669, 110th Cong. (1st Sess. 2007), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR02669:@@L&summ2=m&> (last visited Oct. 8, 2007).

210. Kelly Field. *Federal Lawmakers Approve Landmark Increase in Student Aid*, CHRON. HIGHER EDUC., Sept. 21, 2007, at A17.

on student loans from 6.8% to 3.4% by 2011.²¹¹ It created an income based repayment plan,²¹² established a loan forgiveness program for participants in the Federal Direct Loan Program,²¹³ and increased the number of students eligible for financial aid programs.²¹⁴ In addition to these changes, Congress directed the Secretary of Education to conduct a Competitive Loan Auction Pilot program starting July, 2009.²¹⁵ The ED will receive bids from companies based on how much they expect to be paid to provide the loans for a certain state.²¹⁶ The lowest two bidders will provide student loans to that state for two years.²¹⁷ This program will seek to lower the cost of providing the FFELP. The passage of this bill was a key success for advocates of student loan programs because it increased access to higher education by increasing financial aid, services, and programs to students.

Without doubt, the federal student loan program will remain a topic of great interest and concern for all stakeholders. Amidst all these issues, Congressman Thomas E. Petri (R-Wisconsin) actually called the guaranteed-loan program “a failure—and a costly one at that.”²¹⁸ There is no doubt that higher education becomes more expensive with each year, and at best, students have seen negligible increases in the total grants and scholarships available to them. The current environment has created a growing dependence on student loans resulting in the rapid expansion of federal and privately funded student loans. For federal financial aid to continue opening new doors to college and university students and facilitating the democratization of American higher education; Congress, the administration, program lenders, and college and university officials must find ways to improve efficiency and effectiveness of the student loan program.

SUMMARY

The focus of this paper has been on issues of student debt within higher education. While this is not the only major issue facing higher education today, it is one issue with implications that reach far into the future both for loan recipients and the institutions that serve them. Therefore, the authors offer the following recommendations that are intended to protect the financial stability of individual borrowers, ensure the solvency of the federal student loan program, and increase accessibility to higher education for millions of deserving students.

211. College Cost Reduction and Access Act of 2007, § 201.

212. *Id.* at § 203.

213. *Id.* at §401. This program does not include the Federal Family Education Loan Program, which is the program most students use to get their loans. See discussion under section on Rise of Federal Student Loans.

214. *Id.* at § 601-05.

215. *Id.* at § 701.

216. *Id.*

217. *Id.*

218. Thomas E. Petri, *Guaranteed Loans: Just Plain Expensive*, CHRON. HIGHER EDUC., June 22, 2007, at B14.

RECOMMENDATIONS

1. The Supreme Court or Congress needs to establish a universally accepted test of “undue hardship.”

The confusion about what constitutes “undue hardship” makes it difficult for student debtors to know their rights relating to bankruptcy. While bankruptcy needs to be a last resort, it should not be a vague, inflexible system that treats students in the same category as thieves and other criminals. Congress failed to take the opportunity to define undue hardship with the most recent legislation in the BAPCPA. The Act did expand the definition of what could be considered a student loan; however, this does little to help courts determine whether a debtor’s student loans have created an undue hardship. Actually, with the new definition Congress made the code clear that any money obligated for repayment of qualified education expenses could be considered a student loan.

2. Congress needs to revisit and refine the laws addressing collection of defaulted student loans.

The offsetting of Social Security benefits to collect at least a portion of defaulted student debt, while legal and just, is harsh and damaging to those individuals. The strategy is also inefficient because, by definition, only a small portion of the total debt can be recovered through garnishment of Social Security. Federal law and related regulations should ensure that loan repayment is completed long before Social Security benefits begin. By the time Social Security benefits are garnished, the federal government has missed out on needed funds for a considerable number of years that could have been used to fund additional loans.

3. The government should increase student loan forgiveness programs to include the FFELP.

The College Cost Reduction and Access Act made the first big move toward forgiveness programs.²¹⁹ It focused the forgiveness programs on the Direct Loan Program, but did not include the FFELP. The FFELP is the largest of the federal loan programs and distributes most of the money available to students.²²⁰ Students are eligible for the current forgiveness program if they work within the critical areas of public services while they make 120 monthly payments toward their loans.²²¹ While adding the FFELP program to the current forgiveness program would be expensive for the government to institute, it would provide a societal benefit by increasing the incentive to work in the social services professions where salaries are often not competitive with those in the private sector. Also, this type of program could be used as a catalyst for developing other programs within state and local organizations. At the same time, tax incentives to business for student loan reimbursement would provide another way to assist needy individuals with their educational expenses. Long-term student debt would be reduced commensurately, and the number of defaults and bankruptcies could decline accordingly.²²²

4. Congress should limit the total amount of money that students can borrow to pursue certain degrees, and link the loan limits to entry-level salaries in the student's stated major field of study.

A limit on total debt would help abrogate the economic struggles graduates face in fields like teaching, social work, public health, and other relatively low-paying professions. The downside of such a plan is that it possibly would force the closure of some of these programs on higher tuition based campuses because students could not afford the program over a course of four years. However, students taking loans above the support of their future salaries will face higher risk of defaults, increasing the delay of collection for the federal government.²²³

219. College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (2007) (codified as amended in scattered sections of 20 U.S.C.).

220. FY 2007 FFELP GUARANTY AGENCY LOAN DATA, *supra* note 9.

221. College Cost Reduction and Access Act of 2007, § 401.

222. This recommendation hinges on a direct benefit to the borrower by encouraging work in social related positions and business to increase forgiveness programs. There are other programs that help lessen debt burden such as income contingent, consolidation, and rehabilitation programs. These programs are very beneficial to borrowers, but they do not directly lower the borrower's liability as a forgiveness program would. The income contingent program helps the debtor from entering default, but it does not reduce liability. The consolidation is only beneficial in lowering liability if consolidated at a low interest amount; and the rehabilitation program helps those that have defaulted on their student loans increase their credit rating and get back on track with payments.

223. Republican Presidential candidate Mitt Romney made a similar recommendation while campaigning. Nafeesa Syeed, *Romney: Link College Aid to Occupation*, WASH. POST, Oct. 17, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/17/AR2007101701967.html>. (last visited Oct. 23, 2007).

5. Congress needs to stabilize interest on student loans at one low rate.

Before July 1, 2005, college and university students could lock in an interest rate for consolidated loans of 2.8 to 3.5%.²²⁴ However, students who consolidated their loans between July 1, 2005 and June 30, 2006 had to pay 5.3% for consolidated loans.²²⁵ After that, the loans previous to July 1, 2006 will increase to a variable rate of 7.14% with a capped rate of 8.5%. With the passage of HERA, student loans received after July 1, 2006 will have a fixed rate of 6.8%.²²⁶ By comparison, a fixed rate of 6.8% for the 2006–2007 academic year will be higher than some house loans during the same time period.²²⁷ Congress passed the College Cost Reduction and Access Act reducing the fixed interest rate from 6.8 to 3.4% by July 2011.²²⁸ These changes only make it more difficult for college and university students to plan and repay their student loans. These reductions definitely help all students; however, what is going to happen after the rate gets to 3.4%? Congress should stabilize the interest rate at one percent and this will allow the ED, parents, and students to plan better for needed funds both to distribute the loans and for repayment of those loans.

6. There should be more regulation of loan default rates among problem sectors of higher education.

The default rate for 2004 was 5.1% for all sectors of higher education.²²⁹ This rate was 4.2% when recalculated *excluding for-profit institutions*.²³⁰ The students in for-profit institutions have a default rate that is nearly twice the rate for private and public institutions.²³¹ This fact raises serious concerns about the quality and/or marketability of the education received at these institutions, and the for-profit sector's good-faith efforts (or lack thereof) to collect on this debt.

224. Silla Brush, *Refinancing Frenzy Hits Student Loans*, CHRON. HIGHER EDUC., June 3, 2005, at A1.

225. Anne K. Walters, *Interest Rates for Variable Federal Loans Set to Increase to 7.14% on July 1*, CHRON. HIGHER EDUC., May 31, 2006, (on file with author) available at <http://chronicle.com/daily/2006/05/2006053102n.htm>.

226. Higher Education Reconciliation Act of 2005, Pub. L. No. 109-71, 120 Stat. 4, 158–60 (2005) (codified as amended in scattered sections of 20 U.S.C.).

227. *Mortgage Rates Ease As Inflation Fears Cool*, CNNMONEY.COM, Apr. 19, 2007, http://money.cnn.com/2007/04/19/real_estate/mortgage_rates/index.htm?postversion=2007041911 (last visited Oct. 8, 2007). As of April 19, 2007, the average fixed rate mortgage loan was 6.17%.

228. College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (2007) (codified as amended in scattered sections of 20 U.S.C.).

229. National Student Loan Default Rules, *supra* note 18.

230. U.S. DEP'T OF EDUC., INSTITUTIONAL DEFAULT RATE COMPARISON OF FY 2002, 2003, AND 2004 COHORT DEFAULT RATE, Sept. 11, 2006, <http://www.ed.gov/offices/OSFAP/defaultmanagement/2004instrates.html> (last visited Sept. 29, 2007).

231. *Id.*

7. Congress needs to pass both the Student Loan Sunshine Act and S. 1561.

The Student Loan Sunshine Act and S. 1561 provide needed protection for student borrowers from unscrupulous lenders. Passage of both bills will ensure that lenders and institutions *serve students* first and foremost.

A TRANSCENDENT VALUE:
THE QUEST TO SAFEGUARD ACADEMIC
FREEDOM

LARRY D. SPURGEON*

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INTRODUCTION

If any man is able to convince me and show me that I do not think or act right, I will gladly change; for I seek the truth by which no man was ever injured. But he is injured who abides in his error and ignorance.¹

Academic freedom is our legacy from the dreamers. Since the dawn of human curiosity, shamans and philosophers, artists and poets, scientists and scholars have been given leeway in the pursuit of truth. More of an abstract principle than an enforceable right, this privilege is not intended to establish an elite class; rather, it is a means to the ultimate end of extending the boundaries of knowledge for the benefit of all.

Over time colleges and universities have come to represent intellectual sanctuaries for truth-seekers. Today academic freedom is both a professional principle and a “special concern of the First Amendment.”² Justifiably cherished by the scholar, it is too often presumed an absolute right or simply misunderstood. Without reasoned reflection on its origins, academic freedom can be a hollow phrase—a mantra without meaning—when it is balanced against the counterweight of the professional responsibilities that come with it.

Scholars and judges disagree about the very definition of “academic freedom,” the extent of its coverage, and whether it is entitled to judicial protection. This article was inspired by a brief discussion of academic freedom in *Garcetti v. Ceballos*,³ in which the Supreme Court held that when public employees make statements pursuant to official duties they are “not speaking as citizens for First Amendment purposes, and that the Constitution does not insulate their communications from employer discipline.”⁴ While *Garcetti* did not involve academia, Justice Souter, in his dissent, expressed concern for the impact that the ruling could have on public colleges and universities, noting the Court’s deep commitment to “safeguarding academic freedom, which is of transcendent value to all of us.”⁵

Writing for the majority, Justice Kennedy acknowledged 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.”⁶ But the Court declined to decide whether its analysis “would apply in the same manner to a case involving speech related to scholarship or teaching.”⁷

Someday an academic free speech case will come before the Court. This article attempts to set the stage for that case. Context is everything, and, to understand

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1. MARCUS AURELIUS, *MEDITATIONS* 34 (George Long trans., Peter Pauper Press 1957).
 2. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).
 3. 126 S.Ct. 1951 (2006).
 4. *Id.* at 1960.
 5. *Id.* at 1970 (Souter, J., dissenting) (quoting *Keyishian*, 385 U.S. at 603).
 6. *Id.* at 1962 (majority opinion).
 7. *Id.*

where the Court might go, it is first necessary to review the background of academic freedom, both as a professional doctrine and as a concept developed by courts.

Too much has been read into the Supreme Court's decisions on academic freedom. The Court has recognized academic freedom as a "transcendent value" and as a "special concern of the First Amendment."⁸ These words are not metaphorical. They must be taken at face value with an informed perspective of the tradition of academic freedom in both academia and society. Academic speech for public college or university professors is often protected, albeit under the aegis of normal First Amendment principles that are applicable to all public employees. Academic freedom for the "institution" is neither a right nor a predicate for a cause of action. Rather, it is a qualified immunity—a policy recognition that, most of the time, courts should stay out of academic matters. To understand the Court's reasoning, as well as the rationale for this article's conclusions, it is necessary to explain, at length, the history of academic freedom for both the professors and for the institution.

Part I presents an overview of academic freedom and defines key terms. Part II traces the origins of "professional" academic freedom. Part III explores the scope of constitutional protection for academic speech. Part IV discusses the public employee speech doctrine developed by the Supreme Court in a series of cases culminating with *Garcetti*. Part V examines whether the Supreme Court has recognized separate constitutional rights of academic freedom for the professor and the college or university. Finally, Part VI discusses the future landscape of academic freedom in the wake of *Garcetti*.

I. ACADEMIC FREEDOM—AN OVERVIEW

A. Defining "Academic Freedom"

Definitions of academic freedom are nearly as plentiful as authors on the subject. The only consensus reached thus far seems to be that it is "poorly understood and ill-defined."⁹ Arthur Lovejoy, one of the principal founders of the American Association of University Professors (AAUP),¹⁰ defined it as follows:

Academic freedom is the freedom of the teacher or research worker in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or in the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or

8. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

9. Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom,"* 45 STAN. L. REV. 1835, 1835 (1993).

10. Donald J. Weidner, *Academic Freedom and the Obligation to Earn It*, 32 J.L. & EDUC. 445, 446 (2003).

contrary to professional ethics.¹¹

For Lovejoy, freedom of speech claimed for a college or university professor is not significantly different from that claimed for other citizens.¹² The difference is merely an economic paradox that “those who buy a certain service may not (in the most important particular) prescribe the nature of the service to be rendered.”¹³

Most commentators divide academic freedom into two categories: “professional academic freedom,” which generally refers to the tradition of societal deference to the scholar in the search for truth, and “constitutional academic freedom,” which refers to legally-recognized protection from unwarranted restrictions by courts and legislatures.¹⁴ Walter P. Metzger, a leading scholar, regarded the definitions of these two concepts as “seriously incompatible and probably ultimately irreconcilable.”¹⁵ J. Peter Byrne wrote that academic freedom has “different, if related, meanings in the mouths of academics and in the mouths of judges and that both the academy and the courts have suffered from the confusion.”¹⁶

Due to the efforts of the AAUP, and others, professional academic freedom, as distinguished from constitutional academic freedom,¹⁷ is well established in American colleges and universities.¹⁸ Yet, it carries no “legal or constitutional sanction,” and is not “bestowed by law or some governmental entity.”¹⁹ It is a “‘freedom,’ (i.e., a liberty marked by the absence of restraints or threats against its exercise) rather than a ‘right’ (i.e., an enforceable claim upon the assets of others).”²⁰ It is an exemption from something other than what people are required to do, somewhat like the common law privilege that one cannot be compelled to

11. Arthur O. Lovejoy, *Academic Freedom*, in I ENCYCLOPEDIA OF THE SOCIAL SCIENCES 384, 384 (Edwin A. Seligman ed., 1930).

12. *See id.*

13. *Id.*

14. *See* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1266 (1988) (referring to the two predominant definitions of academic freedom).

15. *Id.* at 1267. Metzger commented that it was only a “modest exaggeration to say that, as far as academic freedom was concerned, law was law, profession was profession, and the twain hardly ever met.” *Id.* at 1296.

16. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 254 (1989).

17. *See generally infra* Part III.D.

18. Phillipa Strum, *Why Academic Freedom? The Theoretical and Constitutional Context*, in ACADEMIC FREEDOM AFTER SEPTEMBER 11, 143, 145 (Beshara Doumani ed., 2006). The AAUP’s 1940 *Statement of Principles on Academic Freedom and Tenure* “has been endorsed by more than 190 professional organizations and learned societies as well as incorporated into hundreds of university and college faculty handbooks.” Brief for Thomas Jefferson Ctr. for the Protection of Free Expression & Am. Ass’n of Univ. Professors as Amici Curiae Supporting Respondents at 4, *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) (No. 04-473).

19. ANTHONY J. DIEKEMA, ACADEMIC FREEDOM AND CHRISTIAN SCHOLARSHIP 7-8 (2000).

20. William Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in THE CONCEPT OF ACADEMIC FREEDOM 59, 71 (Edmund L. Pincoffs ed., 1972).

testify against a spouse.²¹ And, as will be explained,²² the term “constitutional academic freedom” may be a misnomer, implying more judicial protection for academic speech under the First Amendment than is warranted under the case law.

B. Other Key Terms

1. Individual Academic Freedom vs. Institutional Academic Freedom

Scholars disagree on whether the Supreme Court recognizes a constitutional right of academic freedom at all,²³ and, if so, whether it is a right for professors (individual academic freedom), the college or university (institutional academic freedom), or both.²⁴

2. Categories of Speech

Professors speak and write both as private citizens and as college or university employees. Much of the confusion surrounding the analysis of Supreme Court case law appears to be the result of technical analyses of individual rights versus institutional rights. Such analyses seem to supplant the approach whereby cases are viewed under traditional First Amendment principles relating to the context of the speech—where it is made and under what circumstances. The following definitions of speech are useful in the analysis of the scope of protection for academic speech by teachers.

a. Core Academic Speech

A professor’s expression in the classroom or in connection with research is at the heart of academic speech. The term “core academic speech” will be used to refer to speech within the professor’s sphere of expertise. While potentially fraught with problems, this term at least captures what appears to be the primary

21. Frederick Schauer, *Academic Freedom: Rights as Immunities and Privileges*, in *ACADEMIC FREEDOM AND THE INCLUSIVE UNIVERSITY* 13–19 (Sharon E. Kahn & Dennis Pavlich eds., 2000).

22. See generally *infra* Part IV.

23. See Metzger, *supra* note 14, at 1289 (“A sizeable literature of legal commentary asserts that the Supreme Court constitutionalized academic freedom without adequately defining it”). However, Metzger believed that the Supreme Court knew what it meant when it first introduced the concept of constitutional academic freedom. *Id.* at 1291. And though the concept was “imperfectly communicated to the lower courts,” the Court never disavowed it. *Id.* Others view the Court’s discussion of academic freedom as anything but clear. See Byrne, *Academic Freedom*, *supra* note 16, at 257 (observing that the Court has “been far more generous in its praise of academic freedom than in providing a precise analysis of its meaning”). See also David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 *LAW & CONTEMP. PROBS.* 227, 230 (1990) (noting that the Court has “never explained systematically the theory behind its relatively recent incorporation of academic freedom into the first amendment [sic]”).

24. Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors’ Academic Freedom Rights Within the State’s Managerial Realm*, 91 *CALIF. L. REV.* 1061, 1072 (2003).

concern of the Supreme Court in its academic freedom decisions.²⁵

b. Extramural Speech

The term “extramural speech” is normally used to signify speech outside of the classroom and unrelated to academic scholarship.²⁶ Some leading scholars believe the term “academic freedom” should be reserved for core academic speech, because the right of a professor to speak or engage in political activity should be no greater than that of any other governmental employee.²⁷ But, from the beginning, the AAUP consciously included extramural speech within the meaning of academic freedom.²⁸ Those who advocated this approach before 1950 did so because “civil liberty had not yet developed to the point where those who exercised rights were protected against losing public employment.”²⁹

c. Intramural Speech

The term “intramural speech” has been used in different contexts. Sometimes it is used to refer to speech critical of college or university officials or academic colleagues.³⁰ On other occasions, it may refer to speech purely pertaining to personnel issues or other issues of public concern, such as quality of curriculum or instruction.³¹ Thus far, the Supreme Court has not specifically addressed intramural speech.³²

25. See *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1962 (2006) (stating that there is some argument that “expression related to academic scholarship or classroom instruction implicates additional constitutional interests”). The AAUP argued in its joint amicus curiae brief in *Garcetti* that lessening First Amendment protection for job-related speech would threaten academic freedom, because much of the “potentially controversial expression by university professors relates to the subject matter of the speaker’s academic expertise.” Brief for Thomas Jefferson Ctr. for the Protection of Free Expression & Am. Ass’n of Univ. Professors as Amici Curiae Supporting Respondents at 6–7, *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) (No. 04–473).

26. See Risa L. Lieberwitz, *The Corporatization of the University: Distance Learning at the Cost of Academic Freedom?*, 12 B.U. PUB. INT. L.J. 73, 83 (2002) (“The Declaration’s coverage of extramural speech was intended to cover speech outside a faculty member’s professional duties or disciplinary expertise . . .”).

27. See Byrne, *Academic Freedom*, *supra* note 16, at 264 (citing Van Alstyne, *The Specific Theory of Academic Freedom*, *supra* note 20, at 59).

28. See Metzger, *supra* note 14, at 1274–75.

29. Byrne, *Academic Freedom*, *supra* note 16, at 264.

30. Ailsa W. Chang, Note, *Resuscitating the Constitutional “Theory” of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, 53 STAN. L. REV. 915, 936 (2001).

31. Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1337–38 (1988). While discussing intramural speech, Finkin noted:

Speech by an academic over any matter of academic concern was considered protected. Thus, protest over the coerced resignation of a colleague, admission standards, athletics, library policy, the award of a degree, the quality (and probity) of administrative leadership, salary policies, and appeals to outside agencies such as accreditation associations, and the AAUP itself, were all encompassed.

Id. (citations omitted).

32. Chang, *supra* note 30, at 936–37.

II. ORIGINS OF PROFESSIONAL ACADEMIC FREEDOM

A. The Academy

Today the popular image of an “academy” is a landscaped collection of ivy-covered buildings. But the first academy was a place just outside the walls of Athens, a *gymnasion*, or public park in a grove of trees, named after the Greek hero Hekademos.³³ Philosophers met there to discuss ethics, philosophy, and science. Plato purchased an adjacent property that enabled him to move easily from public park to private quarters with his chosen followers—a useful metaphor for intramural and extramural aspects of academic freedom today.³⁴

To his successors,³⁵ Plato passed on “something of a physical plant and a fairly distinctive, though still quite open-ended, intellectual tradition.”³⁶ Members of the Academy may have had a desire to better their fellow citizens, but they were primarily dedicated to truth.³⁷ Academic freedom is a direct descendant of this search for truth, much as it has existed since “Socrates’ eloquent defense of himself against the charge of corrupting the youth of Athens.”³⁸

B. The Early European Colleges and Universities

The earliest colleges and universities in Europe were established and funded by the Church. Despite obvious practical boundaries, medieval colleges and universities were autonomous corporations, essentially self-governing, where faculty made the rules.³⁹ They were allowed a considerable degree of intellectual freedom because of the belief that learning was important not only for religion but also for the sake of learning itself.⁴⁰

The historian Henry Steele Commager observed that, over time, four major functions of colleges and universities evolved and eventually merged. The first function was to train young men for the professions, such as medicine, law, and the

33. JOHN DILLON, *THE HEIRS OF PLATO: A STUDY OF THE OLD ACADEMY (347 – 274 BC)* 2 (2003).

34. *Id.* at 3–4. When Plato was 80 and losing his memory, Aristotle ambushed him in the public area and began to question him aggressively. Plato walked inside his quarters with his companions to get away from Aristotle. A few months later, a friend returned from a trip and asked why Plato was not to be seen in the public area. He was told that Aristotle had been giving him a bad time, and that Plato was “philosophizing in his own garden.” *Id.*

35. *Id.* at 29. The first successor was Plato’s nephew, Speusippus.

36. *Id.*

37. RUSSELL KIRK, *ACADEMIC FREEDOM: AN ESSAY IN DEFINITION* 11 (1955).

38. RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 4 (1955). Socrates observed, rhetorically, that some may ask why he could not hold his tongue and go to another city where no one would interfere with him. His answer is one of the most quoted statements in history, that the greatest good of man is to daily converse about virtue, and “the life which is unexamined is not worth living.” 3 PLATO, *Apology*, in *THE WORKS OF PLATO* 89, 129 (Benjamin Jowett, trans., Tudor Publishing Co. 1937).

39. HOFSTADTER & METZGER, *supra* note 38, at 6.

40. *Id.* at 5.

clergy.⁴¹ The second function, arising in Oxford and Cambridge, was to communicate the heritage of the past and train the young in “intellectual discipline and in character.”⁴² The third function, emerging in Germany in the nineteenth century, was to “carry on research” to “expand the boundaries of knowledge.”⁴³ The fourth function, which was unique to American colleges and universities, was “to combine teaching, character development, professional training, and service to the community.”⁴⁴

C. The German Influence

The modern research institution is modeled on the nineteenth-century German university.⁴⁵ Rather than focusing on vocational training, the German university was dedicated to educating not “pastors but theologians, not lawyers but jurists, not practitioners but medical scientists.”⁴⁶ Three distinct types of academic freedom evolved in Germany: academic freedom for students (*lernfreiheit*), for faculty (*lehrfreiheit*), and for the university (*freiheit der wissenschaft*).⁴⁷

1. *Lernfreiheit*—Academic Freedom for Students

Lernfreiheit was originally more important in Germany than *lehrfreiheit*.⁴⁸ It was intended to provide freedom to learn, to study whatever one chose, and to attend or avoid any class.⁴⁹ In 1963, Commager wrote that America had largely lost sight of *lernfreiheit* and that it was “high time that it be restored,” so that “our universities are not to be merely advanced preparatory schools.”⁵⁰ He concluded that “nowhere else in the world do young persons talk so much about their liberty and do so little with it when they have it as in the United States.”⁵¹

Lernfreiheit was reserved for the best students, as a reward for achievement. It was also a disclaimer by universities of any control over their students’ curricula and their private lives.⁵² More than 9,000 Americans studied in Germany during the latter part of the nineteenth century.⁵³ James Morgan Hart’s account of his

41. Henry Steele Commager, *The University and Freedom: “Lehrfreiheit” and “Lehrfreiheit,”* 34 J. HIGHER EDUC. 361, 361 (1963).

42. *Id.*

43. *Id.*

44. *Id.*

45. HOFSTADTER & METZGER, *supra* note 38, at 369.

46. *Id.* at 373–74. Johns Hopkins University, founded in 1876, was the first American college or university based on the German model. *Id.* at 377. Of the fifty-three professors at Johns Hopkins in 1884, nearly all had studied in Germany. *Id.*

47. Metzger, *supra* note 14, at 1269–70. This section focuses on the first two types of academic freedom. Academic freedom for the institution was ignored for many years but seems to have made a comeback of sorts in the development of institutional academic freedom, discussed *infra* Part VI.

48. Commager, *supra* note 41, at 364.

49. *Id.*

50. *Id.*

51. *Id.*

52. Metzger, *supra* note 14, at 1270.

53. HOFSTADTER & METZGER, *supra* note 38, at 367.

years at the university in Göttingen in the 1860s provides an interesting glimpse of the experience from an American's perspective:

By a course of lectures in a German university is meant a series of lectures on one subject, delivered by one man, during one semester. A German university has, strictly speaking, *no course of instruction*; there are no classes, the students are not arranged according to their standing by years, there are no recitations, there is no grading, until the candidate presents himself at the end of three or four years for his doctor's degree All students stand on a footing of perfect equality in the eye of [the] university, and that theoretically each one is free to select such lectures in his faculty as he sees fit to hear.⁵⁴

Practically speaking, German students were expected to have definite objectives in mind, such as becoming a theologian, lawyer, or physician.⁵⁵ Allowing students to attend lectures of their choice, thus providing a form of competition among the professors, was deemed important.

It is practically the only way that newly matriculated students have of deciding between rival lecturers or of selecting some lecture that is not embraced in the ordinary routine of study. On this, as on so many points, the Germans display a great deal of practical sense. The student is free to roam about for two or three weeks, but at the end of that time it is expected of him that he come to a decision and settle down either to steady work or to steady idleness.⁵⁶

But that decision was largely up to students.⁵⁷ To a nineteenth-century German student, *lernfreiheit* was a "precious privilege, a recognition of his arrival at man's estate."⁵⁸

54. JAMES MORGAN HART, *GERMAN UNIVERSITIES: A NARRATIVE OF PERSONAL EXPERIENCE* 45 (1874) (emphasis in original).

55. *Id.* at 46.

56. *Id.* at 47–48.

57. HOFSTADTER & METZGER, *supra* note 38, at 386 (describing the right of the German student to be "free to roam from place to place, sampling academic wares; that wherever they lighted, they were free to determine the choice and sequence of course, and were responsible to no one for regular attendance; that they were exempted from all tests save the final examination; that they lived in private quarters and controlled their private lives").

58. *Id.* at 387.

2. *Lehrfreiheit*—Academic Freedom for Teachers

Lehrfreiheit means “teaching freedom”—the absence of classroom censorship.⁵⁹ In addition to seeking truth for truth’s sake, a university professor was outside the chain of command common to most government employees.⁶⁰ While, to some, the American version purports to permit a professor to say or write virtually anything, *lehrfreiheit* was more limited to the role of the professor in connection with his or her field.⁶¹ It was a limited privilege, holding teachers accountable for political and social conduct as private citizens.⁶² Inside the academic sphere, German professors saw themselves as “oracles of transcendent truths.”⁶³ Outside the academy, it was assumed that professors, as civil servants, were to be “circumspect and loyal.”⁶⁴

To German professors, their professional status as university scholars and their attendant right of *lehrfreiheit* combined to elevate them to a special status in society.⁶⁵ Academic freedom distinguished professors from other civil servants and freed them to pursue scholarship without the approval of church or state—a distinct privilege not available to most citizens.⁶⁶

D. Academic Freedom in the United States

1. The Early American Colleges & Universities

The first colleges and universities in the United States were founded by Protestants and were largely governed by lay officials. As Richard Hofstadter noted “it was not a very drastic step from admitting men . . . who were not teachers into the government of colleges,” and lay church governance became the model for the Protestant colleges and universities.⁶⁷ Since the lay trustees had neither the expertise nor the time for day-to-day oversight they delegated it to presidents of the colleges and universities, creating a powerful post, especially since there were few professional teachers in the schools at the time.⁶⁸ American colleges and universities were “mostly no more than academies or high schools,” lacking the professional faculties of their European counterparts.⁶⁹

59. Metzger, *supra* note 15, at 1269.

60. *Id.*

61. Arthur Schlesinger, Jr., *Academic Freedom: A Review Essay*, 27 J. HIGHER EDUC. 338, 339 (1956).

62. Metzger, *supra* note 14, at 1269–70.

63. HOFSTADTER & METZGER, *supra* note 38, at 388.

64. *Id.* at 389.

65. *See id.* at 387.

66. Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461, 474–75 (2005).

67. HOFSTADTER & METZGER, *supra* note 38, at 122.

68. *See id.* at 125.

69. Schlesinger, *supra* note 61, at 339.

2. Academic Freedom for Students

Charles W. Eliot, the legendary president of Harvard University from 1869 to 1909, proposed academic freedom for all students from the traditional curriculum of a single set of required courses, regardless of “individual differences in capacity, interest, and aim.”⁷⁰ In an 1885 speech, Eliot addressed the arguments that young people need a required course of study.

An elective system does not mean liberty to do nothing. The most indifferent student must pass a certain number of examinations every year I must add that the policy of an institution of education, of whatever grade, ought never to be determined by the needs of the least capable students; and that a university should aim at meeting the wants of the best students at any rate, and the wants of inferior students only so far as it can meet them without impairing the privileges of the best. A uniform curriculum, by enacting superficiality and prohibiting thoroughness, distinctly sacrifices the best scholars to the average. Free choice of studies gives the young genius the fullest scope without impairing the chances of the drone and the dullard.⁷¹

Andrew F. West of Princeton responded sharply to Eliot, arguing that the proposal “forces upon our American colleges a crisis greater than any they have hitherto been called upon to meet.”⁷² West agreed that students should be allowed, at some stage, the freedom to choose their studies and govern themselves and acknowledged that colleges and universities were, in theory, the proper place.⁷³ To West, however, the American institution was “not in any sense a university, and [had] no early prospect of becoming one.”⁷⁴ He pointed out that before entering the college or university, German students had been through a rigorous course of study, including the gymnasium—a nine year course of study consisting of Latin, Greek, German, French, religious instruction, mathematics, history, geography, writing, drawing, exercise, and music—and that students were required to pass a severe final examination after completing the gymnasium.⁷⁵

In 1907, Eliot gave a speech entitled *Academic Freedom*.⁷⁶ He asserted that college and university students should find an enlargement of their freedom to choose their studies and professors.⁷⁷

[I]n a college or university there is perfect solidarity of interests between teachers and taught in respect to freedom. A teacher who is

70. Charles H. Russell, *Charles W. Eliot and Education*, 28 J. HIGHER EDUC. 433, 434 (1957).

71. CHARLES W. ELIOT, EDUCATIONAL REFORM: ESSAYS AND ADDRESSES 141–42 (1909).

72. Andrew F. West, *What is Academic Freedom?*, 140 N. AM. REV. 432 (1885). See also HOFSTADTER & METZGER, *supra* note 38, at 397.

73. West, *supra* note 72, at 432.

74. *Id.*

75. *Id.* at 436–37. West also pointed out that the German gymnasium averaged about thirty lessons a week while the average in the United States was about twenty lessons a week. *Id.* at 437.

76. Charles W. Eliot, *Academic Freedom*, 26 SCIENCE 1 (1907).

77. *Id.* at 7.

not supposed to be free never commands the respect or personal loyalty of competent students, and students who are driven to a teacher are never welcome, and can neither impart nor imbibe enthusiasm.⁷⁸

Students today enjoy significant freedom of choice as to electives and majors, although *lernfreiheit* is rarely mentioned. The Supreme Court has recognized the rights of student expression under the First Amendment,⁷⁹ but one that is a subset of First Amendment law rather than the German concept of academic freedom for students.⁸⁰

3. Academic Freedom for Faculty—The Role of the AAUP

At the AAUP's 1915 organizational meeting, the Committee on Academic Freedom and Academic Tenure, sometimes called "Committee A," was formed and was headed by Arthur O. Lovejoy of Johns Hopkins University and E.R.A. Seligman of Columbia University. In that year, the committee wrote the *General Report of the Committee on Academic Freedom and Academic Tenure*.⁸¹ Seligman and Lovejoy were directly familiar with the firing of economist Edward A. Ross in 1900 from Stanford University.⁸² Ross had advocated for free silver and against Asian labor importation, to the distress of Stanford's proprietor, Mrs. Leland Stanford,⁸³ who famously wrote to the president of Stanford: "I must

78. *Id.* at 9.

79. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (holding that the wearing of black armbands by minor students in protest of the Vietnam War was akin to "pure speech" and thus protected, so long as it did not "materially and substantially interfere" with the requirements of appropriate discipline and collide with the rights of others). *But see* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding that a high school was justified in suspending a student who used a graphic and explicit sexual metaphor during a mandatory assembly, contrasting the political viewpoint at stake in *Tinker*); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988) (upholding the right of a high school to exercise some censorship control in a student newspaper that was part of a journalism course, and distinguishing *Tinker* by noting the difference between tolerating student expression and school-sponsored activities); *Morse v. Frederick*, 127 S.Ct. 2618, 2627 (2007) (holding that the high school was justified in suspending a student for refusing to take down a banner that read "BONG HiTS 4 JESUS," on the ground that the speech in question could be seen as promoting drug use, in violation of a legitimate school policy).

80. Ironically, one of the few references to the concept of *lernfreiheit*, although not by name, is found in *Edwards v. Aguillard*, 482 U.S. 578 (1987). A Louisiana statute required the teaching of creationism where evolution was taught. The legislature's stated purpose was to protect academic freedom. *Id.* at 586. The Supreme Court struck down the statute on Establishment Clause grounds. Writing for the majority, Justice Brennan agreed with the Fifth Circuit Court of Appeals that academic freedom embodies the principle that individual instructors are at liberty to teach what they deem appropriate in the exercise of their professional judgment, and concluded that the statute actually served to diminish academic freedom. *Id.* n.6. Justice Scalia, in his dissent, argued that the legislature's meaning of the term academic freedom was "freedom from indoctrination," as it gave students a "choice" rather than being subjected to "indoctrination on origins." *Id.* at 628 (Scalia, J., dissenting).

81. Metzger, *supra* note 14, at 1267.

82. Robert Post, *The Structure of Academic Freedom*, in *ACADEMIC FREEDOM AFTER SEPTEMBER 11*, 65 (Beshara Doumani ed., 2006).

83. *Id.*

confess I am weary of Professor Ross, and I think he ought not to be retained at Stanford University I trust that before the close of this semester Professor Ross will have received notice that he will not be re-engaged for the new year.”⁸⁴ Eventually, the president obliged and Lovejoy resigned from Stanford in protest.⁸⁵ Consequently, the “first professorial inquiry into an academic freedom case was conceived and brought into being—the predecessor if not directly the parent of Committee A of the AAUP.”⁸⁶

a. *1915 Declaration*

The Committee drafted the *1915 Declaration of General Principles on Academic Freedom and Academic Tenure*, commonly known as the *1915 Declaration*.⁸⁷ The opening lines acknowledged the German tradition.

The term “academic freedom” has traditionally had two applications—to the freedom of the teacher and to that of the student, *Lehrfreiheit* and *Lernfreiheit*. It need scarcely be pointed out that the freedom which is the subject of this report is that of the teacher. Academic freedom in this sense comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action. The first of these is almost everywhere so safeguarded that the dangers of its infringement are slight. It may therefore be disregarded in this report. The second and third phases of academic freedom are closely related, and are often not distinguished. The third, however, has an importance of its own, since of late it has perhaps more frequently been the occasion of difficulties and controversies than has the question of freedom of intra-academic teaching. All five of the cases which have recently been investigated by committees of this Association have involved, at least as one factor, the right of university teachers to express their opinions freely outside the university or to engage in political activities in their capacity as citizens.⁸⁸

From the beginning, the AAUP rejected academic freedom for students as a concern.⁸⁹ About half the members of the Seligman committee studied in Germany, so it was clearly not an oversight; it was a deliberate amputation of the

84. *Id.* (citing ORRIN LESLIE ELLIOTT, *STANFORD UNIVERSITY: THE FIRST TWENTY-FIVE YEARS* 341 (1937)).

85. *Id.*

86. Thomas Haskell, *Justifying the Rights of Academic Freedom in the Era of “Power / Knowledge,”* in *THE FUTURE OF ACADEMIC FREEDOM* 51 (Louis Menand ed., 1996) (citing HOFSTADTER & METZGER, *supra* note 38, at 442–43). See Haskell, *supra* at 49–53 (providing a detailed description of the Ross controversy).

87. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *1915 Declaration of Principles on Academic Freedom & Academic Tenure*, in *POLICY DOCUMENTS & REPORTS* 291 (10th ed. 2006) [hereinafter *1915 Declaration*].

88. *Id.* at 292.

89. Horwitz, *supra* note 66, at 477.

concept.⁹⁰ Interestingly, the *1915 Declaration* indicates that the Seligman committee did not perceive core academic speech to be at risk. The focus was on extramural speech—something that went beyond the German doctrine.⁹¹

The AAUP was obviously not obliged to clone *lehrfreiheit*. But why should professors be given a special form of protection, as compared to any other professional? William Van Alstyne, writing in 1972, argued that this expanded use of academic freedom had created a disservice to the profession.

[B]y heaping up so much in reliance upon “academic freedom,” while saying so little about freedom of speech as a universal civil right irrespective of one’s vocation, . . . we now find ourselves committed to a view that logically allows to academics less ordinary freedom of speech than other persons may be entitled to exercise.⁹²

According to Van Alstyne, academic freedom harmed the profession.⁹³ First, “it provided substance to a widespread belief that the *professoriate* sees itself as an extraordinary elite.”⁹⁴ This led to a loss of public goodwill. Of greater relevance, “the price we pay is the much greater cost of the lad who cried ‘wolf’ so often when it was false that few would pay attention when it was true,” leading to public indifference when an authentic issue of academic freedom arises.⁹⁵ Second, it “delayed the specific assimilation of academic freedom into constitutional law.”⁹⁶ It is therefore a “marvelous irony” that constitutional law had developed to protect other public employees subjected to retaliation for the exercise of free speech, while the Supreme Court seemed willing to protect professors’ speech rights only outside the confines of academia.⁹⁷

A principle concern of the AAUP was the power of trustees and overseers.⁹⁸

90. Metzger, *supra* note 14, at 1271. Metzger pointed out that in the late 1960s the AAUP joined other groups in drafting a “cautious magna carta of student rights,” but had never investigated a campus incident involving an alleged violation of student freedom as the sole complaint. *Id.* at 1272. He observed that the AAUP has always assumed that student freedom is “something different—and something less.” *Id.* This “magna carta” is the *Joint Statement on Rights and Freedoms of Students*. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Joint Statement on Rights and Freedoms of Students*, in *POLICY DOCUMENTS & REPORTS* 273, 273 (10th ed. 2006). Among other things, it encourages freedom of expression by students, as well as freedom of association. *Id.*

Similarly, the authors of the *1915 Declaration* wrote *freiheit der wissenschaft* out of the scope of academic freedom. According to some, however, courts have placed it squarely within the scope of legal academic freedom. Horwitz, *supra* note 66, at 477.

91. Schlesinger, *supra* note 61, at 339. The Committee was divided on this point, however, with some members believing that “academic freedom would lose its rationale if it were stretched to protect activities not performed in the course of professional duty.” Metzger, *supra* note 14, at 1274. Meanwhile, others on the Committee thought it could extend beyond the classroom and laboratory, “but only when academics stuck to topics pertinent to their discipline.” *Id.*

92. Van Alstyne, *The Specific Theory of Academic Freedom*, *supra* note 20, at 60.

93. *Id.* at 63.

94. *Id.* (emphasis added).

95. *Id.* at 64.

96. *Id.*

97. *See id.* at 68.

98. *1915 Declaration*, *supra* note 87, at 292.

