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This article examines how the Supreme Court has applied the government speech doctrine to limit First Amendment rights of individual speakers in two related areas: public schools and public workplaces. It focuses particularly on how the Court in *Hazlewood School District v. Kuhlmeir* (with respect to the student press) and *Garcetti v. Ceballos* (with regard to public employees) used the government speech concept to reduce or eliminate First Amendment protections belonging to student journalists and public employees. Part II of the article shows how lower courts have interpreted those holdings to allow government administrators in schools, colleges, and public workplaces to stifle unflattering expression and retaliate against those who report malfeasance. Part III of the article explores the concept of hybrid speech, and Part IV concludes that a hybrid speech analysis would better serve the First Amendment values presented in the student press/public workplace contexts.

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This note considers the application of the constitutional law principle of “one person, one vote” to campus elections at public universities. Part I of the note discusses the history, scope, and current application of the “one person, one vote” principle. Part II.A considers whether elected student governments at public universities might be sufficiently governmental to trigger “one person, one vote.” Assuming they are, Part II.B uses the elected student governments at the University of Georgia and the University of Michigan as representative examples of how current methods of student government apportionment violate “one person, one vote.” Finally, notwithstanding constitutional concerns, Part II.C argues that student governments should comply with “one person, one vote” as a matter of good policy.

THE STUDENT PRESS, THE PUBLIC WORKPLACE, AND EXPANDING NOTIONS OF GOVERNMENT SPEECH

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The government speech doctrine, which Justice Souter not long ago described as being in its infancy,¹ appears to have grown up alarmingly quickly into a strapping—and potentially dangerous—adolescent.² Although in the past, the Court primarily referred to the doctrine only in dicta,³ or as an after-the-fact explanation of the Court’s holding in *Rust v. Sullivan*,⁴ the Court more recently has applied the government speech rationale to the compelled subsidy and public employment contexts. As a

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1. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (referring to the government speech doctrine as “relatively new” and as being at a “somewhat early stage of development”).

2. Certain scholars recognized the dangers associated with government speech long ago. See generally THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970) (concluding that government speech is legitimate when used to inform, educate, or persuade, but that it can destroy the system of free expression if used to coerce); MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983) (describing how government communication is both necessary for an informed citizenry and yet can also be used to distort democratic processes and falsify consent).

3. See, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 540–43 (2001) (discussing government speech doctrine but describing program at issue as “designed to facilitate private speech, not to promote a governmental message”); *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000) (stating that although the government must inevitably speak to further its own policies, the University had denied that the speech at issue was its own); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995) (discussing government speech doctrine but rejecting notion that the University was speaking in this case).

4. 500 U.S. 173, 179–80 (1991) (rejecting First Amendment challenge to Title X regulations that forbade doctors at federally funded family planning clinics from discussing abortion); see, e.g., *Velazquez*, 531 U.S. at 541 (“The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.”); *Rosenberger*, 515 U.S. at 833 (explaining that the Court in *Rust* “recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes”).

result, the Court has disposed of some difficult First Amendment questions with one easy analytical stroke, but at the cost of removing sizeable chunks of what had been considered private speech from the ambit of the First Amendment.

The characterization of speech as “government” or “private” expression is tremendously important, of course, because while state regulation of private speech is subject to stringent First Amendment limitations, including the rule against viewpoint discrimination,⁵ the government’s own speech is not similarly encumbered.⁶ The government, which must communicate to achieve the many tasks of governing, must also by necessity favor certain policies over others.⁷ Citizens who disagree with a particular government position will have the opportunity to express their disapproval at the next election, as accountability for state messages comes more from the political process than from the marketplace of ideas.⁸ Complicating matters, however, is the fact that the government as an entity must often express itself through private persons, who possess individual First Amendment rights to speak on their own behalf.⁹

The Court first openly acknowledged its newfound infatuation with the government speech doctrine in *Johanns v. Livestock Marketing Association*,¹⁰ a 2005 case involving a federal statute that required cattle producers to fund generic advertising designed to promote beef

5. The Court has often emphasized the importance of viewpoint neutrality as a fundamental First Amendment precept. *See, e.g., Velazquez*, 531 U.S. at 548–49 (“Where private speech is involved, even Congress’ antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government’s own interest.”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (“The government may not regulate [private speech] based on hostility—or favoritism—towards the underlying message expressed.”).

6. *Velazquez*, 531 U.S. at 541 (“We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker . . .”).

7. *Rosenberger*, 515 U.S. at 833 (recognizing that “when the State is the speaker, it may make content-based choices”).