The authors first took on the proprietary school, acknowledging that the trustees are confined by the scope of the terms of the endowment as established by the proprietors, who are entitled to demand that everything be subordinated to that end.⁹⁹ Similarly, institutions founded and funded by wealthy persons can have as their purpose not the advancement of knowledge by impartial and unrestricted research but the subsidization of their opinions.¹⁰⁰ The authors of the *1915 Declaration* then compared private institutions to public ones, arguing that public institutions hold a public trust and thus “have no moral right to bind the reason or the conscience of any professor.”¹⁰¹ Those in academia are in a unique, even exalted position.

The above-mentioned conception of a university as an ordinary business venture, and of academic teaching as a purely private employment, manifests also a radical failure to apprehend the nature of the social function discharged by the professional scholar. While we should be reluctant to believe that any large number of educated persons suffer from such a misapprehension, it seems desirable at this time to restate clearly the chief reasons, lying in the nature of the university teaching profession, why it is to the public interest that the professional office should be one both of dignity and of independence.¹⁰²

If education is the cornerstone of society and progress in scientific knowledge is essential to civilization, then “few things can be more important than to enhance the dignity of the scholar’s profession, with a view to attracting into its ranks [people] of the highest ability, of sound learning, and of strong and independent character.”¹⁰³ The authors of the report argued that the pecuniary rewards of a teaching career “are not, and doubtless never will be” equal to other professions, and it is not even “desirable that [people] should be drawn into this profession by the magnitude of the economic rewards.”¹⁰⁴ Instead, people of “high gifts and character” should be attracted to the profession by the assurance of an “honorable and secure position, and of freedom to perform honestly and according to their own consciences the distinctive and important function which the nature of the profession lays upon them.”¹⁰⁵

99. *Id.* at 292–93.

100. *Id.* at 293. Somewhat disingenuously, the Committee wrote that it did not desire to “express any opinion” on the desirability of such institutions, “[b]ut [that] it is manifestly important that they should not be permitted to sail under false colors.” *Id.*

101. *Id.* at 293.

102. *Id.* at 294.

103. *Id.*

104. *Id.*

105. *Id.*

With the *1915 Declaration*, the AAUP began the process of persuading authorities that faculty members should not be considered “employees” in the traditional sense. This was in direct response to the traditional treatment of college and university professors as ordinary employees under the common law master-servant doctrine, where employment-at-will meant that professors could be terminated for any cause.¹⁰⁶ The Committee believed that professors should be treated as having a unique status, thus being entitled to special privileges, in return for their sacrifices.

So far as the university teacher’s independence of thought and utterance is concerned—though not in other regards—the relationship of professor to trustees may be compared to that between judges of the federal courts and the executive who appoints them. University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees than are judges subject to the control of the President with respect to their decisions¹⁰⁷

Robert Post asserts that we have forgotten that the original purpose of academic freedom was to redefine the employment relationship. He also states that this “amnesia is unfortunate,”¹⁰⁸ for the following reasons:

[I]t has facilitated the rise of an entirely different conception of academic freedom. In the past half-century, America has developed a culture of rights, and we have accordingly come to conceive of the structure of academic freedom in terms of “rights of free expression, freedom of inquiry, freedom of association, and freedom of publication.” We now tend to conceptualize academic freedom on the model of individual First Amendment rights possessed by all “citizens in a free society.” The difficulty is that this reconceptualization of academic freedom can neither explain the basic structure of faculty obligations and responsibilities within the universities, nor provide an especially trenchant defense of the distinctive freedoms necessary for the scholarly profession.¹⁰⁹

Nevertheless, Post concluded that the claim to self-regulation has “proved remarkably durable and successful,” compared to other professions which have seen increasing government regulation.¹¹⁰ This may be due to public indifference to self-governance by professors as compared to doctors and lawyers. But it may be attributable to the success of the *1915 Declaration* in persuading the public that colleges and universities have generally fulfilled their function and that success would be jeopardized by a limitation on academics.¹¹¹

The authors of the *1915 Declaration* linked academic freedom to the three

106. Metzger, *supra* note 14, at 1278.

107. *1915 Declaration*, *supra* note 87, at 295.

108. Post, *supra* note 82, at 62.

109. *Id.* (citations omitted).

110. *Id.* at 71.

111. *See id.* at 71–72.

purposes of a college or university. The first is to “promote inquiry and advance the sum of human knowledge” through research.¹¹² Colleges and universities increasingly were becoming home to scientific research, and, in all areas of knowledge, “the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results.”¹¹³ The second function is teaching, which, for a long time, was the only function of American colleges and universities.¹¹⁴ No professor can be successful without the respect of students and “their confidence in his intellectual integrity.”¹¹⁵ If students do not believe that the professor is true to himself, the “virtue of the instruction as an educative force is incalculably diminished.”¹¹⁶ The third function of “modern” colleges or universities is to develop experts for the community, to be “of use to the legislator or the administrator,” and, for this, professors must “enjoy their complete confidence in the disinterestedness of his conclusions.”¹¹⁷ Colleges and universities cannot perform these functions without “accepting and enforcing to the fullest extent the principle of academic freedom,” because their responsibilities are to the community at large.¹¹⁸

Today, college and university professors are in a delicate position. They fought to achieve professional status, and, having achieved it, their status became an obstacle to public acceptance of academic freedom. In 1956, Arthur Schlesinger, Jr. observed that perhaps the reason for the erosion of academic freedom, ironically, was the status of college and university teaching as a profession—the higher the status “the more sensitive a group often becomes to real or fancied threats.”¹¹⁹ But an attack on the professoriate’s status, or an end-around as Schlesinger characterized it, is damaging because “if the campaign against their status succeeds, then the battle against their liberty becomes only a mopping-up operation.”¹²⁰ The privilege concept is important to understanding the way courts have treated academic freedom in a constitutional sense. As Sidney Hook suggested, a professional right such as academic freedom must be earned, while other rights, such as human rights, are inherent.¹²¹

While professors owe a duty to the community and depend on it to fund their work, they want no interference from it. The *1915 Declaration* was not only

112. *1915 Declaration*, *supra* note 87, at 295.

113. *Id.*

114. *Id.* at 296.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* See also John R. Searle, *Two Concepts of Academic Freedom*, in *THE CONCEPT OF ACADEMIC FREEDOM* 87 (Edmund L. Pincoffs ed., 1972) (“The purpose of the university is to benefit the community that created and maintains it, and mankind in general, through the advancement and dissemination of knowledge.”).

119. Schlesinger, *supra* note 61, at 341.

120. *Id.* at 342.

121. See SIDNEY HOOK, *ACADEMIC FREEDOM AND ACADEMIC ANARCHY* 35 (1970). Hook whimsically added that while anyone “has a human right to talk nonsense about anything, anywhere, anytime . . . one must be professionally qualified to talk nonsense in a university.” *Id.* at 36.

concerned with funding; it was concerned with something more elusive—public opinion.

The tendency of modern democracy is for men to think alike, to feel alike, and to speak alike. Any departure from the conventional standards is apt to be regarded with suspicion. Public opinion is at once the chief safeguard of a democracy, and the chief menace to the real liberty of the individual. It almost seems as if the danger of despotism cannot be wholly averted under any form of government. In a political autocracy there is no effective public opinion, and all are subject to the tyranny of the ruler; in a democracy there is political freedom, but there is likely to be a tyranny of public opinion.¹²²

The report's most memorable phrase was that a college or university is an "inviolable refuge from such tyranny" and an "intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen."¹²³

The *1915 Declaration* is important to the doctrine of professional academic freedom as it exists today. But it must always be kept in mind that it is a "professional norm of ethics . . . not grounded in any constitutional or other legal right and is not specifically enforced by courts."¹²⁴ Unlike a constitutional right, academic freedom, as empowered by the AAUP, applies equally to public and private colleges and universities, so long as they have signed onto the *1915 Declaration* or the AAUP's *1940 Statement of Principles*.¹²⁵

b. *1940 Statement of Principles*

Since the *1915 Declaration* had no legal enforcement mechanisms,¹²⁶ the AAUP sought to establish relationships with other organizations, such as the American Association of Universities and the American Association of Colleges.¹²⁷ The result was the *1940 Statement of Principles* ("*1940 Statement*") which was based on certain key assumptions: (1) colleges and universities exist for the common good; (2) academic freedom is essential to that purpose; (3) tenure is essential to academic freedom, as well as job security; and (4) academic freedom carries with it duties which are correlative with rights.¹²⁸

122. *1915 Declaration*, *supra* note 87, at 297.

123. *Id.*

124. Lynch, *supra* note 24, at 1067.

125. *Id.*

126. Jennifer Elrod, *Academics, Public Employee Speech, and the Public University*, 22 BUFF. PUB. INT. L.J. 1, 19–20 (2003–2004) ("[T]here was no avenue through which the AAUP could require or compel a particular university or college to comply with AAUP principles and practices, because the organization had no powers other than persuasion to enforce its policies, goals, and principles.").

127. R. Kenton Bird & Elizabeth Barker Brandt, *Academic Freedom and 9/11: How the War on Terrorism Threatens Free Speech on Campus*, 7 COMM. L. & POL'Y 431, 438 (2002).

128. *Id.* at 439. See AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure*, in POLICY DOCUMENTS & REPORTS 3, 3 (10th ed. 2006) [hereinafter *1940 Statement*].

The *1940 Statement* provides, in relevant part, that professors “should be careful not to introduce into their teaching controversial matter that has no relation to their subject.”¹²⁹ Further, as officers of educational institutions, when professors speak or write as citizens, the *1940 Statement* provides:

[Professors] should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge [their] profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.¹³⁰

Responsibilities that come with genuine academic freedom are sometimes overlooked. Professors have considerable latitude within their respective fields, but they should not claim absolute license for expression outside of their field.¹³¹

The AAUP has no legal enforcement mechanisms,¹³² but its definition of academic freedom has been endorsed by most colleges and universities and incorporated into their handbooks.¹³³ The most that the AAUP can do is to place a school on its list of censured colleges and universities, though some critics question the impact that this list has on administrative decisions.¹³⁴ Yet, because they “do not wish to place themselves outside the community of colleges and universities,”¹³⁵ most colleges and universities respond to AAUP action. In any case, the AAUP’s success in obtaining the involvement of other organizations, along with its investigations and censure list, has undoubtedly led to a greater understanding and respect for academic freedom.¹³⁶

c. *A Statement on Extramural Utterances*

In 1964, Committee A of the AAUP issued *Committee A Statement on Extramural Utterances* to clarify sections of the *1940 Statement* relating to extramural speech.¹³⁷ This brief statement referred to an interpretation of the *1940 Statement* which stated that if a college or university administration believed a professor had not observed his “special position in the community,” or that the

129. Bird & Brandt, *supra* note 127, at 439.

130. *Id.* at 439.

131. Post, *supra* note 82, at 82 (observing that like the *1915 Declaration*, the *1940 Statement* seems simultaneously to claim the right of faculty to speak as citizens and yet to diminish that freedom by imposing on professors the special obligations to be accurate and to exercise appropriate restraint).

132. Elrod, *supra* note 126, at 20.

133. Metzger, *supra* note 14, at 1266.

134. Elrod, *supra* note 126, at 23.

135. Bird & Brandt, *supra* note 127, at 439.

136. *Id.*

137. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Committee A Statement on Extramural Utterances*, in *POLICY DOCUMENTS & REPORTS* 32, 32 (10th ed. 2006) [hereinafter *Committee A*].

“extramural utterances” of the professor raised “grave doubts concerning his fitness for his position, it may proceed to file charges.”¹³⁸ In cases involving these charges, “it is essential that the hearing should be conducted by an appropriate—preferably elected—faculty committee,” that the “controlling principle” is that extramural utterances “cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member’s unfitness for his position,” and that the “final decision should take into account the faculty member’s entire record as a teacher and scholar.”¹³⁹

E. Professional Academic Freedom Today

Professional academic freedom is alive and well. Its protections come from a tradition of societal deference and professional respect, often incorporated into college and university policies. It is more meaningful than a legal right because it is more accessible to the professor and more practical. Litigation is expensive and emotionally draining, not to mention it is always dangerous to shoot at the king. Moreover, because this type of academic freedom is a professional doctrine, it operates on a daily basis at all colleges and universities. However, occasionally there is a breach in the academic fortress, and the next line of defense, in some instances, is the court.

III. CONSTITUTIONAL ACADEMIC FREEDOM

Seventy years ago the author of a Yale Law Journal article wrote that it is “extremely difficult to frame a legal action” for violations of academic freedom, because it is neither a property right nor a constitutional privilege.¹⁴⁰ Consequently, the issue of academic freedom was “seldom clearly raised, and, in fact, scarcely ever mentioned in the cases.”¹⁴¹

Contrasting those bleak observations to then-recent case law, a law professor in 1963 was encouraged about the possibility of a “substantial degree of judicial protection” for academic freedom under the Constitution.¹⁴² Whether his enthusiasm was ultimately warranted is debatable, though professors have a better chance of finding protection in the courts today than seventy years ago. A first source of protection can be found in the professor’s contract with the college or university if academic freedom has been incorporated into that contract. In that situation, a breach of contract claim may arise from an express provision, a source incorporated by reference, or a custom or tradition of academic freedom.¹⁴³ Contractual enforcement through college or university policies or faculty

138. *Id.*

139. *Id.* (“Extramural utterances rarely bear upon the faculty member’s fitness for his position.”).

140. Comment, *Academic Freedom and the Law*, 46 YALE L.J. 670, 671 (1937).

141. *Id.* at 676.

142. William P. Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROBS. 447, 449 (1963).

143. Jim Jackson, *Express and Implied Contractual Rights to Academic Freedom in the United States*, 22 HAMLIN L. REV. 467, 473 (1999).

handbooks is possible,¹⁴⁴ though contract law in this area is not well defined.¹⁴⁵ A second potential source for judicial protection lies in the constitutions of some states,¹⁴⁶ which effectively limit state legislatures' abilities to interfere with the governance of colleges and universities.¹⁴⁷

Constitutional academic freedom is the focus of this Part. While, in some situations, it is an important safeguard of academic freedom, it suffers from some serious limitations. First, because of the state action doctrine, which effectively limits First Amendment protection to governmental action, there is virtually no constitutional protection for professors at private colleges and universities.¹⁴⁸ That gap is significant, since about one-third of all full-time faculty in the United States teach in private colleges or universities.¹⁴⁹ At best, then, constitutional academic freedom covers two-thirds of the profession. Second, as will be discussed in Part V, even professors at public colleges or universities may find their speech to be outside the scope of constitutional protection under the public employee speech doctrine.

We will begin the story of judicial treatment of academic freedom with what appears to be the first reported case to use the term "academic freedom," and then turn to the evolution of constitutional treatment of academic freedom by the Supreme Court.

144. *Id.* at 477–78.

145. Bird & Brandt, *supra* note 127, at 440.

146. Byrne, *Academic Freedom*, *supra* note 16, at 327.

147. *Id.* The focus of these provisions is on the institution, however, and, according to Byrne, the tradition of constitutional autonomy for state universities has contributed to the federal right of institutional academic freedom. *Id.*

148. *Id.* at 299. Interestingly, California has extended legal protection to student speech at private postsecondary institutions through the "Leonard Law." CAL. [EDUC.] CODE § 94367 (West 1992).

149. For the academic year 2004–05, of the 530,000 faculty members at Title IV degree-granting institutions, 359,509 faculty members, of all ranks, were at public institutions, and 170,491 were at private institutions. National Center for Education Statistics, *Full-time instructional faculty at Title IV degree-granting institutions, by academic rank, 2004–05*, http://nces.ed.gov/das/library/tables_listings/show_nedrc.asp?rt=p&tableID=2613 (last visited Sept. 18, 2007). A Title IV institution is one that has a written agreement with the Secretary of the Department of Education to participate in federal student financial assistance programs under 20 U.S.C. § 1070. National Center for Education Statistics, *The Integrated Postsecondary Education Data System (IPEDS)*, <http://nces.ed.gov/ipeds/glossary/index.asp?id=465> (last visited Sept. 18, 2007).

A. False Start—The Bertrand Russell Case

Academic freedom had been firmly embedded in the AAUP documents for more than twenty-five years when a reported case first included the words “academic freedom” in its opinion. In *Kay v. Board of Higher Education of the City of New York*,¹⁵⁰ a taxpayer, Jean Kay,¹⁵¹ challenged the appointment of philosopher and mathematician Bertrand Russell to the philosophy chair at the City College of New York on several grounds.¹⁵² The principal ground was that his appointment was against public policy because Russell had “taught in his books immoral and salacious doctrines.”¹⁵³ The Board moved to dismiss the petition. Justice McGeehan ruled on the merits that Russell was unfit to teach at the college.¹⁵⁴ The opinion is devoid of adherence to procedure, and it is replete with inconsistencies and rationalizations.¹⁵⁵ McGeehan’s comments should be recounted at length to remind us of the need for a clear and principled legal basis for academic freedom.

[H]is appointment violates a perfectly obvious canon of pedagogy, namely, that the personality of the teacher has more to do with forming a student’s opinion than many syllogisms. A person we despise and who is lacking in ability cannot argue us into imitating him. A person whom we like and who is of outstanding ability, does not have to try. It is contended that Bertrand Russell is extraordinary. *That makes him the more dangerous* When we consider how susceptible the human mind is to the ideas and philosophy of teaching professors, it is apparent that the board of higher education either disregarded the probable consequences of their acts or were more concerned with advocating a cause that appeared to them to present a challenge to so-called

150. 18 N.Y.S.2d 821 (Sup. Ct. 1940).

151. According to a contemporary account, it was not clear what Jean Kay’s capacity was, but it appears that she was merely a taxpayer. Walton H. Hamilton, *Trial by Ordeal, New Style*, 50 YALE L.J. 778, 780 (1941).

152. *Kay*, 18 N.Y.S.2d at 825.

153. *Id.* at 827. The trial judge stated that it was “not necessary to detail here the filth which is contained in the books,” but went on to provide some examples, including the following:

For my part, while I am quite convinced that companionate marriage would be a step in the right direction, and would do a great deal of good, I do not think that it goes far enough. I think that all sex relations which do not involve children should be regarded as a purely private affair, and that if a man and a woman choose to live together without having children, that should be no one’s business but their own. I should not hold it desirable that either a man or a woman should enter upon the serious business of a marriage intended to lead to children without having had previous sexual experience.

Id. (quoting BERTRAND RUSSELL, MARRIAGE AND MORALS 165–66 (1929)).

154. *Id.* at 824. He “held trial, rendered judgment, and closed the case.” Hamilton, *supra* note 151, at 779. The unfitness was allegedly due to Russell’s writings on sex, though Russell was appointed to teach mathematics. *Kay*, 18 N.Y.S.2d at 826–27.

155. One example will suffice. Judge McGeehan conceded for the purposes of argument “that the board of higher education has sole and exclusive power to select the faculty of City College and that its discretion cannot be reviewed or curtailed by this court or any other agency,” but then proceeded to curtail the Board’s decision. *Id.* at 829.

“*academic freedom*” without according suitable consideration of the other aspects of the problem before them. While this court would not interfere with any action of the board in so far as a pure question of “valid” *academic freedom* is concerned, it will not tolerate *academic freedom* being used as a cloak to promote the popularization in the minds of adolescents of acts forbidden by the Penal Law. This appointment affects the public health, safety and morals of the community and it is the duty of the court to act. *Academic freedom does not mean academic license. It is the freedom to do good and not to teach evil.*¹⁵⁶

This definition of academic freedom is perhaps unique, but it is surely memorable. Russell was tossed out.¹⁵⁷

B. The Supreme Court

Academic freedom did not exist at common law.¹⁵⁸ Not surprisingly, the Bill of Rights does not refer to academic freedom, a fact duly noted by the Supreme Court.¹⁵⁹ One does not need to be an originalist to acknowledge that the Founders probably never contemplated academic freedom as a discrete concept.¹⁶⁰ But does anyone seriously question how Franklin, Jefferson, and Madison would feel about the importance of intellectual freedom in scientific and scholarly research today?

Whether the Founders contemplated academic freedom is not dispositive. While some delegates to the 1787 convention refused to sign the Constitution because it lacked a bill of rights,¹⁶¹ others believed that spelling out specific rights was unnecessary. Alexander Hamilton went even further, writing that a bill of rights might even be dangerous, asking, “Why declare that things shall not be done which there is not power to do?”¹⁶² Simply put, even some of the leading Founders believed that certain rights were inherent and that their omission does not mean that no such right existed.

In any event, the Supreme Court has extolled the virtues of academic freedom for more than fifty years. Whether it has been recognized as a distinct right is not clear.¹⁶³ Walter Metzger, perhaps the most prolific and erudite writer on academic

156. *Id.* (emphasis added).

157. *Id.* at 831.

158. Byrne, *Academic Freedom*, *supra* note 16, at 256.

159. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

160. See Rabban, *supra* note 23, at 237 (“It is inconceivable that those who debated and ratified the first amendment [sic] thought about academic freedom.”). See also Byrne, *Academic Freedom*, *supra* note 16, at 331–32 (“To be sure, there is not even a colorable claim that the founders specifically intended to provide any constitutional status for higher education.”).

161. George Mason and Edmund Randolph, in particular, refused to sign the Constitution, in part because it had no protection for individual rights. See RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* 7–8 (2006).

162. THE FEDERALIST NO. 84 (Alexander Hamilton) (Benjamin F. Wright ed., 1961). As an example, Hamilton wrote, “Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?” *Id.*

163. Byrne, *Academic Freedom*, *supra* note 16, at 256.

freedom, believed the Court firmly acknowledged a constitutional right,¹⁶⁴ while other writers are not so sure.¹⁶⁵ We turn now to the Supreme Court's development of the concept of academic freedom.

1. The Holmes's Epigram

The Supreme Court first referred to academic freedom by name in *Adler v. Board of Education*.¹⁶⁶ At issue was New York's Feinberg Law, which provided that no person could hold a state or local government position if he had deliberately advocated or taught that the government should be overthrown by "force, violence or any unlawful means."¹⁶⁷ The majority opinion famously stated that government employees have the right to assemble, speak, think and believe what they will but that they have no right to work for the government on their own terms.¹⁶⁸

In his dissent, Justice Douglas challenged the "recent doctrine that a citizen who enters the public service can be forced to sacrifice his civil rights."¹⁶⁹ Though the doctrine had recently been exploited, it was actually a vestige of the "Holmes's Epigram," from an opinion by Oliver Wendell Holmes, Jr., which provides:

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.¹⁷⁰

William Van Alstyne observed that, ironically, Holmes later changed his views on freedom of speech,¹⁷¹ as exemplified by his dissent in *Abrams v. United States*,¹⁷² where he wrote that the "best test of truth is the power of [a] thought to get itself accepted in the competition of the market."¹⁷³

164. See Metzger, *supra* note 14, at 1291 ("I believe it can be shown that Supreme Court Justices knew what they meant by academic freedom when they introduced it, and that this inaugural definition—though imperfectly communicated to the lower courts and subsequently overlaid with a different definition by the Court itself—was never disavowed, but continued to influence Court opinions until a decade ago as a subsurface guide, and since then more overtly.").

165. See Bird & Brandt, *supra* note 127, at 443 ("The promise of a well-articulated First Amendment basis for academic freedom represented by these cases has not been borne out by the Court.").

166. 342 U.S. 485, 509 (1952).

167. *Id.* at 488 n.4.

168. *Id.* at 492.

169. *Id.* at 508 (Douglas, J., dissenting).

170. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517–18 (Mass. 1892). See also Metzger, *supra* note 14, at 1287.

171. William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79, 97 (1990).

172. 250 U.S. 616 (1919).

173. *Id.* at 630 (Holmes, J., dissenting). See Van Alstyne, *Academic Freedom*, *supra* note 171, at 98.

Justice Douglas argued in his dissent in *Adler* that the Constitution guarantees freedom of thought and expression to everyone, but “none needs it more than the teacher.”¹⁷⁴ He feared that laws like the Feinberg Law were directed at turning the school system into a spying project.¹⁷⁵

What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment.¹⁷⁶

Justice Douglas wrote eloquently, as he often did, and he believed that academic freedom should have constitutional rank. But he was on the losing side. The Feinberg Law was upheld.¹⁷⁷

2. Priests of Our Democracy

A few months after *Adler* was decided, the Court unanimously invalidated an Oklahoma loyalty oath statute in *Wieman v. Updegraff*.¹⁷⁸ Several professors at Oklahoma A & M University refused to sign an oath affirming that within the past five years they had not been affiliated directly or indirectly with any organization officially determined by the United States government to be a communist front or subversive organization.¹⁷⁹ The Court distinguished *Wieman* from *Adler* on the ground that New York’s Feinberg Law was based on advocacy of subversion whereas the Oklahoma statute targeted mere association.¹⁸⁰ Significantly, the Court began to distance itself from the Holmes’s Epigram, stating that it did not need to decide whether an abstract right to public employment exists. It was “sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.”¹⁸¹

In his concurrence, Justice Frankfurter went beyond utilitarian concerns, and connected academic freedom to a higher principle—survival of democracy.

That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.

To regard teachers—in our entire educational system, from the

174. *Adler v. Bd. of Educ.*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting).

175. *Id.* at 509.

176. *Id.* at 510.

177. *Id.* at 495 (majority opinion).

178. 344 U.S. 183 (1952).

179. *Id.* at 185.

180. *Id.* at 191.

181. *Id.* at 192.

primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole.¹⁸²

This is heady stuff. Justice Frankfurter proclaimed academic freedom as a vital public policy. But *Wieman* is not a First Amendment case; it was decided on due process grounds.¹⁸³

3. The Four Essential Freedoms of Colleges and Universities

Five years later, in *Sweezy v. New Hampshire*,¹⁸⁴ the Court came closer to recognizing a constitutional right of academic freedom, although the case was ultimately decided by a plurality on due process grounds.¹⁸⁵ Paul Sweezy had been invited to give a guest lecture to a humanities course at the University of New Hampshire.¹⁸⁶ Later, he was subpoenaed to appear before the New Hampshire State Attorney General as part of a legislative inquiry into communist infiltration. He denied having been a member of the Communist Party,¹⁸⁷ though he did describe himself as a “classical Marxist” and a “socialist.”¹⁸⁸ He declined to answer questions such as whether he had informed his class that socialism was inevitable.¹⁸⁹ The New Hampshire Attorney General asked the Superior Court to propound certain questions to Sweezy, but, again, Sweezy refused to answer the questions, and the Superior Court held him in contempt and committed him to the county jail.¹⁹⁰ The decision was affirmed by the New Hampshire Supreme Court.¹⁹¹ The United States Supreme Court granted Sweezy’s petition for writ of certiorari.¹⁹²

Writing for four justices, Chief Justice Warren voted to reverse Sweezy’s contempt conviction.¹⁹³ He explained that to compel someone against his will to disclose past expressions and associations is government interference under the Bill of Rights and the Fourteenth Amendment.¹⁹⁴ Chief Justice Warren wrote:

We believe that there unquestionably was an invasion of [Sweezy’s] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.

The essentiality of freedom in the community of American

182. *Id.* at 196 (Frankfurter, J., dissenting).

183. *But see* Van Alstyne, *Academic Freedom*, *supra* note 171, at 109 (crediting Justice Frankfurter’s dissent in *Wieman* with linking academic freedom into the “hard law of the first and fourteenth amendments [sic] as well”).

184. 354 U.S. 234 (1957).

185. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000). *See also* Van Alstyne, *Academic Freedom*, *supra* note 171, at 110.

186. *Sweezy*, 354 U.S. at 243. *See also* *Wyman v. Sweezy*, 121 A.2d 783, 788 (N.H. 1956).

187. *Sweezy*, 354 U.S. at 238.

188. *Id.* at 243.

189. *Id.* at 243–44.

190. *Id.* at 244–45.

191. *Wyman*, 121 A.2d 783.

192. *Sweezy*, 354 U.S. at 236–37.

193. *Id.* at 235–55.

194. *Id.* at 250.

universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation 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.¹⁹⁵

Sweezy is best known, however, for the “four essential freedoms of a university,” set out in Justice Frankfurter’s concurrence:

In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—‘to follow the argument where it leads.’ This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. . . .

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university, to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.¹⁹⁶

Most of the time, the interests of the academic institution and the individual professor are in unison. When the state, itself, restricts the professor’s expression or association, the institution and professor are aligned against the state. Only when an institution attempts to proscribe what the professor may say, or when it takes punitive action because of the professor’s associations or utterances, may a potential constitutional clash occur. *Sweezy* did not contemplate such a clash.¹⁹⁷

195. *Id.*

196. *Id.* at 262–63 (Frankfurter, J., concurring) (quoting A. v. d. S. Centlivres et al., Statement of a Conference of Senior Scholars from the University of Cape Town and the University of Witwatersrand, in OPEN UNIVERSITIES IN SOUTH AFRICA, at 10–12).

197. See Rabban, *supra* note 23, at 238 (noting that the AAUP chose not to file an amicus brief in *Sweezy*, in part, because it was concerned with judicial appropriation of the concept that it had successfully advocated).

4. A Limited Right

Two years later, in *Barenblatt v. United States*,¹⁹⁸ the Court signaled that academic freedom has limits. Lloyd Barenblatt was summoned before the infamous Subcommittee of the House Committee on Un-American Activities after he was identified by another witness as a member of the Haldance Club of the Communist Party while he was a graduate student and instructor at the University of Michigan.¹⁹⁹ After being served with the summons but prior to appearing before Congress, Barenblatt's four-year contract with Vassar College expired and was not renewed.²⁰⁰

When Barenblatt refused to answer certain questions, he was convicted of contempt of Congress—a conviction that was later affirmed by the District of Columbia Circuit Court of Appeals.²⁰¹ In a per curiam opinion, the Supreme Court vacated and remanded the case to the Court of Appeals,²⁰² in light of its recent decision in *Watkins v. United States*.²⁰³ The Court of Appeals reaffirmed Barenblatt's conviction for contempt of Congress, citing several distinctions between the two cases, including the fact that Barenblatt had been informed by the Committee Chairman of the scope of the inquiry, which was the investigation into Communist Party activities in education.²⁰⁴

The Supreme Court again granted certiorari to consider Barenblatt's claim that his conviction could not stand in light of *Watkins*.²⁰⁵ The Court, in a five-to-four decision written by Justice Harlan, found in favor of the government, holding that the provisions of the First Amendment were not offended by the Congressional questioning.²⁰⁶ Unlike the self-incrimination privilege, the First Amendment does not afford a witness the right to resist inquiry in all circumstances.²⁰⁷ Instead, there must be a balancing of competing private and public interests.²⁰⁸ The Court concluded that the investigatory power of Congress was not to be denied solely because education was involved, and it distinguished the case from *Sweezy* on the

198. 360 U.S. 109 (1959).

199. *Barenblatt v. United States*, 240 F.2d 875, 877 (D.C. Cir. 1957).

200. *Barenblatt*, 360 U.S. at 134.

201. *Barenblatt*, 240 F.2d at 884.

202. *Barenblatt v. United States*, 354 U.S. 930 (1957).

203. 354 U.S. 178 (1957). *Watkins* was convicted of contempt of Congress, under the same federal statute, 2 U.S.C. § 192. *Watkins* did not plead the Fifth Amendment, and agreed to answer any questions about himself and about people he knew to have been, and still were, members of the Communist Party. *Watkins*, 354 U.S. at 185. But he stated he would not answer any questions about other people with whom he had associated in the past. *Id.* Focusing on the vagueness of the scope of inquiry by the congressional subcommittee, the Supreme Court held that *Watkins* was "not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment." *Id.* at 215.

204. *Barenblatt v. United States*, 252 F.2d 129, 136 (D.C. Cir. 1958).

205. *Barenblatt*, 360 U.S. at 113.

206. *Id.* at 134.

207. *Id.* at 126.

208. *Id.*

ground that Mr. Sweezy had not been a member of the Communist Party and that he had been asked about connections with the Progressive Party, which was on the ballots in twenty-six states.²⁰⁹ This was “very different,” noted the Court, from Barenblatt’s questioning, which involved “inquiring into the extent to which the Communist Party has succeeded in infiltrating into our universities, or elsewhere, persons and groups committed to furthering the objective of overthrow.”²¹⁰ To the majority, Congress was legitimately trying to determine the extent of infiltration of the Communist Party in universities.²¹¹

A vigorous dissent by Justice Black, joined by Justices Warren and Douglas, posited three reasons why Barenblatt’s contempt conviction should be overturned.²¹² The first reason was that the congressional rule that created the Committee authorized such sweeping and indiscriminating “compulsory examination of witnesses in the field of speech, press, petition and assembly that it violates the procedural requirements of the Due Process Clause of the Fifth Amendment.”²¹³ Second, Barenblatt’s freedom of speech and association was violated by the nature of the questions that he was asked.²¹⁴ Third, the Committee’s proceedings were part of an effort to stigmatize and punish the witnesses by exposing them to public identification as having Communist affiliations, which amounted to improperly seeking to “try, convict, and punish suspects, a task which the Constitution expressly denies to Congress and grants exclusively to the courts.”²¹⁵

5. A Right Like Free Speech

One year after *Barenblatt*, in *Shelton v. Tucker*,²¹⁶ the Supreme Court struck down an Arkansas statute that required all public school and college and university faculty to annually submit an affidavit listing all organizations to which he or she had belonged in the previous five years.²¹⁷ The validity of the statute, passed in 1958,²¹⁸ was challenged in both state and federal courts.²¹⁹ The Court explained

209. *Id.* at 129.

210. *Id.*

211. *Id.* The Court noted that the AAUP’s amicus brief acknowledged that the claims of academic freedom cannot be asserted unqualifiedly, but rather that there must be a “demonstrable justification” for governmental action that endangers a freedom guaranteed by the Constitution. *Id.* at 130 n.29.

212. *Id.* at 136 (Black, J., dissenting).

213. *Id.*

214. *Id.*

215. *Id.* at 136–37.

216. 364 U.S. 479 (1960).

217. *Id.* at 480–81.

218. The statute was Act 10 of the Second Extraordinary Session of the Arkansas General Assembly of 1958. It provided, in part, that:

[N]o person shall be employed or elected to employment as a superintendent, principal or teacher in any public school in Arkansas, or as an instructor, professor or teacher in any public institution of higher learning in that State until such person shall have submitted to the appropriate hiring authority an affidavit listing all organizations to which he at the time belongs and to which he has belonged during the past five years, and also listing all organizations to which he at the time is paying regular dues or is

that to compel an instructor to disclose every associational tie was to impair the instructor's "right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society."²²⁰ Further, the Court noted that the "vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools," because of its unmistakable tendency to create a chilling effect on free inquiry.²²¹

Justice Frankfurter, the guiding spirit of the four essential freedoms, dissented, not because he "put a low value on academic freedom"²²² but because "that very freedom, in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers."²²³ This seeming contradiction between Frankfurter's position in *Sweezy* and his position in *Shelton* can still be seen as supporting a *practical* institutional academic freedom. If the college or university is selective in the hiring of a professor, more academic freedom is warranted, because the best professors will exercise that freedom responsibly.

6. A Transcendent Value and a Special Concern of the First Amendment

The most important Supreme Court academic freedom case is *Keyishian v. Board of Regents*.²²⁴ Once again, New York's Feinberg Law was before the Court.²²⁵ Several professors at the State University of New York ("SUNY") sued the Board of Regents for declaratory and injunctive relief on the ground that SUNY violated the Constitution by requiring every professor to sign a certificate that he was not and had never been a Communist and, if so, that he had disclosed any prior affiliation to SUNY.²²⁶ A three-judge panel upheld the statutory requirement.²²⁷ The Supreme Court reversed and remanded the case, holding the statutes invalid, because it "proscribe[d] mere knowing membership without any showing of specific intent to further the unlawful aims of the Communist Party of the United States or of the State of New York."²²⁸

Keyishian, unlike *Sweezy*, was grounded on the First Amendment.²²⁹

making regular contributions, or to which within the past five years he has paid such dues or made such contributions.

Shelton, 364 U.S. at 480–81 (quoting *Shelton v. Tucker*, 174 F. Supp. 351, 353 (1959)). The Supreme Court noted that the scope of the associational inquiry was unlimited; it required a teacher to list "every conceivable kind of associational tie—social, professional, political, avocational, or religious." *Id.* at 488. Many of these relationships "could have no possible bearing upon the teacher's occupational competence or fitness." *Id.*

219. *Id.* at 480.

220. *Id.* at 485–86 (citing *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937)).

221. *Id.* at 487.

222. *Id.* at 495–96.

223. *Id.* at 496.

224. 385 U.S. 589 (1967).

225. *See id.* at 593.

226. *Id.* at 592–93.

227. *Keyishian v. Bd. of Regents*, 255 F. Supp. 981 (W.D.N.Y. 1966).

228. *Keyishian*, 385 U.S. at 609–10.

229. Horwitz, *supra* note 66, at 487; Van Alstyne, *Academic Freedom*, *supra* note 171, at 114 (noting that *Sweezy* was grounded on the First Amendment at its core).

Nevertheless, the *Keyishian* opinion had little to do with academic freedom directly, as the law was struck because it was vague.²³⁰ Nonetheless, perhaps the most eloquent Supreme Court statement on academic freedom comes from *Keyishian*:

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.²³¹

As Peter Byrne observed, this passage is “quasi-religious” in tone.²³² Professors should cherish these words. But what exactly is a “special concern”? Is it a right available only to professors? Does it have different legal standards than ordinary speech? Or is it simply hyperbole, laying gifts at the altar of intellectuals?

Since *Keyishian* the Court has used the term academic freedom many times.²³³ Despite the homage paid to the principle, *Sweezy* and *Keyishian* remain the two major cases for academic freedom, at least insofar as individual rights may be concerned.²³⁴

230. Horwitz, *supra* note 66, at 487.

231. *Keyishian*, 385 U.S. at 603.

232. Byrne, *Academic Freedom*, *supra* note 16, at 296.

233. The Supreme Court has referred to academic freedom in the context of alleged infringements on academic speech by college and university professors. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). *See also* *Grutter v. Bollinger*, 539 U.S. 306 (2003) (see discussion in Section VI.C.1 *infra*); *Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124 (1999) (where Justice Stevens, dissenting, wrote that there was a debate about academic freedom at the root of a ruling by the majority that an Ohio statute that required state universities to develop faculty workloads did not violate the Equal Protection Clause); *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990) (holding that the First Amendment right of academic freedom would not be extended to shield the production of tenure files); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding that a Louisiana statute that required creation science to be taught in schools if evolution was taught did not serve any secular purpose, including the advancement of academic freedom); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (see discussion in Section VI.C.2 *infra*); *Minn. State Bd. of Cmty. Colls. v. Knight*, 465 U.S. 271 (1984) (where the dissent argued that academic freedom was at stake in a challenge by twenty community college instructors to a Minnesota statute which required all discussions between the colleges and the faculty to be through union representatives); *N.L.R.B. v. Yeshiva Univ.*, 444 U.S. 672 (1980) (see discussion in Section VI.C.4 *infra*); *Regents of the Univ. of Cal. v. Bakke*, 385 U.S. 265 (1978) (see discussion in Section VI.C.1 *infra*); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972) (finding no liberty or property interest for non-tenured teachers at Wisconsin State University – Oshkosh in a Fourteenth Amendment claim by the professor); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (striking down an Arkansas statute that prohibited the teaching of evolution in public schools and colleges and universities on religion grounds, but stating that while courts “cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values,” the “vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools”); *Whitehill v. Elkins*, 389 U.S. 54, 59–60 (1967) (holding that a loyalty oath at the University of Maryland was unconstitutionally vague, and stating that this type of law is “hostile to academic freedom”).

234. *See* Byrne, *Academic Freedom*, *supra* note 16, at 298 (noting that “these two cases

Part V will explore whether the Court has recognized distinct constitutional rights of academic freedom and, if so, whether there are separate rights for professors and the colleges or universities. First, however, it is necessary to explore the scope of protected speech for government employees, as Part V will do.

IV. THE PUBLIC EMPLOYEE SPEECH DOCTRINE

A. The *Pickering* Balancing Test

The first important case on the scope of protected speech for government employees was *Pickering v. Board of Education*.²³⁵ To determine whether the speech of a government employee has First Amendment protection, the Court balances two competing interests: the employee's interest in commenting on public issues and the employer's interest in providing services to the public.²³⁶ The employee's speech as a citizen in "commenting on matters of public concern" must outweigh the employer's interest "in promoting the efficiency of the services it provides to the public."²³⁷

Marvin Pickering, a high school teacher, was fired for criticizing the school board about athletic funding in a letter to a newspaper.²³⁸ The Court concluded that Pickering was speaking as a citizen about an important public issue.²³⁹ The fact that he was a professor did not disqualify him from this right, because the letter was not directed at anyone with whom he would come into contact at work.²⁴⁰ There was no question of maintaining discipline, nor was there a disruption of harmony among co-workers.²⁴¹ Unless there is proof that a professor knowingly or recklessly made false statements, the Court explained, his speech on "issues of public importance may not furnish the basis for his dismissal from public employment."²⁴² Oddly, the Court did not rely upon academic freedom, citing *Keyishian* "only for the proposition that public employees do not shed the free speech rights enjoyed by all citizens simply because they are in the public's employ."²⁴³

B. *Connick*

The *Pickering* balancing test was modified in *Connick v. Myers*.²⁴⁴ As in

exhaust the Supreme Court's development of a university faculty member's right of academic freedom").

235. 391 U.S. 563 (1968).

236. *Id.* at 568.

237. *Id.*

238. *Id.* at 564–65.

239. *Id.* at 571–72.

240. *Id.* at 569–70.

241. *Id.*

242. *Id.* at 574.

243. Bird & Brandt, *supra* note 127, at 444.

244. 461 U.S. 138 (1983).

Garcetti, the plaintiff was an assistant district attorney. Unhappy about a transfer, Sheila Myers prepared a questionnaire soliciting the views of other employees about the transfer policy, office morale, level of confidence in supervisors, and whether employees felt compelled to work on political campaigns.²⁴⁵ The District Attorney told Myers that she was terminated for refusing to accept the transfer and considered the questionnaire to be an act of insubordination.²⁴⁶ Myers brought a § 1983 action alleging that her speech was protected.²⁴⁷ The district court agreed, ordering Myers to be reinstated and awarded back pay, among other damages. The Fifth Circuit Court of Appeals affirmed.²⁴⁸

The Supreme Court reversed, noting that in all of *Pickering's* precedents,²⁴⁹ “the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs.”²⁵⁰ Speech on public issues “occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.”²⁵¹ The Court concluded that:

Pickering, its antecedents, and its progeny lead us to conclude that if Myers’ questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.²⁵²

When a public employee speaks as an employee on matters of only personal interest, and not as a citizen, absent the most unusual circumstances, courts are not the appropriate fora in which to review personnel decisions.²⁵³ Thus, *Connick* added a threshold requirement to the mix: the speech must concern a public matter.²⁵⁴

245. *Id.* at 141.

246. *Id.*

247. *Id.*

248. *Id.* at 142.

249. The precedents cited by the Supreme Court were: *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Sherbert v. Verner*, 374 U.S. 398 (1963) (involving a freedom of religion claim by a Seventh Day Adventist who was denied unemployment compensation because she refused to work on Saturday); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961) (striking down on vagueness grounds a Florida statute which required state employees to swear in writing that they had never lent aid or support to the Communist Party); *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961) (holding that the government could not deny employment because of previous membership in a particular party); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding that a provision in the Maryland Constitution that allowed a religious test based on a declaration in the belief in God invaded a notary applicant’s freedom of belief and religion); *Wiemann v. Updegraff*, 344 U.S. 183 (1952) (holding that a state could not require employees to establish loyalty through an oath denying past affiliation with Communists).

250. *Connick*, 461 U.S. at 144–45.

251. *Id.* at 145 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

252. *Id.* at 147.

253. *Id.* at 146.

254. Marni M. Zack, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per*

The Court found that only one question in the Myer's questionnaire—the question asking whether office employees felt pressured to work in political campaigns²⁵⁵—fell under the “rubric of matters of ‘public concern.’”²⁵⁶ But that was enough to proceed with the *Pickering* test to determine whether the employer was justified in discharging Myers.²⁵⁷ 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 substantially interfered with [Myers'] official responsibilities.”²⁵⁸ The Court read *Pickering* to hold that this determination “varies depending upon the nature of the employee's expression.”²⁵⁹ The Supreme Court did agree, however, that Myers failed to establish that the questionnaire impeded her ability to perform her job duties.²⁶⁰

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.”²⁶¹ The Court concluded that private expression may “bring additional factors to the *Pickering* calculus.”²⁶²

C. *Waters*

In *Waters v. Churchill*,²⁶³ the Court added another twist to the *Pickering* test. The Supreme Court was asked whether that test should be applied to speech as the employer understood it to be or whether the fact finder should first determine the actual facts.²⁶⁴ Cheryl Churchill was fired after co-workers told the supervisor that she had made negative comments about work conditions.²⁶⁵ Not surprisingly, Churchill's version was different. She claimed that her comments were intended to improve patient care.²⁶⁶

The trial court determined that neither version of the conversation was protected speech.²⁶⁷ The Seventh Circuit reversed, finding that the speech was a matter of public concern, that it was not disruptive, and that the employer should conduct an investigation to determine what the speech actually was.²⁶⁸ In holding that the speech was not protected, the Supreme Court rejected the Seventh Circuit's approach.

Se Rule Precluding Speech Rights, 46 B.C. L. REV. 893, 897 (2005).

255. *Connick*, 461 U.S. at 149.

256. *Id.* at 148.

257. *Id.* at 149–50.

258. *Id.* at 150.

259. *Id.*

260. *Id.* at 151.

261. *Id.* at 152.

262. *Id.* at 152–53.

263. 511 U.S. 661 (1994).

264. *Id.* at 664.

265. *Id.* at 665.

266. *Id.* at 666. Two other workers who heard the conversation later sided with Churchill, but they were not interviewed before the termination. *See id.*

267. *Id.* at 667.

268. *Id.*

[I]t would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court. The government manager would have to ask not what conclusions she, as an experienced professional, can draw from the circumstances, but rather what conclusions a jury would later draw. If she relies on hearsay, or on what she knows about the accused employee's character, she must be aware that this evidence might not be usable in court. If she knows one party is, in her personal experience, more credible than another, she must realize that the jury will not share that personal experience.²⁶⁹

To mitigate the impact of its holding, the Court added a caveat: although the employer did not have to determine the actual facts surrounding the speech, the employer must reach its conclusion in good faith, rather than as a pretext, and the trial court should look into the reasonableness of the conclusions.²⁷⁰

D. *Garcetti*

Richard Ceballos was a deputy district attorney in Los Angeles County, working in the Pomona branch.²⁷¹ A defense attorney filed a motion to challenge a search warrant and then asked Ceballos to review the warrant for alleged inaccuracies.²⁷² Ceballos concluded that the affidavit contained serious misrepresentations.²⁷³ He prepared a memo explaining his concerns and recommending dismissal of the case.²⁷⁴ After a heated meeting, his supervisor decided to proceed with the case, pending disposition of the motion.²⁷⁵ Ceballos was called as a witness at the hearing where he recounted his observations about the affidavit. The trial court subsequently rejected the challenge to the warrant.²⁷⁶

Ceballos alleged that he was later subjected to retaliatory actions, including reassignment, transfer to another courthouse, and denial of a promotion.²⁷⁷ He filed suit alleging that the District Attorney violated his First and Fourteenth Amendment rights.²⁷⁸ The District Attorney argued that the memo was not protected speech under the First Amendment, and the trial court granted summary judgment to the employer.²⁷⁹

269. *Id.* at 676. *See also* Chang, *supra* note 30, at 926 (observing that the Court clarified the efficiency concern to mean expectation of disruption); Elrod, *supra* note 126, at 47–48 (explaining that the “result of *Waters* is the elevation of the government employer’s interest in efficiency over any other value, including expression by public employees,” virtually eliminating the employee’s right to speak about matters of public concern while “in the workplace”).

270. *Waters*, 511 U.S. at 677.

271. *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1955 (2006).

272. *Id.*

273. *Id.*

274. *Id.* at 1955–56.

275. *Id.* at 1956.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

The Ninth Circuit reversed, holding that the allegations of wrongdoing in the memo constituted protected speech under the First Amendment.²⁸⁰ Applying the *Pickering/Connick* test, the Ninth Circuit held that the alleged governmental misconduct—falsification of an affidavit—was “inherently a matter of public concern.”²⁸¹ The court did not consider whether the speech was made in Ceballos’s capacity as a citizen, relying instead upon Ninth Circuit precedent, which rejected the idea that a public employee’s speech has no First Amendment protection if made pursuant to an employment responsibility.²⁸²

The Supreme Court reversed and remanded.²⁸³ The Court clarified that under *Pickering* and its progeny the first inquiry is whether the speech involves a matter of public concern. If the answer is no, there is no First Amendment protection.²⁸⁴ If the answer is yes, a possibility of a First Amendment claim arises. The next question is whether the “relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.”²⁸⁵ The Court explained:

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services. Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.²⁸⁶

So long as a government employee speaks as a citizen on matters of public concern, the employee faces only those speech restrictions that are necessary for the employer to operate efficiently and effectively.²⁸⁷ The controlling factor was that Ceballos’s statements were made in his capacity as a calendar deputy. “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.”²⁸⁸ The Court stressed that since the memo was written pursuant to his official duties, there was no infringement of any liberties Ceballos might have had as a private citizen.²⁸⁹

Concerned about imposing a precedent that would require judicial oversight of communications between government employees and their supervisors, the Court explained :

280. *Id.*

281. *Id.*

282. *Id.* (citing, *inter alia*, *Roth v. Veteran’s Admin.*, 856 F.2d 1401 (9th Cir. 1988)).

283. *Id.* at 1962.

284. *Id.* at 1958.

285. *Id.*

286. *Id.* (citation omitted).

287. *Id.*

288. *Id.* at 1960.

289. *Id.*

When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.²⁹⁰

The Court attempted to explain the doctrinal anomaly raised by the Ninth Circuit—that it would be inconsistent to require government employers to tolerate speech by their employees made publicly but not when the speech is made pursuant to their duties.²⁹¹ Calling this argument a misconception of the “theoretical underpinnings” of previous Supreme Court decisions,²⁹² the Court defended its new ruling:

Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.²⁹³

The goal of establishing a simple threshold is understandable, but it introduces a troubling paradox for academia. When is speech by a college or university professor made pursuant to his or her official duties? Chief Justice Roberts posed this question to counsel for the District Attorney, Cindy Lee, in the initial oral argument in *Garcetti*: “What do you do if a public university professor, who is fired for the content of his lectures? [sic] Certainly, in the course of his employment, that’s what he’s paid to do. That has no first amendment [sic] protection?”²⁹⁴

Ms. Lee answered that “if the assigned job duties of that university professor was [sic] to speak on a particular topic or content, and they [sic] were paid for doing that,” then “that is a job-required speech,” and “should not be entitled, presumptively, to first-amendment [sic] protection.”²⁹⁵ The Chief Justice inquired further, asking whether the District Attorney was contending there might be First Amendment protection, depending on the context of the speech.²⁹⁶ Ms. Lee responded that the problem with the Ninth Circuit’s ruling below was that anytime a public employee speaks on a matter of public concern that speech is

290. *Id.* at 1961.

291. *See id.*

292. *Id.*

293. *Id.* (citation omitted).

294. Transcript of Oral Argument at 6, *Garcetti*, 126 S.Ct. 1951 (No. 04–473).

295. *Id.* at 6–7.

296. *Id.* at 7.

presumptively entitled to First Amendment protection.²⁹⁷

Justice Scalia interposed that the “professor would still be able to contend that the university fired him because it disagreed with the political content of his speech or because of the university’s politics.”²⁹⁸ Ms. Lee acknowledged that the approach advocated by the District Attorney would not prohibit that type of challenge.²⁹⁹ Concluding the line of questioning, the Chief Justice noted that he would have expected the District Attorney to have “argued that it’s speech paid for by the Government, that’s what they pay him for, it’s their speech; and so, there’s no first-amendment [sic] issue at all.”³⁰⁰

In his dissent, Justice Souter argued that the majority’s ruling was “spacious enough” to include the teaching of a professor,³⁰¹ adding that he hoped 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.’”³⁰²

Justice Kennedy responded in his majority opinion 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.”³⁰³ This statement, though dicta, is telling. Justice Kennedy is transparently referring to core academic speech, acknowledging that an exception to *Garcetti* may be required. But since the issue was not directly before the Court, he wrote that the justices “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.”³⁰⁴

In some ways the Court’s actual holding is elusive. The fact that Ceballos’s statements were made “inside his office rather than publicly, is not dispositive,” as expression at work can be given First Amendment protection.³⁰⁵ That the memo concerned his employment is not controlling, because the “First Amendment protects some expressions related to the speaker’s job.”³⁰⁶ The line drawn by the Court appears to be a new one, a *per se* rule.³⁰⁷ The profession of the speaker is of no moment, nor is the relative significance of the speech. If it is made in

297. *Id.*

298. *Id.*

299. *Id.* at 8.

300. *Id.* As counsel for the District Attorney responded, the Chief Justice was apparently referring to *Rust v. Sullivan*, 500 U.S. 173 (1991). *Id.* at 6–7.

301. *Garcetti*, 126 S.Ct. at 1969 (Souter, J., dissenting).

302. *Id.*

303. *Id.* at 1962 (majority opinion).

304. *Id.* The exchange between Justices Souter and Kennedy was not spontaneous. The academic freedom concern had been raised in a brief submitted by the AAUP, referring to the *1915 Declaration* and the *1940 Statement*, which codified the *1915 Declaration* and “has been endorsed by over 190 professional organizations and learned societies as well as incorporated into hundreds of university and college faculty handbooks.” Brief for Thomas Jefferson Ctr. for the Protection of Free Expression & Am. Ass’n of Univ. Professors as Amici Curiae Supporting Respondents at 4, *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006) (No. 04–473).

305. *Garcetti*, 126 S.Ct. at 1959.

306. *Id.*

307. See generally Zack, *supra* note 254 (analyzing the *per se* approach prior to *Garcetti*).

connection with one's job description, presumably it cannot be a matter of public concern and therefore fails to satisfy the first prong of the *Pickering/Connick* test. Justice Kennedy's majority opinion holds out the possibility, however, that other readings of *Garcetti* are available.

Government-employed professors have long been subject to the *Pickering/Connick* test. The significance of *Garcetti* is that if it is applied to public college or university employees, it could provide a blunt weapon to those who would challenge the content of a professor's expression. A controversial statement by a professor made in connection with his job could then be attacked on the ground that the professor is a government employee and that his speech is therefore paid for by the taxpayer.

This takes the focus off the pertinence of the speech to society and shifts it to the relatively mundane question of whether it falls within the technical job description of the employee. In short, *Garcetti* may have resurrected the Holmes's Epigram. Part VI will discuss the landscape of academic freedom in the wake of *Garcetti*. But first, Part V returns to constitutional academic freedom, and examines whether professors have a distinct right to that freedom.

V. INDIVIDUAL RIGHT VS. INSTITUTIONAL RIGHT

Academic freedom has been placed in the constitutional firmament, but its coordinates are a bit fuzzy. A leading commentator argued that there are separate constitutional rights for professors and institutions.³⁰⁸ Another commentator took the position that the Supreme Court seemed to be defining academic freedom solely in institutional terms.³⁰⁹ A third concluded that the Supreme Court had not given academic freedom for institutions a specific rationale and indeed had never extended constitutional rights to "non-natural persons."³¹⁰

How can there be such different interpretations by leading scholars? The answer to this question is deceptively simple. The Supreme Court has never recognized a constitutional right of academic freedom for individuals or institutions. The Supreme Court's characterizations of academic freedom should be taken at face value. Some commentators have missed the point by adding their own gloss.

There is no need to read between the lines: the Supreme Court knew very well what it meant when it described academic freedom as a "special concern of the First Amendment" and a "transcendent value."³¹¹ A transcendent value hearkens to the tradition of academic freedom as a professional doctrine and a societal principle. A "special concern" means that courts should be particularly vigilant

308. See Rabban, *supra* note 23, at 230.

309. Byrne, *Academic Freedom*, *supra* note 16, at 255. See also *Urofsky v. Gilmore*, 216 F.3d 401, 415 (4th Cir. 2000) (observing that the Supreme Court has "focused its discussions of academic freedom solely on issues of institutional autonomy"). But see Rabban, *supra* note 23, at 230 (noting his disagreement with Byrne); see also J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 89-92 (2004) (providing a discussion of the disagreement between Byrne and Rabban).

310. Metzger, *supra* note 14, at 1318.

311. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

when an alleged assault on the First Amendment involves academic speech. This approach is analogous to an explanation of clear and convincing evidence in a civil case; it is not a “quantum of proof, but rather a quality of proof.”³¹²

The premise of this article is that the Supreme Court has never recognized a distinct constitutional right of academic freedom, either for professors or colleges and universities. It did not need to do so for professors because the First Amendment already covers individuals. Moreover, the Court has not extended such a “right” to colleges and universities to be exercised affirmatively. Rather, the Court has expressed a policy that the academic community should make academic decisions with minimal court interference.³¹³ In short, institutional academic freedom is a sort of qualified immunity to be used as a shield against unwarranted interference by the state, not a right to be wielded as a sword.

A. Individual Academic Freedom

The Supreme Court has never expressly recognized a distinct free speech right for professors.³¹⁴ No professional caste system has been constructed under the First Amendment. Prior to *Garcetti* there was not a compelling need to differentiate on the basis of professional status. First Amendment principles were applied subject to the *Pickering/Connick* test. Yet, it is also true that the Supreme Court has never declared that no such right exists. Clarification by the Court is needed, especially in the wake of *Garcetti*. Until then, however, we must read the tea leaves as best we can. Support for the conclusion that no such right exists can be found in a twenty year old Supreme Court decision³¹⁵ and from a sampling of recent circuit court opinions.³¹⁶

1. The Deputy Constable

Ardith McPherson was a nineteen year old probationary employee in the office of the Constable of Harris County, Texas.³¹⁷ Like everyone else in the office, her title was deputy constable.³¹⁸ Her duties were purely clerical: she wore no

312. *Foster v. AlliedSignal Inc.*, 293 F.3d 1187, 1194 (10th Cir. 2002) (quoting from *Barbara Oil Co. v. Kan. Gas Supply Corp.*, 827 P.2d 24, 32 (Kan. 1992)).

313. See *infra* Parts VI.C.1–2 for a discussion of the institutional focus of academic freedom in the Supreme Court’s decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). See also Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment*, 30 *HAMLIN L. REV.* 1, 56 (2007) (arguing that the “Supreme Court has never held that public colleges and universities are entitled to either academic freedom or institutional autonomy under the First Amendment”).

314. See Rabban, *supra* note 23, at 244. See also Van Alstyne, *The Specific Theory of Academic Freedom*, *supra* note 20, at 67 (“Despite these dicta of the Court, and despite the writings of those who have urged the judiciary to acknowledge a separately-identifiable First Amendment right to academic freedom, it is clear that closure between the First Amendment and a distinct right of academic freedom has not yet been made.”) (citation omitted).

315. *Rankin v. McPherson*, 483 U.S. 378 (1987).

316. See *infra* Part VI.B.2.

317. *Rankin*, 483 U.S. at 380.

318. *Id.*

uniform, could not make arrests, and could not carry a gun.³¹⁹ On March 30, 1981, McPherson heard a radio report of the attempted assassination of President Reagan.³²⁰ She said to a co-worker, who was also her boyfriend, that “if they go for him again, I hope they get him.”³²¹ Another employee overheard the remark and reported it to the constable, who then summoned McPherson to his office.³²² McPherson was fired after she admitted that she had made the remark, despite her claim that she meant nothing by the statement.³²³

Although McPherson could have been discharged for any reason or no reason at all, the Supreme Court held that “she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression.”³²⁴ The threshold question was whether her speech could be fairly characterized as speech on a matter of public concern, which is “determined by the content, form, and context of a given statement, as revealed by the whole record.”³²⁵ The Supreme Court concluded that the statement dealt with a matter of public concern—if it had been a threat to kill the President it would not have been protected—but it was not a threat under the federal statute.³²⁶ The Court reasoned that the “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.”³²⁷ Applying the *Pickering* balancing test, the Court determined that, while her statement was made at work, there was no evidence that it had interfered with the efficient functioning of the office.³²⁸

Contrast the result in *Rankin* to a potential case involving controversial speech by a college or university professor. How could that professor hope to have any greater constitutional protection than that given to McPherson? The Court’s focus was not on the speaker’s profession or her right to continued employment. What the Court cared about was whether her speech touched upon a matter of public concern and whether it had caused a disruption to the workplace. Whatever a special concern of the First Amendment may be, it is plainly not a right that affords greater protection for a professor than it did for a nineteen-year-old probationary deputy constable who, while at work, expressed a death-wish for the president.

2. Circuit Courts

A good starting point in the review of circuit court decisions is *Urofsky v. Gilmore*,³²⁹ a case criticized for its approach³³⁰ but which undeniably provides a

319. *Id.* at 380–81.

320. *Id.* at 381.

321. *Id.*

322. *Id.* at 381–82.

323. *Id.* at 382.

324. *Id.* at 383–84.

325. *Id.* at 385 (quoting *Connick v. Myers*, 461 U.S. 138, 147–48 (1983)).

326. *Id.* at 386–87.

327. *Id.* at 387.

328. *Id.* at 388–89.

329. 216 F.3d 401 (4th Cir. 2000) (en banc).

330. For a thorough analysis of the impact of *Urofsky*, see Zack, *supra* note 254. See also

thorough examination of academic freedom. Six professors challenged the constitutionality of a Virginia law that restricted state employees from accessing sexually explicit material on state computers.³³¹ The district court granted summary judgment to the professors, holding the Act violated their First Amendment rights.³³² A Fourth Circuit panel reversed that decision,³³³ reasoning that the Act regulated only “state employees’ speech in their capacity as state employees, as opposed to speech in their capacity as citizens addressing matters of public concern.”³³⁴ That decision was reviewed *en banc* by the Fourth Circuit, which then reversed the lower court’s decision.³³⁵ Addressing the professors’ argument that the law violated the First Amendment academic freedom rights of professors at state universities, the court wrote:

Appellees’ insistence that the Act violates their rights of academic freedom amounts to a claim that the academic freedom of professors is not only a professional norm, but also a constitutional right. We disagree. It is true, of course, that homage has been paid to the ideal of academic freedom in a number of Supreme Court opinions, often with reference to the First Amendment Despite these accolades, the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom.³³⁶

The court explained that the “audacity” of claimants’ argument was revealed by the facts of the case and that if the professors were correct that the First Amendment provides special protection for academic speech, “a professor would be constitutionally entitled to conduct a research project on sexual fetishes while a state-employed psychologist could constitutionally be precluded from accessing the very same materials.”³³⁷ To the extent that the Supreme Court had “constitutionalized a right of academic freedom at all,” it appeared to have done so only as an “institutional right of self-governance in academic affairs.”³³⁸

The Fourth Circuit observed that despite the “paean to academic freedom” in *Sweezy v. New Hampshire*,³³⁹ “the plurality did not vacate Sweezy’s contempt conviction on First Amendment grounds, but rather concluded that because the Attorney General lacked authority to investigate Sweezy, the conviction violated due process.”³⁴⁰ As for *Sweezy’s* four essential freedoms, the Fourth Circuit observed that at no point did Justice Frankfurter indicate that the academic

Byrne, *The Threat to Constitutional Academic Freedom*, *supra* note 309, at 110–11 (describing *Urofsky* as “the worst academic freedom decision since the notorious Bertrand Russell case in 1940”).

331. *Urofsky*, 216 F.3d at 404.

332. *Id.*

333. *Urofsky v. Gilmore*, 167 F.3d 191 (4th Cir. 1999), *aff’d*, 216 F.3d 401 (4th Cir. 2000) (*en banc*).

334. *Urofsky*, 216 F.3d at 404.

335. *Id.*

336. *Id.* at 411–12 (citation omitted).

337. *Id.* at 411 n.13.

338. *Id.* at 412.

339. 354 U.S. 234 (1957).

340. *Urofsky*, 216 F.3d at 412.

freedom rights of the individual had been infringed.³⁴¹ Thus, the court concluded that *Sweezy* did not “adopt” academic freedom as a right, and even if it did, “such a holding would not advance Appellees’ claim of a First Amendment right pertaining to their work as scholars and professors, because *Sweezy* involved only the right of an individual to speak in his capacity as a private citizen.”³⁴²

The *Urofsky* court also distinguished its case from *Keyishian v. Board of Regents*,³⁴³ because it also involved the right of a professor to speak as a private citizen. Further, the *Urofsky* Court wrote that the Supreme Court in *Keyishian* was “not focusing on the individual rights of teachers, but rather on the impact of the New York provisions on schools as institutions.”³⁴⁴ The Fourth Circuit concluded its analysis as follows:

Taking all of the cases together, the best that can be said for Appellees’ claim that the Constitution protects the academic freedom of an individual professor is that teachers were the first public employees to be afforded the now-universal protection against dismissal for the exercise of First Amendment rights. Nothing in Supreme Court jurisprudence suggests that the “right” claimed by Appellees extends any further. Rather, since declaring that public employees, including teachers, do not forfeit First Amendment rights upon accepting public employment, the Court has focused its discussions of academic freedom solely on issues of institutional autonomy. We therefore conclude that because the Act does not infringe the constitutional rights of public employees in general, it also does not violate the rights of professors.³⁴⁵

341. *Id.* at 413.

342. *Id.*

343. 385 U.S. 589 (1967).

344. *Urofsky*, 216 F.3d at 414.

345. *Id.* at 415.

The Third Circuit reached the same conclusion in *Edwards v. California University of Pennsylvania*.³⁴⁶ Dilawar Edwards was a tenured professor who taught a course entitled “Introduction to Educational Media” which originally focused on the use of classroom tools such as projection equipment, chalkboards, photographs, and films.³⁴⁷ Over time, Edwards’s syllabus included an emphasis on “issues of bias, censorship, religion, and humanism.”³⁴⁸ A student complained to the University that Edwards used the class to advance religious ideas.³⁴⁹ The administration instructed Edwards to “cease and desist” from using “doctrinaire material[s]” of a religious nature.³⁵⁰ Later, a new department chair concluded that Edwards was teaching from a non-approved syllabus and that the course had a distinct religious bias.³⁵¹ Eventually, book orders for Edwards were canceled, and he was assigned to teach a new course.³⁵² The situation continued to deteriorate with the chair calling Edwards an embarrassment to the department. Eventually Edwards was suspended with pay for some time.³⁵³

Edwards brought suit claiming that by restricting his choice of materials in the classroom, the University violated his rights of free speech, due process, and equal protection.³⁵⁴ The court held that a “public university professor does not have a First Amendment right to decide what will be taught in the classroom.”³⁵⁵ For support, the court quoted *Rosenberger v. Rector and Visitors of the University of Virginia*:³⁵⁶

[W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.³⁵⁷

On its face, this quote, taken from the Supreme Court’s decision in *Rosenberger*, reads suspiciously like the Holmes’s Epigram, fully resurrected. But the Third Circuit’s reliance on *Rosenberger* may be misplaced given the context of this statement.

In *Rosenberger*, the University of Virginia was sued by several members of a student organization called Wide-Awake Productions (WAP), an organization that was established to “publish a magazine of philosophical and religious expression,”

346. 156 F.3d 488 (3d Cir. 1998). The opinion was written by Justice Samuel Alito while he was on the Third Circuit Court of Appeals. *Id.*

347. *Id.* at 489.

348. *Id.*

349. *Id.*

350. *Id.* at 490.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.* at 489.

355. *Id.* at 491.

356. 515 U.S. 819 (1995).

357. *Edwards*, 156 F.3d at 491–92 (quoting *Rosenberger*, 515 U.S. at 833).

and to “facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints.”³⁵⁸ WAP qualified as a “contracted independent organization” under the University guidelines, even though the guidelines excluded organizations “whose purpose is to practice a devotion to an acknowledged ultimate reality or deity.”³⁵⁹ However, the University denied a request by WAP to pay for its newspaper’s printing costs, despite the fact that the University covered similar costs for many other student organizations.³⁶⁰ The students filed a § 1983 suit, alleging that their constitutional rights of speech, press, religion, and equal protection had been violated.³⁶¹ The trial court held for the University, finding no viewpoint discrimination, and concluded that the University’s concern about the Establishment Clause was sufficient to deny the funding request.³⁶² The Fourth Circuit disagreed on the freedom of speech argument, holding there had been discrimination based on content but upheld the trial court’s decision on the ground that the discrimination was justified due to the University’s compelling interest in maintaining a strict separation of church and state.³⁶³

The Supreme Court reversed, holding that the University’s regulation, which denied the funding request, was a denial of the students’ right of free speech³⁶⁴ and that the Establishment Clause had not been violated.³⁶⁵ The University of Virginia relied on the Supreme Court’s decision in *Widmar v. Vincent*,³⁶⁶ where in striking down a public university’s policy that excluded religious groups from using its facilities, the Supreme Court noted, “Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources.”³⁶⁷ In *Rosenberger*, the Court noted that the language in *Widmar* was merely “a proper recognition . . . that when the State is the speaker, it may make content-based choices,” and when the college or university determines educational content it is the institution speaking.³⁶⁸

Since neither *Widmar* nor *Rosenberger* involved curricula or the alleged rights of academic freedom for teachers or the colleges or universities, the Third Circuit’s reliance upon *Rosenberger* in *Edward* as precedent for its holding that the teacher has no right of academic freedom in the choice of educational content is questionable. Indeed, in *Rosenberger* the Supreme Court went to great lengths to stress the vital importance of the First Amendment principles at stake:

358. *Rosenberger*, 515 U.S. at 825–26.

359. *Id.* at 826.

360. *Id.* at 827.

361. *Id.*

362. *Id.* at 827–28.

363. *Id.* at 828.

364. *Id.* at 837.

365. *Id.* at 845–46.

366. 454 U.S. 263 (1981).

367. *Rosenberger*, 515 U.S. at 833 (quoting *Widmar*, 454 U.S. at 276 (1981)).

368. *Id.*

The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.³⁶⁹

In any case, the Supreme Court does not appear to have directly addressed the question of whether there is a constitutional right of academic freedom for the professor or the institution itself.

Grading is another area where, presumably, professors assume that academic freedom gives them the right to assign a grade. That assumption is incorrect. For example, in *Brown v. Armenti*,³⁷⁰ Robert Brown, a tenured professor, alleged that he was suspended because he refused the University President's instruction to change a student's grade from an "F" to an incomplete and was later terminated because he criticized the President in writing for this act.³⁷¹ In ruling against Brown, the court cited *Edwards v. California University of Pennsylvania*,³⁷² holding that since "grading is pedagogic, the assignment of [a] grade is subsumed under the university's freedom to determine how a course is to be taught," and therefore, a "professor does not have a First Amendment right to expression via the school's grade assignment procedures."³⁷³

*Johnson-Kurek v. Abu-Absi*³⁷⁴ involved a refusal by a teacher to fully explain what was expected of students in her syllabus.³⁷⁵ The Sixth Circuit cited its earlier decision in *Parate v. Isibor*,³⁷⁶ which compared the right of a professor to issue a grade to a college or university's power to override that grade assignment. The court explained:

Our concern in *Parate* was not with the University's insistence that the grade be changed, but only with the insistence that Parate himself make and endorse that change. A professor's own evaluation of a student's work, and the grade that he or she decides to assign to reflect that evaluation is an important part of a professor's teaching method. The grade that is affixed to a student's transcript, however, is the concern of the university In other words, the university may override the professor's evaluation, and change the assigned grade. It may not

369. *Id.* at 835.

370. 247 F.3d 69 (3d Cir. 2001).

371. *Id.* at 72.

372. 156 F.3d 488 (3d Cir. 1998).

373. *Brown*, 247 F.3d at 75. For a helpful summary of academic freedom applied to grading cases in the circuit courts, see Evelyn Sung, Note, *Mending the Federal Circuit Split on the First Amendment Right of Public University Professors to Assign Grades*, 78 N.Y.U. L. REV. 1550 (2003).

374. 423 F.3d 590 (6th Cir. 2005).

375. *Id.* at 591-92.

376. 868 F.2d 821 (6th Cir. 1989).

require him to publicly endorse those changes.³⁷⁷

Given this ruling, the court had little trouble holding that Johnson-Kurek's rights were not implicated, much less violated, since the dispute did not involve grading but rather her refusal to spell out what was required in the class.³⁷⁸

The Tenth Circuit rejected a separate right of academic freedom for individuals in *Schrier v. University of Colorado*.³⁷⁹ Robert Schrier, a professor of medicine, alleged that his termination as chair of the Department of Medicine was in retaliation for speaking out about a move of the medical facility from Denver to a former Army medical center in Aurora, Colorado.³⁸⁰ Applying the *Pickering* test, the court found that the subject matter of his speech—the expenditure of public funds and the potential impact relocation would have on patient care—addressed matters of public concern.³⁸¹ The professor lost because his speech impaired harmony with his co-workers.³⁸² Responding to the professor's academic freedom arguments, the court explained that “an independent right” does not arise outside of normal free speech principles.³⁸³ The idea “that professors possess a special constitutional right of academic freedom not enjoyed by other governmental employees” was rejected because it would promote inequality with similarly situated citizens.³⁸⁴

As the court succinctly concluded in *Omosegbon v. Wells*,³⁸⁵ “[a]cademic freedom rights are rooted in the First Amendment,” but they must be balanced against competing interests³⁸⁶ and are “subject to all the usual tests that apply to assertions of First Amendment rights.”³⁸⁷ In short, some academic speech is protected, but it is because of the same First Amendment principles available to all government employees.

377. *Johnson-Kurek*, 423 F.3d at 594 (citations omitted).

378. *Id.* at 594–95.

379. 427 F.3d 1253 (10th Cir. 2005).

380. *Id.* at 1257.

381. *Id.* at 1263.

382. *Id.* at 1265.

383. *Id.* at 1266.

384. *Id.* See also *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 (10th Cir. 2004) (holding that academic freedom is not a “separate right apart from the operation of the First Amendment within the university setting”).

385. 335 F.3d 668 (7th Cir. 2003). Indiana State University (ISU) decided not to renew the contract of an untenured faculty member, Oladele Omosegbon, who alleged that his due process and academic freedom rights under the First and Fourteenth Amendments respectively were violated. *Id.* at 674. He relied upon a statement in ISU's handbook that the “teacher is entitled to full freedom in research, . . . subject to adequate performance.” *Id.* at 676. He complained that he was told by the department chair not to associate with two other faculty members in the department, and that he was told to change the focus of his community activities. *Id.* He filed suit in Indiana state court. ISU removed the case to federal district court, which then granted summary judgment to ISU. *Id.* at 671. The Seventh Circuit held that his academic freedom claims must fail because he did not allege that he was ever restricted from speaking publicly about an issue, and the restrictions had to do with the performance of his duties as a university employee and a member of the department. *Id.* at 677.

386. *Id.* at 676.

387. *Id.* at 677.

B. Institutional Academic Freedom is an Immunity Not a Right

1. Back to the Four Essential Freedoms

Conventional wisdom holds that institutional academic freedom originated with the four essential freedoms in *Sweezy v. New Hampshire*.³⁸⁸ These freedoms are for colleges and universities to determine “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”³⁸⁹ The fourth freedom was a basis for Justice Powell’s concurring opinion in *Regents of the University of California v. Bakke*,³⁹⁰ a case more famous for its limited support of race-conscious admissions programs than for its teaching on institutional academic freedom. According to one commentator, *Bakke* represented a significant shift in constitutional law from what had previously been considered to be an individual right to a qualified right of the institution from government interference with core administrative activities.³⁹¹ Justice Powell referred to the four essential freedoms in explaining the University’s freedom to make its own judgment as to education, including the selection of the students.³⁹²

This theme was revisited in *Grutter v. Bollinger*.³⁹³ In upholding the University of Michigan Law School’s admission program, the Court viewed its ruling as “keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”³⁹⁴ Citing *Bakke*, the Court held that the “freedom of a university to make its own judgments as to education includes the selection of its student body.”³⁹⁵ The *Grutter* Court held that the Law School has a compelling interest in a diverse student body.³⁹⁶ No doubt, the Court believed that it should defer to the academic community in academic matters most of the time. But did the Court elevate that policy to a constitutional right?

388. 354 U.S. 234, 263 (1957). See Byrne, *Academic Freedom*., *supra* note 16, at 292.

389. *Sweezy*, 354 U.S. at 263.

390. 438 U.S. 265 (1978) (Powell, J., concurring). See Horwitz, *supra* note 66, at 465 (citing Byrne, *Academic Freedom*, *supra* note 16, at 257). See also Susan L. Pacholski, *Title VII in the University: The Difference Academic Freedom Makes*, 59 U. CHI. L. REV. 1317, 1325 (1992); Rabban, *supra* note 23, at 256.

391. Horwitz, *supra* note 66, at 465.

392. *Bakke*, 438 U.S. at 311–12 (Powell, J., concurring).

393. 539 U.S. 306 (2003).

394. *Id.* at 328.

395. *Id.* at 329 (citing *Bakke*, 438 U.S. at 312).

396. *Grutter*, 539 U.S. at 332.

2. The Amazing Footnote

Some commentators refer to a brief comment by the Supreme Court in a footnote in *Regents of the University of Michigan v. Ewing*³⁹⁷ as evidence of the Court's acknowledgment of its intent to establish separate rights of academic freedom.³⁹⁸

In *Ewing* a student challenged his dismissal from the University of Michigan on due process grounds.³⁹⁹ When the case reached the Supreme Court, the Court first stressed its "reluctance to trench on the prerogatives" of educational institutions and its responsibility to safeguard academic freedom.⁴⁰⁰ Once again, the Court's language should be read carefully. The Court is not talking about a right; it is reiterating its reluctance to interfere in academic matters. Citing both *Keyishian* and *Sweezy*, the Court then observed, in a now famous footnote, that academic freedom thrives on the "independent and uninhibited exchange of ideas among teachers and students," "but also, and somewhat inconsistently, on autonomous decision-making by the academy itself."⁴⁰¹

This statement is nothing more than a bow to the tradition of deference to the academic community. It is also the Court's acknowledgement that an occasional by-product of judicial deference is that the rights of the individuals within the academic community will sometimes clash with the decisions of the institution. It is hard to see how this simple statement can be evidence of a constitutional right of academic freedom for a college or university as an institution. The rights in *Ewing* belonged to the student, but they were curtailed by the state interest against which they were balanced. It is no more appropriate to label this state interest a "right" of the college or university than it is to label any other exercise of governmental

397. 474 U.S. 214 (1985).

398. See Stacy E. Smith, Note, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299, 321 (2002) ("The Court first explicitly acknowledged the existence of institutional academic freedom in *Regents of University of Michigan v. Ewing*."). See also Strum, *supra* note 18, at 150. Strum quoted Justice Stevens' statement in *Ewing* that federal courts are not suited to evaluate the substance of the "multitude of academic decisions that are made daily by faculty members of public educational institutions." *Id.* (quoting *Ewing*, 474 U.S. at 226). From this statement, Strum reasoned that Justice Stevens was "suggesting that academic freedom inheres in faculty members." *Id.* at 150. This is another example of a leap of logic towards a constitutional right of academic freedom, when Justice Stevens was only referring to the Court's tradition of deference in academic matters. See also Rabban, *supra* note 23, at 281 ("No case to date has presented the Court with a direct conflict between institutional and individual claims of first amendment [sic] academic freedom. The closest the Court has come to analyzing this issue is a footnote by Justice Stevens in *Regents of the University of Michigan v. Ewing*.").

399. *Ewing*, 474 U.S. at 217.

400. *Id.* at 226.

401. *Id.* at 226 n.12. See Strum, *supra* note 18, at 150 (arguing, without any real explanation, that this statement by the Court logically means that both teachers and students must be the possessors of academic freedom). See also Byrne, *Academic Freedom*, *supra* note 16, at 317-18 (commenting on the *Ewing* case before it was decided by the Supreme Court, that the strength and reach of institutional academic freedom remained in doubt, and noting that the Court had an opportunity in the *Ewing* case to decide whether there is a privilege for peer review evaluations).

power a “right.” As a governmental power to curtail the student’s liberty, it stands in contradistinction to what we think of as “rights.”

3. A Qualified Immunity?

Academic freedom is not inviolable, as one university found out in *University of Pennsylvania v. EEOC*.⁴⁰² After the University of Pennsylvania (“Penn”) denied tenure to Rosalie Tung, she filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), alleging race, sex, and national origin discrimination.⁴⁰³ Penn refused to comply with the EEOC’s subpoena of its tenure review files of both Tung and her male colleagues, and the EEOC sought to enforce the subpoena.⁴⁰⁴

Penn made two arguments. First, it urged the Court to recognize a common-law privilege against disclosure of confidential peer-review materials.⁴⁰⁵ Second, it asserted a First Amendment right of academic freedom against wholesale disclosure of the documents.⁴⁰⁶ Penn relied on one of the four essential freedoms—determining “who may teach”—to support its position that requiring disclosure of peer-review files on a finding of mere relevance would undermine the process of tenure and result in a significant infringement of Penn’s First Amendment right of academic freedom.⁴⁰⁷ Here, Penn was using academic freedom to fend off the government’s intrusion on the tenure process. The Court parried the attack. Surveying its *Sweezy* and *Keyishian* decisions, the Court concluded:

In those cases [the] government was attempting to control or direct the content of the speech engaged in by the university or those affiliated with it. In *Sweezy*, for example, the Court invalidated the conviction of a person found in *contempt* for refusing to answer questions about the content of a lecture he had delivered at a state university. Similarly, in *Keyishian*, the Court invalidated a network of state laws that required public employees, including teachers at state universities, to make certifications with respect to their membership in the Communist Party. When, in those cases, the Court spoke of “academic freedom” and the right to determine on “academic grounds who may teach” the Court was speaking in reaction to content-based regulation.⁴⁰⁸

The Court declined to define the precise contours of academic freedom in connection with governmental attempts to influence academic speech through faculty selection, because the EEOC subpoena did not involve direct infringement on that process.⁴⁰⁹ The EEOC did not prevent the University from using any

402. 493 U.S. 182 (1990).

403. *Id.* at 185.

404. *Id.* at 186–87.

405. *Id.* at 188.

406. *Id.*

407. *Id.* at 196.

408. *Id.* at 197.

409. *Id.* at 198.

criteria it wished in tenure decisions, “except those—including race, sex, and national origin—that are proscribed under Title VII.”⁴¹⁰ Stressing that it was not retreating from its earlier decisions, the Court indicated that it simply was not prepared to extend the scope of academic freedom any further.⁴¹¹

Justice Souter appears to read some of the Court’s decisions as recognizing a qualified immunity for colleges and universities from state interference. In his concurring opinion in *Board of Regents of the University of Wisconsin System v. Southworth*,⁴¹² Justice Souter stated that the Court’s decisions had emphasized “broad conceptions of academic freedom that if accepted by the Court might seem to clothe the University with an immunity to any challenge to regulations made or obligations imposed in the discharge of its educational mission.”⁴¹³

Like most modern Supreme Court cases on academic freedom, *Southworth* involved a clash between a university and its students. Students at the University of Wisconsin challenged a mandatory student activity fee on First Amendment grounds because it was used, in part, to support student organizations that were engaged in political or ideological speech.⁴¹⁴ When the case reached the Supreme Court, the majority opinion, written by Justice Kennedy, noted that the University had not claimed that the speech in question was its own; rather, the student activity fee was exacted for the “free and open exchange of ideas by, and among, its students.”⁴¹⁵ Thus, the Court held that the “objecting students may insist upon certain safeguards with respect to the expressive activities which they are required to support.”⁴¹⁶ The Court concluded that the program’s viewpoint neutrality requirement was sufficient to protect these rights.⁴¹⁷

Justice Souter concurred in the outcome but wrote that the Court did not need to impose a “new standard of viewpoint neutrality.”⁴¹⁸ Citing to the *Ewing* footnote, Justice Souter explained that *Ewing* did not address the “relationship between academic freedom and First Amendment burdens imposed by a university” and that, instead, it was a “due process challenge to a university’s academic decisions, while as to them the case stopped short of recognizing absolute autonomy.”⁴¹⁹ He further explained:

While we have spoken in terms of a wide protection for the academic freedom and autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching . . . we have never held that universities lie entirely

410. *Id.*

411. *Id.* at 199.