8. *Southworth*, 529 U.S. at 235 (“When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.”).

9. This observation has been made by a number of commentators. *See, e.g.,* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1381 (2001) (“This bipolar universe [of government vs. private speech] is, of course, an artifice, for government speech is necessarily accomplished through the speech of individuals—employees, agents, regulated businesses, supplicants, and volunteers.”); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 100 (1998) (“[T]hings admittedly become more difficult once we recognize that the state cannot literally speak, but can speak only through the voices of others, others who have their own First Amendment rights in many contexts.”).

10. 544 U.S. 550 (2005).

consumption.¹¹ The free speech questions surrounding various compelled agricultural commodity advertising programs had bedeviled the Court for years; the beef campaign was the third such scheme to reach the Court on First Amendment grounds in less than a decade.¹² Just four years before, the Court ruled that a similar statute forcing mushroom handlers to pay for generic mushroom advertisements designed by a council of private producers and approved by the Secretary of Agriculture violated the First Amendment rights of objecting producers.¹³

It came as a bit of a surprise, then, that the Court in *Johanns* ultimately accepted the government speech rationale to uphold the beef advertising assessments, even while acknowledging that the beef program was “very similar” to the mushroom promotion scheme the Court previously had invalidated.¹⁴ In his majority opinion, Justice Scalia reasoned that the “Beef: It’s What’s for Dinner” campaign was properly characterized as government speech because it was developed, approved and “effectively controlled” by Congress and the Department of Agriculture, despite the fact that the ads were designed, paid for, and attributed to America’s Beef Producers rather than the federal government.¹⁵ That the public might be misled as to the speech’s true source made no difference in the Court’s analysis; the “correct focus” was whether the compelled assessment interfered with the objecting cattle producers’ speech rights.¹⁶ Once the speech was deemed to be the government’s own, the Court could conclude that the private producers’ First Amendment rights were unaffected.¹⁷

11. *Id.*

12. *Id.*; *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997).

13. *United Foods*, 533 U.S. at 410–11. Noting that the Court did not need to consider the government speech defense because the Department of Agriculture failed to raise it in the Court of Appeals, Justice Kennedy’s majority opinion hinted that mere pro forma approval of the mushroom ads by the Agriculture Secretary would not suffice to turn private speech into government expression. *Id.* at 416–17.

14. *Johanns*, 544 U.S. at 558. Indeed, the Eighth Circuit Court of Appeals described the beef checkoff program as “in all material respects, identical to the mushroom checkoff” at issue in *United Foods*. *Livestock Mktg. Ass’n v. Dep’t of Agric.*, 335 F.3d 711, 717 (8th Cir. 2003) (quoting *Livestock Mktg. Ass’n v. Dep’t of Agric.*, 207 F. Supp. 2d 992, 1002 (D.S.D. 2002)), *vacated sub nom, Johanns*, 544 U.S. 550.

15. *Johanns*, 544 U.S. at 560–64.

16. *Id.* at 564 n.7.

17. *Id.* Private speech interests might be implicated sufficiently to justify an as-applied challenge, Justice Scalia wrote, but only if objecting producers could demonstrate that program advertisements would be attributed to them individually. *Id.* at 565–66.

Although a critique of the government speech doctrine as applied to compelled agricultural assessments is beyond the scope of this Article, for a critical response to the Court’s decision in *Johanns*, see Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L. J. 983, 1042–48 (2005).

A year later, the Court again used the government speech doctrine to limit the First Amendment's scope, this time in the realm of public employee speech. Previous Supreme Court cases had established that a public employee who spoke "as a citizen, in commenting upon matters of public concern" was protected from employer retaliation unless, on balance, the employer's interest in promoting workplace efficiency outweighed the value of the speech.¹⁸ In its first five-to-four decision, the Roberts Court held in *Garcetti v. Ceballos*¹⁹ that public employees fail to qualify as "citizens" under the earlier test when they engage in speech required by their jobs.²⁰ No longer would courts have to balance competing interests when employees spoke "pursuant to their official duties;" *Garcetti* created a blanket First Amendment exception for on-the-job speech, even when that speech dealt with matters of clear public importance.²¹ Judicial deference to the discretion of government employers in this area is required, the Court said, to comport with "sound principles of federalism and the separation of powers."²² As in *Johanns*, once the Court categorized the expression as being within government control, the private speaker's First Amendment rights no longer figured into the Court's analysis.

Almost twenty years before *Garcetti* and a full three years before *Rust*, however, the Court had employed what was seen by some as a public forum approach,²³ but what was, in fact, a government speech analysis to impose significant limitations on the First Amendment rights belonging to another class of private speakers within a government institution—in this instance, public high school students.²⁴ In *Hazelwood School District v.*

18. *Connick v. Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

19. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

20. *Id.* at 421.