412. 529 U.S. 217 (2000) (Souter, J., concurring).

413. *Id.* at 237.

414. *Id.* at 221 (majority opinion).

415. *Id.* at 229.

416. *Id.*

417. *Id.* at 230.

418. *Id.* at 236 (Souter, J., concurring).

419. *Id.* at 238 (citing *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985)).

beyond the reach of students' First Amendment rights.⁴²⁰

Justice Souter was talking about a policy of deference—a qualified immunity for colleges and universities on academic matters.

4. The Professors Are the University

For institutional academic freedom to exist at all, conceptually, there needs to be both a logical distinction between the individual teacher and the institution, as well as a recognition of their separate interests. Again, some have missed the forest for the seedling. When the Court refers to colleges or universities, it does not mean a technical legal entity; it is referring to the academic community.

From its formation, the AAUP fought to persuade trustees and administrators that professors are not mere employees serving at the whim of their masters but rather professionals.⁴²¹ In *NLRB v. Yeshiva University*,⁴²² the Court conceded the profession's victory to some extent and in some contexts, in effect acknowledging that from the Court's vantage point, professors *are* the college or university. *Yeshiva* involved a battle over the rights of professors to have standing for collective bargaining under the National Labor Relations Act.⁴²³ The Court was required to decide whether professors are supervisors and managers and thus not covered by the Act.⁴²⁴

The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught.⁴²⁵

The Court's own words are telling. Institutional academic freedom supposedly emanates from the four essential freedoms, but, in *Yeshiva*, the Court noted that the professors call the shots, at least at colleges and universities that are structured in the same manner as Yeshiva University. Undoubtedly, although many professors believe the Court seriously misperceives reality, the salient point is that the Court does not distinguish between the college or university as a corporate entity and the people who teach there.

The Court's concern is to show deference to the academic community to the extent possible. This simple theme was stated clearly by the Supreme Court. When asked to review the "substance of a genuinely academic decision," courts should "show great respect for the faculty's professional judgment."⁴²⁶ That is not to say that the desires and interests of the teacher always align with the decisions of the college or university. The courts see the college or university as an institution that is largely self-governed by its faculty, with far greater autonomy

420. *Id.* at 238–39.

421. *See Metzger, supra* note 14, at 1279.

422. 444 U.S. 672 (1980).

423. *Id.* at 674.

424. *Id.*

425. *Id.* at 686.

426. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

than most any other organization.

A good summary of the respective roles of the college or university and the teacher, as seen by judges, is found in *Feldman v. Chung-Wu Ho*.⁴²⁷ Southern Illinois University did not renew the contract of an assistant professor of mathematics, Marcus Feldman, and Feldman sued, alleging a violation of his freedom of speech.⁴²⁸ The claim submitted to the jury was that Feldman was fired after he had accused a faculty colleague of lying about writing a paper with a famous mathematician.⁴²⁹ The jury awarded a monetary judgment under a state law claim of contract interference and decided against the university on Feldman's First Amendment claim.⁴³⁰ When the case reached the Seventh Circuit, Judge Easterbrook observed that a "university's academic independence is protected by the Constitution, just like a faculty member's own speech."⁴³¹ He summarized the difference between the type of speech protected because the speaker is a citizen, and the limits on speech by professors in the academic setting:

"The government" as an abstraction could not penalize any citizen for misunderstanding the views of Karl Marx or misrepresenting the political philosophy of James Madison, but a Department of Political Science can and should show such a person the door—and a public university may sack a professor of chemistry who insists on instructing his students in moral philosophy or publishes only romance novels. Every university evaluates *and acts* on the basis of speech by members of the faculty.⁴³²

In *Chung-Wu Ho*, Judge Easterbrook wrote that the University erred in telling Feldman to seek employment elsewhere and "that is unfortunate, but the only way to preserve academic freedom is to keep claims of academic error out of the legal maw."⁴³³ Judge Easterbrook contrasted *Jeffries v. Harleston*,⁴³⁴ which he described as a "hard case," because the professor was accused of making "hateful and repugnant" comments about Jewish people in a speech given off campus to a group which had no affiliation to his university, to *Chung-Wu Ho*, which he described as an "easy" case, because Feldman "charged a colleague with academic misconduct," the University investigated the claim and vindicated the colleague, and it later concluded that it "could obtain better mathematicians than Feldman for its faculty."⁴³⁵ Finally, Judge Easterbrook reasoned that if the decision by Southern Illinois University was "mete for litigation, then we might as well commit all tenure decisions to juries, for all are equally based on speech."⁴³⁶

427. 171 F.3d 494 (7th Cir. 1999).

428. *Id.* at 495.

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.* at 496 (citing *Feldman v. Bahn*, 12 F.3d 730, 732–733 (1993) (emphasis in original)).

433. *Id.* at 497.

434. 52 F.3d 9 (2d Cir. 1995).

435. *Chung-Wu Ho*, 171 F.3d at 497.

436. *Id.*

C. Summation

The Supreme Court has not slighted professors at government run colleges and universities. They are covered by the First Amendment, but they are given no greater *rights* than any other government employee.

Institutional academic freedom exists, but it is not a right. Rather, it is a qualified immunity based upon the long tradition of deference to the academic community, or, as J. Peter Byrne called it, of “academic abstention.”⁴³⁷ It was not a doctrine, he wrote, because the courts have never developed a consistent body of rationales for it.⁴³⁸ He observed that “most cases . . . of academic abstention involve complaints by students against college discipline or application of academic standards” but that the same principle also applies when a faculty member who complains about being rebuffed is met with the same court attitude that it should not interfere.⁴³⁹

VI. ACADEMIC FREEDOM IN THE WAKE OF *GARCETTI*

As this article explains, academic freedom is not a distinct constitutional right. College and university professors have received the same First Amendment protection as other government employees. But what is the future landscape for academic freedom in the wake of *Garcetti*?

Prior to *Garcetti*, courts applied the *Pickering* test.⁴⁴⁰ Some professor expressions in the classroom and in connection with research may involve matters of public concern. In those cases, a portion of the *Pickering/Connick* test will be satisfied. Indeed, it can be argued that all academic speech touches on public concern. Some commentators—one writing well before *Garcetti*—made this very suggestion.⁴⁴¹

However, *Garcetti* requires a new threshold determination. A court must first determine whether the speech is made pursuant to the employee’s official duties.⁴⁴² In a post-*Garcetti* world, the initial focus will not be on the importance of the speech to the public but on whether it was technically part of the professor’s job description. Those in academia should be concerned with the Supreme Court’s tendency to stir the ghost of the Holmes’s Epigram, as it did in *Rosenberger v. Rector and Visitors of the University of Virginia*⁴⁴³ and to hint that what matters is whether the state paid for the speech.

Context of the speech matters more than ever. Extramural speech has the best chance of protection precisely because it is not normally made pursuant to one’s official job duties. Almost a century ago, the AAUP fought to include extramural

437. Byrne, *Academic Freedom*, *supra* note 16, at 323.

438. *Id.*

439. *Id.* at 324.

440. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

441. See Finkin, *supra* note 31 at 1346 (1988). See also Chang, *supra* note 30, at 941 (“[I]t is possible to argue that what a professor chooses to teach her students in a public university is *inherently* and *always* of public concern”) (emphasis in original).

442. *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1960 (2006).

443. 515 U.S. 819 (1995).

speech under the academic freedom umbrella. One writer deemed that decision to be a “serious weakness under the logic of the 1915 Declaration itself,” because when scholars speak as ordinary citizens and not within their areas of expertise, they are “not engaging in speech to which academic freedom should apply.”⁴⁴⁴ Ironically, after *Garcetti*, that very distance from the ivy-covered walls may give extramural speech the greatest protection.

Core academic speech has always been considered sacrosanct—the subject of eloquent homilies. Nevertheless, it is endangered if *Garcetti* is applied literally. Professors are paid to teach. Curricula are often established by colleges and universities, especially in this age of outcome-based assessments. Unless the Supreme Court carves out a specific exception for academic speech, *Garcetti* will be the weapon of choice by would-be censors. That is precisely why Justice Souter voiced his concerns in *Garcetti*.⁴⁴⁵

Intramural speech is simply an enigma. Prior to *Garcetti*, this type of speech was sometimes protected. For example, in *Perry v. Sindermann*,⁴⁴⁶ a teacher at a two-year college, and president of the state’s association for junior college teachers, became involved in public disagreements with the Board of Regents about elevating his college to four-year status.⁴⁴⁷ He wrote a newspaper ad critical of the Regents.⁴⁴⁸ His contract was not renewed, and he received no explanation or hearing.⁴⁴⁹

He brought suit alleging that the decision not to renew his contract was due to his public criticism of the college administration, thus infringing his freedom of speech and that the failure to provide him a hearing was a denial of his Fourteenth Amendment right of procedural due process.⁴⁵⁰ The district court granted summary judgment to the defendants.⁴⁵¹ The Fifth Circuit reversed, holding that despite his lack of tenure, not renewing his contract violated the Fourteenth Amendment if it was based on protected speech and that the failure to provide a hearing would violate the guarantee of due process if the teacher had an “expectancy” of re-employment.⁴⁵² The Supreme Court affirmed, explaining that for at least twenty-five years, it was clear that although a person has no right to a valuable governmental benefit, and that benefit could be denied for a number of reasons, “there are some reasons upon which the government may not rely,” especially if that denial infringed constitutionally-protected speech or association.⁴⁵³ The professor’s speech was held intramural, and he won.⁴⁵⁴ In the wake of *Garcetti*, however, the same outcome is less certain.

444. Rabban, *supra* note 23, at 243.

445. *Garcetti*, 126 S.Ct. at 1969.

446. 408 U.S. 593 (1972) (Souter, J., dissenting).

447. *Id.* at 594–95.

448. *Id.* at 595.

449. *Id.*

450. *Id.* at 596.

451. *Id.*

452. *Id.*

453. *Id.* at 596–97.

454. *Id.* at 602–03.

If, for example, a professor should speak out post-*Garcetti* as part of assigned committee work, the speech may be part of the professor's job duties, which means it cannot get past the *Garcetti* threshold and the teacher will lose the First Amendment challenge. But suppose that a professor complains about a personnel issue. That speech probably was not made pursuant to his or her official job duties, which means that it satisfies the threshold requirement in *Garcetti* and moves the inquiry to the public concern determination of the *Pickering* test. But it may not be deemed to be a matter of public concern, and the teacher will still lose the case.

Intramural speech cases are much like obscenity cases—fact specific and hard to define.⁴⁵⁵ They run the gamut from a complaint about faculty parking to a statement by a professor as part of his college or university service. The former is too mundane for constitutional protection, while the latter relates to administrative matters, and may well deserve it.⁴⁵⁶ Neither is directly related to core academic speech.

The Supreme Court has addressed academic speech disputes which relate to intramural matters, but the analysis seems to have been nothing different from the typical *Pickering/Connick* approach. Matthew W. Finkin argued that protection of intramural speech is essential:

[A]lthough intramural criticism, debate, and protest do not contribute to the discovery of a disciplinary truth, they conduce toward something almost as important in the life of the university. In developing and executing its policies, institutions seek not truth but wisdom: a decision on admission, curriculum, or tenure is not true nor untrue, but is wise or unwise.⁴⁵⁷

Intramural utterance is connected to both freedom of teaching and learning.⁴⁵⁸ Finkin argued that in considering the capacity in which his or her speech will be uttered—is it within the discipline, extramural, etc.—professors will normally weigh the risks before speaking, and they will steer clear of the forbidden zone.⁴⁵⁹ That is the chilling effect courts have long tried to avoid.

While *Garcetti* involved a government-lawyer and not an academic, the language of the Court was very broad, seemingly covering all public employees. Indeed, that is why Justice Souter expressed concern about the fate of academic freedom in his dissent.⁴⁶⁰ Yet, this author thinks that the Supreme Court will carve out an exception for academic freedom when it is faced with a case squarely on

455. This is a reference to Justice Potter Stewart's famous concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), that was an appeal from a criminal conviction of a movie theater owner for showing a French film alleged to be obscene. Justice Stewart wrote, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of obscenity]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Id.* at 197.

456. See Rabban, *supra* note 23, at 295.

457. Finkin, *supra* note 31, at 1341.

458. *Id.* at 1342.

459. *Id.* at 1342–43.

460. *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1969 (2006) (Souter, J. dissenting).

point. That exception, however, will not be because there is a separate and distinct constitutional right of academic freedom, either for individuals or institutions. Rather, the exception will be attributable to the long tradition of professional academic freedom, as well as the Court's reluctance to interfere with academic matters.

Though *dicta*, Justice Kennedy's comments in *Garcetti* indicate that the Court may well search for ways to honor its commitment to academic freedom. One way is for the Court to recognize that inherent in every professor's official job duties is freedom of expression, at least with respect to core academic speech. As with professional academic freedom, the purpose would not be to exalt those in academia to an elite status; rather, it is to benefit democracy itself. In other words, the Court should connect its own jurisprudence of academic abstention and incorporate professional academic freedom into the law of public employee speech protection.

As support, the Court can cite the utilitarian mission of academic freedom—to enhance the “marketplace of ideas”⁴⁶¹—because we turn to professors to “foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion.”⁴⁶² The important public policy of molding independent and informed citizens can be accomplished only by carving out a special right of freedom for professors. By this approach, the Court can clarify its rulings, unite the constitutional and professional aspects of academic freedom, and fortify the academic breastworks against future sieges by enemies of academic independence.

CONCLUSION

Academic freedom is endlessly fascinating and critically important, not only for the teacher and scholar but also for the public they serve. The pursuit of truth has always required some leeway or an exemption of sorts from the restraints most citizens face. To follow the argument where it leads, to have the necessary elbow room to find a cure for a disease, or to make a scientific discovery, requires a disconnect from political opinions and financial strings.

For many years this principle has been understood, and it is embedded in our colleges and universities today. Professional academic freedom is the advance guard against would-be attackers—the academic Maginot Line. Our courts have paid tribute to the principle, calling it a “transcendent value”⁴⁶³ and honoring professors as “priests of our democracy.”⁴⁶⁴

As for judicial protection, scholars will continue to debate the technicalities. As things stand today, constitutional academic freedom is important, though perhaps overrated as a means to provide judicial protection. It does not protect professors at private colleges and universities because of the state action doctrine. Professors at public colleges and universities have always been subject to the limits imposed

461. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

462. *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

463. *Keyishian*, 385 U.S. at 603.

464. *Wieman*, 344 U.S. at 196 (Frankfurter, J., concurring).

by the public employee speech doctrine, and now *Garcetti* has the potential to further restrict academic speech. We should therefore join Justice Souter in hoping that someday the Supreme Court will declare core academic speech and intramural speech exceptions to the *Garcetti* ruling.

MILLENNIALS AND DISABILITY LAW:

REVISITING *SOUTHEASTERN COMMUNITY COLLEGE V. DAVIS*

LAURA ROTHSTEIN*

INTRODUCTION

In 1979, the Supreme Court, in its first decision addressing any issue under Section 504 of the 1973 Rehabilitation Act¹ (“Section 504”), began laying the groundwork for addressing issues of students with disabilities in higher education. In *Southeastern Community College v. Davis*,² the Supreme Court addressed the issue of when an individual with a disability is “otherwise qualified.”³ The Court established that the individual must be able to carry out the essential requirements of the program with or without reasonable accommodation and in spite of the disability.⁴ This decision also established that the institution is not required to make fundamental alterations⁵ and is not required to lower standards or provide accommodations that are unduly burdensome.⁶

Though the courts did not decide many higher education disability

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1. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2000).

2. 442 U.S. 397 (1979). See Laura Rothstein, *Southeastern Community College v. Davis: the “Prequel” to the Television Series “ER,”* in EDUCATION STORIES (Michael Olivas & Ronna Schneider eds., Foundation Press 2007), for a detailed discussion of this decision and the developments that evolved from this case. This is the first Supreme Court decision issued under any federal disability discrimination statute.

3. 442 U.S. at 405. The case dealt with a hearing impaired student seeking entry into a registered nursing program. *Id.*

4. *Id.* at 406.

5. *Id.* at 410.

6. *Id.* at 413.

discrimination cases in the 1980s, they did establish a number of key concepts. Much of the case law established in the 1980s from the Rehabilitation Act was adopted as part of the statutory language in the 1990 Americans with Disabilities Act⁷ (“ADA”), which covers both public and private colleges and universities.

The statutory language of the ADA, judicial decisions, and opinion letters from the Department of Education’s Office for Civil Rights (“OCR”) provide guidance on several issues. The underlying principles include: requiring equal opportunity, not just equal treatment; providing education in the most integrated appropriate setting; providing reasonable accommodations; making individualized determinations about accommodations; allowing undue burden as a defense; and establishing further guidance on what it means to be “otherwise qualified.”

A number of issues have been the focus of substantial recent judicial attention in the higher education context.⁸ These issues include whether the individual meets the definition of being disabled; whether the institution is immune from damage actions under different statutes; what accommodations are required; what relationship exists between standardized admissions, professional licensing tests, and educational programs; and how behavior and conduct issues arise in a variety of contexts. Architectural barrier issues, study abroad programs, and technology access issues have also begun to receive attention.

The legal response to resolving these issues has not changed substantially in recent years. The enrollment of “millennials”—students born after 1982 who have grown up with technology and the culture that affects their generation—has brought a unique set of challenges to institutions of higher education. Millennial students present new and unusual issues ranging from wanting a companion turtle to accompany the student to exams to expecting instant responses to three a.m. emails or cell phone calls requesting unlimited time on exams. Combining these millennial behaviors with disability discrimination law makes life even more interesting. Knowing the legal requirements is only the first step in developing a proactive approach to serving this generation of students, each one of whom may truly believe that he or she is “The Time Magazine Person of the Year.”⁹

Part I of this article briefly describes who millennials are and why they are different. Part II then poses several hypothetical scenarios to highlight the kinds of issues that might arise in the context of students of this generation seeking accommodations for disabilities, real or imagined. Part III includes a general discussion and overview of the response from courts and Department of Education

7. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000).

8. See LAURA F. ROTHSTEIN & JULIA ROTHSTEIN, *DISABILITIES AND THE LAW* (3d ed. Thomson West 2006), for a comprehensive review of cases. See also Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We’ve Been and Where We May be Heading*, 63 MD. L. REV. 122, 143–44, 153, 156–57 (2004).

9. Cover, *TIME*, Dec. 25, 2006 (depicting a mirror as the face of a computer screen and the words “You. Yes, you. You control the Information Age. Welcome to your world,” intended to indicate that everyone is the “Person of the Year”). See also NEIL HOWE & WILLIAM STRAUSS, *MILLENNIALS RISING: THE NEXT GREAT GENERATION* (2000); JEAN M. TWENGE, *GENERATION ME: WHY TODAY’S YOUNG AMERICANS ARE MORE CONFIDENT, ASSERTIVE, ENTITLED—AND MORE MISERABLE THAN EVER BEFORE* (2006); *How the New Generation of Well-Wired Multitaskers Is Changing Campus Culture*, *CHRON. OF HIGHER EDUC.* (Wash., D.C.), Jan. 5, 2007, at B10.

guidance on key issues in this area, describing trends both in the types of situations arising and in the legal responses to these situations. Finally, Part IV offers some practical suggestions for administrators to implement and for college and university counsel to suggest as preventive measures. An appendix of resources follows the article. A proactive approach has always been advisable, but it is more important than ever to anticipate the issues and plan for them in light of this new generation of students.

I. MILLENNIALS—WHO ARE THEY AND HOW ARE THEY DIFFERENT?

A. Who Are They?

In current pop culture, millennials are identified as individuals born after 1982.¹⁰ Their entire life experience has included technology—cell phones, iPods, computers, instant messaging, and email. They can be very self-absorbed and “me” oriented. Many of them have parents who have been heavily involved in their lives and ensuring that everything is okay for their children. These parents have come to be known as “helicopter” parents, because they hover and land to take care of things that they perceive as needing attention. The millennial persona has seven distinguishing traits: they are special, sheltered, confident, team-oriented, achieving, pressured, and conventional.¹¹

Millennials have been described as “needy”—wanting constant reassurance and praise. Because of their experience of instant response via technology, they often do not recognize social and other boundaries in certain settings. They have set high goals and want to do whatever is necessary to be “the CEO of everything important.”¹² Some of them are not accustomed to being accountable. If they make a mistake, someone (often their parents) will fix it, and things will go on as before. Often they are not as attentive to rules, regulations, deadlines, and limits, and may chafe at having to pay attention to these things. They are also used to multitasking. Because of technology, they are on information overload and may not have developed the tools to sort the critical and essential from the extraneous.

10. HOWE & STRAUSS, *supra* note 9, at 11.

11. *Id.* at 43–44.

12. Chris McGrath, Recruiting and Admitting the Millennial Generation: Back By Popular Demand, Presentation at the Law School Admission Council Annual Meeting and Educational Conference (June 1, 2007) (on file with author).

B. Why Are They Different in the Context of Disability Issues on Campus?

What millennial students request for disability accommodations is not that different from what previous cohorts of students with disabilities requested. There are requests for accommodations for a variety of conditions—learning disabilities (“LD”), attention deficit disorder (“ADD”), attention deficit hyperactivity disorder (“ADHD”), depression and other mental health problems, substance abuse, sensory impairments (vision, hearing, etc.), mobility impairments, and other conditions. Millennials request the same types of accommodations that were requested before—extra time for exams, note takers, reduced course loads, interpreters, books on tape, readers, course waivers, auxiliary aids, etc. The data indicate that the numbers of students with disabilities on college and university campuses have not changed dramatically in recent years.¹³ As discussed below, the legal mandates have not changed substantially in recent years,¹⁴ although in some areas, changes may account for some of the recent challenges, particularly with respect to who is legally entitled to accommodations.

So why does it feel different or more troubling? Perhaps it is because of the intense approach that millennials, and sometimes their parents, take to disability issues. They want constant reinforcement and confidence building.¹⁵ They want answers quickly. They do not always follow directions. They want someone to hold their hand to walk them through everything. Perhaps some level of sympathy is due because they are on information overload. Perhaps another factor is that millennials are so different in their approach to many issues. The administrators and faculty members with whom they are dealing, however, are not millennials and may be less sympathetic and understanding of how they think and work. There are indications, however, that millennials want more structure,¹⁶ but it is important for administrators and faculty members to clearly communicate what that structure is and what the rules are for working within that structure.

Today, even experienced student service professionals who are accustomed to dealing with demanding students find themselves at a new level of amazement when scenarios such as the following arise. Those who work with students in counseling, advising, and teaching at colleges and universities find themselves challenged with how to respond.

II. MILLENNIALS—RAISING DISABILITY ISSUES

In reviewing the following scenarios, consider the following questions.¹⁷ What

13. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2003 (2003), available at <http://nces.ed.gov/pubs2003/2003067.pdf> (reporting that approximately nine percent of all undergraduate students have a disability requiring an accommodation, an increase from about three percent in 1978).

14. Sara Hebel, *How a Landmark Anti-Bias Law Changed Life for Disabled Students*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Jan. 26, 2001, at A23.

15. Jeffrey Zaslow, *Praise Becomes Workplace Necessity*, WALL ST. J., Apr. 20, 2007, at W1.

16. HOWE & STRAUSS, *supra* note 9, at 166.

17. The hypotheticals discussed in this article are based on a composite of case law, the

additional facts are needed? What would be the next steps to address this situation? What policies, practices, or procedures might help to avoid these situations in the future? What are the legal implications? What are the practical implications?

A. Schizoaffective Disorder—Class Attendance

Student A was admitted to the university's engineering program. During the first semester, he began experiencing anxiety, panic, and depression. As a result, he missed several class sessions. Upon his return, one professor dropped him from the class and refused to accommodate his condition. The professor also ridiculed the student in front of the class. The following summer, the student attempted suicide but returned to campus the following fall. He was hospitalized briefly in the fall and again had attendance problems. He was also late for class as a result of the side effects of some of his medications. He provided the professor with a physician's certificate regarding the side effects of his medications. The professor refused to grant him additional time to complete assignments. The dean reprimanded the student for complaining about the professor on an evaluation form. The student was not permitted to enroll in the spring because of his academic standing. He has sued the university for violating Section 504 and the ADA.

B. ADD/Dyslexia—Various Accommodations

Student B enrolled as a freshman majoring in political science at state college. His long term goal was to attend law school, for which he knew good grades would be important. He initially made no requests from the college. He received C's on most exams in the first semester (one B and one D), and upon returning in January, he provided a statement from his family physician to the office for student services which confirmed that he has ADD and dyslexia. He has requested the following: unlimited time on exams, exam administration at his convenience in his residence hall room, waiver of a required statistics course, and a reduced course load. He has also indicated that he will request a single room at the double room rate because having a roommate is distracting and disturbing. Aware that a reduced course load would put him below full time status, he has also requested a waiver of the college's twelve credit enrollment requirement for eligibility for financial aid and residence hall living.

Department of Education's Office for Civil Rights ("OCR") opinions, popular media accounts, the author's own experience, and situations of other colleagues in legal education and higher education.

C. Panic Attacks—Pets in the Residence Hall or in the Classroom

Student C enrolled as an English major at a private university. On the day she moved into the campus residence hall for freshmen, she brought her ferret. The information on the residence hall policy clearly stated that animals were not allowed. When confronted by the residence hall advisor, she provided documentation of her panic disorder and indicated that the ferret is an accommodation to reduce her anxiety. Her roommate is afraid of the ferret and also says that the room smells from the animal.

D. Learning Disability—Distance Learning Accommodations

Student D enrolled in an online university learning program and provided documentation from a psychiatrist confirming both his attention deficit disorder and depression. Participation in an online discussion accounts for a portion of the course grade. The psychiatrist recommended a tutor, printed material instead of material from the internet, extra time for tests, and extra time for assignments. Part of the course is an interactive discussion among students and the professor, with participation at any hour or day. The student service office notified the instructor of the student's disability and need for accommodations, and the office further advised the student to contact the instructor directly for specific classroom needs as they arise.

E. Asperger's Syndrome—Behavior Issues

Student E enrolled in an undergraduate program in early-childhood development. She was diagnosed with Asperger's syndrome, a condition that makes it difficult to recognize social cues and adapt to new environments. Related learning disabilities also provide challenges to her ability to organize tasks. The disability service office arranged some accommodations to her academic program, but professors, classmates, and students living in her residence hall have raised concerns about some of her behaviors. These concerns include blurting out in class without raising her hand, shouting at other students whom she thinks have slighted her in some way, and shouting at a professor who would not give her an extension on an assignment. At one campus speaking event, she shouted an obscenity at the speaker and was escorted from the room. She was advised that her enrollment may be terminated because of her behavior.

III. MAJOR LEGAL DEVELOPMENTS

The following is an overview of the broad legal developments affecting students with disabilities in a higher education context.¹⁸ It includes both Section 504 and ADA requirements.

A. Who Is Protected—Definition of Disability

Pursuant to the Individuals with Disabilities Education Act, many students with disabilities entering a college or university previously received services in K–12 schools, such as tutors, special testing accommodations, and other accommodations.¹⁹ Under this comprehensive special education statute, the school must identify the student, pay for the documentation to test the student, and provide special education and related services that are often substantially beyond the federal nondiscrimination requirements for reasonable accommodations. Colleges and universities should educate the parents of these students, informing them that the rules in higher education are different than in K–12. Otherwise, the parents' expectations will reflect prior K–12 educational experiences.

Both the ADA and Section 504 protect three classes of individuals: individuals with physical or mental impairments that substantially limit one or more major life activities; individuals who have a record of such impairment; and individuals who are regarded as having such impairment.²⁰ The individual must be otherwise qualified to carry out the essential requirements of the program with or without accommodations.²¹ The individual must not pose a direct threat to self, to others, or to property.²²

Courts addressed the issue of what it means to be substantially limited and what constitutes a major life activity. In 1999, three Supreme Court decisions in the context of the ADA and employment determined what it means to be substantially limited, and narrowed the definition of who is protected. In what is known as the *Sutton* trilogy,²³ the Court determined that an individual's disability was to be

18. This section is not intended to provide a comprehensive overview of all the cases and Office for Civil Rights opinions on these issues. Instead, the discussion generally discusses some interesting recent cases and a landmark decision that provides clarity to the situation. It does not address the issue of enforcement—including immunity—or remedies. The article does not cover architectural barriers and physical access issues because these are not generally the kinds of issues that are the basis of disputes related to behavior and conduct of millennial students.

19. Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400–1491 (Supp. IV 2004). See ROTHSTEIN & ROTHSTEIN, *supra* note 8, for a detailed discussion of this statute.

20. 28 C.F.R. § 35.104(2005)

21. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 413 (1979). In the scenarios in Section III, Student A who failed to meet attendance requirements might not be otherwise qualified.

22. See *infra* Part IV.D, for additional discussion.

23. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (holding that individuals whose vision was corrected with eyeglasses or contact lenses were not disabled); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (holding that a truck driver with correctable monocular vision was not disabled); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (holding that an individual with high blood pressure controlled by medication was not disabled).

determined by taking into account mitigating measures such as eyeglasses or medication. The Supreme Court also provided guidance on what constitutes a major life activity. In *Toyota Motor Manufacturing Kentucky, Inc. v. Williams*,²⁴ the Court held that major life activities are those that are central to the daily lives of most people.²⁵ This employment case has been the precedent for many subsequent decisions in employment and other contexts which address the issue of major life activity.

On the same day the Court decided the *Sutton* trilogy, it remanded a case more relevant to the higher education context. The case of *New York State Board of Law Examiners v. Bartlett*²⁶ addressed a bar examination accommodation request. Marilyn Bartlett had been diagnosed with dyslexia,²⁷ but as the Second Circuit noted on remand, not every impairment is a disability entitled to protective status under federal law.²⁸ Ms. Bartlett had requested accommodations for her learning disability during several bar exam administrations.²⁹ The accommodations she requested were unlimited or extended time, tape recording of essay responses, and circling multiple choice answers in the test book instead of on the answer sheet.³⁰ The requests were consistently denied on the basis that her “application does not support a diagnosis of a reading disability or dyslexia.”³¹

The Supreme Court remanded the case because the lower court had not examined whether mitigating measures affected whether Ms. Bartlett was “disabled.”³² On remand, the lower court reviewed the assessments and evaluations of Ms. Bartlett and determined that the record demonstrated that even with her history of self-accommodation (the mitigating measure), she was disabled.³³ The Second Circuit held that she may be disabled if her impairment substantially limited the major life activity of reading.³⁴ The district court found that she met that standard.³⁵ The Second Circuit also determined that to be substantially limited in the major life activity of working, she would have to demonstrate that her impairment caused her to be excluded or significantly restricted in a class of jobs or a broad range of jobs.³⁶

For many years after the passage of Section 504 and the ADA, higher education institutions rarely challenged students on whether they were disabled or not.

24. 534 U.S. 184 (2002).

25. *Id.* at 197.

26. 156 F.3d 321 (2d Cir. 1998), *vacated*, 527 U.S. 1031 (1999).

27. *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1102 (S.D.N.Y. 1997).

28. *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 226 F.3d 69, 74 (2d Cir. 2000).

29. *Id.* at 75.

30. *Id.*

31. *Id.* On one occasion, the parties agreed to the granting of some accommodations but that the results would not be certified unless Bartlett prevailed in her lawsuit. *Id.* at 76.

32. *Id.* at 74, *remanded to*, *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93 CIV. 4986(SS), 2001 WL 930792, at *51 (S.D.N.Y. Aug. 15, 2001).

33. *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93 CIV. 4986(SS), 2001 WL 930792, at *51 (S.D.N.Y. Aug. 15, 2001).

34. *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 226 F.3d 69, 74 (2d Cir. 2000).

35. 2001 WL 930792, at *1.

36. 226 F.3d at 82.

Instead, the disputes tended to focus on two major issues. The first issue was whether the individual was otherwise qualified, i.e. able to carry out the essential requirements of the program with or without reasonable accommodation.³⁷ The second issue was whether the requested accommodation was itself reasonable.³⁸ After the *Sutton* trilogy, perhaps because of the legal basis and perhaps because of the greater demand for expensive accommodations, higher education institutions seemed more likely to raise the defense that the student was not disabled and thus had not been discriminated against or was not entitled to reasonable accommodations. The decisions in *Sutton*, *Toyota*, and *Bartlett* have guided the subsequent judicial response to this issue.

Recent challenges have favored the institutions. These decisions often include discussions about whether the activity at issue is a “major life activity,” which would include “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”³⁹ For example, in the case of *Swanson v. University of Cincinnati*,⁴⁰ the court held that a surgical resident’s major depression did not substantially limit any major life activities.⁴¹ His difficulty in concentrating was temporary and was alleviated by medication.⁴² His communication problems were short-term, caused by medication, and consisted of only a few episodes.⁴³ This case highlights the dilemma that many individuals face after *Sutton*. Taking medication for a condition may mitigate the condition, but the medication may have adverse side effects that may cause other impairments.

A number of cases have addressed whether conditions such as test anxiety, panic attacks, and post traumatic stress disorder are disabilities, and have generally found that the facts indicated that these conditions did not substantially limit a major life activity.⁴⁴ While these judicial assessments are individualized and

37. See, e.g., *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1051 (9th Cir. 1999) (holding a student was not otherwise qualified to complete a medical school’s requirements).

38. See, e.g., *id.* at 1048–50 (noting that reasonableness is fact specific and that it was unreasonable to require the medical school to modify its internship because doing so “would sacrifice the integrity of its program”).

39. OCR Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 104.3(j)(2)(ii). See also *Dalton v. Roane State Cmty. Coll.*, No. 3:04-CV-9, 2006 WL 2167242 (E.D. Tenn. July 31, 2006) (holding that dyslexia of a student seeking accommodation in a nursing program did not substantially limit the major life activity of learning).

40. 268 F.3d 307 (6th Cir. 2001).

41. *Id.* at 318.

42. *Id.* at 317.

43. *Id.* at 316.

44. See, e.g., *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052 (9th Cir. 2005) (holding that a medical student was not substantially limited by a learning disability for purposes of daily living, as compared to most people); *Gonzales v. Nat’l Bd. of Med. Exam’rs*, 225 F.3d 620 (6th Cir. 2000) (holding that a medical student was not substantially limited in the ability to read); *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974 (10th Cir. 1998) (holding that test anxiety was not a disability for a medical student); *Baer v. Nat’l Bd. of Med. Exam’rs*, 392 F. Supp. 2d 42 (D. Mass. 2005) (holding that a student with learning disabilities was not disabled if impairment only limits ability to take timed, standardized tests); *Witbeck v. Embry Riddle Aeronautical Univ.*, 184 Ed. Law Rep. 853 (M.D. Fla. 2004) (finding that a student failed to

evaluate how the condition affects that particular person, they nonetheless indicate a reluctance to find such conditions to be substantially limiting.

The third class of disabled individuals—those “regarded as” or “perceived as” having an impairment—has not been addressed in many cases. Since *Sutton*, however, more plaintiffs are arguing that based on this portion of the definition they are covered. Consistent with most decisions, however, the college or university has generally prevailed. For example, in the case of *Marlon v. Western New England College*,⁴⁵ a law student who claimed he was treated adversely and suffered from a learning disability, panic attacks, and depression⁴⁶ did not prove he was protected because he did not offer sufficient evidence for the court to determine that he was regarded as disabled.⁴⁷

According to the court in *Davis v. University of North Carolina*, even a multiple personality disorder was not perceived as a disability.⁴⁸ Ms. Davis was enrolled in a teacher certification program and had succeeded in her academic courses.⁴⁹ Yet her aberrant behavior, resulting from her diagnosed multiple personality disorder, was disruptive to faculty members and students and caused concern.⁵⁰ Eventually these behaviors reached a level which resulted in her removal from the program.⁵¹ The reason for the removal was failure to meet non-academic requirements, including failure to meet expectations of “professional demeanor; professional interactions with university students, faculty, staff, and administrators; . . . and adherence to school rules and ethical standards.”⁵² The court also noted that “there is evidence in the record from which a jury could conclude that [the] action was motivated at least in part by its apprehension about whether Davis should work with children.”⁵³ She had admitted that she occasionally had memory blackouts.⁵⁴ The court would only concede that the institution may have perceived her as disabled by her disorder but not that it perceived her as *substantially* disabled.⁵⁵ The court noted:

At most, Davis’s evidence establishes that she was perceived as unable

demonstrate central auditory processing disorder); *In re Allegheny Health, Educ. and Research Found.*, 321 B.R. 776 (Bankr. W.D. Pa. 2005) (holding that a student with ADD was unable to show substantial limitation of her ability to learn, as compared to other adults her age). See ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 3.2 n.8, for additional case citations.

45. *Marlon v. W. New England Coll.*, 124 F.App’x 15 (1st Cir. 2005). See also *Letter to Genesee Community College*, 33 Nat’l Disability L. Rep. (LRP) ¶ 199 (Mar. 8, 2006) (stating that a student banned from campus after acting strangely did not prove that campus officials perceived him as having a disability).

46. *Marlon v. W. New England Coll.*, No. Civ.A. 01-12199DPW, 2003 WL 22914304, at *1 (D. Mass. 2003).

47. 124 F.App’x at 17.

48. 263 F.3d 95 (4th Cir. 2001).

49. *Id.* at 97.

50. *Id.* The circuit court opinion describes aggressive manner towards students and professors and aberrant behavior. *Id.*

51. *Id.*

52. *Id.* at 98.

53. *Id.*

54. *Id.*

55. *Id.* at 99.

to perform a single job—teaching, or perhaps a very narrow range of jobs—those that require unsupervised contact with children At best, her evidence shows that UNC-W perceived her to be unable to complete one specific program—the teacher certification program UNC-W was willing to waive the certification requirement and allow Davis to apply to the master’s degree program UNC-W did not prohibit Davis from attending classes . . . but simply determined that she was not suitable for the one particular program.⁵⁶

The holding in the case indicates that even if Davis could have proven that she was “perceived as” disabled, she would probably not have been able to prove that she was otherwise qualified because of her academic conduct failures and the concerns about her fitness to work with children.

In reviewing the five scenarios illustrated above, it is probable that in at least some of these cases, a court might determine that the condition did not reach the definitional requirements of a disability. For example, Student A with schizoaffective disorder and Student C with panic attacks might not be able to demonstrate their conditions substantially affected major life activities. The same might be true for Student E with Asperger’s Syndrome. The students with ADD, dyslexia, and other learning disabilities (Students B and D) might have greater success, depending on the proof offered. Thus, if the students cannot even survive a motion to dismiss based on the lack of standing, the institution would not be required to provide the accommodation.⁵⁷ It should be noted, however, that many state discrimination laws provide broader protection in applying the definitional status.

B. Documentation Issues

One area that has received a great deal of attention is documentation.⁵⁸ The individual not only must meet the definition of having a disability but the disability must also justify the requested accommodations. In considering documentation, the issues include: who is qualified to evaluate the particular condition; what the documentation should include; and how recent it should be. The student is generally required to pay for the documentation.⁵⁹ This is a change from K-12 education, and this requirement sometimes comes as a surprise to students and their parents.

It is appropriate for the institution to require the expert who prepares the assessment and designates the requested accommodations to have the appropriate

56. *Id.* at 100–01.

57. See Rothstein, *supra* note 2, for a discussion of the evolution of this issue in the courts.

58. See generally ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 3.2.

59. In grades K-12, the school has the obligation both to identify students with disabilities and to provide testing and other documentation to determine the appropriate special education and related services. Students coming into higher education often do not realize that the burden of requesting accommodations and the burden of paying for testing to justify the accommodations shifts to the student and the student’s parents. This misunderstanding may be one source of tension between the institution and the student.

expertise.⁶⁰ The major case to address this issue is *Guckenberger v. Boston University*,⁶¹ in which the court discussed the credentials needed for making these assessments.⁶² The court differentiated the credentials needed based on the claimed disability.⁶³ A higher level of expertise was required to document the conditions of attention deficit disorder and attention hyperactivity deficit disorder than to diagnose learning disabilities.⁶⁴ Not only should evaluators have the appropriate professional experience, but they should also be aware of the requirements of the program the student is seeking to enter in order to determine what types of accommodations would be needed.

Highlighting the differing expectations for admissions exams, student enrollment, and licensing exams is the case of *In re Reasonable Testing Accommodations of Terry Lee LaFleur*.⁶⁵ The case involved requested accommodations for the bar examination for a student who had received accommodations in previous academic settings. The psychologist who testified about the student's need for extra time was not an expert on bar exam accommodations but was an expert on law school admissions examinations.⁶⁶ While the testimony might have been appropriate with respect to the diagnosis of the condition, it did not satisfy the requisite expertise about how that condition related to specific accommodations in a bar examination setting.⁶⁷ This case indicates that in order to ensure appropriate documentation, the evaluator should request information on the specifics of the program. This will better ensure a recommendation of accommodations appropriate to the condition. A four hour multiple choice standardized admission test is different from a series of end-of-term essay exams, and both are different from a two or three day licensing exam including both multiple choice and essay questions. Additionally, the subject matter is important—exams that require math calculations will be different than those testing reading comprehension.

There is little guidance on the issue of currency of documentation, but it seems permissible to require that the documentation be appropriately recent.⁶⁸ Because there is no specific federal regulatory guidance on this issue, institutions that set

60. *Guckenberger v. Boston Univ.*, 974 F. Supp. 106 (D. Mass. 1997) (holding that a university's policy of requiring re-evaluations by certified experts every three years was impermissible); *Ware v. Wyo. Bd. of Law Exam'rs*, 973 F. Supp. 1339 (D. Wyo. 1997) (granting summary judgment for defendants who had denied requested accommodations for an applicant with multiple sclerosis and finding that the fact that accommodations had been granted in law school did not mean that they should be granted for the bar exam); *In re Reasonable Testing Accommodations of LaFleur*, 722 N.W.2d 559 (S.D. 2006) (holding that a psychologist testifying about extra time for a student with ADD was not an expert on bar exam accommodations, causing his testimony to be discounted).

61. 974 F. Supp. 106 (D. Mass. 1997).

62. *Id.* at 140–41.

63. *Id.* at 140.

64. *Id.*

65. 722 N.W.2d 559 (S.D. 2006).

66. *Id.* at 564.

67. *Id.* at 564–65.

68. See *Guckenberger*, 974 F. Supp. at 139 (finding that a university's policy of requiring re-evaluations by certified experts every three years was impermissible).

absolute rules, such as those institutions which use the common three year rule, are on shaky ground.

Finally, the documentation should justify the accommodations requested. The documentation should not only include the diagnosis and describe the instruments used for the evaluation but also should specify how the requested accommodations are related to the condition.

C. Otherwise Qualified

As previously noted, students must be able to carry out the essential requirements of the program, with or without reasonable accommodation.⁶⁹ Also, a school neither needs to lower standards nor fundamentally alter the program.⁷⁰ Several judicial opinions and OCR opinions have addressed these issues.⁷¹

The requirements that have been found to be essential include meeting academic standards,⁷² meeting attendance and classroom participation expectations,⁷³ complying with student honesty expectations,⁷⁴ and refraining from disruptive or injurious conduct.⁷⁵ At least one case has addressed the issue of completion of degree requirements within an expected time frame as an essential requirement that need not be accommodated.⁷⁶ One unusual case involved a student who had been given additional time to take exams other than the final

69. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 407 (1979). *See also* ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 3.3.

70. *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 26 (1st Cir. 1991).

71. *See, e.g., Letter to Cmty Coll. of Allegheny County*, 33 Nat'l Disability L. Rep. (LRP) ¶ 48 (June 28, 2005) (upholding a college's refusal to allow a course to be taken as an independent study because class participation and attendance were integral to the political science course and could not be waived); *Letter to Univ. of Houston*, 32 Nat'l Disability L. Rep. (LRP) ¶ 74 (Apr. 8, 2005) (holding that a graduate school of social work could dismiss a student with bipolar disorder who failed an exam and that the student was not treated differently than other students).

72. *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974 (10th Cir. 1998) (holding that a medical school was not required to advance a student with marginal grades because it would constitute a substantial alteration); *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432 (6th Cir. 1998) (holding that a graduate student with ADHD did not meet the academic standards); *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161 (D.C. Cir. 2004) (holding that a student dismissed from medical school because of unsatisfactory academic performance was not disabled); *Leacock v. Temple Univ. Sch. of Med.*, No. Civ.A. 97-7850, 1998 WL 1119866 (E.D. Pa. 1998) (holding that a medical student with a learning disability did not meet academic standards to continue).

73. *Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006) (upholding the attendance requirements in an architecture program for a student with schizoaffective disorder resulting in anxiety, panic and depression).

74. *Childress v. Clement*, 5 F. Supp. 2d 384 (E.D. Va. 1998) (holding that a student who had plagiarized was not otherwise qualified for position as a graduate student in criminal justice program because his learning disability had been taken into account in evaluating violations of the honor code and the inquiry was individualized).

75. *See infra* Part IV.D.

76. *Long v. Howard Univ.*, 439 F. Supp. 2d 68 (D.D.C. 2006) (holding that in the case of a doctoral student with pulmonary fibrosis who required leaves of absence and requested unconditional readmission, it was valid to refuse to relax some requirements with respect to credits in core courses that the university required to be retaken because this would fundamentally alter its program).

exam.⁷⁷ The accommodation was denied during the final exam because she was observed to have fallen asleep during the time allowed for the exam.⁷⁸

D. Direct Threat

The April 2007 shootings at Virginia Tech University raised extensive concern and elicited a reaction across the country. Everyone wanted to know how to keep dangerous people off campus. One common response was that students should be required to disclose mental health status, which should be reported to a wide variety of college and university officials and law enforcement offices to ensure the safety of these students. This is not only inappropriate in most cases under current legal doctrine⁷⁹ but also is likely to have a deterrent effect on students who might want treatment. In addition, it might violate the treating professional's confidentiality obligation as a therapist.⁸⁰

It should be noted that most individuals with mental illness are not violent or dangerous and do not present a direct threat. Some, however, are disruptive and may seem threatening in some instances because of their behavior. This behavior may or may not be a result of the mental illness. For that reason, it is critical to focus on the behavior and conduct and not on the diagnosis or history of treatment.

Some would suggest that asking about mental health problems during the admissions process might reduce problems on campus. While the courts have upheld narrow questions about mental health status and substance abuse in the context of professional licensing certification,⁸¹ they are unlikely to do so in the context of higher education admission. The public protection issues that arise in professional licensing are not the same as those in higher education. The appropriate and permissible questions in higher education are those relating to behavior and conduct, not those relating to diagnosis and status. While institutions need not admit or continue the enrollment of students who present a direct threat to self, others, or property, institutions should not adversely treat those who are diagnosed with a mental illness or a substance abuse problem, unless that individual's condition has raised direct threat concerns in the past or there is a justifiable basis for the likelihood of future concerns. It is also important that the institution keep this information confidential.⁸²

77. *Buhendwa v. Univ. of Colo.*, 214 F. App'x 823 (2007).

78. *Id.* at 827.

79. See ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 3.5, for a discussion of the legal standards for preadmission inquiries that directly or indirectly might identify a disability.

80. *E.g.* AMERICAN PSYCHOLOGIST ASSOC., ETHICS CODE § 4.01 (2003), available at <http://www.apa.org/ethics/code2002.pdf>.

81. *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430 (E.D. Va. 1995) (providing a detailed discussion of mental health history questions and a review of the statutes in other jurisdictions). See Stanley Herr, *Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities*, 42 VILL. L. REV. 635 (1997); Hilary Duke, *The Narrowing of State Bar Examiner Inquiries into the Mental Health of Bar Applicants: Bar Examiner Objectives Are Met Better Through Attorney Education, Rehabilitation, and Discipline*, 11 GEO. J. LEGAL ETHICS 101 (1997), for an excellent overview of *Clark*. See also ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 5.8 n.1.

82. See generally ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 3.21.

Misconduct and misbehavior may make a student “not otherwise qualified,” thereby removing any need to be excused even if caused by a mental impairment or a substance abuse problem.⁸³ For example in *El Kouni v. Trustees of Boston University*,⁸⁴ a student who was dismissed from a joint medical school and Ph.D. program sought to have his academic record expunged so he would be eligible for reinstatement.⁸⁵ He had been diagnosed with clinical anxiety and bipolar disorder,⁸⁶ and he had not requested accommodations on exams before the diagnosis.⁸⁷ Once he notified the medical school, additional time on the exams was granted.⁸⁸ He was eventually terminated from the program because of unsatisfactory grades, some of which had been received before accommodations had been granted.⁸⁹ In addition, “his persistent offensive and disrupting behavior during course lectures,” the poor quality of his research, and his failure to make sufficient progress in laboratory experiments were factors in the medical school’s decision.⁹⁰ The court found that the university terminated his enrollment because he was not otherwise qualified, not because of his disability.⁹¹

Situations where a student exhibits self destructive behaviors, such as threats of suicide, eating disorders, engaging in substance or alcohol abuse, and engaging in antisocial behaviors, are difficult situations for the college or university. While there may not be a threat to others, there can be a disruption or interference with the educational process in the classroom or in a campus living situation. Such behavior may disturb and disrupt roommates, other students, instructors, and even patients in health care settings. For example, a roommate who feels the need to keep a constant eye on a student who is suicidal will be disrupted in the

83. *E.g.*, *Mershon v. St. Louis Univ.*, 442 F.3d 1069 (8th Cir. 2006) (affirming the district court’s summary judgment decision against a student with a disability who filed suit for being banned from campus after making a threat of violence against a professor); *Letter to Marietta College*, 31 Nat’l Disability L. Rep. (LRP) ¶ 23 (July 26, 2005) (stating that the dismissal of a student threatening suicide violated Section 504 because the decision was not sufficiently based on a high probability of substantial harm); *Letter to Thomas M. Cooley Law School*, 31 Nat’l Disability L. Rep. (LRP) ¶ 24 (July 26, 2005) (involving a student who was dismissed because of alcohol related conduct); *Northern Michigan University*, 7 Nat’l Disability L. Rep. (LRP) ¶ 244 (June 19, 2005) (finding no Section 504 or ADA violation when observers were placed in the classroom of a student with Tourette’s Syndrome to evaluate whether placement was for the benefit of the student); *Letter to St. Thomas University, School of Law*, 23 Nat’l Disability L. Rep. (LRP) ¶ 160 (Dec. 19, 2001) (upholding the dismissal of a law student with bipolar disorder who was dismissed because of threats to “blow up the legal writing department”); *Dixie College (UT)*, 8 Nat’l Disability L. Rep. (LRP) ¶ 31 (Nov. 20, 1995) (finding no ADA or Section 504 violation in expelling a student because of stalking and harassing a professor because expulsion was not on account of perceived mental disability but rather because she posed a threat).

84. 169 F. Supp. 2d 1 (D. Mass. 2001).

85. *Id.* at 2.

86. The court held that the plaintiff was disabled within the ADA and Section 504 because his mental impairments slowed his thought processing and resulted in “cognitive blunting.” *Id.* at 3.

87. *Id.*

88. *Id.*

89. *Id.* at 4.

90. *Id.*

91. *Id.*

educational process. The college or university's focus should be on documenting the destructive behavior and determining the best course of action based on the exhibited behavior. One of the challenges is to identify what code of conduct or disciplinary code is violated by such behaviors and to ensure that college and university policies that address that behavior are in place. In the scenarios in Section III, Students A, C and E might be determined to pose a direct threat or at least be found to be disruptive to others. Student A's attempted suicide, Student C's ferret's affect on the roommate, and Student E's disruptive behavior might all be found to make the student not otherwise qualified.⁹²

E. Reasonable Accommodations

1. General Standards

Section 504 regulations list a number of examples of accommodations and adjustments that might be considered for a student with a disability.⁹³ Commonly requested accommodations include the following: additional time for exams; other exam modifications such as a separate room or extra rest time; reduction, waiver, substitution, or adaptation of course work; extensions on assignments; extension of time for degree completion; preference in registration; and permission to tape record classes. The scenarios in Section III all involve different types of accommodations. These include waiver of attendance requirements (Student A); exam accommodations, course waiver and reduction, and a single room (Student B); waiver of pets prohibition (Student C); tutoring, materials in another format, exam and assignment time extensions (Student D); and excusing disruptive behavior (Student E).

The key case setting the standard on when an institution should provide accommodations is *Wynne v. Tufts University School of Medicine*.⁹⁴ In cases involving modifications and accommodations, the burden is on the institution to demonstrate that relevant institution officials considered alternative means, their feasibility, cost, and effect on the program, and came to a rationally justifiable conclusion that the alternatives would either lower academic standards or require substantial program alteration.⁹⁵ The courts have applied this standard to a

92. See *Kaminsky v. St. Louis Univ. Sch. of Med.*, No. 4:05CV1112 CDP, 2006 WL 2376232 (E.D. Mo. Aug. 16, 2006); *Letter to Genesee Community College*, 33 Nat'l Disability L. Rep. (LRP) ¶ 199 (Mar. 8, 2006) (involving a student who was asked to leave a campus meeting by a security guard and finding no demonstration that the student was perceived as disabled).

93. OCR Academic Adjustments, 34 C.F.R. § 104.44 (2006).

94. 932 F.2d 19 (1st Cir. 1991). While it is not a Supreme Court decision, *Wynne* seems to have similar precedential weight based on the frequency with which it is cited as the standard. This is likely due to its sound and articulate reasoning.

95. *Id.* at 26. See also *Letter to Academy of Art University*, 33 Nat'l Disability L. Rep. (LRP) ¶ 149 (Nov. 7, 2005) (holding that a request for accommodations to an Online Distance Learning Program for a student with ADD and depression required the student to provide appropriate notification); *Letter to Bridgewater State College*, 33 Nat'l Disability L. Rep. (LRP) ¶ 150 (July 1, 2005) (holding that a college did not provide a hearing impaired student with appropriate accommodations for testing).

number of cases, generally deferring to the institution.⁹⁶ Numerous OCR opinions have deferred to the institution with regard to requests to waive or substitute courses.⁹⁷ While some institutions have engaged in special programs to assist students with Asperger's and other conditions,⁹⁸ the institution is not required to have such programs in place.

One emerging issue involves companion animals as accommodations. Unlike the assistance dog for vision, hearing, or mobility, these animals are intended for psychological or emotional support for students needing stress relief and comfort. Although there are some students for whom there is evidence that the animals do alleviate emotional problems, there also seems to be a trend towards students wanting to have small accessory size pets, such as Elle Wood's chihuahua, Bruiser,

96. *Compare* Stern v. Univ. of Osteopathic Med. & Health Scis., 220 F.3d 906 (8th Cir. 2000) (finding that a program did not have to supplement multiple choice test answers with oral or essay responses for a dyslexic medical school student), *and* Hayden v. Redwoods Cmty. Coll. Dist., No. C-05-01785 NJV, 2007 WL 61886 (N.D. Cal. Jan 8, 2007) (denying summary judgment to a student seeking involvement in selection of interpreter to ensure effective communication), *and* Long v. Howard Univ., 439 F. Supp. 2d 68 (D.D.C. 2006) (denying summary judgment to a student claiming refusal to allow him to return where his work was well beyond the period of doctoral candidacy), *and* *In re* Kimmer, 896 A.2d 1006 (Md. 2006) (involving the Maryland bar's denial of accommodations to a bar applicant, who had received similar accommodations in law school, on the basis that he had not demonstrated a disability and had demonstrated above average performance), *and* Guckenberger v. Boston Univ., 8 F. Supp. 2d 82 (D. Mass. 1998) (finding that a university had demonstrated that waiving the foreign language requirement would constitute a fundamental alteration of the program) *with* Bartlett v. N.Y. State of Bar Exam'rs, 970 F. Supp. 1094 (S.D.N.Y. 1997) (ordering that a bar applicant with dyslexia be given the test over four days, receive extra time, be permitted to use a computer, and be awarded \$25,000 in damages). *See also* Bennett-Nelson v. La. Bd. of Regents, 431 F.3d 448 (5th Cir. 2005) (finding that a university was not immune from a suit alleging that the denial of sign language interpreters and notetakers constituted a Section 504 action); Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474 (4th Cir. 2005) (finding no Eleventh Amendment immunity and permitting a law student with intractable migraine syndrome requesting additional time on exam to pursue claim); *Columbia Basin College (WA)*, 7 Nat'l Disability L. Rep. (LRP) ¶ 188 (June 6, 1995) (finding that Title II (ADA) and Section 504 were violated when a college instructor, in good faith, went overboard in ensuring that a learning disabled student understood classroom instructions, and, though there was no violation in asking the student to confirm in writing a decision to decline accommodations, repeatedly and *publicly* asking student for reassurance of understanding instructions was a violation).

97. *See, e.g.,* Guckenberger, 974 F. Supp. 106 (holding that course substitution in foreign language may be a reasonable accommodation but course substitution in math was not and awarding \$29,452 in damages to the students); *Letter to Hudson County Community College*, 33 Nat'l Disability L. Rep. (LRP) ¶ 198 (Mar. 27, 2006) (finding that a student's documentation did not justify course waiver or substitution in math); *Letter to New York City College of Technology*, 33 Nat'l Disability L. Rep. (LRP) ¶ 173 (Feb. 9, 2006) (finding that the college had approved accommodations, including the use of a graphing calculator in class and on exams, and that the college was not required to waive the requirement to show all calculations on assignments and exams); *Letter to University of West Florida*, 33 Nat'l Disability L. Rep. (LRP) ¶ 25 (Apr. 1, 2005) (finding that there was insufficient evidence of a Section 504 violation when a university did not make adjustments to academic requirements).

98. Sara Lipka, *For the Learning Disabled, a Team Approach to College*, CHRON. OF HIGHER ED. (Wash., D.C.), Dec. 15, 2006, at A36 (discussing programs which help students with various emotional and behavioral disorders cope with higher education).

in the movie “Legally Blond.”⁹⁹ One way of pursuing this is under the guise of an accommodation for an emotional disability, such as depression, anxiety, or other condition. There is little, if any, guidance from agencies and the courts on these issues, although the popular media increasingly recognizes the problem.¹⁰⁰ In many of these cases, courts might determine that the student is not “disabled” within the statute. Additionally, there may be issues of undue burden or direct threat with respect to some of these animals on campus. These animals may cause allergic reactions, may have cleanliness problems and strong odors, may be noisy and thus disruptive, and may bite. The burden or danger to others will be a factor in addressing these situations.

Although the regulations for higher education do not specify a requirement of an interactive process to determine reasonable accommodations, at least one court has required such a process.¹⁰¹ Generally, this has been an issue addressed in the employment context, but good planning would suggest it should be a standard practice with respect to students as well.

2. Auxiliary Aids and Services

Many accommodations are not financially costly for the institution, although there may be some administrative costs. The primary reasons for denying such accommodations may be fairness, concern about setting precedent, or fundamental alteration of the program. Still, cost is the primary issue that arises with respect to auxiliary services, such as interpreters, note takers, taped texts, and similar services. Unlike many accommodations that can be provided at little or no cost, these services may be quite expensive.

For the millennial student with anxiety and similar stress concerns, the request may be for note takers or tutors. Tutors are probably considered to be personal services, and as such, the institution is not required to provide them to students.¹⁰² If, however, there is a tutoring program available to all students, the college or university must not discriminate by denying that to a student with a disability. It is unclear to what extent a college or university might have to adapt its tutorial services to the unique learning styles of students with certain types of disabilities.

Although there has not been extensive litigation or OCR guidance on the issue

99. LEGALLY BLOND (Metro Goldwyn Mayer 2001).

100. See, e.g., Bennet J. Loudon, *UR Dog Case Part of Growing Trend*, ROCHESTER DEMOCRAT & CHRON., Oct. 22, 2007; Kelly Field, *These Student Requests Are a Different Animal*, CHRON. OF HIGHER ED. (Wash., D.C.), Oct. 13, 2006, at A30–31. See also Sara T. Scharf, *How Much Is That Doggie in the Classroom?*, CHRON. OF HIGHER ED. (Wash., D.C.), June 1, 2007, at B5 (discussing the increase in students wanting to have their pets on campus and university policies).

101. *Cutrer v. Bd. of Supervisors of La. State Univ.*, 429 F.3d 108 (5th Cir. 2006) (holding that a university should have engaged in an interactive process to decide what were reasonable accommodations for an employee’s visual impairment). The employment requirements provide guidance on what is expected in terms of an interactive process. Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,747–49 (July 26, 1991).

102. OCR Academic Adjustments, 34 C.F.R. § 104.44(d)(2) (2006) (“Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.”).

of auxiliary services, the general standard is that the institution is financially responsible for auxiliary aids and services unless it can demonstrate that the cost is an undue burden.¹⁰³ While it is permissible for the college or university to seek support from state vocational rehabilitation funding sources and other sources, it is nonetheless the responsibility of the higher education program to facilitate the provision of these services and to do so in a timely manner.¹⁰⁴ This does not negate the burden on the student to request these services, but the institution is obligated to ensure that whatever process or procedure is required for obtaining these services is clearly communicated to the student.

While cost might be a defense in discrimination claims, it is one that is rarely raised. Perhaps this is because colleges and universities, particularly those with expensive athletic programs, are not eager to have public awareness of their discretionary budgets through the discovery process.

3. Readmission as an Accommodation after Misconduct or Academic Deficiencies

The issue of readmission of students with disabilities who have not met academic standards has been addressed on many occasions by both the courts and OCR. Sometimes the student is diagnosed as having a learning or other disability after an academic failure. Sometimes students with learning disabilities attempt to succeed without making the learning disability known or without requesting accommodations. The desire to get by without assistance and concerns about stigma and discrimination are two possible reasons why the student may not request accommodations.

Institutions are only required to make accommodations for students with known disabilities.¹⁰⁵ Courts and OCR have consistently determined that the institution is

103. See *United States v. Bd. of Trs. for Univ. of Ala.*, 908 F.2d 740 (11th Cir. 1990). The issue has never been decided by the Supreme Court, and this circuit court opinion seems to be the best guidance available on the topic. See also *Letter to Kent State University*, 33 Nat'l Disability L. Rep. (LRP) ¶ 125 (July 14, 2005) (involving an issue of note taking services and finding that the student and the university should work in interactive process); ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 3.10.

104. *Bd. of Trs. of Univ. of Ala.*, 908 F.2d at 749.

105. See, e.g., *Garcia v. State Univ. of N.Y. Health Scis. Ctr.*, No. CV 97-4189, 2000 WL 1469551 (E.D.N.Y. Aug. 21, 2000) (granting summary judgment to a university because a student was dismissed from medical school for unsatisfactory performance prior to diagnosis of disability); *Leacock v. Temple Univ. Sch. of Med.*, No. Civ.A. 97-7850, 1998 WL 1119866 (E.D. Pa. Nov. 25, 1998) (finding in favor of a university because the university dismissed the student before knowing of his disability); *Tips v. Regents of Tex. Tech Univ.*, 921 F. Supp. 1515 (N.D. Tex. 1996) (holding that there was no violation of ADA or Section 504 because a graduate psychology student did not make her learning disability known nor request accommodation); *Gill v. Franklin Pierce Law Ctr.*, 899 F. Supp. 850 (D.N.H. 1995) (rejecting the claim that a law school should have known that he needed accommodations because of post-traumatic stress syndrome, resulting from being the child of alcoholic parents, when student had not requested accommodations); *Elmhurst College*, 33 Nat'l Disability L. Rep. (LRP) ¶ 255 (May 1, 2006) (finding that a student did not follow reasonable procedures for accommodations that the college had delineated); *Letter to University of South Florida*, 33 Nat'l Disability L. Rep. (LRP) ¶ 23 (Apr. 1, 2005) (finding that a student failed to make requests for academic adjustments for unstructured course work or qualifying exam); *Letter to Moberly Area Community College*, 31

not required to lower standards or make fundamental alterations to the program.¹⁰⁶ As a result, where institutional procedures and practices were nondiscriminatory and appropriate, institutions are not required to raise grades, to excuse below standard performance, or readmit a student who has not met clearly mandated standards.¹⁰⁷

The *El Kouni v. Trustees of Boston University*¹⁰⁸ case raises virtually all of these issues. The medical student, whose bipolar disorder and clinical anxiety probably affected his performance, requested accommodation to exams only after initial deficiencies.¹⁰⁹ He was granted additional time.¹¹⁰ He did not request any accommodations for his laboratory work, and the court found that there was no causal connection between his impairments and that work.¹¹¹ Nonetheless, the court determined that he was incapable of satisfying the academic requirements to complete the program and that there were no reasonable accommodations that would enable him to do so.¹¹²

El Kouni does not address a situation where the performance deficiency was totally based on test failures before the student had realized there was a disability. There is some guidance that where there is a later discovered disability, the institution should take that fact into account in any readmission consideration.¹¹³ An institution that does readmit a student whose prior performance deficiencies were related to a disability may be permitted to apply different standards to that student than that required of other students.¹¹⁴ There is still some debate about what kind of reporting by professionals or monitoring of behavior would be permissible or advisable in these situations.

Nat'l Disability L. Rep (LRP) ¶ 178 (Feb. 18, 2005) (finding that a student did not give notice of the need for accommodations for a math test). See also Laura Rothstein, *The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Law*, 47 SYRACUSE L. REV. 931 (1997).

106. *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 26 (1st Cir. 1991). See also *Amir v. St. Louis Univ.*, 184 F.3d 1017 (8th Cir. 1999) (holding that a student's request to change supervisors was an unreasonable accommodation).

107. See *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999).

108. *El Kouni v. Trs. of Boston Univ.*, 169 F. Supp. 2d 1 (D. Mass. 2001). See *supra* Part IV.D.

109. *Id.* at 3.

110. *Id.*

111. *Id.* at 4.

112. *Id.* at 4–5.

113. *DePaul University*, 4 Nat'l Disability L. Rep. (LRP) ¶ 157 (May 18, 1993) (holding that an institution must at least consider the effects of a disability in evaluating a student for readmission in a case involving dismissal from law school).

114. *Haight v. Hawaii Pac. Univ.*, 116 F.3d 484 (9th Cir. 1997) (holding that where an institution was aware of behavior or performance deficiencies or where reasonable questions are raised after dismissal, the institution may have discretion to make readmission subject to conditions not applied to students in the initial admission process).

F. Other Issues

1. Study Abroad Programs and Off Campus Programs

The issue of accommodations for study abroad programs and other off campus programs has begun to receive some attention, although there is not yet extensive guidance on this issue.¹¹⁵ The standards relating to reasonable accommodation will be applied in these settings, taking into account the special issues that arise in these types of programs. Study abroad programs may provide particularly difficult challenges because although the country in which the program is located may not have architectural accessibility requirements, the United States institution must still comply with American law in implementing the program.¹¹⁶ These challenges include architectural barriers as well as language barriers for students with hearing and visual impairments.¹¹⁷ For the millennial student seeking accommodations for stress related or other mental health issues, the accommodation issues may include access to mental health counseling. This can present a challenge in certain countries, and the small amount of case law available seems to indicate that programs can legitimately consider whether access to such programs presents a danger to self or others or is an undue burden.¹¹⁸

Off campus programs such as student teaching and internships can cause problems if the instructor or the administration has not proactively anticipated accommodation issues. These situations might raise concerns about off campus supervisors and their need to know about a student's disability.¹¹⁹ The millennial

115. See Arlene Kanter, *The Presumption Against Extraterritoriality As Applied to Disability Discrimination Laws: Where Does It Leave Students with Disabilities Studying Abroad?*, 14 STAN. L. & POL'Y REV. 291 (2003); Amy Magaro Rubin, *Students with Disabilities Press Colleges to Help Them Take Part in Foreign Study*, CHRON. OF HIGHER ED. (Wash., D.C.), Sept. 27, 1996, at A47.

116. *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015 (9th Cir. 2002) (holding that a college did not violate Section 504 or Title III of the ADA by failing to provide certain accommodations in an overseas program even though wheelchair access was not provided in some instances); *Letter to Husson College*, 31 Nat'l Disability L. Rep. (LRP) ¶ 180 (Jan. 5, 2005) (concluding that there was not enough evidence to support a student's discrimination allegation against a nursing school regarding a summer abroad program in Honduras where the student voluntarily decided not to attend after faculty expressed concerns about susceptibility to illness and the remote location of site); *Arizona State University*, 22 Nat'l Disability L. Rep. (LRP) ¶ 239 (Dec. 3, 2001) (holding that Section 504 and Title II of ADA do not require the institution to pay for auxiliary aids and services in study abroad programs).

117. See *Bird*, 303 F.3d at 102.

118. See *Barth v. Gelb*, 2 F.3d 1180 (D.C. Cir. 1993) (holding that it was an undue hardship to grant an employee a particular job placement abroad in order to accommodate his health concerns).

119. See generally *Burns v. Slippery Rock Univ. of Pa.*, No. 06-318, 2007 WL 2463402 (W.D. Pa. Aug. 28, 2007) (holding that school districts operating field placements must comply with the ADA); *Hartnett v. Fielding Graduate Inst.*, 400 F. Supp. 2d 570 (S.D.N.Y. 2005) (denying the requested accommodation of relocation of cluster group placement to a closer location because the student did not demonstrate that the commuting difference was substantially different between the placements); *Raffaele v. City of N.Y.*, No. 00-CV-3837, 2004 WL 1969869 (E.D.N.Y. 2004) (holding that difficulty in commuting need not be accommodated); *Letter to Hampton University*, 32 Nat'l Disability L. Rep. (LRP) ¶ 173 (June 20, 2005) (finding

student, claiming a mental health stress type condition, who does not get along with a supervisor at an off campus program and who seeks reassignment complaining about supervisors in such programs, will probably not receive a positive response by the courts. There is substantial case law in the employment setting that denied reassignment of supervisors.¹²⁰

2. Hostile Environment and Retaliation Issues

It is not unusual for a court or for the Department of Education to determine that while the underlying complaint about discrimination does not give rise to a violation, the institution has nonetheless either retaliated against the individual for making the complaint¹²¹ or has created a hostile environment for the individual.¹²² Although this does not frequently occur, colleges or universities should be mindful of this in handling or responding to complaints. The Section III scenario involving Student A who was reprimanded for complaining about the professor could give rise to a hostile environment situation if not handled carefully. While Student E's disruptive behavior resulting from her Asperger's syndrome appears to be the basis of the adverse action, the university should take care in handling this situation for the same reasons.

In *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*,¹²³ the Second Circuit considered a claim by a medical student who was dismissed for failure to complete the first year curriculum. After his dismissal, he was diagnosed as having attention deficit disorder and a learning disability.¹²⁴ He then sought to re-enroll, but he and the medical school could not agree on how much of the first year

no Section 504 violation with respect to a student's failing grade because the grade was based on safety concerns not discrimination); *University of California, Los Angeles*, 8 Nat'l Disability L. Rep. (LRP) ¶ 314 (Feb. 15, 1996) (finding that there was no Section 504 or ADA violation when a student did not provide adequate notice of the need for accommodation of learning disabilities for field placement work in social work program).

120. See ROTHSTEIN & ROTHSTEIN, *supra* note 8, at § 4.20, for additional case citations.

121. See, e.g., *Amir v. St. Louis Univ.*, 184 F.3d 1017 (8th Cir. 1999) (holding that although the dismissal of a medical student with obsessive compulsive disorder was validly based on academic difficulties, the student may have had a basis for claim of retaliation); *Bayon v. State Univ. of N.Y. at Buffalo*, No. 98-CV-0578E, 2006 WL 1007616 (W.D.N.Y. Apr. 13, 2006) (awarding \$100,000 to a graduate student in a case claiming retaliation for bringing an ADA complaint); *Letter to Alamance Community College*, 32 Nat'l Disability L. Rep. (LRP) ¶ 48 (July 21, 2005) (finding that a student's suspension was because of physical abuse of another student in violation of Student Code of Conduct, not in retaliation for requesting auxiliary aids); *Letter to Washburn University*, 32 Nat'l Disability L. Rep. (LRP) ¶ 197 (June 3, 2005) (finding that there was insufficient evidence to demonstrate retaliation by a law school).

122. See, e.g., *Rothman v. Emory Univ.*, 123 F.3d 446 (7th Cir. 1997) (finding that a law school did not create a hostile environment for a student with epilepsy by sending a letter to bar examiners and other incidents did not create a hostile environment when the law school's actions were not related to student's epilepsy); *Guckenberger v. Boston Univ.*, 957 F. Supp. 306 (D. Mass. 1997) (denying dismissal of ADA claims based on hostile environment); *Letter to Indiana University Southeast*, 31 Nat'l Disability L. Rep. (LRP) ¶ 203 (May 21, 2004) (finding that the evidence was insufficient to support a hostile environment claim and that the student needed to follow the procedures for obtaining assistance).

123. 280 F.3d 98 (2d Cir. 2001).

124. *Id.* at 103-04.

coursework he would have to retake.¹²⁵ He brought suit on a number of grounds, including retaliation for exercising his First Amendment rights in a letter “opposing SUNY’s requirement that he retake gross anatomy during that summer.”¹²⁶ Although the court dismissed this particular case¹²⁷ and although the availability of damages in such cases is uncertain,¹²⁸ the claim highlights the fact that institutions should be careful that their responses to disability accommodation requests do not create a basis for retaliation claims. An annoying student—who might eventually not be defined as disabled—may nonetheless be able to make out a retaliation case because a professor or administrator engages in actions that might be deemed retaliatory when the student requests an accommodation, even if the requested accommodation seems facially unreasonable. The situation of Student E with Asperger’s who blurts out in class and engages in other disruptive behaviors provides an example where care should be taken.

3. Policies, Practices, and Procedures

One of most common issues raised by the OCR when investigating complaints of discrimination on college and university campuses is the lack of appropriate policies and procedures to receive accommodations. It is not unusual that after a complaint, the OCR will determine that the institution did not discriminate in its actions but that the institution nonetheless had inadequate policies and procedures or that these policies and procedures were not adequately communicated to students and others.¹²⁹ It is also important that institutions ensure that a policy exists that does not place the decision about accommodations solely in the discretion of the faculty member. While faculty members should be involved in these decisions, they should not be the final arbiter.¹³⁰

Other common situations for an OCR investigation include the failure of the

125. *Id.* at 104.

126. *Id.* at 105.

127. *Id.* at 116.

128. *Arredondo v. S2 Yachts*, 496 F. Supp. 2d 831 (W.D. Mich. 2007) (holding that compensatory and punitive damages were not available under ADA sections prohibiting retaliation in an employment case).

129. *See, e.g., Loyola University Chicago*, 33 Nat’l Disability L. Rep. (LRP) ¶ 256 (May 1, 2006) (finding that an effective grievance procedure should include appropriate due process standards and provide for prompt equitable resolution of complaints); *Letter to Kansas State University*, 33 Nat’l Disability L. Rep. (LRP) ¶ 124 (Jan. 23, 2006) (finding that a university’s internal grievance procedures, which included substantial review of records, student submitted materials, and witness testimony, adequately addressed complaint); *Letter to Northern Oklahoma College*, 32 Nat’l Disability L. Rep. (LRP) ¶ 198 (May 31, 2005) (finding that an early complaint resolution process appropriately responded to a student’s request for an interpreter service and a counseling service); *Letter to Bakersfield College*, 32 Nat’l Disability L. Rep. (LRP) ¶ 22 (Apr. 22, 2005) (involving a case where the college responded quickly to student concerns and the complaint was resolved without litigation); *Letter to Southern University and A&M College*, 31 Nat’l Disability L. Rep. (LRP) ¶ 177 (Feb. 22, 2005) (finding that a university did not provide a decision in formal grievance process and that the university agreed that its staffing of grievance process should be improved).

130. *But see Bradford v. Bd. of Regents of the Univ. of Houston*, No. H-06-2478 (S.D. Tex., filed July 27, 2006) (involving a policy of allowing a professor to deny reasonable accommodations).

student to request accommodations in a timely manner, the failure of the student to provide notice of absence when an expensive accommodation, such as an interpreter, was being provided, and the failure of the institution to promptly provide auxiliary services.¹³¹ An issue on the horizon where more litigation and questions are likely to arise is accessible technology. The law on what is required in this area is far from well settled,¹³² but institutions should be proactive in planning for accessibility in classroom technology, websites, and other technology used to communicate with students on campus.

IV. RECOMMENDATIONS

So, if the legal requirements on disability discrimination do not apply differently to millennial students, why should any special attention be paid to this group? The courts and the OCR are still likely to reach the same conclusions in cases involving this generation. Given the behaviors of millennials, however, colleges and universities will probably save a lot of time, energy, and resources by anticipating the new behaviors that might give rise to disputes in the first place. Implementing policies, practices, and procedures that anticipate this may not eliminate all of the challenges, but it is likely that at least some of them will not occur.

As was noted in the introductory portion of the article, millennials communicate differently and are often accustomed to getting their way. The response is not to excuse their failure to meet deadlines or to act reasonably because of these behaviors. Instead, in responding to millennial students who raise disability issues, it is important to be proactive, to anticipate their behaviors, to set limits, to communicate expectations early and often and in a variety of formats, and to ensure that these communications and policies are coordinated across campus. While the institutions will generally win cases in which their actions are challenged, these strategies should minimize the challenges in the first place.¹³³

131. See, e.g., *Letter to Columbia University*, 33 Nat'l Disability L. Rep. (LRP) ¶ 172 (Mar. 3, 2006) (finding that the allegation that accommodation was not provided in a timely manner was not supported); *Whittier College (CA)*, 7 Nat'l Disability L. Rep. (LRP) ¶ 187 (June 19, 1995) (finding no Section 504 violation where college delayed in providing auxiliary aids—notetaker and computer with spell check, etc.—to an aspiring law student); *Wheaton College (MA)*, 7 Nat'l Disability L. Rep. (LRP) ¶ 330 (June 8, 1995) (finding that a student's requests for accommodations—course substitution and unlimited time—were premature); *Temple University (PA)*, 8 Nat'l Disability L. Rep. (LRP) ¶ 125 (Dec. 1, 1995) (finding no Section 504 or ADA violation when a student did not seek academic modifications for an economics class until well into the semester).

132. See NAT'L COUNCIL ON DISABILITY, WHEN THE AMERICANS WITH DISABILITIES ACT GOES ONLINE: APPLICATION OF THE ADA TO THE INTERNET AND THE WORLDWIDE WEB, (2003), available at <http://www.ncd.gov/newsroom/publications/2003/adainternet.htm> (last visited Nov. 12, 2007).

133. See *Harvard University*, 34 Nat'l Disability L. Rep. (LRP) ¶ 200 (July 24, 2006) (praising the university for its proactive response to a complaint about numerous access issues).

A. Policies, Practices, and Procedures

Section 504 of the Rehabilitation Act was passed in 1973¹³⁴ and the ADA was passed in 1990.¹³⁵ While in the 1970s it was understandable that a college or university did not have in place policies, practices, and procedures to address issues relating to students with disabilities, that is no longer the case. There are many models, and much technical assistance is available. Also, the requirements under the law are sufficiently well known. Thus, there is no longer an excuse not to have policies, practices, and procedures that address major disability issues in place.

Each institution of higher education is different, and as a result, each will have to develop policies, practices, and procedures that work at that institution. For example, a small liberal arts college with 2,000 students will operate very differently than a large 40,000 student campus with several graduate and professional programs. The policies should take into account academic and other unit specific issues. For example, a medical school may need to have its own internal administrative structure for addressing certain issues, such as accommodations. Although different programs may have different policies, practices, and procedures, these should be coordinated centrally with consultation from college or university counsel and other appropriate officials, such as the vice president for student affairs and the office for disability services.

“Policies” for requesting accommodations should make clear how a student requests accommodations, the timing of such requests, and the procedures for challenging a denial. The administrator responsible for each of these issues should be clearly identified. Institutional “policy” is the institution’s position on an issue. For example, the overarching policy, based on federal legal requirements, should be not to discriminate and to provide reasonable accommodations. The college or university policy may prohibit animals on campus. The faculty member’s policy may prohibit open book exams or tape recording of lectures.

“Procedures” developed pursuant to policy address how to receive accommodations or how to request exceptions to the policy. Policies often will, and should, clarify procedural issues. Disability discrimination law anticipates an interactive resolution, thus the institution should have policies, practices, and procedures for resolution that avoids a formal grievance or complaint. But if the interactive process does not resolve the disagreement, what is the student to do? When and how does the student request accommodations? When and how does the student complain? What are the deadlines for making such complaints?

Student D with the learning disability who is seeking accommodations, such as providing printed material instead of using the Internet and an exemption from participating in interactive discussions, might not be able to demonstrate that these accommodations are reasonable. It might be that such accommodations would be unduly burdensome due to the time delay required to print out every internet exchange. Moreover, the accommodations might fundamentally alter the program

134. See Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2000).

135. See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000).

if class participation on the internet is essential. The program, however, should be mindful of the *Wynne* standard and make sure that the “relevant officials” considered these accommodations and came to a rationally justifiable conclusion that the accommodation would lower standards or fundamentally alter the program. Student D’s scenario also presents an issue for institutions to consider. It can be quite problematic to advise the student to contact the instructor for specific classroom needs, unless there is a clear procedure to notify the instructor that the student is eligible for accommodations and to define what types of accommodations those might be. For example, notifying the instructor that a student has a diagnosed hearing impairment and should be allowed to sit in the front row is very different from notifying the instructor that a student has a learning disability and should be given twice the allotted time on the exam. A process for interaction with the instructor or academic department is also important. The office that makes the assessment of the documentation and approves the accommodations should not have the final say if the instructor believes that use of a calculator or extra time fundamentally alters the program or lowers standards in some way. The procedures should allow for a resolution to that disagreement.

“Practices” refers to the often unwritten system of implementing policies and procedures. Is the practice to have annual training of staff members? Is the practice that student orientation includes a discussion of disability accommodations? Is the practice that faculty members generally allow pets in the classroom, even if there is no formal policy or procedure? Will faculty members allow students to listen to music on iPods during exams? What are the concerns about cheating that have not been addressed? For students accustomed to having music available constantly, this could be a major adjustment. Will faculty members require, prohibit, or be neutral about using laptops for exams?

The term “practice” may incorporate institutional and individual norms and attitudes. Is the practice to be positive and accommodating or to rigidly adhere to strict rules? Practices may be more difficult to codify and communicate comprehensively, but an institutional discussion of policies and procedures should pay attention to how they are actually implemented in practice.

B. Record Keeping

Student records are subject to federal privacy and confidentiality laws and may be subject to additional state or institutional requirements.¹³⁶ It is critical that the utmost care be given to what information is kept in student records, where records are kept, how they can be accessed, and who has access. Unfortunately, federal guidance is not specific on some of these issues. Administrators and others who have responsibility for and access to student records should be trained about the legal requirements. The possibility that private, sensitive, and perhaps stigmatizing

136. See Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g (2000); Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, 42 U.S.C.); OCR Privacy Act Regulations, 34 C.F.R. § 5b (2006). See generally ROTHSTEIN & ROTHSTEIN, *supra* note 8, § 3.21.

information might be in a student record highlights the importance of ensuring privacy and confidentiality.