21. *Id.*

22. *Id.* at 423.

23. *See, e.g., Searcey v. Harris*, 888 F.2d 1314, 1318–19 (11th Cir. 1989) (interpreting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), as holding that schools may regulate student speech in a nonpublic forum based on content but not on viewpoint); Rosemary C. Salomone, *Free Speech and School Governance in the Wake of Hazelwood*, 26 GA. L. REV. 253, 315–16 (1992) (describing how lower courts interpreted *Hazelwood* as applying a "'reasonableness' standard . . . in the context of public forum analysis").

24. *Hazelwood*, 484 U.S. 260. In *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), the Court cited *Hazelwood* in dicta for the proposition that the state may engage in viewpoint discrimination when the state itself is the speaker. *Id.* at 892 n.11. Justice Alito also characterized *Hazelwood* as a government speech case in his concurring opinion in *Morse v. Frederick*, stating that the *Hazelwood* decision "allows a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ." *Morse v. Frederick*, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring).

Kuhlmeier,²⁵ the Court held that a high school principal did not violate the First Amendment when he removed two pages in advance of publication from an issue of the school-sponsored student newspaper.²⁶ School officials clearly have the power to establish the school's curriculum; therefore, the Court reasoned, those officials must also have the ability to control the content of curricular activities such as school-sponsored student publications.²⁷ The newspaper, although written by the students, contained speech that the Court viewed as properly attributable to the school.²⁸

In these various contexts, the Court has relied on the government speech rationale as a quick and clean solution to potentially messy First Amendment questions. If the speech belongs to the government, the Court need not resort to complicated, fact-specific balancing tests that weigh state interests against individual rights. If the speech belongs to the government, the Court can bypass the public forum doctrine, with its insistence on viewpoint neutrality.²⁹ If the speech belongs to the government, the Court can justify deferring to the state's managerial discretion in the name of preserving government and judicial resources and promoting efficiency. The significant downside is that when the government speech doctrine is invoked, individual liberties always lose. It means, in the *Garcetti* context, that the First Amendment rights belonging to the nearly 19 million adult public servants employed by federal, state and local government entities³⁰ are essentially the same as, if not even weaker than,³¹ those possessed by public schoolchildren. Given that the Court recently limited student speech rights even further in *Morse v. Frederick*,³² the Court's analogous approach to First Amendment questions involving public students and public employees becomes even more troubling.

This Article takes the position that the Court has overextended the government speech doctrine as a formalistic, line-drawing exercise that gives too little consideration to the First Amendment rights of individual

25. 484 U.S. 260 (1988)

26. *Id.* at 276.

27. *Id.* at 271.

28. *Id.*

29. *See infra* notes 120–128 and accompanying text.

30. According to the U.S. Census Bureau, state and local governments employed 16,135,699 full-time equivalent employees as of March, 2006. U.S. CENSUS BUREAU, 2006 PUBLIC EMPLOYMENT DATA STATE AND LOCAL GOVERNMENTS (2006), available at <http://ftp2.census.gov/govs/apes/06stlus.txt>. The federal government employed 2,720,688 full- and part-time employees as of December, 2006. U.S. CENSUS BUREAU, FEDERAL GOVERNMENT CIVILIAN EMPLOYMENT BY FUNCTION 1 (2006), available at <http://ftp2.census.gov/govs/apes/06fedfun.pdf>.

31. *See infra* Part II.B.

32. *Morse v. Frederick*, 127 S.Ct. 2618 (2007). In *Morse*, the Court created a First Amendment exception for student speech that could reasonably be interpreted as endorsing illegal drugs in contravention of the school's own anti-drug message. *Id.* at 2629.

speakers in government-controlled institutions such as schools and workplaces.³³ By doing so, the Court has failed to recognize that when the government speaks through the mechanism of individual speakers, the resulting expression presents a hybrid mixture of public and private speech interests. In Part I of this Article, I show how the Court's decisions first recognizing, and then restricting, speech rights of public school students and public employees have followed a parallel course. I focus particularly on how *Hazelwood* and *Garcetti* use the concept of government speech to limit or eliminate the First Amendment protections previously granted by the Court to public students and employees.