In the wake of the Virginia Tech shootings in April 2007, there was a great deal of discussion about why information about the individual who was known to have demonstrated behaviors of concern was not more widely shared. The emotional response of some was that student mental health records should be more accessible to others.¹³⁷ Some of the media coverage addressed the need for changes in the law, and other media coverage simply thought administrators may not have acted appropriately within the law.¹³⁸ Whenever an event such as this occurs, care must be taken not to implement policies that are reactive but not thoughtful. The incident, however, is a wake-up call to the importance of having appropriate student record policies and ensuring that all parties affected by those policies are knowledgeable about them.¹³⁹

One of the complexities of student records is that often records are maintained at more than one location on a campus. The following example highlights why there are so many locations for student records.

Lisa Matthews is a student at state university. During her first semester, her boyfriend broke up with her, and she had a serious episode of depression. Her residence hall counselor suggested that she seek counseling at the student health center, which she did. The student health service would have a record of that treatment. Because it is a medical record, it would be subject to high levels of privacy and confidentiality.

During her second year, she and some friends got drunk at a bar off campus and were arrested and given a warning. A record of the arrest exists at the city law enforcement office. After being released, she engaged in disruptive behavior in the dorm, and she was disciplined through the university disciplinary process and given a warning that if there was another incident she would have to move out of the dorm.

After her second year of college, her grades were below standard and she was placed on academic probation. At this point, her parents had her evaluated for a learning disability. Documentation was provided to the university requesting accommodations of additional time for exams, which was granted. The university placed this documentation in her student file.

After graduation, Lisa was admitted and enrolled in law school at state university. The campus disability services office which had evaluated her learning disability documentation recommended to the law school a continuation of extra time on exams.

During her second year of law school, a professor found that Lisa had

137. See Ian Urbina, *Virginia Tech Criticized for Actions in Shooting*, N.Y. TIMES, Aug. 30, 2007, at A1 (noting that “federal privacy laws would have allowed [university officials] to communicate some information about Mr. Cho’s mental health problems among local, state, and campus security officials”).

138. See, e.g., *id.*

139. VIRGINIA TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH, (Aug. 2007), <http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf>. Chapter V of the report refers to Information Privacy Laws.

plagiarized a seminar paper. At the law school honor code hearing, Lisa's defense was that her learning disability affected her judgment which caused her to plagiarize. She was found guilty of the violation and was suspended for one semester. Her learning disability was viewed as a mitigating factor in the penalty determination. In many cases, plagiarism would have resulted in permanent expulsion.

Lisa has now completed law school and is preparing to take the bar exam. She is seeking additional time on the bar exam. Information about her prior accommodations in undergraduate and law school has been requested in order to decide about accommodations on the bar exam. The professional certification process in the state where she seeks to practice requires that the law school provide information certifying her character and fitness.

It is easy to see why information on Lisa might not exist in one single location. Some would argue that this demonstrates the need for a centralized record system. Setting up central record keeping can be complex and useful, but great care should be taken in ensuring that concerns of privacy and confidentiality are considered, particularly where highly private and stigmatizing information is accessed on the internet.

There is nothing impermissible with having several locations for information on a particular student. Greater discussion of this issue is beyond the scope of this article, and greater guidance at a national level would be helpful.¹⁴⁰ At this point, however, college and university counsel and administrators should at least begin to consider these issues. They should also ensure that whatever policies and procedures are implemented are coordinated and communicated to the affected administrators. In addition, these policies should take into account what information is to be kept, where it is to be located, who can access it, what record should be made of that access, who is privileged to know, and how those policies are known to the students themselves and their parents.

A review of the scenarios in Section III also highlights some of the concerns. In reviewing these scenarios, consider who should have access to information about the student's disability—the individual faculty member, the dean for student services, others? How much information should they have? At what point does behavior that is potentially harmful to others allow for broader disclosure to other students and the community?

C. Communication

One of the most important areas of attention for millennials involves communication. As was noted previously, everyone is on information overload, and most students on college campuses today are used to accessing information in a wide variety of formats, many of which involve technology such as cell phones, listservs, and text messaging. Attention to communication should consider content, format, frequency, and coordination.

140. *Id.*

1. Content

The content of policies and procedures should include information on what is required to receive accommodations, the timing and deadlines for making a request, whom to contact, when the student can expect a response to the request, and what limits exist on when to expect responses. Information that is “educational” in nature should also be included in the content. What if students need mental health counseling? Where do they go? To the extent it is feasible to provide the information, contact information should provide email, phone and physical addresses about who to contact. Identifying the office rather than the person may keep these references current.

2. Format

Information about accommodations, counseling, and other issues affecting individuals with disabilities should be communicated through a variety of formats and vehicles. The website of the college or university or specific unit should guide the student to key information on disability services. Student handbooks or brochures (both in hard copy and on the web) should provide essential information with guidance about where to obtain additional information. The letter of acceptance to the student should invite the student to identify the need for accommodations and should highlight the fact that some accommodations, such as interpreters or signers, may take time to arrange. Orientation materials should clearly direct students to disability services. Faculty syllabi should provide information on how to obtain accommodations or services.

3. Frequency

The information in these various formats should be provided early and often. Information should be in application information, websites that applicants use, and other pre-admission communications. As noted previously, at the acceptance stage, the orientation stage, and ongoing through enrollment, this information should be provided. Faculty members should be strongly encouraged to make this information available as well.

Generally, preadmission inquiries are prohibited unless, for example, the student is applying for a program specifically for students with learning disabilities. Identifying to all students, however, the availability of disability services and the guidelines for accessing those services is allowed because it is very different than asking the student to self-identify and only then providing disability service information.

4. Coordination

Finally, it is important that communications are coordinated among various campus offices. In particular, student disability service offices, student health programs, and campus law enforcement offices need to be involved in communicating general information about disability issues to students and in the procedures about how to handle and when to share information provided by the student.

Time is at a premium for college or university administrators. A regular meeting or other means to coordinate education and information on institutional policies, practices, and procedures about disability issues, however, can go a long way to prevent miscommunications and mixed signals.

VI. CONCLUSION

This article has provided a legal overview of current judicial and Department of Education views on whether students meet the definition of having a disability, what accommodations are being sought and granted, and what constitutes discrimination. With the exception of who is considered to have a disability, the legal interpretations have not changed substantially in recent years. Institutions of higher education seem more likely to deny requests for accommodations, and the courts and the Office for Civil Rights generally support their decisions. Nevertheless, higher education administrators seem to find themselves increasingly challenged on these issues. While the institution is likely to win cases in which challenges are raised, the resource implications and the potential negative publicity surrounding these cases should encourage institutions to re-evaluate policies, practices, and procedures to be in the best position to avoid the challenges in the first place. Institutions of higher education are in the business of helping students and facilitating their learning. Because litigation is such an adversarial process, it is important to consider its impact on that goal.

This article is not intended to provide comprehensive guidelines about exactly how each campus should handle these issues. It should, however, encourage all institutions of higher education to develop and fine-tune their policies, practices, and procedures with respect to students with disabilities. It also suggests that the unique behaviors of millennials make it even more important than ever to review and reconsider student disability issues on campus.

Millennials with disabilities will not be treated any differently by courts or the Department of Education, but their behaviors make it more likely that disability issues will be raised. For that reason, college and university attorneys can play a proactive role in encouraging a review of current handling of students with disabilities. It is much better to spend time on ensuring that the policies, practices, and procedures are good ones for all students than to spend time responding to record requests from the Department of Education or handling grievances or litigation.

Louis D. Brandeis, one of the most well known legal figures in American history, had the highest grade point average in Harvard Law School history, graduating in 1876 at age twenty.¹⁴¹ Nonetheless, he had a visual impairment that required accommodation during law school.¹⁴² He could not read for extended periods of time,¹⁴³ so a classmate read to him, in exchange for tutorial instruction. Without accommodation, we might never have had the benefit of Justice Brandeis' wisdom and example as the "people's lawyer."¹⁴⁴ While Justice Brandeis certainly did not have "millennial" behaviors, it is good to keep in mind that the next Louis Brandeis might well be a millennial and to ensure that institutional

141. *Justice Louis D. Brandeis: The People's Attorney* (PBS television broadcast 2007); See also LEWIS J. PAPER, *BRANDEIS* 16 (1983) (discussing Brandeis' time at Harvard).

142. *Brandeis*, *supra* note 141; PAPER, *supra* note 141, at 16.

143. *Brandeis*, *supra* note 141; PAPER, *supra* note 141, at 16.

144. *Brandeis*, *supra* note 141.

policies, practices, and procedures do not unduly create barriers excluding that individual.

APPENDIX

Office of the Americans with Disabilities Act
Civil Rights Division
Department of Justice
P.O. Box 66118
Washington, D.C. 20036-6118
(202)514-0301; (202)514-0381 (TT); (202)514-0383 (TT)

Architectural and Transportation Barriers Compliance Board
1331 F Street, NW, Suite 1000
Washington, DC 20004-1111
(800)USA-ABLE (Voice/TT)
<http://www.access-board.gov>

Association on Higher Education and Disability (AHEAD)
P.O. Box 21192
Columbus, Ohio 43221-0192
(614)488-4972 (Voice/TDD)
<http://ahead.org>

Institute for Higher Education Policy
Higher Education for Students with Disabilities:
A Primer for Policymakers (June 2004)

Job Accommodation Network (JAN)
912 Chestnut Ridge Road, Suite 1
West Virginia University
Morgantown WV 26506
1-800-527-7234
<http://janweb.icdi.wvu.edu>

Technical Assistance on Technology Access
www.itpolicy.gsa.gov/coca/nii.htm
United Kingdom tests for website accessibility
(UK standards differ from US Section 508 Guidelines)
www.publictechnology.net

United States Department of Education
Office for Civil Rights
<http://www.ed.gov/about/offices/list/ocr/kindex.html?src=oc>

“When the ADA Goes Online: Application of the ADA to the Internet and the

Worldwide Web”

National Council on Disability

<http://www.ncd.gov/newsroom/publications/adainternet.html>

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ACADEMIC ACCOMMODATIONS FOR LEARNING-DISABLED COLLEGE AND UNIVERSITY STUDENTS: TEN YEARS AFTER *GUCKENBERGER*

MARIE-THÉRÈSE MANSFIELD*

I. MEET “SOMNOLENT SAMANTHA”

In 1995, at the beginning of a speech entitled “Disabling Education: The Culture Wars Go to School,” Jon Westling, future president of Boston University, recounted the story of Samantha, a freshman at Boston University.¹ He stated that Samantha came to him on the first day of class and brought him a letter from the Disability Services office, explaining that she had:

a learning disability “in the area of auditory processing” and would need the following accommodations: “time and one-half on all quizzes, tests, and examinations;” double-time on any mid-term or final examination; examinations in a room separate from other students; copies of [Westling’s] lecture notes; and a seat at the front of the class. Samantha, [Westling] was also informed, might fall asleep in [his] class, and [he] should be particularly concerned to fill her in on any material she missed while dozing.²

* B.A., University of Notre Dame; M.S., Tulane University; J.D. candidate, Notre Dame Law School. The author is indebted to Professor L. Kent Hull who helped at many stages of the writing and editing process of this note. Without his encouragement, this note would never have been published. In addition, the author would like to thank Matthew Pepping, the Journal of College and University Law staff members, and the referees who facilitated the editing and publishing process for this note.

1. *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 118 (D. Mass. 1997). *Guckenberger* was litigated entirely as a non-jury case before Judge Patti Sarris of the United States District Court for the District of Massachusetts. Neither plaintiffs nor defendants appealed any of the District Court’s rulings. One can find the principal substantive rulings at 974 F. Supp. 106 (D. Mass. 1997) (findings and conclusion after a two-week bench trial) and at 8 F. Supp. 2d 82 (D. Mass. 1998) (reporting a post-trial decision that Boston University, in response to the lawsuit, had complied with federal and state law and was entitled to judicial deference in making some policy choices). In a pretrial ruling at 957 F. Supp. 306 (D. Mass. 1997), the court determined, *inter alia*, class certification issues, standing of individual and organizational plaintiffs, legal sufficiency of supplemental state law claims, and the liability of former Boston University president John Silber. A post-trial opinion at 8 F. Supp. 2d 91 (D. Mass. 1998) awarded more than \$1.2 million in attorneys’ fees to plaintiffs as prevailing parties, awarded total damages of \$29,500 to plaintiffs, and terminated the litigation.

2. *Guckenberger*, 974 F. Supp. at 118.

Westling went on in his speech to refer to the student as “Somnolent Samantha.”³ In fact, Westling later admitted that no such student ever existed and the description he gave was not even consistent with that of a typical learning-disabled student.⁴ However, Westling did comment that “Samantha” symbolized real learning-disabled students and that he only “altered the details to preserve [his] students’ privacy.”⁵

Westling and Boston University made the news again in the late 1990s with the case *Guckenberger v. Boston University*.⁶ *Guckenberger* is the seminal case highlighting the plight of learning-disabled students in colleges and universities following the enactment of the Rehabilitation Act and the Americans with Disabilities Act.⁷ In that class action lawsuit, several students with various learning disabilities, including Attention Deficit Disorder (“ADD”),⁸ Attention Deficit Hyperactivity Disorder (“ADHD”),⁹ and dyslexia,¹⁰ sued Boston University and its officers under the Americans with Disabilities Act of 1990 (“ADA”)¹¹ and Section 504 of the Rehabilitation Act of 1973 (“Section 504”).¹² The plaintiffs claimed that Boston University discriminated against them because of their learning disabilities.¹³ Specifically, the plaintiff class alleged that Boston University: (1) established unreasonable eligibility criteria for qualifying as a disabled student, (2) failed to provide reasonable procedures for review of accommodation requests, and (3) initiated a policy to prevent all course substitutions for mathematics and foreign languages.¹⁴ The plaintiff class sought injunctive and declaratory relief, as well as compensatory damages.¹⁵ Ultimately, the court granted judgment for the plaintiffs, with a total of roughly \$29,500 awarded in compensatory damages¹⁶ and over \$1.2 million in attorneys’ fees.¹⁷

3. *Id.*

4. *Id.*

5. Jon Westling, *One University Defeats Disability Extremists*, WALL ST. J., Sept. 3, 1997, at A21.

6. *Guckenberger*, 974 F. Supp. at 118.

7. See Peter David Blanck, Commentary, *Civil Rights, Learning Disability, and Academic Standards*, 2 J. GENDER RACE & JUST. 33, 47 (1998) (commenting on *Guckenberger* from the unique perspective of an expert witness for the plaintiffs in the case).

8. ADD is a subtype of ADHD and only involves a problem with attention, not with hyperactivity. See *Guckenberger*, 974 F. Supp. at 131 (noting that the Diagnostic and Statistical Manual, Volume IV describes ADD and ADHD as “a persistent pattern of inattention and/or hyperactivity-impulsivity that is more frequent and severe than is typically observed in individuals at a comparable level of development”).

9. Individuals with ADHD have neurological problems that involve inattention, hyperactivity, and impulsivity. *Id.*

10. Dyslexia is a reading disability in which an individual has trouble breaking down words into their smaller linguistic units. *Id.* at 130–31.

11. 42 U.S.C. §§ 12101–12213 (2000).

12. 29 U.S.C. § 794 (2000).

13. *Guckenberger*, 974 F. Supp. at 114.

14. *Id.*

15. *Id.*

16. *Id.* at 153–54.

17. See Susan M. Denbo, *Disability Lessons in Higher Education: Accommodating Learning-Disabled Students and Student-Athletes Under the Rehabilitation Act and the*

Guckenberger highlights “the underlying, often insidious, and always pervasive attitudinal biases toward many qualified persons with disabilities.”¹⁸ The case is particularly important because it sheds light on the unfounded views of the President of Boston University—the very person who at one point had the power to deny academic accommodations for learning-disabled students and to change the university’s policy regarding accommodations for students with learning disabilities.¹⁹ Even though Westling admitted that there was no occurrence of “faking” by students with disabilities,²⁰ “academic policy and attitudes, such as those implemented by [Boston University] toward learning-disability screening and testing, were influenced in profound ways by negative stereotypes.”²¹

This note examines the legal issues surrounding academic accommodations at colleges and universities for students with learning disabilities. In particular, this note illustrates the importance and complexity of learning-disability litigation in post-secondary education, as evidenced by *Guckenberger*. Part I introduced “Somnolent Samantha” and provided a glimpse of the significance of legislation regarding discrimination against individuals with learning disabilities. Part II offers a summary of the relevant federal statutes that prohibit discrimination in post-secondary schools on the basis of disability—Section 504 and Title III of the ADA.²² Part III discusses the definition, diagnosis, and accommodations for students with learning disabilities. Part IV analyzes case law to determine whether learning disabilities are “disabilities” for purposes of Section 504 and the ADA. Part V presents policy considerations regarding whether academic accommodations for learning-disabled students are beneficial or harmful. Finally, Part VI offers a summary of the current state of academic accommodations and provides suggestions for future directions in this area.

Americans with Disabilities Act, 41 AM. BUS. L.J. 145, 183 (2003) (discussing the outcome of *Guckenberger* in the context of cases involving adequate documentation of learning disabilities).

18. See Blanck, *supra* note 7, at 47.

19. See *Guckenberger*, 974 F. Supp. at 120.

20. See Blanck, *supra* note 7, at 37.

21. *Id.* at 54.

22. A detailed analysis of the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400–1485 (2000), and workplace accommodations under Title I of the ADA, 42 U.S.C. §§ 12111–12213 (2000), falls beyond the scope of this note.

II. SECTION 504 AND THE ADA—AN OVERVIEW

Section 504²³ and the ADA²⁴ are both legislative measures to protect against discrimination of individuals with disabilities. Both statutes prohibit colleges and universities from discrimination based on disability, including learning disabilities.²⁵ Section 504 applies to institutions receiving federal funding and requires post-secondary educational institutions to provide academic accommodations for qualified students with disabilities.²⁶ These academic accommodations may include “changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.”²⁷

Even though Section 504 had been in effect since 1973, Congress found that individuals with disabilities still faced discrimination in many situations, including education.²⁸ In an effort to eliminate the discrimination that individuals with disabilities continued to encounter²⁹ and to expand the protections of Section 504 to a broader section of society,³⁰ Congress passed the ADA in 1990. Although the ADA did not explicitly address academic accommodations, courts regularly merge the analysis for the ADA and Section 504 when reviewing claims for academic accommodations.³¹ While some procedural differences do exist between Section 504 and the ADA,³² courts generally read the two statutes together to grant the same substantive protections.³³

Congress divided the ADA into several sections: Title I, prohibiting discrimination within the employment context;³⁴ Title II, prohibiting

23. 29 U.S.C. § 794 (2000).

24. 42 U.S.C. §§ 12101–12213 (2000).

25. *See id.* § 12101(a)(3) (stating that “discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services”).

26. 34 C.F.R. § 104.44(a) (2005).

27. *Id.*

28. *See* Bonnie Poitras Tucker, *Application of the Americans with Disabilities Act (ADA) and Section 504 to Colleges and Universities: An Overview and Discussion of Special Issues Relating to Students*, 23 J.C. & U.L. 1, 2 (1996).

29. *See id.*

30. *See* Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We've Been and Where We May Be Heading*, 63 MD. L. REV. 122, 133 (2004).

31. *See* 42 U.S.C. § 12201(a) (2000) (expressly providing for this congruence of construction). *See also* *Guckenberger*, 974 F. Supp. at 133 (noting that “the ADA and Section 504 . . . are frequently read in sync”); Melissa Krueger, Comment, *The Future of ADA Protection for Students with Learning Disabilities in Post-Secondary and Graduate Environments*, 48 U. KAN. L. REV. 607, 614 (2000).

32. *See* Tucker, *supra* note 28, at 2 n.12 (explaining in greater detail the procedural differences between Section 504 and the ADA).

33. *See id.* at 2.

34. 42 U.S.C. § 12112 (2000).

discrimination in state and local public services;³⁵ Title III, prohibiting discrimination in public accommodations by private entities;³⁶ Title IV, prohibiting discrimination through telecommunication services;³⁷ and Title V, articulating miscellaneous provisions.³⁸ The purpose of the ADA as declared in the statute is to provide “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”³⁹ As stated earlier, this note will only focus on Titles II and III of the ADA, which affect discrimination against individuals with disabilities by colleges and universities.⁴⁰

When the ADA was passed in 1990, Congress reported that forty-three million Americans were disabled—meaning that forty-three million Americans had a physical or mental impairment that substantially limited one or more of their major life activities, had a record of such an impairment, or were regarded as having such an impairment.⁴¹ Congress also reported that the number of disabled Americans was expected to rise.⁴² Indeed, the number of disabled Americans has continued to rise over the last decade and a half. The most recent data from 2002 indicate that 51.2 million people (18.1% of the population) are disabled.⁴³ While information is not available regarding the total number of Americans who have learning disabilities, data indicate that nearly 26,500 college freshmen in the fall of 2000 reported having a learning disability.⁴⁴

35. *Id.* § 12132 (stating that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity”).

36. *Id.* § 12182(a) (stating that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation”).

37. 47 U.S.C. § 225 (2000).

38. 42 U.S.C. §§ 12201–13 (2000) (including sections explaining that certain behaviors, such as illegal drug use, are not considered disabilities for purposes of the ADA).

39. *Id.* § 12101(b)(1).

40. *See supra* Part I.

41. *See* 28 C.F.R. § 35.104 (2005).

42. *See* 42 U.S.C. § 12101(a)(1) (2000).

43. ERIKA STEINMETZ, AMERICANS WITH DISABILITIES: 2002 (2006), available at <http://www.census.gov/prod/2006pubs/p70-107.pdf>.

44. *See* CATHY HENDERSON, COLLEGE FRESHMEN WITH DISABILITIES: A BIENNIAL STATISTICAL PROFILE (2001), available at http://www.heath.gwu.edu/files/active/0/college_freshmen_w_disabilities.pdf (reporting that 66,197 freshmen, about 6% of freshmen, at four-year institutions self-identified as being disabled in some way and that of those students, 40% identified as having a learning disability).

III. LEARNING DISABILITIES—BACKGROUND

A. Definition

Professionals and the public have used the term “learning disability” only for the past forty years.⁴⁵ This fact may help explain some of the difficulty in defining, diagnosing, and accommodating individuals with learning disabilities. Neither Section 504 nor the ADA defines the term “learning disability,” but the Individuals with Disabilities Education Act (“IDEA”),⁴⁶ which applies only to public elementary and secondary schooling, defines “specific learning disability” as:

[A] disorder in [one] or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.⁴⁷

Additionally, the Learning Disabilities Association of America defines learning disabilities as “neurologically-based processing problems . . . [that] can interfere with learning basic skills such as reading, writing, or math.”⁴⁸ However, because Section 504 and the ADA do not define learning disabilities directly, determining whether certain learning disabilities qualify for protection under the law is difficult. For example, courts widely debate whether ADHD is considered a

45. See Craig S. Lerner, “Accommodations” for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?, 57 VAND. L. REV. 1043, 1055 n.52 (2004) (stating that professionals have observed the general phenomenon of learning difficulties for centuries, but only recently documented the phenomenon as a disability). See also Learning Disabilities Association of America, History of LDA, <http://www.ldaamerica.org/about/history.asp> (last visited Oct. 29, 2007) (describing the history of the Learning Disabilities Association).

46. 20 U.S.C. §§ 1400–1485 (2000).

47. *Id.* § 1401(30). The U.S. Department of Education uses almost the same language to define learning disabilities on its website for Vocational and Adult Education. See Learning Disabilities in Adult Education, Office of Vocational and Adult Education, <http://www.ed.gov/about/offices/list/ovae/pi/AdultEd/dislearning.html> (last visited Oct. 29, 2007) (defining learning disability as “[a] disorder in one or more of the central nervous system processes involved in perceiving, understanding, and/or using concepts through verbal (spoken or written) language or non-verbal means” which manifests itself “with a deficit in one or more of the following areas: attention, reasoning, processing, memory, communication, reading, writing, spelling, calculation, coordination, social competence, and emotional maturity”). See also 45 C.F.R. § 1308.14(b)(2) (2005) (defining learning disability as a “severe discrepancy between achievement of developmental milestones and intellectual ability in one or more of these areas: oral expression, listening comprehension, pre-reading, pre-writing, and pre-mathematics”).

48. Learning Disabilities Association of America, Types of Learning Disabilities, http://www.ldaamerica.org/aboutld/parents/ld_basics/types.asp (last visited Oct. 29, 2007).

learning disability for purposes of Section 504 and the ADA.⁴⁹

Some courts, such as the First Circuit in *Bercovitch v. Baldwin School, Inc.*,⁵⁰ have held that, while ADHD is not a disability *per se*, under certain circumstances ADHD can be a disability under the ADA.⁵¹ In *Bercovitch*, the court noted that “[a]lthough the relevant regulations do not specifically list ADHD as an included physical or mental impairment, the list is not exhaustive,” indicating that ADHD, under certain circumstances, could be considered a disability under the ADA.⁵² Other courts, such as the Seventh Circuit in *Davidson v. Midelfort Clinic, Ltd.*,⁵³ have held that, under the facts specific to *Davidson*, ADHD is not a disability under the ADA.⁵⁴ *Davidson* was a case involving a woman with ADHD who was seeking accommodations at work, not in an educational context.⁵⁵ The court held that the woman’s ADHD did not affect her major life activities of working, speaking, or learning.⁵⁶ In addition, some scholars have noted that although an individual may be labeled as learning-disabled, he or she may not be considered *legally* disabled for purposes of the ADA.⁵⁷ Many courts, however, tend to interpret “disability” broadly in the educational context.⁵⁸

B. Diagnoses

Traditional diagnoses of learning disabilities involve identifying a discrepancy between mental aptitude, typically measured with an IQ test, and some form of academic achievement, usually measured by grades or standardized tests.⁵⁹ However, the medical community has yet to agree upon any specific reliable methods for validly diagnosing the majority of learning disabilities.⁶⁰ Even if one accepts learning disabilities as a legitimate handicap, discerning whether someone who works slowly has a learning disability and deserves protection under the ADA

49. See *Ferrell v. Howard Univ.*, No. Civ.A.98-1009, 1999 WL 1581759, at *3 (D.D.C. Dec. 2, 1999), *aff’d*, 254 F.3d 315 (D.C. Cir. 2000).

50. 133 F.3d 141, 155 (1st Cir. 1998).

51. *Id.*

52. *Id.* at 155 n.18.

53. 133 F.3d 499, 505–06 (7th Cir. 1998).

54. *Id.* Although *Davidson* concerns Attention Deficit Hyperactivity Disorder, or ADHD, the court refers to Attention Deficit Hyperactivity Disorder as “ADD” in its opinion. This note uses the term “ADHD” in order to differentiate between Attention Deficit Hyperactivity Disorder and Attention Deficit Disorder.

55. *Id.* at 502.

56. *Id.* at 506–08. Notably, *Davidson* did not suggest that ADHD would never rise to the level of substantially limiting one’s major life activities.

57. See *Lerner*, *supra* note 45, at 1076. See also *infra* Part IV (discussing the differences between merely being labeled as disabled and being considered *legally* disabled for purposes of the ADA).

58. See *Lerner*, *supra* note 45, at 1077 (commenting that interpretations of “disabilities” have differed in employment cases, which tend to construe “disability” narrowly, and education cases, which tend to interpret “disability” more broadly).

59. See *id.* at 1058.

60. See Linda Feldmeier White, *Learning Disability, Pedagogies, and Public Discourse*, 53 COLL. COMPOSITION AND COMM. 705, 708 (2002) (noting that a series of studies in the 1980s found that misdiagnosis for learning disabilities was widespread).

or whether that person is just a slow worker is extremely difficult.⁶¹ Some cynics argue that so-called “learning disabilities” diagnosed in adolescents and pre-teens are really just an “ordinary mix of mind-wandering, exuberance, and boredom that is part and parcel of ‘growing up.’”⁶² Thus, according to some scholars, an explanation for the increase of students diagnosed with learning disabilities may be the fact that doctors’—and the public’s—definitions of “learning disabilities” have expanded over the years to encompass a growing number of students.⁶³

An additional problem concerns the credibility of those who diagnose students with learning disabilities.⁶⁴ Some skeptics, such as Jon Westling, the President of Boston University, have labeled such evaluators of learning disabilities as “self-proclaimed experts who fail to accept that behavioral and performance difficulties exist”⁶⁵ and “snake oil salesmen.”⁶⁶ In *Guckenberger*, Boston University required that students’ evaluators be medical doctors, licensed clinical psychologists, or individuals with doctorate degrees.⁶⁷ Many students in *Guckenberger* had documentation from evaluators that their elementary and secondary schools accepted, but which Boston University would not accept.⁶⁸ Judge Patti Sarris, in her ruling in *Guckenberger*, held that students with a history of professional evaluation by a person who did not meet the university’s criteria would not have to find a new evaluator, but that students not yet diagnosed would need to be tested by a person who met the university’s standards.⁶⁹ In other words, students who had never been evaluated for a learning disability could only be diagnosed as learning disabled if the evaluator met Boston University’s standards.⁷⁰

Another concern considered in *Guckenberger* involved retesting of learning-disabled students previously diagnosed with learning disabilities.⁷¹ In addition to being evaluated by someone who met the university’s credentials, students at Boston University also had to be retested if their initial diagnosis of a learning disability was more than three years old.⁷² Some medical professionals assert that certain learning disabilities, like dyslexia, remain fairly stable over time; thus, there is no reason to require a student diagnosed with dyslexia to be retested every three years.⁷³ Other evidence exists, however, that “[a] learning disability is not static; its effects may change in relation to a number of student, environmental, and

61. See Tamar Lewin, *Ideas & Trends; Shaky Crutch for Learning-Disabled*, N.Y. TIMES, Sept. 20, 1998.

62. Lerner, *supra* note 45, at 1068.

63. See *id.* at 1072.

64. See *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 120 (D. Mass. 1997).

65. *Id.* at 119.

66. *Id.* at 141.

67. *Id.* at 136.

68. *Id.*

69. *Id.* at 137.

70. *Id.*

71. *Id.* at 135 (referring to the need to retest for learning disabilities as the “currency requirement”).

72. *Id.*

73. *Id.* at 138 (citing findings from a medical researcher who performed a comprehensive longitudinal study on a large population of dyslexic children).

curricular factors.”⁷⁴ Judge Sarris ruled in *Guckenberger* that Boston University’s initial plan regarding mandatory retesting discriminated against students with disabilities. Even though by the time of the trial the university had already modified its requirement to include a waiver of retesting where medically unnecessary, the retesting policy still “screened out” some learning disabled students.⁷⁵

Diagnoses and retesting can be very expensive and time-consuming, especially if done by a highly-educated and credentialed provider.⁷⁶ Because of the high costs associated with diagnosing learning disabilities, some critics claim that learning disabilities are an “elite” disorder, implying that if one has enough money, then he or she can obtain a diagnosis of a learning disability.⁷⁷ Some scholars have also termed this effect as “affirmative action for the rich and sophisticated.”⁷⁸ The idea is that parents who have the means will want to seek explanations for why their son or daughter may not be performing well in school. Some parents might seek a diagnosis of a learning disability as an explanation. In fact, one scholar has gone so far as asserting that “[a]n entire industry has arisen dedicated to the diagnosis and medication of any student falling short of Einsteinian mental prowess combined with Ghandian spiritual calmness.”⁷⁹ Thus, some scholars have articulated the fear that eventually all individuals could be diagnosed with a learning disability merely because they have some academic shortcoming.⁸⁰

Clearly, the diagnosis of learning disabilities is a very complex issue and one that has led to debate within both the medical and educational communities.⁸¹ For educators, especially administrators at the college and university level, it is especially important to be able to identify students who have learning disabilities in order for their institutions to conform to the ADA by providing appropriate academic accommodations. Arguably, Jon Westling and other Boston University administrators and defendants in *Guckenberger* took the wrong approach to the issue of academic accommodations. Instead of making up stories about sleepy students and discrediting evaluators of learning disabilities,⁸² Boston University could have responded to this important issue as overwhelmed administrators who were trying to “do the right thing” for their learning-disabled students but who

74. NATIONAL JOINT COMMITTEE ON LEARNING DISABILITIES, *LEARNING DISABILITIES: ISSUES IN HIGHER EDUCATION* (1999), available at <http://www.ldonline.org/?module=uploads&func=download&fileId=590> (reporting that “[s]uch factors as the student’s abilities, the classroom setting, methods of instruction, or task demand may entail the need to provide different academic adjustments”).

75. *Guckenberger*, 974 F. Supp. at 136, 140.

76. See *id.* at 136 (stating that Elizabeth Guckenberger testified that “her retesting process took four days and cost \$800” and that other evaluations could cost up to \$1,000 per visit and require multiple visits).

77. See Lerner, *supra* note 45, at 1045.

78. See *id.*

79. *Id.* (demonstrating the author’s extreme cynicism regarding the legitimacy of learning disabilities).

80. See *id.* at 1045–46 (envisioning an America that may be on the road to “universal disability” where “virtually all Americans are diagnosed as learning disabled”).

81. See, e.g., White, *supra* note 60, at 708.

82. See *supra* Part I.

were honestly confused about how to implement the ADA regarding academic accommodations at the post-secondary level. While it is difficult to say whether or not this suggested approach would have made a difference in Judge Sarris' ruling in *Guckenberger*, it does seem that Boston University would have benefited from this strategy at least in terms of a more positive public perception.

C. Accommodations

Entities covered by Section 504 and the ADA must provide students with disabilities "reasonable accommodations or adjustments where required to meet the non-discrimination mandate, and must ensure that students with disabilities are informed about how to access appropriate services."⁸³ An academic accommodation for learning disabilities is not reasonable if it constitutes an undue burden or hardship to provide it, or if it would require a fundamental alteration to the institution's program.⁸⁴ Moreover, a duty to accommodate does not arise until a school receives sufficient documentation of a learning disability and the need for reasonable accommodations.⁸⁵ The ADA also requires an individualized inquiry about a student's learning disability, rather than one based merely on the diagnosis of an impairment and generalized conclusions about its effects.⁸⁶ Finally, the college or university, not the student, must pay the cost of the reasonable accommodations.⁸⁷

In *Guckenberger*, Boston University refused to allow learning-disabled students to obtain course substitutions for foreign language and mathematics classes as an accommodation for the students' various learning disabilities.⁸⁸ Although Judge Sarris found for the plaintiff class, she instructed Boston University to form a committee to decide whether the requested course substitutions would fundamentally alter the nature of the university's program.⁸⁹ Boston University did convene such a group, and it decided that the course substitutions would indeed fundamentally alter the nature of the program.⁹⁰ Judge Sarris accepted the

83. See Tucker, *supra* note 28, at 4 (emphasis added).

84. See *id.* at 14-15.

85. See Tracey I. Levy, *Legal Obligations and Workplace Implications for Institutions of Higher Education Accommodating Learning Disabled Students*, 30 J.L. & EDUC. 85, 87 (2001) (commenting that "[t]he reported cases suggest that individuals with learning disabilities who received accommodations from institutions of higher education will not be entitled to similar accommodations when they enter the workforce").

86. See Mark C. Weber, *Disability Discrimination in Higher Education*, 27 J.C. & U.L. 417, 418 (2000).

87. See Tucker, *supra* note 28, at 25.

88. *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 147 (D. Mass. 1997).

89. *Id.* at 154.

[I]f the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternate means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternative would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.

Id. at 148 (quoting *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19 (1st Cir. 1991)).

90. *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 82, 87 (D. Mass. 1998).

university's decision on this matter, holding that the committee showed the requisite "reasoned deliberation" in reaching its conclusion.⁹¹

As with many hotly-debated cases, both sides of the *Guckenberger* case claimed victory.⁹² The plaintiff class felt they "won" in receiving judgment in their favor regarding the award of damages, yet Boston University administrators felt they "won" in that they did not have to offer course substitutions as academic accommodations because substitutions would be a fundamental alteration of the degree programs at the university.⁹³ In the end, Judge Sarris was perhaps the real victor in this case. She was able to weigh each side's competing considerations carefully—with little guidance from ADA legislation, regulations, or cases decided by higher courts—and issue a series of rulings and a final opinion that were not appealed.

While *Guckenberger* involved academic accommodations in the form of course substitutions, other cases have raised different forms of academic accommodations, such as different formats for examinations. In *Wynne v. Tufts University School of Medicine*,⁹⁴ the court held that changing the format of a medical exam from multiple choice to essay would fundamentally alter the nature of the program.⁹⁵ In cases such as *Wynne*, courts have upheld the colleges' and universities' decisions that modifications would fundamentally alter the nature of the program.⁹⁶

In other words, colleges and universities must strike a delicate balance between accommodating students and holding true to their academic reputations as high-caliber learning institutions.⁹⁷ The fact that individuals complete courses or

91. *Id.*

92. See Lawrence S. Elswit et al., *Between Passion and Policy: Litigating the Guckenberger Case*, 32 J. OF LEARNING DISABILITIES 292, 300 (1999) ("Although the plaintiffs may have won the war of passion, the university won the war of policy."). Notably, the authors of this article were the attorneys who litigated *Guckenberger* on behalf of Boston University. Thus, the article is partial to explaining the facts of *Guckenberger* in a light most favorable to Boston University.

93. See Westling, *supra* note 5 at A21 (maintaining that Boston University was the clear "winner" in the ruling that "disabilities law does not require universities to compromise essential academic standards").

94. 932 F.2d 19 (1st Cir. 1991).

95. *Id.* at 27. On April 30, 1990, a First Circuit panel of Judge Cyr, Senior Judge Coffin, and Senior Judge Bownes reversed the unreported summary judgment granted to Tufts University by District Judge Rya W. Zobel in Boston, holding that there were disputes of material fact requiring trial. *Wynne v. Tufts Univ. Sch. of Med.*, No. 89-1670, 1990 WL 52715 (1st Cir. Apr. 30, 1990). However, on June 11, 1990, the First Circuit withheld the earlier opinion from publication and issued a new opinion, *en banc*, at 932 F.2d 19 (1st Cir. 1991) (*Wynne I*). Judge Coffin wrote the *en banc* opinion for a majority which included the other 1990 panel members, Judges Cyr and Bownes, and Judge Selya. Judge (now Justice) Breyer dissented in an opinion joined by Judges Campbell and Torruella. The majority opinion affirmed summary judgment on plaintiff's supplemental state law claim, but still reversed the summary judgment on the Section 504 claim, which the First Circuit panel—Judge (now Justice) Breyer, with Judges Torruella and Selya—affirmed and in which the Supreme Court denied certiorari. 976 F.2d 791 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993) (*Wynne II*).

96. See *Wynne I*, 932 F.2d at 27.

97. See Anne P. Dupre, *Disability, Deference, and the Integrity of the Academic Enterprise*, 32 GA. L. REV. 393, 410 (1998) (citing *Alexander v. Choate*, 469 U.S. 300 (1985), which stated that a disabled individual's "right must be balanced with the rights of institutions receiving

receive degrees from such institutions serves as an indication that those students have met the standards set by the institutions—that is, the graduates have “demonstrated sufficient knowledge, skill, or understanding” to earn those degrees.⁹⁸ Courts usually defer to determinations made by colleges and universities in deciding what constitutes a “fundamental alteration” of their programs.⁹⁹ Given this deference, a student’s chance to appeal an institution’s refusal to grant an accommodation would appear to be slim.¹⁰⁰

IV. WHO IS “DISABLED” FOR STATUTORY PURPOSES?

In order to establish the *prima facie* elements for a Section 504 or an ADA case, individuals must show that (1) they have a disability within the meaning of the statute, (2) they are otherwise qualified to participate in the educational program, (3) an adverse action was taken as a result of the disability, and (4) the educational institution receives federal funding (for a Section 504 claim), is a public entity (for a Title II ADA claim), or is a private entity that has a public accommodation (for a Title III ADA claim).¹⁰¹

Several authors have commented that most learning-disabled students currently receiving academic accommodations probably do not meet the first prong of having a disability.¹⁰² In other words, these students should not qualify as “disabled” for purposes of the ADA. One author has astutely pointed out that courts rarely question this prong, but rather assume an individual’s learning disability falls under the scope of the ADA.¹⁰³ In order to satisfy the first prong, an individual must have a disability—a physical or mental impairment—that substantially limits one or more of the individual’s major life activities, a record of

federal grants to preserve ‘the integrity of their programs’”); *see also* James Leonard, *Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act*, 75 NEB. L. REV. 27, 29 (1996).

98. *See* Leonard, *supra* note 97, at 29.

99. *See* Tucker, *supra* note 28, at 23. *See also* Dupre, *supra* note 97, at 396 (commenting on the deference courts give to various levels of academic administrations by saying “while most courts are comfortable deferring to the academic judgments of educators in colleges and universities, many courts are less willing to defer to the professional judgment of educators in elementary school or high school”).

100. *See* Tucker, *supra* note 28, at 23. *See also* Leonard, *supra* note 97, at 48 (noting that “[a]cademic institutions in the United States have enjoyed remarkable freedom from judicial scrutiny” because “courts have been reluctant to review decisions of universities in academic matters”). Because many colleges and universities now routinely provide accommodations in the form of extended time or note-taking services, students may likely be more successful in obtaining these types of accommodations as opposed to obtaining accommodations such as course substitutions or taking required examinations in a markedly different format. *See, e.g., Wynne I*, 932 F.2d at 27.

101. *See* Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1045 (9th Cir. 1999). Zukle appealed the Eastern District of California’s grant of summary judgment in favor of the Board of Regents for the medical school that had expelled Zukle for failing to meet its standards. The Ninth Circuit affirmed the ruling of the district court, noting that Zukle failed to establish that she could have met the medical school’s academic standards even with reasonable accommodations.

102. *See* Levy, *supra* note 85, at 87.

103. *See* Lerner, *supra* note 45, at 1076.

such impairment; or be regarded as having such an impairment.¹⁰⁴ The following sections discuss the courts' interpretations of the terms "substantially limit" and "major life activity."

A. Substantially Limit

*Toyota Motor Manufacturing of Kentucky, Inc. v. Williams*¹⁰⁵ held that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."¹⁰⁶ While *Toyota* involved manual tasks in an automobile manufacturing plant, extrapolating its holding to the learning-disability context means that a learning disability would have to prevent a student from an activity that is of central importance to most people. In a student's case, the activity of "central importance"¹⁰⁷ is learning. The Court in *Toyota* continued by saying that "[m]erely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity."¹⁰⁸ Thus, in order to qualify as a disabled individual, a learning-disabled student must further show that the limitations on the major life activity are "substantial."¹⁰⁹

If a student has a learning disability, how does that student demonstrate that the learning disability substantially impairs the major life activity of learning? In *Wong v. Regents of the University of California*,¹¹⁰ a learning-disabled student in medical school was diagnosed with a limited ability to process and communicate information.¹¹¹ The student requested and was denied additional time to prepare for his clinical clerkship.¹¹² Because the medical school did not allow the learning-disabled student extra time, he failed his clinical clerkship and the medical school subsequently dismissed him from its program.¹¹³

When concluding that the student in *Wong* was not substantially limited in learning, the majority opinion considered the fact that the learning-disabled student

104. 28 C.F.R. § 35.104 (2005).

105. 534 U.S. 184 (2002).

106. *Id.* at 198.

107. *See id.*

108. *See id.* at 195.

109. *Id.*

110. 379 F.3d 1097 (9th Cir. 2004).

111. *Id.* at 1100.

112. *Id.* *Wong* first came before the Ninth Circuit when a panel consisting of Senior Circuit Judge Kravitch, sitting by designation from the Eleventh Circuit, and Ninth Circuit Judges Reinhardt and Nelson unanimously reversed the unreported summary judgment in favor of the university granted by United States District Judge Lawrence K. Karlton of the Eastern District of California. *See Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807 (9th Cir. 1999). The opinion by Judge Kravitch found reversible error in the district court's deference to the university's rationale for its decision to terminate Wong from the school and in its failure to recognize disputes of material fact which precluded summary judgment. Upon remand, District Judge Karlton again granted an unreported summary judgment to the university, which a Ninth Circuit panel of Circuit Judges Beezer, Thomas, and Clifton affirmed by a 2-1 vote, with Judge Thomas writing the dissent discussed herein and Judge Clifton writing for the majority.

113. *Wong*, 379 F.3d at 1101.

succeeded in graduating from high school and college and took standardized tests without accommodations.¹¹⁴ However, as Judge Thomas pointed out in his dissent in *Wong*, the majority's opinion implied that one would have to fail before being considered to be learning-disabled under the scope of the ADA.¹¹⁵ One scholar noted that "[a]lmost by definition, an individual who is enrolled at an institution of higher education has demonstrated greater skills in reading, writing, and learning than the average person in the general population."¹¹⁶ This statement echoes Judge Thomas' concern that the majority's opinion in *Wong* has "effectively bar[red] the entire class of learning disabled students from receiving ADA accommodations in graduate school" because learning-disabled graduate students had "worked too hard and succeeded too well" in previous settings.¹¹⁷

In *Dixson v. University of Cincinnati*,¹¹⁸ a graduate student alleged that the University of Cincinnati failed to provide reasonable accommodations for her learning disability and dismissed her from the program.¹¹⁹ She claimed that she was substantially limited in the major life activity of learning.¹²⁰ The court, however, used the standard enunciated in *Toyota* that "having an impairment does not make one disabled."¹²¹ The court granted summary judgment for the University of Cincinnati, stating that Dixson failed to demonstrate the effect her disabilities had on her ability to learn, and noting that she received a bachelor's degree and performed adequately on standardized tests.¹²²

Dixson exemplifies the problem stated by Judge Thomas in his dissent in *Wong*: how does a learning-disabled student prove that he or she is substantially limited in learning? The logical conclusion is that a learning-disabled student has to fail in order to show that he or she has a substantial limitation in learning.¹²³ Judge Thomas noted that the majority's decision in *Wong* "places the ADA plaintiff in an untenable situation where 'success negates the existence of the disability, whereas failure justifies dismissal for incompetency.'"¹²⁴ In other words, a learning-disabled student must struggle just enough to demonstrate that he or she is "substantially limited" in learning, but not struggle so much that the college or university would claim that the individual is not otherwise qualified to participate in its educational program.

114. *Id.* at 1108 (noting that "[r]egarding the activity of learning, Wong's claim to be 'disabled' is fatally contradicted by his ability to achieve academic success, without special accommodations").

115. *Id.* at 1110 (Thomas, J., dissenting).

116. See Levy, *supra* note 85, at 94.

117. *Wong*, 379 F.3d at 1113-14 (Thomas, J., dissenting).

118. No. 1:04-CV-558, 2005 WL 2709628 (S.D. Ohio Oct. 21, 2005).

119. *Id.* at *1.

120. *Id.* at *2.

121. *Id.* at *3 (quoting *Toyota Motor Mfg., of Ky., Inc. v. Williams*, 534 U.S. 184, 195 (2002)).

122. *Id.*

123. See *Wong v. Regents of the Univ. of Cal.*, 379 F.3d 1097, 1111 (9th Cir. 2004) (Thomas, J., dissenting).

124. *Id.* (quoting Andrew Weis, *Jumping to Conclusions in "Jumping the Queue"* (reviewing MARK & GILLIAN LESTER, *JUMPING THE QUEUE* (1997)), 51 STAN. L. REV. 183, 205 (1998)).

In addition to *Wong* and *Dixson*, several other cases since *Guckenberger* have involved students bringing claims against colleges and universities for failing to accommodate their learning disabilities.¹²⁵ Most of these cases, however, ended with summary judgment granted for the defendant colleges and universities.¹²⁶ Often, the plaintiffs could not show that they were disabled as a matter of law because they could not demonstrate that their learning disabilities substantially limited them in the major life activity of learning.¹²⁷

B. Major Life Activity

As previously stated, in order to classify an individual as legally disabled, the impairment must affect a “major life activity.”¹²⁸ According to the ADA, a major life activity includes “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”¹²⁹ While “learning” is included in the list of major life activities, it is unclear whether it should be defined broadly as “learning” or narrowly as “learning at the doctoral level.”¹³⁰ It seems clear that learning is of central importance to most people, while studying for a doctorate, for example, is not.¹³¹ Another important consideration when assessing whether an individual is substantially limited in a major life activity is the presence of mitigating factors.¹³² If the individual can use appliances or medications to mitigate the effect of the disability, the major life activity may not be substantially limited.¹³³ Hovering just beyond the horizon of the 1997 *Guckenberger* ruling was the “*Sutton* trilogy”—three Supreme Court cases decided in 1999 which discuss the role of mitigating measures, such as appliances and medication, in determining whether or not an individual is disabled under the ADA.¹³⁴

1. *Sutton v. United Air Lines, Inc.*

*Sutton*¹³⁵ involved severely myopic twins who sought to become airline pilots, but who did not meet the airline’s vision requirement.¹³⁶ The majority opinion held that the twins were not disabled within the scope of the ADA because when

125. See, e.g., *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432 (6th Cir. 1998); *Abdo v. Univ. of Vt.*, 263 F. Supp. 2d 772 (D. Vt. 2003); *Hamilton v. City Coll. of the City Univ. of N.Y.*, 173 F. Supp. 2d 181 (S.D.N.Y. 2001).

126. See, e.g., *Wong*, 379 F.3d at 1110; *Kaltenberger*, 162 F.3d at 437; *Dixson*, 2005 WL 270928, at *3; *Hamilton*, 173 F. Supp. 2d at 186.

127. See discussion of cases *infra* Part IV.B.

128. 28 C.F.R. § 35.104 (2005).

129. *Id.* at § 35.104(2) (2005).

130. See *Dixson*, 2005 WL 2709628, at *3.

131. *Id.*

132. See generally *Weber*, *supra* note 86.

133. See *id.*

134. See *id.* (discussing the cases of *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999), and *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)).

135. 527 U.S. 471 (1999).

136. *Id.* at 475–76.

they wore their corrective contact lenses they could function as well as people without their impairment.¹³⁷ Although the ADA does not address whether mitigating measures should be taken into consideration when ascertaining if one is “disabled” for purposes of the statute, both the Equal Employment Opportunity Commission (“EEOC”)¹³⁸ and the Department of Justice¹³⁹ had issued guidelines which recommended that mitigating measures *not* be taken into account. The interpretive guidelines did not persuade the majority; rather, the majority looked to the language of the ADA and the legislative intent for passing the statute.¹⁴⁰ Specifically, the majority opinion stated that the figure of forty-three million Americans with disabilities contained in the preamble of the ADA indicated that Congress meant for “disability” to be determined by taking mitigating measures into account.¹⁴¹ As Justice Ginsburg noted in her concurrence, “the inclusion of correctable disabilities within the ADA’s domain would extend the Act’s coverage to far more than 43 million people.”¹⁴²

The dissenting opinion by Justice Stevens, however, provided an interesting perspective.¹⁴³ He stated that the threshold question for determining whether a person is disabled should focus on “past or present physical condition without regard to mitigation that [had] resulted from rehabilitation, self-improvement, prosthetic devices, or medication.”¹⁴⁴ In addition, he noted that eight of the nine federal Courts of Appeals, as well as three governmental agencies, had all agreed that disability should be assessed without considering mitigating factors.¹⁴⁵ He illustrated his point by providing an example of a war veteran who had a prosthetic leg, but who had learned to use the prosthesis very effectively.¹⁴⁶ According to Justice Stevens, the Court should not deny ADA protection to this war veteran merely because he had succeeded in overcoming great adversity.¹⁴⁷

2. *Murphy v. United Parcel Service, Inc.*

The second case in the *Sutton* trilogy is *Murphy v. United Parcel Service,*

137. *Id.* at 488.

138. See 29 C.F.R. Pt. 1630, App., § 1630.2(j) (1998) (stating that “the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigation measures such as medicines, or assistive or prosthetic devices”). However, 29 C.F.R. Pt. 1630, App., § 1630.2(j) (2005), an edition published after the *Sutton* case, does not include the clause about mitigating measures. Rather, it reads: “The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis.” *Id.*

139. See 28 C.F.R. Pt. 35, App. A, § 35.104 (2005) (stating that “[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services”).

140. *Sutton*, 527 U.S. at 484–85.

141. *Id.*

142. *Id.* at 494 (Ginsburg, J., concurring).

143. *Id.* at 495 (Stevens, J., dissenting).

144. *Id.*

145. *Id.* at 495–96.

146. *Id.* at 497.

147. *Id.* at 497–98.

*Inc.*¹⁴⁸ In *Murphy*, United Parcel Service (“UPS”) fired a mechanic who had hypertension.¹⁴⁹ With medication, Murphy’s blood pressure did not “significantly restrict his activities and . . . in general, he [could] function normally and [could] engage in activities that other persons normally [did].”¹⁵⁰ Although the Department of Transportation (“DOT”) should not have granted Murphy certification because of his hypertension, he was erroneously granted the certification and thus allowed to work at UPS.¹⁵¹ Once the mistake was discovered, UPS required Murphy’s blood pressure to be retested.¹⁵² Because Murphy’s blood pressure exceeded the guidelines set forth by the DOT, he was fired.¹⁵³

Murphy filed suit, claiming discrimination under Title I of the ADA.¹⁵⁴ The District Court granted summary judgment in favor of UPS, noting that Murphy’s hypertension, viewed in its medicated state, did not qualify as a disability under the ADA.¹⁵⁵ The Court of Appeals affirmed this decision in an unpublished opinion.¹⁵⁶ The Supreme Court affirmed the lower courts’ judgments and held that courts must take mitigating measures into consideration when determining whether a person has a disability for purposes of protection under the ADA.¹⁵⁷ Justice Stevens again dissented, reiterating his dissent in *Sutton*, stating that “[s]evere hypertension . . . easily falls within the ADA’s nucleus of covered impairments.”¹⁵⁸

3. *Albertson’s, Inc. v. Kirkingburg*

The third of the *Sutton* trilogy¹⁵⁹ is *Albertson’s, Inc. v. Kirkingburg*,¹⁶⁰ a case where Albertson’s, a grocery store chain, fired a truck driver for failing to meet certain vision standards as a result of his amblyopia, an uncorrectable eye condition.¹⁶¹ Similar to the *Murphy* case, Kirkingburg did not meet the standard set out by the DOT, but the agency erroneously granted him certification.¹⁶² When a doctor finally noticed that Kirkingburg’s vision did not meet the DOT standards, he suggested that Kirkingburg apply for a waiver, given that he had been driving

148. 527 U.S. 516 (1999).

149. *Id.* at 518.

150. *Id.* at 519 (quoting *Murphy v. United Parcel Serv., Inc.*, 946 F. Supp. 872, 875 (D. Kan. 1996)).

151. *Id.* at 519–20.

152. *Id.*

153. *Id.*

154. *See Murphy*, 946 F. Supp. 872.

155. *Id.* at 881–82.

156. *See Murphy v. United Parcel Serv., Inc.*, 141 F.3d 1185 (10th Cir. 1998) (unpublished table decision).

157. *Murphy*, 527 U.S. at 521 (referring to the Supreme Court’s holding in *Sutton*, 527 U.S. 471).

158. *Id.* at 525 (Stevens, J., dissenting).

159. *See Weber*, *supra* note 86, at 420.

160. 527 U.S. 555 (1999).

161. *Id.* at 558–60.

162. *Id.* at 559.

without incident for several years, even with the eye condition.¹⁶³ Before Kirkingburg's waiver came through, however, Albertson's fired him.¹⁶⁴ Even after Kirkingburg received the DOT waiver, Albertson's refused to rehire him.¹⁶⁵

Kirkingburg filed suit, claiming that his dismissal was a violation of the ADA.¹⁶⁶ The District Court granted summary judgment for Albertson's, holding that Kirkingburg was not qualified without an accommodation because he could not meet the DOT standards.¹⁶⁷ In addition, the District Court ruled that Albertson's was not required to wait for Kirkingburg to receive a waiver because the waiver program was "a flawed experiment that has not altered the DOT vision requirements."¹⁶⁸

The Ninth Circuit Court of Appeals reversed the District Court's ruling, however.¹⁶⁹ The court held that Kirkingburg established a genuine issue of material fact regarding whether he was disabled, whether he was qualified to do the job, and whether Albertson's fired him because of his disability.¹⁷⁰ It specifically found that Kirkingburg did suffer from a disability and that he was protected under the ADA.¹⁷¹ The Supreme Court held that when gauging whether a person has a disability, courts should take into account an individual's ability to compensate for the affect of the impairment.¹⁷² So while *Sutton* considered the use of an "appliance"—corrective lenses—as mitigation and *Murphy* involved the use of "medication" as a mitigating factor, *Kirkingburg* involved an individual who had "learned to compensate for the disability by making subconscious adjustments to the manner in which he sensed depth and perceived peripheral objects."¹⁷³ The Supreme Court concluded that there was "no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems."¹⁷⁴

4. Effects of the *Sutton* Trilogy

Although each case in the *Sutton* trilogy involves cases of discrimination against disabled individuals in the workplace, they are the only Supreme Court cases dealing with the issue of whether mitigating factors should be taken into account when assessing whether an individual is disabled for purposes of the ADA. Thus, for purposes of learning-disabled students, these decisions can be interpreted to mean that students who are on medication for ADD or who self-

163. *Id.* at 559–60.

164. *Id.*

165. *Id.*

166. *Id.* at 560.

167. *Id.* at 561 (discussing the District Court's rulings).

168. *Id.* (citation omitted).

169. *See Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1230 (9th Cir. 1998).

170. *See id.* at 1231.

171. *Id.* at 1237.

172. *Kirkingburg v. Albertson's, Inc.*, 527 U.S. 555, 565–66 (1999).

173. *Id.* at 565 (quoting *Kirkingburg*, 143 F.3d at 1232).

174. *Id.* at 565–66.

compensate for a reading disability by spending twice as long on an assignment would not be considered disabled for the purposes of the ADA.¹⁷⁵ The holdings in the *Sutton* trilogy continue to evoke controversy in the realm of mitigating factors for those with disabilities.¹⁷⁶

If courts continue to take mitigating circumstances into consideration, then it seems that almost no learning-disabled student would be considered “disabled” for the purposes of the ADA because no major life activity would be substantially limited. While a case involving mitigating measures for learning disabilities has not yet come before the Supreme Court, Justice Stevens would likely be one of the few justices to acknowledge that those students could still be labeled as disabled for purposes of the ADA by looking at their disabilities without considering mitigating factors.¹⁷⁷ In the context of learning disabilities, Justice Stevens’ view seems to be the only way to remain true to the purpose of the ADA—to eliminate discrimination for those who are disabled.¹⁷⁸

V. ACADEMIC ACCOMMODATIONS: HELPFUL OR HURTFUL IN THE LONG-RUN?

Statistics reveal a sharp increase in learning-disabled students seeking academic accommodations in colleges and universities.¹⁷⁹ One obvious reason for this increase is a natural outcome of special education statutes, such as the IDEA, which ensure that more learning-disabled students graduate from high school and are prepared to attend college.¹⁸⁰ Another reason is an increase in awareness of learning disabilities and disability discrimination brought to public attention by cases involving Section 504 and the ADA.¹⁸¹ Still, some commentators claim that the increase “reflects inappropriate claims of learning disabilities by students hoping to gain a competitive advantage in the educational process.”¹⁸²

If reasonable academic accommodations are granted to students in undergraduate work and possibly even at the graduate school level, then when do

175. See *Wong v. Regents of the Univ. of Cal.*, 379 F.3d 1097, 1113 (9th Cir. 2004) (Thomas, J., dissenting).

176. See *infra* text accompanying note 178.

177. See *Sutton*, 527 U.S. at 495 (Stevens, J., dissenting). One should note that considering that the definition of disability is the same for all titles of the ADA, see 42 U.S.C. § 12102 (2000), it is hard to see how courts could reach a different result regarding mitigation in a Title III case involving education, as opposed to a Title I case involving employment.

178. See 42 U.S.C. § 12101(b)(1) (2000). The National Council on Disability has been vocal about the result of the *Sutton* trilogy because it has undercut the congressional intent of providing protections under the ADA for individuals with disabilities. See Robert L. Burgdorf, Jr., *Policy Brief Series: Righting the ADA*, 11 NATIONAL COUNCIL ON DISABILITY 12 (Mar. 17, 2003), available at <http://www.ncd.gov/newsroom/publications/pdf/mitigatingmeasures.pdf> (“The result of the *Sutton*, *Murphy*, and *Kirkingburg* decisions is to turn the ADA’s terminology into an instrument for slashing out large groups of potential beneficiaries instead of forcefully eliminating instances of the pervasive unfair and unnecessary discrimination that the law sought to prohibit.”).

179. See Rothstein, *supra* note 30, at 123.

180. *Id.*

181. *Id.* at 123–24.

182. See Denbo, *supra* note 17, at 162–63 (providing a hypothetical example of a cynical point of view) (citation omitted).

the accommodations end?¹⁸³ Some professionals, especially those who work as accountants, lawyers, and doctors, “have begun to wonder . . . whether the increasing academic accommodation of those with learning disabilities will lead to career problems.”¹⁸⁴ An example of one anticipated career problem might include learning-disabled individuals who are used to having extra time to complete a project now having to adjust to inflexible deadlines that cannot be extended.

In addition, some critics wonder if the accommodations are even effective in terms of learning-disabled students’ final grades, noting that there is “little empirical evidence to confirm of [sic] refute the effectiveness of accommodations for postsecondary students with [learning disabilities] and/or [attention deficit disorder], highlighting the need for more statistical and comparative studies to clarify if [learning-disabled] students benefit from specific ADA-related academic accommodations.”¹⁸⁵

Commentators have also noted that “[a] poor achiever without [a learning disability] would profit just as much from the kinds of assistance students are given in special programs for the learning disabled, so the analogy with accommodations like Braille texts or wheelchair ramps is not apt.”¹⁸⁶

Another concern is a fairness issue for non-learning-disabled students, in that “granting accommodations to students who are not legally entitled to receive them creates an unfair system in which students who are earning their degrees by traditional means must compete with students having greater advantages, and greater likelihood of success.”¹⁸⁷ There is also a concern with non-disabled students’ perceptions of fairness, leading one scholar to comment that “non-disabled students will misperceive equal opportunity measures as affording an illegitimate advantage to their disabled peers.”¹⁸⁸ While these are valid concerns, academic accommodations for learning-disabled students can also serve to further the purpose of Section 504 and the ADA—to *promote* fairness toward learning-disabled students treated unfairly and discriminated against on the basis of their disability.¹⁸⁹

183. See Lerner, *supra* note 45, at 1047 (discussing the possible progression of a hypothetical 18-year-old being accommodated on the SATs, then as a 28-year-old being accommodated on the bar exam, and as a 38-year-old being accommodated in her legal practice).

184. Lewin, *supra* note 61, at 1.

185. Jack K. Trammell, *The Impact of Academic Accommodations on Final Grades in a Postsecondary Setting*, 34 J. COLL. READING AND LEARNING 76, 76 (2003).

186. White, *supra* note 60, at 723.

187. Suzanne Wilhelm, *Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements*, 32 J.L. & EDUC. 217, 220 (2003).

188. GERARD QUINN, MAINTAINING ACADEMIC EXCELLENCE AND ACHIEVING EQUAL OPPORTUNITIES (1999), available at <http://www.nuigalway.ie/law/Common%20Files/Disability%20Research%20Unit/GQ/Ahead%20and%20Dyslexia.pdf>. See also Judith Warner, Op-Ed., *The Columbine Syndrome*, N.Y. TIMES, Aug. 4, 2007, at A13 (citing a study about parents’ negative attitudes towards children with learning disabilities, stating “one in five parents [say] they would not want children with A.D.H.D. or depression as their neighbors, in their child’s classroom, or as their child’s friends”).

189. See *supra* Part III.

VI. CONCLUSION

Some cynics, such as Boston University's president Jon Westling, may ask whether academic accommodations even the playing field for individuals with learning disabilities or whether they are merely creating an unfair system where those without diagnosed learning disabilities are disadvantaged.¹⁹⁰ Another question concerning academic accommodations is the policy concern of who is most qualified to make decisions about academic accommodations for learning-disabled students. Should doctors who are trained in evaluating and diagnosing learning disabilities provide more guidance as to the legitimacy of certain accommodations for particular learning disabilities? Should colleges and universities be solely responsible for determining whether academic accommodations fundamentally alter a learning program?¹⁹¹ Perhaps one solution would be for colleges and universities to employ unbiased, outside input in making such determinations. However, problems would still exist when the outside source and the college or university officials differ in what they feel would "fundamentally alter" an educational program.

Clearly, negative stereotypes persist regarding learning-disabled students, their accommodations, and even the validity of the learning disability itself.¹⁹² Some predict that in the future any and every person will be able to attain a diagnosis of learning disabled.¹⁹³ However, this is unlikely. With the advent of technological advances, especially in the medical field, it may be possible to gain more accurate diagnoses of learning disabilities through brain scans, for example. A better method of diagnosing learning disabilities would be beneficial to all involved in that it would provide legitimacy to those affected by learning disabilities, while differentiating among those students who may not be academically gifted, but who do not suffer from a learning disability.

What role should courts play in these decisions? Is the great deference that courts currently give colleges and universities helping to ensure academic freedom or actually helping to create greater discrimination against learning-disabled students? Some scholars suggest that "[a]llowing federal judges unfettered discretion in protecting both the interests of disabled students and the interests of educators in ensuring the integrity of the academic enterprise for all students disserves the interests of both."¹⁹⁴ Indeed, Judge Sarris understood the importance of this balancing act when she decided the *Guckenberger* case. Judge Sarris took an extremely complex and politically-charged issue and appeared to reach a balanced result, as evidenced by the absence of appeal from either the plaintiff

190. See generally Lerner, *supra* note 45.

191. See Westling, *supra* note 5 (writing less than a month after the *Guckenberger* ruling, "Who should establish academic standards? Colleges and universities? Congress? The courts?").

192. See *supra* Part I (recounting the negative stereotypes and misconceptions held by Jon Westling, President of Boston University).

193. See Lerner, *supra* note 45, at 1123 (predicting that more people will seek a learning disability diagnosis, which is "so malleable it can encompass virtually everyone").

194. Dupre, *supra* note 97, at 466 (noting that such unrestrained judicial discretion will lead to some disabled students not being protected enough and other disabled students receiving more protection than they should).

class or Boston University. While finding for the plaintiff class and awarding a small amount of damages,¹⁹⁵ she also upheld academic freedom for Boston University in allowing it to decide what courses were fundamental to its degree programs.¹⁹⁶

Although *Guckenberger* is the landmark case with regard to academic accommodations for learning-disabled students, few Courts of Appeals have cited to the principal opinion.¹⁹⁷ In contrast, the *Guckenberger* case has generated many scholarly academic articles over the past ten years.¹⁹⁸ Possible explanations for this discrepancy include the fact that this issue is extremely sensitive for both sides and that the Supreme Court has yet to hear a case regarding academic accommodations and the ADA, so the lower courts do not have any precedent to follow. Perhaps, on one hand, no court wants to lean too far in favor of learning-disabled students, which would then inhibit the academic freedom of colleges and universities in structuring their own academic programs. On the other hand, courts do not want to lean too far in favor of educational institutions, which might then deny learning-disabled students the protections guaranteed by Section 504 and the ADA. This dilemma was precisely the struggle with which Judge Sarris grappled in the *Guckenberger* case.

Ideally, one day individuals with learning disabilities will be able to enjoy all the benefits of higher education that non-disabled students currently have without fear of a backlash of negative attitudes. Until then, Section 504 and the ADA offer protection to learning-disabled students who can prove that they are substantially limited in the major life activity of learning, have current documentation of their learning disability, and can show that a college or university denied them a reasonable accommodation that would not fundamentally alter the nature of the school program. With the relative ease in which colleges and universities can rebut a learning-disabled student's claims by showing that an accommodation would fundamentally alter the nature of a program and with the great deference that courts currently afford colleges and universities,¹⁹⁹ it continues to be extremely difficult for a student with a learning disability to win his or her case against a college or university.

195. See *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 152–54 (D. Mass. 1997).

196. See *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 82, 91 (D. Mass. 1998).

197. As of the writing of this note, the First Circuit Court of Appeals, which encompasses the District of Massachusetts, had not cited to the principal opinion of *Guckenberger v. Boston University*, 974 F. Supp. 106 (D. Mass. 1997). Only two publishable opinions of Courts of Appeals have cited to the principal opinion in *Guckenberger*. See *Stern v. Univ. Osteopathic Med. & Health Scis.*, 220 F.3d 906, 909 (8th Cir. 2000); *Colo. Cross Disability Coal. v. Hermanson Family Ltd. P'ship*, 264 F.3d 999, 1003 (10th Cir. 2001).

198. See, e.g., Elswit et al., *supra* note 92; Denbo, *supra* note 17.

199. See *Guckenberger*, 8 F. Supp. 2d at 87–88 (holding that the committee formed by Boston University used the requisite “reasoned deliberation” in its conclusion that allowing course substitutions to learning-disabled students would fundamentally alter the nature of the program).

THE EQUITY IN ATHLETICS DISCLOSURE ACT: DOES IT REALLY IMPROVE THE GENDER EQUITY LANDSCAPE?

KATHRYN KEEN*

INTRODUCTION

Intercollegiate athletics provide many colleges and universities with both tangible financial benefits in addition to intangible benefits, such as prestige and publicity. Moreover, participation in intercollegiate athletics provides student-athletes with opportunities to develop leadership skills, perfect self-discipline, and nurture self-confidence.¹ National Collegiate Athletic Association (“NCAA”) President Myles Brand asserts that sports are a proper part of the college and university, and that “athletics support, enhance, and imbue the educational experience that takes place within the university.”² Intercollegiate athletics can help develop the character of athletes, create a focus for campus community, and sustain ties between schools, alumni, and the public.³ The NCAA Presidential Task Force describes the benefits of intercollegiate athletics:

As an integral part of the higher education experience, the operation of intercollegiate athletics is comparable to other components of the campus. Similar to theater, music and other performing arts, athletics is entertaining; however, entertainment is not its mission. Like all other parts of the campus, the mission of intercollegiate athletics is to educate. The characteristics of participation in athletics (pursuit of excellence, resilience in the face of defeat, self-discipline, time management, etc.) are direct benefits to student-athletes. Furthermore, athletics in a well-run and value-based program models these important characteristics to other students, the academic community and to

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1. Rodney K. Smith, *An Academic Game Plan for Reforming Big-Time Intercollegiate Athletics*, 67 DENV. U. L. REV. 213, 220 (1990) (quoting NAT’L COLLEGIATE ATHLETIC ASS’N, SIXTH SPECIAL CONVENTION PROCEEDINGS 72 (1987)).

2. Memorandum from the NCAA Presidential Task Force Fiscal Responsibility Subcommittee, *Fiscal Responsibility in Intercollegiate Athletics: Recommendations and Best Practices 2* (May 2, 2006), available at http://www2.ncaa.org/portal/legislation_and_governance/committees/future_task_force/fiscal/fiscal4.doc [hereinafter NCAA Recommendations].

3. *Id.*

society. They are the characteristics of a well-educated individual. In addition, there is significant and well-documented research that correlates success in college to a sense of belonging. Athletics provides a sense of attachment to the campus for both the student-athlete and other students. Intercollegiate athletics is the common experience for the entire student body.⁴

Gender equity in intercollegiate athletics has been a subject of public debate since the late 1960s, when Congress began examining the discriminatory policies and practices that colleges and universities applied against women.⁵ In 1972, with the goal of ending gender discrimination, President Richard Nixon signed Title IX into law.⁶ In 1994, Congress passed the Equity in Athletics Disclosure Act ("EADA"), a law designed to increase awareness among prospective student-athletes of their school's commitment to providing equitable athletic opportunities for its male and female students.⁷

Notably, despite the similar data collection requirements under the EADA and Title IX, EADA reporting is separate from Title IX. It is required of all coeducational postsecondary educational institutions participating in Title IV federal student assistance programs.⁸ Under the EADA,⁹ the Department of Education is required to provide Congress with a financial and statistical report based on data it has collected on men's and women's collegiate sports.¹⁰

Relevantly, all colleges and universities that participate in any federal student financial aid program and have an intercollegiate athletic program must prepare an annual EADA report.¹¹ Under the regulations,¹² EADA reports must include, among other information, the total revenues and expenses attributable to football, men's basketball, women's basketball, all men's sports combined except football and basketball, and all women's sports combined except basketball; the number of participants for each varsity team and an unduplicated head count of individuals

4. Memorandum from NCAA Presidential Task Force Fiscal Responsibility Subcommittee, Fiscal Responsibility in Intercollegiate Athletics, What is the Problem? 2 (Apr. 12, 2006), available at http://www2.ncaa.org/portal/legislation_and_governance/committees/future_task_force/fiscal/fiscal1.doc [hereinafter What is the Problem?].

5. THE SECRETARY OF EDUCATION'S COMMISSION ON OPPORTUNITY IN ATHLETICS, "OPEN TO ALL" TITLE IX AT THIRTY 14 (Feb. 28, 2003), available at <http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf> [hereinafter OPEN TO ALL].

6. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended 20 U.S.C. §§ 1681-1688 (2000)). Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.* at § 1681.

7. U.S. Dept. of Educ., Office of Postsecondary Educ., Equity in Athletics Disclosure Act (EADA) Survey, <http://surveys.ope.ed.gov/athletics/> (last visited Nov. 15, 2007) [hereinafter EADA Survey].

8. *Id.*

9. 20 U.S.C. § 1092 (2000).

10. EADA Survey, *supra* note 7.

11. *Id.*

12. See Report on Athletic Program Participation Rates and Financial Support Data, 34 C.F.R. § 668.47 (2005).

(by gender) who participate on at least one varsity team; and whether a coach is assigned to a team full- or part-time, and, if part-time, whether the coach is a full- or part-time employee of the institution.¹³

Despite Congress' intention to improve gender equity within intercollegiate athletics, many government officials and college and university administrators demand the law's repeal, or, at least, reform.¹⁴ The NCAA has also unequivocally acknowledged that the EADA has its shortcomings.¹⁵ In its request for public comments, the Department of Education seemingly acknowledged some of the EADA's shortcomings. Among different information the Department sought to collect, it first sought comment on whether the collection of EADA information is necessary.¹⁶ The Department also sought comment on whether the "information was processed and used in a timely manner" and if the estimated financial cost on schools was accurate.¹⁷ Additionally, the Department wanted advice on "enhanc[ing] the quality, utility, and clarity of the information."¹⁸ Finally, the Department acknowledged the burden the EADA requirements created and asked how it could be minimized.¹⁹

This paper will examine the flaws of the EADA and address the criticisms proffered by various members of our government, NCAA officials, and college and university administrators. Following the analysis, the author concludes that repealing the EADA is the best course of action.

DISCUSSION

A. The Athletic Community Condemns the EADA

One of the most stinging criticisms of the EADA is that it fails to serve its avowed purpose of making prospective student-athletes better aware of their institutions' commitment to providing equitable athletic opportunities for their male and female students.²⁰ In 2004, retired University of Iowa athletics director Christine Grant questioned whether prospective students were even aware that EADA data were available:

The intent of [the EADA] was to shame universities into doing the right thing. And, to a certain extent, it's had that effect, but not the effect it

13. ROBERT E. LITAN ET AL., THE EMPIRICAL EFFECTS OF COLLEGIATE ATHLETICS: AN INTERIM REPORT 12 (2003), *available at* http://www.ncaa.org/library/research/athletic_spending/2003/empirical_effects_of_collegiate_athletics_interim_report.pdf.

14. *See generally*, Jodi Upton & Erik Brady, *Errors Mar Equity Reports*, USA TODAY, Oct. 18, 2005, at C1.

15. *See* Press Release, NCAA, NCAA Releases Interim Report on the Effects of Spending in Intercollegiate Athletics (Aug. 14, 2003), *available at* <http://www.ncaa.org/releases/miscellaneous/2003081401ms.htm> [hereinafter NCAA Release].

16. Notice of Proposed Information Collection Requests, 67 Fed. Reg. 60,642, 60,643 (Sept. 26, 2002).

17. *Id.* at 60,643.

18. *Id.*

19. *Id.*

20. EADA Survey, *supra* note 7.

could have because we envisioned that prospective student-athletes would have access to that data. And they do—they just don't know it. They don't know about the EADA. They don't know to ask an institution, "Could I see your EADA report?"²¹

Not surprisingly, many question the utility of EADA information, including college and university athletic directors, NCAA personnel, and, strikingly, the government department charged with the administration of the Act. Boston College athletic director Gene DeFilippo mirrored Christine Grant's sentiment when asked whether people were aware of the availability of EADA data: "I really don't know anybody that really looks at them."²²

Perhaps suggesting that there is little concern for the EADA's effectiveness, the Department of Education was unable to say whether it even tracked how many people accessed the Department's EADA website database.²³ Further, no one tracks whether student-athletes find the reports useful.²⁴ NCAA spokeswoman Gail Dent also seemed to doubt whether student-athletes used the EADA information: "It is possible that student-athletes and the public use these publications, but it is more membership- or administration-focused."²⁵ It is interesting to note that even the Department of Education does not use the reports and cannot verify the data that colleges and universities publish under them.²⁶ Although EADA data is a matter of public information, it is not easy to find, and when it is found, it is not widely used to influence school choices by student-athletes.²⁷

Sheldon Steinbach, vice-president and general counsel for the American Council on Education, scoffed at the idea that prospective student-athletes would even consider using the EADA reports:

Please. Student-athletes, male or female, who are seeking a full-ride scholarship at a Division I school will look at a lot of things They will look at the training facilities. They will look at the size of the stadium. They will look at what meals are served at the training table. They will be influenced dramatically by who the coach is. But the last thing any of them would think to look at is financial data filed with the federal government.²⁸

Others criticize the EADA data because of its astonishing lack of precision. A 2005 study by USA Today found that over one-third of NCAA Division I-A

21. Maureen Mullen, *They Earn Their Keep*, BOSTON GLOBE, Mar. 26, 2004, at E13.

22. *Id.*

23. Alan Schmadtke, *What's Hidden in the EADA?*, ORLANDO SENTINEL, May 14, 2006, at C8.

24. *Id.*

25. *Id.*

26. Memorandum from Welch Suggs, Members of Federal Panel on Gender Equity in Sports Suggest How They Would Change Title IX, *available at* http://www1.ncaa.org/membership/governance/division_I/board_of_directors/2003/January/12_BOD_Title_IX.htm. (last visited Nov. 15, 2007).

27. Schmadtke, *supra* note 23.

28. Erik Brady, *An Overlooked Resource*, USA TODAY, Oct. 18, 2005, at C12.

schools reported erroneous EADA data:

Of the nation's highest-profile athletic programs, more than 34% had at least one error in the 2003 and 2004 revenue and expense figures

The errors range from just a few dollars to a \$34 million data-entry mistake in the University of Texas report.²⁹

Due to the inaccurate reporting under the EADA, "[t]he NCAA . . . maintains an adjusted set of records that it declines to make public."³⁰ Other problems abound in the EADA reporting, such as misclassification of colleges and universities and, in one instance, a complete lack of data for a major institution.³¹ The EADA data often do not accurately reflect athletic department budgets.³² Despite the frequency of errors in reported data, the Department of Education does not correct errors in data from past fiscal periods.³³

Senator Edward M. Kennedy finds it "troubling" that after ten years of reporting under the EADA, the numbers are so flawed, saying that "[i]t's essential . . . to have reliable information on gender equity in college sports so that we can deal with the discrimination that still exists."³⁴ Rep. Louise M. Slaughter suggests that the errors are intentional, an attempt by the schools to make their treatment of women seem more equitable: "I don't think those [errors] are by chance at all."³⁵ An NCAA report found that of the 114 Division I-A schools filing a combined NCAA/EADA report for the 2000-2001 academic year, 13 either failed to report a total institutional spending figure or reported a clearly erroneous amount.³⁶

Critics of the EADA make a compelling argument that the data collected do not provide meaningful comparisons between various colleges and universities. Former University of Iowa athletic director Christine Grant noted, "This is a big flaw when you start to compare institution to institution That's the kind of thing that those of us who communicate with the DOE are trying to get them to correct. If we're going to do differential analysis, let's do it as well as we can."³⁷ Ohio State associate athletics director Susan Henderson finds institution to institution comparisons meaningless: "People use these to compare budgets, and that's not what EADA is for. The comparisons are apples to oranges."³⁸ Former

29. Upton & Brady, *supra* note 14.

30. *Id.*

31. *Id.* Problems are abundant:

Of the 119 NCAA Division I-A schools, 41 had errors. There are other problems: Five community colleges are classified as Division I-A schools in the Education Department's data; a Division I-AA school also was classified as I-A. The University of Arkansas has no data for 2003 even though the school says it filed its EADA report.

Id.

32. Erik Brady & Jodi Upton, *Financial Report Not Standardized*, USA TODAY, Oct. 19, 2005, at C12.

33. Upton & Brady, *supra* note 14 (noting that there is no process to clean old files and, while the website information can be updated, changes are not reflected in permanent records).

34. *Id.*

35. *Id.*

36. LITAN ET AL., *supra* note 13, at 13.

37. Mullen, *supra* note 21.

38. Brady & Upton, *supra* note 32.

Stanford athletics director Ted Leland agrees that school-to-school comparisons are impossible and suggests that part of the problem may be due to a lack of standardized accounting practices under the EADA.³⁹ Leland contends that the information is flawed because it “is supposed to serve as a comparison between institutions when no comparison is actually possible because different schools use different accounting practices and fill out the reports in different ways.”⁴⁰

The lack of accounting standards is troubling also to a number of college and university administrators, and it is partly responsible for the uselessness of data for school-to-school comparisons. “The reality of the EADA reports is that there is a disconnect between their intent and their use. Varying accounting methods preclude many apples-to-apples comparisons between schools.”⁴¹ The NCAA has acknowledged that “[w]ithout ‘uniform and common definitions,’ the concept of comparative transparency is meaningless.”⁴² Some schools complain that reporting under the EADA has little to do with standard accounting practices.⁴³

The lack of accounting standards under the EADA has come to the attention of the academic community, as well.⁴⁴ “When it comes to money used for recruiting, for instance, schools often record different expenses. Some include the cost of phone calls. Some include the cost of meals served during official visits. Others include only what they pay for their coaches’ recruiting trips.”⁴⁵

The NCAA Presidential Task Force similarly concluded that inconsistencies in data reporting lessened the usefulness of information:

Clouding the financial picture of intercollegiate athletics has been the problem that for more than a decade, data regarding revenues and expenses for college sports have been less than reliable because they were subject to individual institutional interpretation. For example, one institution may report security costs for athletics events as institutional costs, while another school reports them as athletics costs. Also, notwithstanding the widespread evaluative commentary and debates using terms such as “self-sufficiency of athletics departments” and “institutional support,” no commonly accepted definitions of such terms have been used. The divergent reporting options made comparison of data points difficult, if not impossible.⁴⁶

39. *Id.*

40. *Id.* Leland argues, “It is a garbage-in, garbage-out type of proposition. . . . You could argue bad information is better than no information. I’d make the opposite argument. I’d rather know I don’t know than think I know and not know.” *Id.*

41. Schmatke, *supra* note 23.

42. NCAA Recommendations, *supra* note 2, at 3.

43. Brady & Upton, *supra* note 32.

44. Schmatke, *supra* note 23 (“Notre Dame finance professor Richard Sheehan doesn’t blame anyone if he or she ignores the gender-equity reports Much of the information released to the public falls into categories that keep school accountants busy with their creative thinking.”).