Part II of the Article makes the danger of this approach clear by examining the response to *Hazelwood* and *Garcetti* by the lower courts, a response that shows how government administrators in schools, colleges, and public workplaces have used those holdings to stifle unpopular and unflattering expression and perpetuate their own regimes. I then explore the concept of hybrid speech in Part III, describing how the Supreme Court has acknowledged that both individual and governmental interests deserve consideration in certain mixed speech contexts, and how at least one federal circuit court of appeals has used a hybrid speech approach in analyzing the constitutionality of specialty license plate programs. In Part IV, I propose that a hybrid speech analysis, rather than a per se application of the government speech doctrine, in student press and public employee speech cases would better serve the First Amendment values presented in these contexts. I conclude that although truly legitimate pedagogical concerns may be sufficiently compelling to justify official control of curricular student publications in the K-12 public school setting, those concerns are significantly less weighty in the context of post-secondary education. Similarly, while government interests may predominate when public employees engage in scripted tasks, the private speech component of discretionary, duty-based employee expression should outweigh government efficiency concerns when job-required speech brings potential wrongdoing, fraud, or corruption to light. Finally, I provide an alternative reading of *Garcetti* that is consistent with this approach, and that would limit the government speech doctrine's application so as to protect public employees who report official misconduct or corruption as part of their jobs.

I. PUBLIC STUDENTS, PUBLIC EMPLOYEES, AND THE SUPREME COURT

The extent to which the First Amendment protects speech by public school students on one hand, and public employees on the other, has

33. For an excellent analysis of *Garcetti* as a misguided and potentially dangerous example of the Court's current preference for formalism, see Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173 (2007).

developed along strikingly similar lines. That speech by either category of speaker is not entirely outside of the First Amendment was established by the Supreme Court almost forty years ago in two landmark cases decided just a year apart: *Pickering v. Board of Education*,³⁴ which involved teacher expression, and *Tinker v. Des Moines Independent School District*,³⁵ which concerned student speech. Since then, the Court has ruled against student speech rights in every case that it has decided. In later public workplace cases, the Court has not always sided with the government employer but nevertheless consistently has limited the scope of protected employee speech. When juxtaposed, the Court's major decisions in these two contexts reveal a corresponding reliance on the government speech doctrine to eliminate First Amendment rights belonging to both public students and public employees.

A. *Pickering* and *Tinker*: The Court Protects Non-disruptive Speech

There can be no doubt that the First Amendment guarantees an ordinary citizen's ability to criticize the government.³⁶ Whether a different rule applies to government employees by virtue of their employment status was the issue presented to the Court in *Pickering*, where a public school teacher took issue with the school board's financial priorities in a letter to the local newspaper.³⁷ After a hearing, the board fired Pickering on the ground that the letter contained false statements that would damage board members' reputations, interfere with faculty discipline, and create "controversy, conflict and dissension" in the school district.³⁸ The state courts affirmed the board's action based on the old right/privilege doctrine:³⁹ Pickering gave up his First Amendment right to speak out about the public schools the day he accepted a job teaching at one.⁴⁰

The Supreme Court unanimously overturned Pickering's dismissal, noting in an opinion for the Court by Justice Marshall that earlier decisions

34. 391 U.S. 563 (1968).

35. 393 U.S. 503 (1969).

36. See, e.g., *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (acknowledging "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"); *Bridges v. California*, 314 U.S. 252, 270–71 (1941) ("[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.").

37. *Pickering*, 391 U.S. at 566.

38. *Id.* at 567.

39. See, e.g., *Adler v. Bd. of Educ.*, 342 U.S. 485, 491–93 (1952) (upholding law barring public school teachers from exercising right of association); *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517–18 (Mass. 1892) (stating, in an opinion by Justice Holmes, that although a citizen "may have a constitutional right to talk politics, . . . he has no constitutional right to be a policeman").

40. *Pickering*, 391 U.S. at 567.

had already rejected the right/privilege approach.⁴¹ Recognizing that government employers may object to critical statements made by their employees in an “enormous variety of fact situations,” Justice Marshall deemed it inappropriate to create a bright-line rule to resolve these claims.⁴² Rather, courts should balance the interests belonging to the employee “as a citizen, in commenting upon matters of public concern” with those belonging to the government employer “in promoting the efficiency of the public services it performs through its employees.”⁴³

To assist lower courts in performing what became known as the *Pickering* balancing test, Justice Marshall identified several significant factors in the Court’s analysis. First, Justice Marshall considered whether Pickering’s letter actually impaired his classroom performance or disrupted school operations, and concluded it did not.⁴⁴ Second, the Court looked to the content of the speech in balancing the competing interests.⁴⁵ Pickering’s letter dealt with school funding, a topic that had generated significant community interest as well as two recent ballot initiatives.⁴⁶ The Court warned that the school board must not be allowed to monopolize discussion of such an important question, emphasizing that “free and open debate is vital to informed decision-making by the electorate.”⁴⁷ Pickering’s identity as a teacher was a third consideration that weighed in his favor.⁴⁸ Teachers were “members of a community most likely to have informed and definite opinions” about school finance; therefore, the Court deemed teacher speech on the issue to be especially valuable.⁴⁹ Public understanding would suffer a significant blow if teachers could be punished for expressing their opinions on the matter.⁵⁰

After weighing these various factors, the Court found little on the school district’s side of the equation to justify Pickering’s dismissal. The board had not shown that the letter had impaired Pickering’s classroom performance or disrupted school operations generally. On the other hand, Pickering had a substantial interest in being allowed to speak, given the significant public interest in the topic and his own membership in an informed group. Even with respect to those statements in Pickering’s letter that were clearly wrong, the Court found that their only effect was to anger the board; according to Justice Marshall, Pickering’s missive was greeted

41. *Id.* at 568.

42. *Id.* at 569.

43. *Id.* at 568.

44. *Id.* at 572–73.

45. *Id.* at 571.

46. *Id.*

47. *Id.* at 571–72.

48. *Id.* at 572.

49. *Id.*

50. *Id.*

by everyone else “with massive apathy and total disbelief.”⁵¹ Nor did the letter stray so far from the truth as to cause genuine concern about Pickering’s competence as a teacher.⁵² Had members of the public been misled by the mistakes in Pickering’s remarks, the Court considered the board well-placed to correct those misconceptions through its own speech.⁵³ Given these facts, the Court concluded that the school district could no more forbid Pickering from expressing his views than it could any other member of the public.⁵⁴

A year after it recognized the First Amendment rights of public school teachers in *Pickering*, the Court engaged in the same kind of fact-specific balancing to hold that public junior high and high school students could not be disciplined for wearing black armbands in class to protest the Vietnam War.⁵⁵ In *Tinker*, the Court rejected the idea that schools can be turned into free speech no-fly zones where school officials exercise complete control over students.⁵⁶ The Court envisioned student speech rights as encompassing not just supervised speech in the classroom, but also interpersonal communications among students between classes, in the lunchroom, and elsewhere on school facilities both during and outside of school hours.⁵⁷ Just as Pickering retained his individual status when he expressed his views about work-related issues, the underage students in *Tinker* were considered citizens with First Amendment rights even while at school.⁵⁸

The Court nevertheless also recognized that school officials must have the authority to impose discipline by creating and enforcing rules of conduct,⁵⁹ in the same manner that employers must be allowed to manage employees to create an efficient workplace. Faced with these conflicting interests, the Court again attempted to resolve the standoff in a way that gave due consideration to both sides. School officials’ need to maintain order, the Court said, will trump the students’ right to free speech when that expression substantially interferes with schoolwork or the security of other students.⁶⁰ When school authorities cannot show that student expression materially disturbs normal school activities, however, the students’ free

51. *Id.* at 570.

52. *Id.* at 573 n.5.

53. *Id.* at 572.

54. *Id.* at 573.

55. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

56. *Id.* at 511.

57. *Id.* at 512.

58. *Id.* at 511.

59. *Id.* at 507.

60. *Id.* at 513.

speech rights must prevail.⁶¹ Echoing its *Pickering* conclusion, the Court held that the individual's right of free speech in these circumstances is outweighed only when that expression substantially impairs the functioning of the public institution in question.⁶²

Even though the school district claimed its anti-armband policy would prevent disturbances, the Court remained unconvinced.⁶³ Taking into account the passive, individual, and unspoken nature of the students' speech, as well as statements by school officials disputing the appropriateness of anti-war protests in class, the Court concluded that the district's desire to avoid controversy, not disruption, was the actual motivating force behind the policy.⁶⁴ Noting that the school district previously had allowed students to wear other potentially divisive political symbols, the Court suggested the real reason school officials opposed the armbands was disagreement with the protesting students' ideological stance—a clear example of constitutionally impermissible viewpoint discrimination.⁶⁵ The Court indicated that schools cannot restrict student expression of disfavored ideas just to prevent those ideas from gaining wider acceptance.⁶⁶ That the students in *Tinker*, like the teacher in *Pickering*, had expressed sentiments the respective school boards preferred others neither hear nor adopt failed to justify the boards' actions in either case.