45. *Id.*

46. PRESIDENTIAL TASK FORCE ON THE FUTURE OF DIVISION I INTERCOLLEGIATE ATHLETICS, THE SECOND-CENTURY IMPERATIVES 19–20 (Oct. 2006), available at http://www2.ncaa.org/portal/legislation_and_governance/committees/future_task_force/final_report.pdf

The electricity bill is a simple example of how differences in accounting methods are apparent. Some schools pay the athletic department's electricity bill without itemizing the cost of electricity to the department, let alone apportion amounts spent on women's teams. That is, some schools may include the cost of electricity on their EADA reports, while others leave it out.⁴⁷ A Department of Education administrator admitted that standards under the EADA may be lacking: "We define what expenses are, we define what revenues are But those definitions are maybe not as precise as they could be."⁴⁸ Indeed, defining and categorizing an expense require subjective judgment calls, which leads to the inability for meaningful comparison.⁴⁹

Another source of the problem may be that the Department of Education does not verify the data it receives. At least one member of the academic community strongly advocates auditing EADA data it receives from colleges and universities:

David Ridpath, an assistant professor of sports administration at Mississippi State, calls the current numbers "window dressing" unless schools can be held accountable for their accounting practices. Ridpath, executive director of The Drake Group, a national organization of faculty and others that lobbies for academic integrity in college sports, suggests random audits of five or 10 schools a year.

"The Department of Education should do spot checks, like the IRS," he says. "If schools thought they could be audited, there would be real incentive to get things right."⁵⁰

There is also considerable concern that the EADA, or regulations promulgated pursuant to it,⁵¹ do not properly measure capital expenditures.⁵² In 2003 the

[hereinafter SECOND-CENTURY IMPERATIVES].

47. Upton & Brady, *supra* note 14.

48. Mullen, *supra* note 21.

49. *See id.*

50. Brady & Upton, *supra* note 32. *See also* Mullen, *supra* note 21 (noting that Christine Grant, retired athletic director at the University of Iowa, agrees: "The DOE could do spot audits. You don't have to do hundreds. Just do a few to scare everybody to do it right.").

51. *See generally* NCAA Release, *supra* note 15.

52. 26 C.F.R. § 1.263(a)-1 (2005) defines capital expenditures as:

(1) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate, or (2) Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made in the form of a deduction for depreciation, amortization, or depletion.

Id. 26 C.F.R. § 1.263(a)-2 provides the following useful examples of capital expenditures:

(a) The cost of acquisition, construction, or erection of buildings, machinery and equipment, furniture and fixtures, and similar property having a useful life substantially beyond the taxable year.

(b) Amounts expended for securing a copyright and plates, which remain the property of the person making the payments. *See* section 263A and the regulations thereunder for capitalization rules which apply to amounts expended in securing and producing a copyright and plates in connection with the production of property, including films, sound recordings, video tapes, books, or similar properties.

(c) The cost of defending or perfecting title to property.

NCAA released an interim report,⁵³ examining the economic impact of intercollegiate athletics in a number of areas.⁵⁴ The NCAA report found that measurement error in the capital expenditures data is an area of particular concern.⁵⁵ The report found that the value of the outstanding athletics capital stock is not recorded anywhere on the EADA forms.⁵⁶ The difference in reporting requirements for public and private colleges and universities explains part of the problem in measuring capital expenditures. Because they account for their expenses differently, “[i]t’s difficult to compare two entities other than in the aggregate.”⁵⁷

The report examines the issue in more depth. The survey of chief financial officers from seventeen Division I colleges and universities revealed that their EADA data did not capture all athletic capital expenditures.⁵⁸ Further, the report found that the data clearly excluded substantial amounts of capital expenses, many of which were not recorded on their athletic departments’ books.⁵⁹ As an example, more than half of all Division I-A schools have either opened a new football stadium or undertaken a major renovation of their old stadium since 1990, though much of these capital expenditures are not reflected in EADA data.⁶⁰

The 2003 NCAA study, *The Empirical Effects of Collegiate Athletics: An Interim Report*,⁶¹ emphasized that the data provided under the EADA were imperfect and failed to capture various components of athletic activities.⁶² An updated study performed in 2005 maintained that the data were “still imperfect.”⁶³ However, the study held out hope for better data:

Further efforts are underway to improve the data; in conjunction with the National Association of College and University Business Officers

(d) The amount expended for architect’s services.

Id.

53. See generally LITAN ET AL., *supra* note 13.

54. NCAA Release, *supra* note 15. The release provides :

The research is based in large part on a comprehensive database of school-specific information collected as part of the Equity in Athletics Disclosure Act (EADA) and other sources, including the Integrated Post-Secondary Education Data System (IPEDS) managed by the Department of Education. The study also relies on a detailed survey of chief financial officers from 17 Division I institutions.

Id.

55. LITAN ET AL., *supra* note 13, at 32.

56. NCAA Release, *supra* note 15.

57. *Id.* NCAA Chief Financial Officer Jim Isch stated, “What you’ll find with the capital expenditures in particular is that some may be on the books of the state, some may be on the books of municipalities, and some may be for multi-use facilities where expenses are allocated among a number of functions.” *Id.*

58. LITAN ET AL., *supra* note 13, at 32.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 33.

63. JONATHAN M. ORSZAG & PETER R. ORSZAG, THE EMPIRICAL EFFECTS OF COLLEGIATE ATHLETICS: AN UPDATE 9 (2005), available at http://www.ncaa.org/library/research/athletic_spending/2005/empirical_effects_of_collegiate_athletics_update.pdf.

(NACUBO), the NCAA has devised a new annual financial survey that will better capture ongoing capital expenditures. As these new data become available, they should provide additional insights into the effects of college athletics on institutions of higher education.⁶⁴

In January of 2005, the NCAA established the Presidential Task Force on the Future of Division I Intercollegiate Athletics and, within that Task Force, a Fiscal Responsibility Subcommittee.⁶⁵ The Fiscal Responsibility Subcommittee was charged with examining the extent and depth of the financial pressures facing Division I intercollegiate athletics,⁶⁶ as well as with examining financial concerns that are at the root of broader concerns about the sustainability of intercollegiate athletics.⁶⁷ Noting that “[m]ore work will be required to improve the quality, transparency, and availability of financial information,”⁶⁸ the Subcommittee found:

Despite Herculean efforts by the NCAA in recent years to collect and publicly display relevant data about intercollegiate athletics, much remains to be done in establishing common standards of financial reporting and developing the culture of transparency necessary for effective financial management. The development of these standards and the required culture is an important task of the Fiscal Responsibility Subcommittee.⁶⁹

The Fiscal Responsibility Subcommittee pointed to a lack of common standards and sufficient transparency as a problem with current data collection.⁷⁰ “The story . . . is very clear, but the language used to tell the story needs clarification and greater consistency”, said Peter Likins, Chair of the Task Force and of the Fiscal Responsibility Subcommittee.⁷¹ To this end, the Fiscal Responsibility Subcommittee developed a set of dashboard indicators and presented a series of recommendations, best practices, and next steps.⁷² The Subcommittee believes that “the adoption of consistent financial terms and financial ‘best practices’ is a critical first step. Decision-makers must believe they are operating with the best available information as they undertake plans for the future.”⁷³

B. The Roadmap to Better Reporting, Courtesy of the NCAA

The Fiscal Responsibility Subcommittee developed recommendations for NCAA reporting that should be considered in reviewing the EADA. In order to

64. *Id.*

65. Press Release, NCAA, Presidential Task Force Calls for Moderation of Budget Growth Rate, Integrating Athletics Within Academics (Oct. 30, 2006), *available at* http://www2.ncaa.org/portal/media_and_events/press_room/2006/october/20061030_presidential_task_force_rls.html.

66. NCAA Recommendations, *supra* note 2, at 1.

67. What is the Problem?, *supra* note 4, at 12.

68. *Id.* at 11.

69. *Id.* at 3.

70. NCAA Recommendations, *supra* note 2, at 2.

71. *Id.*

72. *Id.*

73. *Id.* at 3.

enhance reporting of financial data, the Subcommittee recommended the following:

- 1) Collecting financial data using uniform and common definitions;
- 2) Presenting a full and comprehensive financial picture to decision-makers;
- 3) Providing easy access to aggregate data by decision-makers for use in strategic planning and policy development;
- 4) Creating dashboard indicators for decision-makers to make comparisons among institutions easier; and
- 5) Ensuring institutional and individual privacy in the presentation of data.⁷⁴

To the NCAA, whose members are most likely the primary users of the data collected and presented under the EADA reports, the “concept of creating a common language for athletics finances and presenting financial data in a clear and uniform manner is an essential goal.”⁷⁵

Among the NCAA Presidential Task Force’s recommendations was the reinstatement of the fiscal integrity review.⁷⁶ Such a fiscal integrity review would incorporate review of both operating and capital expenditure data, and the review would be required as a part of the NCAA athletics certification process.⁷⁷ The Task Force also recommended that the NCAA consider requiring college and university chancellors and presidents to conduct an internal fiscal integrity review every five years, both as part of the NCAA athletics certification process and as a mid-point check.⁷⁸

The Fiscal Responsibility Subcommittee of the NCAA Presidential Task Force proffered a solution to the problem of lack of comparability in collected data, suggesting the adoption of a set of dashboard indicators⁷⁹ or ratios and data

74. *Id.*

75. *Id.*

76. SECOND-CENTURY IMPERATIVES, *supra* note 46, at 24.

77. *Id.*

78. *Id.*

79. The Fiscal Responsibility Subcommittee offers the following explanations of dashboard indicators:

The number of potential operational variables that might be used to describe any complex organization will vary widely by the nature of the parent institution and by the maturity and status of the program. Drawn from business process improvement and continuous quality literature, dashboard indicators are comparators. They can be individual data points or ratios of variables that make comparisons among programs, organizations, or institutions easy to assimilate for all interested parties. The use of such indicators is increasingly common in many settings, including academic programs (for accreditation and other purposes), bond rating agencies and a variety of other financial and programmatic aspects of complex organizations.

Memorandum from NCAA Presidential Task Force Fiscal Responsibility Subcommittee, Dashboard Indicators 1 (May 2, 2006), *available at* http://www2.ncaa.org/portal/legislation_and_governance/committees/future_task_force/fiscal/fiscal3.doc [hereinafter Dashboard Indicators].

points.⁸⁰ Though the Task Force's recommendations were intended for the use by member colleges and universities, as well as the NCAA itself, the suggestions can be extrapolated to the EADA data collection process to enhance the usefulness, transparency, and comparability of the data collected. Through the use of dashboard indicators, the Fiscal Responsibility Subcommittee seeks to improve transparency, accountability, institutional control, and the quality of information available to individual presidents and institutions, while emphasizing that the responsibility and authority to utilize the available information in making decisions reside exclusively with each college and university.⁸¹ The NCAA would require the following financial dashboard indicators:

Athletics expenditures / institutional expenditures – Athletics expenditures as a percent of institutional expenditures. Identifies the relative importance of athletics expenditures to the institution's total expenditures.

Total revenues – Total athletics revenues and percent change from the previous year. Trends total revenues and percent change over time.

Generated revenues – Athletics-generated revenues as a percent of total athletics revenues. Identifies the share of revenues that the athletics department is producing.

Allocated revenues – Athletics-allocated revenues as a percent of total athletics revenues. Identifies the share of revenues that the athletics department is receiving.

Allocated revenues increase – Allocated revenue increase as a percent of university revenue increase. Provides a comparison of the growth rates of funds allocated by the institution for the athletics programs with the overall increase in university revenues percentage.

Athletics expenditure per category – Athletics expenditures for salary and benefits, participation and game expenses, facilities and administrative support, debt service and other as a percent of total expenditures. Identifies the major athletics expenditure categories and its share of the overall athletics expenditures.

Athletics debt service – Athletics debt service as a percent of the athletics expenditures. Identifies the percent of athletics expenditures dedicated to athletics debt service.

Athletics debt – Athletics debt as a percent of university debt. Identifies the total long-term financial commitment of athletics debt on the university.⁸²

The dashboard indicators are intended to enable comparisons to pooled data for relevant peer groups, rather than comparisons of colleges and universities in a one-

80. NCAA Recommendations, *supra* note 2, at 3.

81. *Id.* at 5.

82. Dashboard Indicators, *supra* note 79, at 4–5.

to-one context.⁸³ However, the dashboard indicators are part of a larger plan to incorporate certain best practices into the college and university athletics reporting environment. The Fiscal Responsibility Subcommittee recommended, among others, the following best practices for member colleges and universities:

1. Financial Integration

The financial processes of the athletics program should be integrated within the institution's overall financial controls. Working within the institution's processes for budgeting, accounting, purchasing and debt management strengthens financial oversight and accountability.

Guidelines should be established outlining the responsibilities of the chancellor or president, the chief financial officer, and the athletics director with respect to the budget, accounting, purchasing, and debt management of the athletics program. If it is not already an institutional practice, the chancellor or president should ensure that the institution's accounting offices have complete access to athletics financial records for internal audit and review purposes, consistent with the level of access to other university programs.

In line with institution practices, the chancellor or president should receive annual budget planning information, and interim and end-of-year financial reports for the athletics program. In addition, multi-year budget planning should be adopted so that chancellors or presidents and athletics directors can evaluate the reliability of the athletics program's revenue streams for planning purposes. This process will help to assure the chancellor or president that appropriate planning is taking place and provides a way to anticipate potential financial problems before they arise.

Institutions should provide faculty, through their representatives [sic] bodies (e.g., faculty senate), access to and the opportunity to provide input and recommendations on the athletics budget to at least the same extent that they do for other campus programs.

2. Outside Entities

Institutions should clarify internally the reporting and financial relationships among the athletics program and any outside entities. Insofar as is practical, these relationships should be consistent with similar administrative oversight of other university business operations and related support organizations.

Reporting of independent activities undertaken by individual coaches, such as summer camps, should be compliant with NCAA requirements and at a higher standard than the institution's policies and procedures for external activities undertaken by faculty."⁸⁴

The Subcommittee also recommended that college and university officials use

83. NCAA Recommendations, *supra* note 2, at 3.

84. *Id.* at 6-7.

“an annual set of comparators or dashboard indicators” to assist in managing the athletics program.⁸⁵ Additionally, they should “strive to ensure that federal EADA and NCAA financial data are consistent.”⁸⁶ The Subcommittee encouraged institutions and associations of higher education to determine how “to address the use of two different sets of numbers as a result of different submission dates” for the reports required by the NCAA and the EADA, while simultaneously ensuring third party review.⁸⁷ The Subcommittee also suggested “[r]e-institut[ing] the fiscal integrity review, including operating and capital expenditure data, into a fiscal integrity section of the NCAA certification process” and requiring institutions to “conduct an internal fiscal integrity review every five years.”⁸⁸ Finally, the recommendations sought to “[r]equire that salary and total compensation data for intercollegiate athletics be submitted annually to the NCAA” and to have the data published.⁸⁹

The Task Force addresses the problem of inconsistent reporting of capital expenditures as well, recommending that aggregated capital expenditures be reported for athletics facilities.⁹⁰ Specific categories would include “capitalized additions and deletions to facilities during the current reporting period, total estimated book value of athletically related plant and equipment net of depreciation, total annual debt service on athletics and university facilities, and total debt outstanding on athletics and university facilities.”⁹¹

Additionally, the Presidential Task Force recommended more accurate and transparent salary reports.⁹² The Task Force suggested that an annual salary and benefits survey be conducted for athletics positions.⁹³ Further, collected data would necessarily include “base salary, bonuses, endorsements, media fees, camp income, deferred income and other income contractually guaranteed by the institution.”⁹⁴

Also, the Task Force would require colleges and universities to report the value of endowments dedicated to the sole support of athletics at the end of each fiscal year.⁹⁵ The recommended changes, if made, would also require institutions to report the present value of all pledges supporting athletics, as well the ending fiscal year fund balance.⁹⁶

Potentially most effective in assuring accuracy and transparency in reported data is the Task Force’s suggestion that an “independent third party use agreed-upon procedures to verify the accuracy and completeness of the data before

85. *Id.* at 5–6.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 5–6.

90. SECOND-CENTURY IMPERATIVES, *supra* note 46, at 25.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

submission.”⁹⁷ In fact, the NCAA followed up on this recommendation, and by the end of 2006, all Division I schools were required to have a third party accounting firm or state auditor review reports before submission.⁹⁸ As of August 31, 2006, the NCAA had revised its Agreed-Upon Procedures, requiring that all revenues, expenses, and capitalized expenditures on behalf of a college or university’s athletics program, including those by outside entities, are reported annually by an independent accountant from outside the college or university.⁹⁹ The Agreed-Upon Procedures further provided that the independent accountant be “selected by the college or university’s chief executive or the chief executive’s designee.”¹⁰⁰

Colleges and universities are responsible for the production of the statement of revenues and expenses, as well as for a written representation from institutions regarding the assertion of information within the statement.¹⁰¹ Colleges and universities are to provide to independent accountants a statement of revenues and expenses for the athletics department, for review by the independent accountant.¹⁰² The revised Agreed-Upon Procedures also provides a classification of revenues and expenses to be used by college or university staff members and independent accountants in preparing the college or university’s statement of revenues and expenses.¹⁰³ The uniform classification of revenue and expenses may assist in eliminating some of the problems caused by inconsistent reporting of revenue and expense items.

The revised Agreed-Upon Procedures also addresses the issue of capital expenditures reporting. Included in the new reporting requirements is a “Capital Expenditures Survey.”¹⁰⁴ The survey requires reporting of current fiscal year additions and deletions, as well as total book-value at year end of athletically-related property, plant, and equipment, net of depreciation.¹⁰⁵ Through this form, the survey captures not only current fiscal year capital expenditures and losses but also tracks the year-to-year value of athletics-related capital assets. The survey also tracks debt service,¹⁰⁶ as well as debt outstanding on athletic facilities.¹⁰⁷ Facilities are categorized as property, plant, and equipment, and thus are considered capital assets. Also required with respect to capital assets is a description of the college or university’s policies and procedures for acquiring,

97. *Id.*

98. Jodi Upton, *NCAA Considers Reforms on Reports*, USA TODAY, Oct. 18, 2005, at C12.

99. NCAA, AGREED-UPON PROCEDURES 1 (Aug. 31, 2006), available at http://www1.ncaa.org/membership/ed_outreach/eada/procedures.pdf.

100. *Id.*

101. *Id.* at 8.

102. *Id.* at 5.

103. *Id.* at 10.

104. *Id.* at 22–23.

105. *Id.*

106. Debt service is defined as Cash Flows from Operations before Interest and Taxes divided by Interest and Principal Payments. DAVID R. HERWITZ & MATTHEW J. BARRETT, ACCOUNTING FOR LAWYERS 402 (4th ed. 2006). That is, debt service is how many times cash flows from operations can cover the debt principal and interest payments.

107. OPEN TO ALL, *supra* note 5, at 23.

approving, depreciating, and disposing of intercollegiate athletics-related assets, as well as repayment schedules for all outstanding intercollegiate athletics-related debt maintained during the fiscal year.¹⁰⁸

The revised Agreed-Upon Procedures appear to directly address the consistency, accuracy, and comparability issues that plague the EADA reports; however, as the NCAA has only implemented these procedures as of the end of the 2006 fiscal year, the impact of the new procedures remains to be seen. Further, the assurances provided by an independent auditor are less substantial than in years past, given the flurry of recent financial reporting scandals. However, the revised procedures represent a step in the right direction by the NCAA; such drastic measures have yet to be taken by the Department of Education.

C. A Government Commission Responds to Criticism, Recommending Repeal of the EADA

The Department of Education has not left the matter uninvestigated. On June 27, 2002, then-Secretary of Education Rod Paige created the Secretary's Commission on Opportunities in Athletics.¹⁰⁹ The Commission was charged with collecting information, analyzing issues, and obtaining broad public input directed at improving the application of current federal standards for measuring equal opportunity for men and women to participate in athletics under Title IX.¹¹⁰ The Commission held four public meetings, conducted four town hall meetings, heard from more than fifty expert witnesses, and reviewed thousands of documents, reports, letters, and e-mails.¹¹¹ The Commission adopted twenty-three recommendations and considered several more,¹¹² certain of which deal directly with the Equity in Athletics Disclosure Act.

Recommendation nine, adopted by unanimous vote, held, "The Department of Education should encourage the redesign of the Equity in Athletics Disclosure Act so that it provides the public with a relevant and simplified tool to evaluate the status of Title IX compliance in the nation's post-secondary institutions."¹¹³ The Commission "also felt that the form should be significantly simplified."¹¹⁴ Since this form was created legislatively, any change would come through Congress, so the Commission framed the recommendation as a suggestion of encouragement that the Department of Education can give to Congress.¹¹⁵

Significantly more interesting, however, is Vote 12 taken by the Commission. Vote 12, which was narrowly defeated 6-8, would have adopted recommendation nine (b), in lieu of recommendation nine.¹¹⁶ Recommendation nine (b) would

108. *Id.* at 9.

109. *Id.* at 1.

110. *Id.* at 2.

111. *Id.* at 4.

112. *Id.*

113. *Id.* at 35.

114. *Id.*

115. OPEN TO ALL, *supra* note 5, at 34.

116. *Id.* at 63.

have “encourage[d] the repeal of the Equity in Athletics Disclosure Act.”¹¹⁷ Those Commission members who voted in favor of recommendation nine (b) believed that the EADA report is overly burdensome, subjective, and cumbersome and that the Act should be repealed.¹¹⁸

A number of Commission members voiced their opposition to the EADA both prior to and following the issuance of the Final Report. Sally Stroup,¹¹⁹ a ranking official in the Department of Education, supported the repeal of the EADA, because the Department of Education does not use the report and cannot verify the data that colleges and universities publish under it.¹²⁰ At a town hall meeting in Philadelphia, Stroup responded to criticisms of another Commission member:

[O]ne consideration is to recommend to the Secretary that he support the repeal of [the EADA] and get rid of it all together People don’t use it. We [the Department of Education] don’t use it for any purpose at all. We literally pay a contractor to load it to the web site and stick it up there.

Half of the time, we don’t know if the data is right [W]e have no way of knowing if [colleges and universities] are reporting the right numbers. The Department of Education . . . would never be able to tell. We have to take your word for it that you are actually giving us good data.

If what everyone says is true . . . and I have no reason to doubt you, half of it is irrelevant and not comparable across institutions so I don’t know what value it has. You are right, it is costing everybody a lot of time and effort.¹²¹

At a Commission meeting on December 3, 2002, Graham Spanier, a Commission member, called the EADA requirements an “unfunded mandate.”¹²² Spanier further commented:

If you totaled up the bill of what we are all spending on these reports that go to the Department of Education, it’s probably a couple of hundred thousand dollars per institution. . . . If we did away with all of the reports, we could add another women’s sport. I’m dead serious about that.¹²³

University of Arizona President Peter Likins, Chair of the of the NCAA

117. *Id.*

118. *Id.*

119. “Sally Stroup was the U.S. Department of Education’s assistant secretary for postsecondary education From 1993 to 2001, she was a professional staff member for the U.S. House of Representatives Committee on Education and the Workforce. From 1981 to 1993, Stroup was with the Pennsylvania Higher Education Assistance Agency.” *Id.* at 57.

120. Suggs, *supra* note 26.

121. Sally Stroup, Address to the Secretary of Education’s Commission on Opportunity in Athletics 100–01 (Dec. 4, 2002), *available at* <http://www.ed.gov/about/bdscomm/list/athletics/transcript-120402.pdf> [hereinafter Stroup Address].

122. Brady & Upton, *supra* note 32.

123. *Id.*

Presidential Task Force, agreed with Spanier's cost estimate,¹²⁴ but he proposed reform, rather than repeal, saying, "What we have [now] is disclosure for disclosure. What we have may satisfy the press or public, but it makes people grumpy."¹²⁵ Adding to the financial burden imposed on colleges and universities is the cost of compliance with NCAA information reporting requirements, which, like the revisions discussed earlier, require significant resources.

Commission co-chair and former Stanford athletics director Ted Leland dislikes the EADA reporting because "the information is supposed to serve as a comparison between institutions when no comparison is actually possible."¹²⁶ Leland, during a Commission meeting held in Colorado Springs, criticized the EADA even more strongly:

I think anybody on our campuses who fills out those EADA forms just says they're garbage. They don't mean anything because the way we do it, and it's uncertain, and even though the government has tried to—you know, every year it gets more complicated, and every year there's more clarifications and more questions, in the end, the people in most campuses that fill it out say "These numbers don't make any sense to the numbers I handed in last year. My numbers don't [make] any sense to the guy that's across the bay because they're just different."¹²⁷

At a Philadelphia town hall meeting, Graham Spanier continued to criticize the EADA reports on the grounds that the reports were not being used by student-athletes and proposed that the information be made useful to the intended users:

I have not met an athlete yet who has ever looked at those data. I mean, our country is spending a lot of money and staff time . . . , but I've never met an athlete yet who actually looked at it. So my suggestion would be if we're going to take a look at it, let's redo it so it's a report of maybe a few pages with relevant information that somebody might be actually interested in looking at.¹²⁸

At a later town hall meeting in Washington, D.C., Bob Bowsby,¹²⁹ Director of Athletics at the University of Iowa, argued that the EADA could not be preserved through amendment:

I don't think [the EADA] can be amended to be functional. I think we need to get away from the EADA and identify what it is we want to

124. *Id.*

125. *Id.*

126. *Id.*

127. Ted Leland, Address to the Secretary of Education's Commission on Opportunity in Athletics 134 (Oct. 23, 2002), *available at* <http://www.ed.gov/about/bdscomm/list/athletics/transcript-102302.pdf>.

128. Stroup Address, *supra* note 121, at 99.

129. Bowsby was recently named National Athletic Director of the Year by Street & Smith's *Sports Business Journal* and Regional Athletic Director of the year by the National Association of Athletics Directors. Bowsby has served as chair of the Big Ten Championships and Awards Committee Council, and chair of the NCAA Management Council during its first two years. Bowsby has also served as director of men's athletics and the assistant athletic director for facilities at the University of Northern Iowa. OPEN TO ALL, *supra* note 5, at 53.

provide in the way of information to each other, to the public, and to Department of Education, and then design that document to make it happen.

Of all things, it needs to be a lot simpler. . . . [O]ur institutions are spending thousands and thousands of dollars preparing this [EADA] report to be put up in a website and then left.¹³⁰

Mr. Bowlsby went on to note that the EADA report was the “most labor intensive, manually manufactured report that we do during the entire year in our department. Without question.”¹³¹

Though the Commission eventually voted to recommend to Congress the reform—rather than repeal—of the EADA, a review of the town hall meeting transcripts shows that the issue of repeal was not lightly dismissed.¹³² The tone of the discussions often turned bitter, as evidenced by the comments of the various Commission members. However, the unanimous adoption of recommendation nine, encouraging the reform of the EADA, conclusively shows the dissatisfaction among the members of the intercollegiate athletics community. Further, the apathy evinced by Sally Stroup, a ranking official within the Department of Education, toward the very existence of the EADA reports, casts doubt on the utility of the EADA’s continued existence.

CONCLUSION

The declared purpose of the Equity in Athletics Disclosure Act is to make prospective students aware of the school commitment to providing equitable athletic opportunities for its men and women students.¹³³ However, a great deal of anecdotal evidence suggests that prospective athletes never see, much less use, the reports produced through EADA data collection. Further, the EADA reporting standards are too vague to permit meaningful comparison among various colleges and universities. Thus, even if prospective student-athletes saw the information, they would be unable to use it effectively. The EADA reports omit essential information regarding capital assets and expenditures, thereby ignoring a large portion of investment into intercollegiate athletics and making the data not only incomplete, but ultimately misleading.

The NCAA, the premier intercollegiate athletics organization, has long recognized the shortcomings of the federally-required information disclosures. In order to enhance the accuracy, transparency, and utility of the information it collects, the NCAA has imposed stringent reporting requirements on its members that go far beyond the requirements of the EADA.

130. Bob Bowlsby, Address to the Secretary of Education’s Commission on Opportunity in Athletics 350 (Jan. 29, 2003) *available at* <http://www.ed.gov/about/bdscomm/list/athletics/transcript-012903.pdf>.

131. *Id.* at 357.

132. *See* U.S. Dept. of Educ., Transcripts—Secretary’s Commission on Opportunity in Athletics, <http://www.ed.gov/about/bdscomm/list/athletics/transcripts.html> (last visited Nov. 15, 2007).

133. EADA Survey, *supra* note 7.

Additionally, the Secretary of Education's Commission on Opportunities in Athletics unanimously concluded that the EADA reports were significantly flawed and of very limited utility. A representative of the Department of Education publicly conceded that the information contained in the EADA reports is never verified or used by the Department in any manner.

The Equity in Athletics Disclosure Act no longer serves its avowed purpose, if indeed it ever did. Although secondary purposes do exist in the use of the reports by colleges and universities to make comparisons among themselves and to meet Title IX requirements that are beyond the scope of this discussion, the EADA reports are widely regarded as useless for all purposes. The frequency of errors in reported data, the absence of any third party or Department of Education verification of the information, and the array of inconsistencies in reporting all preclude the effective and meaningful use of the information.

In light of the shortcomings of the Equity in Athletics Disclosure Act and the unhelpful reports generated under it, Congress should consider relieving the burden it imposed on colleges and universities in 1994, when it passed the Act. In the coming years, the NCAA's revised Agreed-Upon Procedures may provide insight into which, if any, of the EADA reforms will be truly effective. Alternatively, the NCAA revisions may show that reform is not possible and that the law's repeal is the solution. The NCAA action provides the legislature with a unique and valuable incubator for possible reform. Ultimately, the possibility of reform or repeal of the EADA lies with the legislature. While it is possible that the NCAA-initiated reform will spur on change, it is equally possible that the legislature may leave the matter alone and let the NCAA retain the lead in improving the accuracy, transparency, and utility of intercollegiate athletics-related financial disclosure. Ultimately, reform is not worth the effort if prospective student-athletes will never see the information collected. Thus, repealing the Act and thereby removing a tremendous financial burden from colleges and universities is the best course of action.

Beyond the possibilities of reform and repeal, consideration of the state of the EADA prompts difficult questions that beg further investigation. For instance, no one, not even the federal government that requires the collection of the EADA data, bothers to verify whether prospective student-athletes use the information. Given the apparent nonuse of the information by its intended users, as well as the unreliability of the data, can Congress justify imposing this cost upon colleges and universities? Further, if the Department of Education declines to verify the data collected, makes no discernible attempt to get the information to its intended users, and does not even monitor its own website to check whether users are accessing the data, it is worth asking whether the federal government is, in fact, concerned with the EADA. Inevitably, we are led to the darker issue of whether gender equity in athletics is still a government priority.

A RESPONSE TO TIMOTHY KAYE'S *AIM HIGHER: CHALLENGING FARRINGTON & PALFREYMAN'S THE LAW OF HIGHER EDUCATION*

Dennis Farrington & David Palfreyman*

As the joint authors of *The Law of Higher Education*¹ we greatly appreciate Professor Timothy S. Kaye's book review *Aim Higher: Challenging Farrington and Palfreyman*² and are grateful for the opportunity to respond.

Unlike our respected colleagues and friends Professors Bill Kaplin and Barbara Lee, joint authors of *The Law of Higher Education*,³ which runs to 1,726 pages, we do not have the advantage of a publisher willing to allow us more than 637 pages to fit the Oxford Legal Practitioner series of which our text forms part. So, some of the discussion is relatively abbreviated. However, our accompanying website updates,⁴ which already extend to many thousands of words, allow us to expand the material to an appropriate level in length and breadth and to keep it up to date. Professors Kaplin and Lee utilize a similar concept on the web pages of the National Association of College and University Attorneys (NACUA).⁵ For our part, again like Professors Kaplin and Lee, we have had the welcome assistance of

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1. D.J. FARRINGTON & DAVID PALFREYMAN, THE LAW OF HIGHER EDUCATION (2006).
2. Timothy S. Kaye, *Aim Higher: Challenging Farrington and Palfreyman's The Law of Higher Education*, 33 J.C. & U.L. 559 (2007).
3. WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING (4th ed. 2006).
4. D.J. Farrington & David Palfreyman, Online Updating for *The Law of Higher Education*, <http://www.oxcheps.org.uk/law/ilaw.php> (last visited Oct. 3, 2007).
5. See National Association of College and University Attorneys, <http://www.nacua.org> (last visited Oct. 3, 2007).

consultant editors drawn from both academia and practicing lawyers specializing in the law of higher education in the United Kingdom and Europe. We have corresponded with leading academics in controversial areas, so we are as reasonably confident in our coverage of the relevant law in all areas as anyone can be in this field. We also made it as plain as we could that there are certain unresolved issues in the United Kingdom's higher education law and, hence, it was implicit, if not actually explicit, that we were giving our own view, not claiming to set out an authoritative line.

As Professor Kaye remarks, there are far fewer decided court cases in higher education in the United Kingdom than in the United States.⁶ In large part, this is due to the fact that for the majority of its history all disputes with the older colleges and universities in England, Wales, and Northern Ireland were referred to the Visitorial procedure, of medieval origin, often technically before the Queen, a member of the Royal Family, an Archbishop or Bishop of the Church of England, or a hereditary peer. Indeed, it was not until 1988 for academic staff and 2004 for students that courts began resolving disputes. In recent Decision Notices of the Information Commissioner, it has been held that a Visitor (in these cases the Lord President of the Privy Council), which remains in existence for other issues, is not a public body or exercising a public function for the purposes of the Freedom of Information Act 2000.⁷ It has proved, therefore, impossible to obtain information about Visitorial decisions, other than in the very few reported cases during the period from the 13th century to the present. This, of course, impedes our understanding of the legal principles on which the Visitors' decisions were based. So we have to rely on the relatively small number of cases concerning students that have reached the courts from those colleges and universities without a Visitor, almost all of which have been created since 1992. From those, we have a reasonable understanding of the attitude of the higher courts, one which is broadly similar to that of the United States' courts, notably in relation to deference to academic judgment.

While there could be room for considerable debate and doubt about Professor Kaye's interpretation of the United Kingdom's higher courts' attitudes to the tort of educational malpractice, and we have already received comment from one other leading expert to this effect, this response is not the place to enter into it nor can we discuss all the points raised in what we consider to be a thorough and challenging review. Suffice it to say that we do not think the situation is as clear-cut as Professor Kaye suggests, and this is certainly an area on which we have expanded in the relevant updates.

Professor Kaye's principal points of criticism concerned the discussion of the legal status of higher education institutions in English law (incorporating all relevant European Union (EU) and European Convention on Human Rights

6. Kaye, *supra* note 2, at 564.

7. Decision Notice, Information Commissioner's Office, Freedom of Information Act 2000 (Sec. 50), FS50125731, April 23, 2007, http://www.ico.gov.uk/upload/documents/decision_notices/2007/fs_50125731001.pdf. See also Decision Notice, Information Commissioner's Office, Freedom of Information Act 2000 (Sec. 50), FS50084354, April 23, 2007, http://www.ico.gov.uk/upload/documents/decisionnotices/2007/fs_50084354.pdf.

(ECHR) law), a short discussion on consumerism, and what he calls a wasted opportunity to discuss the U.K. equivalent of the issues raised in the 2003 U.S. Supreme Court decisions *Grutter v. Bollinger*⁸ and *Gratz v. Bollinger*^{9,10}. Dealing swiftly with the latter criticism, we do not doubt Professor Kaye's expertise in the area of diversity in admission to Higher Education Institutions (HEIs). In fact, we welcome his comments and will address them in our updates so far as they concern the law. However, nothing remotely resembling *Grutter* or *Gratz* has reached the United Kingdom's courts; much of the discussion is media-led and there is very little for us to comment on from a legal perspective beyond what we have already offered. In the past, attempts to show that college and university admissions policies are racially biased have uniformly failed. The introduction of the Office of Fair Access procedures was a political response to a suggestion that children from lower socioeconomic groups might not be getting a fair opportunity to access higher education, not one based on any successful legal challenge. Further discussion of this appears in Palfreyman's OxCHEPS Occasional Paper Number 16.¹¹

Turning to the vexed issue of whether students are to be considered as "customers," "clients," "consumers," "partial employees," or just simply students, it was a coincidence that in the same week in which we received our copy of *The Journal of College and University Law*, H.M. Government announced the portfolio of Lord Triesman, Minister in the new Department for Innovation, Universities and Skills, as including "students as 'customers'"!¹² Whether it is right or wrong or politically desirable to treat students in this way is the cause of much debate in the United Kingdom. This culminated in June 2007 with senior college and university managers (not faculty) releasing a draft of a formal college- or university-student contract that sought to maximize the institution's ability to eliminate or limit liability.¹³ The draft was immediately rejected by ourselves, the National Union of Students, and other commentators.¹⁴ Professor Kaye may be correct in his view that neither current English law nor any leading court case justifies a rigid consumerist approach. Only *Buckingham v. Rycotewood College*¹⁵ provides valuable insights by academic commentators and by the Office of the Independent Adjudicator in terms of its award of damages for inconvenience and distress.¹⁶ In

8. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

9. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

10. Kaye, *supra* note 2, at 582.

11. David Palfreyman, *Does OFFA Have Teeth?*, 2004, <http://oxcheps.new.ox.ac.uk> (follow "Papers" hyperlink; then follow "OxCHEPS Occasional Paper No. 16" hyperlink).

12. Department for Innovation, Universities & Skills, Lord Triesman, Parliamentary Under Secretary of State for Intellectual Property and Quality, <http://www.dius.gov.uk/ministerialteam/triesman-responsibilities.htm> (last visited Aug. 16, 2007).

13. Melanie Newman, *Move to Curb Student Rights*, *TIMES HIGHER EDUC. SUPPLEMENT* (London), July 13, 2007, at 1.

14. *Lesson in Law for Students*, *TIMES* (London), July 17, 2007, at 6.

15. OX004741/OX004342 (Oxford County Court, March 26, 2002). We discuss this case at length because it is the only one to discuss—not because, as Kaye suggests, it occurred near Oxford.

16. *Rycotewood*, OX004341/42 (Warwick Crown Court, February 28, 2003).

fact, we generally agree with Professor Kaye, appreciate the efforts he and others have made to address the deficiencies in this approach, and hope to work with him to develop his ideas as they are relevant to the United Kingdom. Many of us feel it is important to set out in reasonably comprehensive terms the nature of the institution-student relationship as far as it can be reduced to writing or as a series of web pages. That goal is a long way from advocating a legalistic student contract, and very much echoes the view taken in the United States.

Coincidentally, during the same week in a statement to the *Times Higher Education Supplement* the Minister of State, Lifelong Learning, Further and Higher Education also made it clear, yet again, that, in H.M. Government's view, colleges and universities are definitively not public bodies, but are private bodies operating in the public interest.¹⁷ The 2006 text has developed further the conceptual discussions to this effect in Farrington¹⁸ and Palfreyman and Warner¹⁹ and in other United Kingdom authored works on the law of education, two of the authors of which were part of our team of consultant editors. We have also been influenced by discussions in leading texts on the public-private dichotomy. Professor Kaye is a relatively recent entrant to this debate, and his views are both interesting and welcome. It is, however, clear to us that, contrary to Professor Kaye's assertion, it is not established that all colleges and universities are public bodies for the purposes of EU law and it is our view that our analysis of their functions in terms of compliance with Directives and other legislation of the EU and the U.K. Human Rights Act (HRA) (and therefore with the relevant Articles and Protocols of the European Convention on Human Rights (ECHR)) is soundly arguable. It is widely acknowledged that classifying higher education in the EU context is increasingly complex.²⁰ As a sign of the continuing problem of the core-hybrid/functional issue in the HRA/ECHR and the overlap with judicial review, we address in the Updates not only the views expressed by Wadham²¹ but also the decision of the House of Lords in *YL v. Birmingham City Council and Others*,²² both of which suggest that matters are not as clearly settled as Professor Kaye asserts (even if they *may* be moving in the direction he would like). Moreover, that uncertainty still prevails, especially after *YL*, which gave the United Kingdom's equivalent of the United States' Supreme Court the chance to consider the public bodies issue, is duly noted—at least in relation to independent schools—by Professor Neville Harris, Editor of the *Education Law Journal*.²³ However, unlike in the United States, where no doubt the issue would be litigated, no non-statutory higher education institution in England has any interest in arguing the

17. Newman, *supra* note 13, at 1.

18. D. J. FARRINGTON, *THE LAW OF HIGHER EDUCATION* (2d ed. 1998).

19. DAVID PALFREYMAN & DAVID WARNER, *HIGHER EDUCATION LAW* (2d ed. 2002). *See also* DAVID PALFREYMAN & DAVID WARNER, *HIGHER EDUCATION AND THE LAW: A GUIDE FOR MANAGERS* (1998).

20. *See* T. Birtwistle & H. Davies, *How Will the EU Directive on Trade in Services Affect Higher Education?*, 8 *EDUC. & L.* 177 (2007).

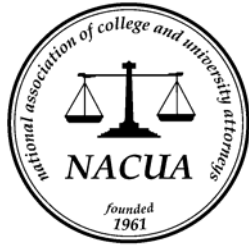
21. JOHN WADHAM ET AL., *BLACKSTONE'S GUIDE TO THE HUMAN RIGHTS ACT 1998* (4th ed. 2007).

22. *YL v. Birmingham City Council*, [2007] UKHL 27, [2007] 3 W.L.R. 112 (U.K.).

23. *See* Neville Harris, Editorial, *A Judicial Gap*, 8 *EDUC. & L.* 153 (2007).

issue.

In summary, we believe that we can aim “even higher” and we would welcome the opportunity to publicly debate with Professor Kaye.



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The National Association of College and University Attorneys (NACUA), established in 1961, is the primary professional association serving the needs of attorneys representing institutions of higher education. NACUA now serves over 3,000 attorneys who represent more than 1,400 campuses and 660 institutions.

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