As it had in *Pickering*, the *Tinker* Court also considered the value of the forbidden speech as a factor in its balancing of interests. In his majority opinion, Justice Fortas celebrated free speech as being not only compatible with public education, but in fact indispensable to the learning process.⁶⁷ Although he recognized the school's need to convey its own curricular message, Justice Fortas nevertheless declared that “students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.”⁶⁸ He contrasted America's public schools to ancient Sparta's authoritarian educational regime, concluding that a system of state indoctrination would ill equip young people to assume the mantle of democratic self-government.⁶⁹

Taken together, *Pickering* and *Tinker* provide that neither public employees nor public students automatically give up their First

61. *Id.* at 509.

62. *Id.*

63. *Id.* at 504–06.

64. *Id.* at 508–10.

65. *Id.* at 510–11.

66. *See id.* at 514 (indicating that students in *Tinker* wore armbands both to express their views about the war, and “to influence others to adopt [those views]”).

67. *Id.*

68. *Id.* at 511.

69. *Id.* at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

Amendment rights by virtue of their status as participants in public institutions. Although public officials must have the ability to manage those institutions, public employees and public students who disagree with officially favored positions cannot be punished simply for expressing a different view. In both cases, the key consideration for the Court was whether the speech substantially disrupted the normal functioning of the school or workplace. The decisions show a reluctance by the Court to rely on institutional managers' justifications for restricting speech; rather, the Court indicated a willingness to scrutinize the underlying evidence itself. Most importantly, the decisions champion the value of dissent, and decry the consequences of official suppression of ideas, even in authoritarian institutions such as public schools and workplaces. Having thus granted a significant measure of First Amendment protection to public student and public employee speakers, the Court has since issued a series of decisions limiting that protection, again in often comparable ways.

B. *Connick* and *Bethel*: The Court Emphasizes the Public Interest Value of the Speech

Beginning in the 1980s, the Court ruled that certain types of speech by either public employees or public students could be regulated, even if that speech caused no significant institutional disruption. Rather than focusing on whether the individual speech in these cases impaired efficient institutional operations, the Court instead looked to the content of the speech at issue. More specifically, the Court asked whether the speech dealt with a subject that it believed deserved First Amendment protection, concluding in another pair of landmark cases that it did not.

The issue before the Court in *Connick v. Myers*⁷⁰ was whether an assistant district attorney, Sheila Myers, could be fired for distributing a questionnaire at work to measure her colleagues' satisfaction with certain office policies and procedures.⁷¹ In upholding Myers' termination for insubordination, the Court held for the first time that the *Pickering* balancing test applied only to employee speech that dealt with matters of public concern.⁷² Under this threshold test, public employers are free to discipline or discharge employees for engaging in "personal interest" speech without raising First Amendment implications.⁷³

The Court gave little guidance as to how courts should determine when

70. 461 U.S. 138 (1983).

71. *Id.* at 140.

72. Although the public concern test had not previously been articulated as a threshold requirement in its previous decisions, the Court located the test's origins in "*Pickering*, its antecedents, and its progeny,"—cases that the Court described as involving the rights of public employees to participate in political affairs. *Id.* at 146.

73. *Id.* at 147.

speech involves matters of public concern other than to say that a proper inquiry entails an examination of “the content, form, and context of a given statement, as revealed by the whole record.”⁷⁴ Here the district court had erred, the Court explained, by concluding that because Myers’ questionnaire addressed the “effective functioning of the District Attorney’s Office,” it automatically qualified as a matter of public concern.⁷⁵ The Court instead concluded that Myers’ question that dealt with whether employees were pressured to work in political campaigns was the only one to make the cut as speech about a public matter.⁷⁶

Two main reasons were advanced by the Court in holding that most of Myers’ questionnaire did not rise to the level of public concern speech. First, the Court examined Myers’ motive in distributing the questionnaire, and found that her actions stemmed more from a desire to advance her own self-interest in avoiding a pending transfer than to apprise the public about scandal or corruption in the district attorney’s office.⁷⁷ The Court was determined not to allow a malcontent employee to turn a mere workplace grievance into what it called a “cause célèbre.”⁷⁸ Second, the Court refused to consider all expression about the performance of government officials as public concern speech for pragmatic reasons.⁷⁹ Doing so, the Court said, would make it impossible for government offices to function, because “virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case.”⁸⁰ In the interest of efficiency, employers, not judges, were seen by the Court as the proper arbiters of purely internal workplace disputes.⁸¹

Because one question on Myers’ survey qualified as a matter of public concern, the Court nevertheless advanced to the second of what had now become a two-part test, and weighed Myers’ interest in free speech against the employers’ interest in maintaining an effective workplace.⁸² However, even the *Pickering* balance had now become more employer-friendly. The Court held it was appropriate to give “a wide degree of deference” to the employer’s judgment as to how the survey would interfere with working relationships, and added that the employer’s prediction of interference would suffice to justify Myers’ termination.⁸³

Given that Myers’ questionnaire was distributed at the workplace, the

74. *Id.* at 147–48.

75. *Id.* at 143.

76. *Id.* at 149.

77. *Id.* at 148.

78. *Id.*

79. *Id.* at 149.

80. *Id.*

81. *Id.* at 146.

82. *Id.*

83. *Id.* at 152.

Court also agreed with the employer that the survey posed more of a danger to institutional functioning than had Pickering's letter to the editor, which, despite its inaccuracies, was composed and published outside the office.⁸⁴ Finally, the Court weighed the context in which the speech arose, noting yet again that the questionnaire was motivated by a personal workplace dispute rather than an academic desire to obtain "useful research."⁸⁵ As a result, the lack of significant value ascribed to the questionnaire by the Court resulted in Myers' speech failing not only the public concern prong, but also the balancing portion, of the Court's new, two-part *Pickering-Connick* test for employee speech.⁸⁶

Just as it looked to the public interest value of employee speech in *Connick*, the Court in *Bethel School District v. Fraser*⁸⁷ also emphasized the content of student speech in determining whether that expression would be protected by the First Amendment. In *Bethel*, the Court held that the First Amendment did not prohibit school officials from punishing a student who delivered a lewd speech during a high school assembly, noting that indecent, offensive language expresses no political viewpoint and plays "no essential part of any exposition of ideas."⁸⁸ Chief Justice Burger, writing for the Court, emphasized the "marked distinction" between the political message of the *Tinker* armbands and the sexual innuendo used by Matthew Fraser to nominate a friend to a student government position.⁸⁹ Fraser's sexual double entendres were described by the Court as "plainly offensive to both teachers and students—indeed to any mature person" and as "acutely insulting to teenage girl students."⁹⁰

Normally, the First Amendment protects adults who engage in this type of offensive expression; however, Justice Burger denied that the constitutional rights of public school students were equivalent to those of adults.⁹¹ The public education system as described by the *Bethel* Court bore an uncanny resemblance to the ancient Spartan system that had been maligned in *Tinker*. Schools exist not only to educate students, but also to instill in them the "fundamental values necessary to the maintenance of a democratic political system."⁹² Although the schools must teach tolerance of diverse views, the Court emphasized that they must also train students to respect the "sensibilities of others" and the boundaries of what school

84. *Id.* at 153.

85. *Id.*

86. *Id.* at 154.

87. 478 U.S. 675 (1986).

88. *Id.* at 685 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

89. *Id.* at 680.

90. *Id.* at 683.

91. *Id.* at 682.

92. *Id.* at 683 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

officials consider socially acceptable.⁹³

As it had in *Connick*, the *Bethel* Court downplayed the need for evidence of actual institutional disruption to justify regulating the speech at issue. The district court had concluded, and the appeals court affirmed, that while student reaction to Fraser's speech may have been "boisterous," it was not disruptive, and the speech itself had not materially interfered with the educational process.⁹⁴ The Court nonetheless deferred to the judgment of school officials, stating that the "determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."⁹⁵

The *Bethel* majority made two implicit references to the government speech doctrine to justify its holding. First, the Court again recognized, as it had in *Tinker*, that schools are "instruments of the state" that communicate certain state-approved lessons to their students pursuant to an educational mission.⁹⁶ Second, the Court enunciated for the first time what might be called a government speaker's right of disassociation, a type of negative speech right, stemming from that mission. To teach certain lessons effectively, the Court concluded that a school may need to distance itself by punishing or eradicating student speech that could undermine those lessons.⁹⁷ "Accordingly," the Court said, "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education."⁹⁸

This right of disassociation also played an important role in the Court's recent decision in the "BONG HITS 4 JESUS" case, *Morse v. Frederick*.⁹⁹ There, high school students in Alaska watching the Olympic Torch Relay with their classmates across the street from school unfurled a banner featuring those enigmatic words just as television cameras panned the crowd.¹⁰⁰ The school principal ordered that the banner be taken down, and when high school senior Joseph Frederick refused, the principal suspended him.¹⁰¹ The Court affirmed the suspension, holding that a school can prohibit and punish student speech at a school-sponsored, off-campus event that the school principal reasonably interprets as sending a pro-drug

93. *Id.* at 681.

94. *Id.* at 693 (Stevens, J., dissenting) (citing *Fraser v. Bethel Sch. Dist.*, 755 F.2d 1356, 1360–61 (9th Cir. 1985)).

95. *Id.* at 683.

96. *Id.*

97. *Id.* at 685.

98. *Id.* at 685–86.

99. *Morse v. Frederick*, 127 S.Ct. 2618 (2007)

100. *Id.* at 2622.

101. *Id.*

message.¹⁰² Had the principal allowed Frederick's banner to remain, the school would have sent what the Court viewed as a potent, pro-drug message that was not only contrary to, but could also undermine, the school's anti-drug position.¹⁰³

Although Frederick had argued that the banner was mere "nonsense" meant only to attract media attention, the Court parsed the banner's words carefully to conclude that it advocated illegal drug use.¹⁰⁴ Ironically, the Court then relied on Frederick's "nonsense" claim to deny that the banner constituted a political message about decriminalization of marijuana, aligning the holding with *Bethel* and distinguishing it from *Tinker*.¹⁰⁵ A banner that plausibly supported drug use, and that potentially undermined the school's own anti-drug message, could be restricted by school officials without a showing of substantial disruption with school activities, according to five members of the Court.¹⁰⁶

In these cases, the Court concluded that certain types of speech are less worthy of First Amendment protection in public school or office settings, even when the speech has not been shown to have disrupted normal operations. At school or in the workplace, the Court viewed the government's interest in exercising authority over its subordinates, for purposes of either avoiding litigation or inculcating school-approved values, as trumping the individual's right to engage in what the Court considered to be lower-value speech.

C. *Hazelwood* and *Garcetti*: The Court Classifies School-Sponsored and Job-Required Expression as Government Speech

Whereas *Bethel* and *Morse* both involved public school students' personal speech, the Court in *Hazelwood*¹⁰⁷ used the same "disassociation" rationale to give school officials' almost complete control over student speech in school-sponsored, curricular activities. In *Hazelwood*, a high school principal removed two pages from the campus newspaper prior to publication because he objected to a pair of student-written articles, one about teen pregnancy, and the other about the effects of parental divorce on

102. *Id.*

103. *Id.* at 2629.

104. *Id.* at 2624–25.

105. *Id.* at 2625.

106. Justice Alito, joined by Justice Kennedy, wrote separately to emphasize that, in their view, the holding extended only to student speech that could not "plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'" *Id.* at 2636 (Alito, J., concurring). Apparently, as noted by Justice Breyer's concurring opinion, had Frederick's banner started with the word "LEGALIZE," his speech might well have been protected. *Id.* at 2639 (Breyer, J., concurring).

107. 484 U.S. 260 (1988).

students.¹⁰⁸ Although the Court of Appeals concluded that the newspaper qualified as a public forum for student expression,¹⁰⁹ the Supreme Court ruled instead that as a “supervised learning experience,” the paper was part of the school curriculum.¹¹⁰ State and local school officials are charged with designing the content of public school curricula;¹¹¹ therefore, the Court reasoned that those officials must also have editorial control over curricular publications.¹¹² School-sponsored activities that bear “the imprimatur of the school,” such as student publications or theatrical productions, were seen by the Court as vehicles used by the school to teach and transmit its own messages.¹¹³ The school, as the real speaker, need not tolerate objectionable student expression that contradicts the school’s own message or could be misattributed to the school.¹¹⁴

The only First Amendment limit the Court recognized on a school’s ability to restrict student speech “disseminated under [school] auspices” was that the restriction must be reasonably calculated to advance a “valid educational purpose.”¹¹⁵ Student expression that the Court suggested could legitimately be regulated under this test would include speech that interferes with school operations or violates the rights of others; is poorly written, vulgar, profane or otherwise unsuitable for younger students; advocates unacceptable behavior such as alcohol or drug use, or irresponsible sex; or “associate[s] the school with any position other than neutrality on matters of political controversy”¹¹⁶—undeniably a wide swath of student communication that the Court said can be restricted subject to only rational basis review. In these facts, the Court held that it was reasonable for the principal to conclude that the pregnancy article invaded privacy and was inappropriate for younger students, and that the divorce article did not meet journalistic standards of objectivity.¹¹⁷ As long as a school acts reasonably, the Court said it must defer to school authorities, because “the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal

108. *Id.* at 263–64.

109. *Id.* at 265.

110. *Id.* at 270–71. In his dissent, Justice Brennan cited both an approved policy statement published annually in the newspaper in which it claimed “all rights implied by the First Amendment,” and a school board policy providing that “[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism” to argue that the newspaper was a forum for student expression. *Id.* at 277–78 (Brennan, J., dissenting).

111. *Id.* at 273; *see also* *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) (noting the state’s “undoubted right to prescribe the curriculum for its public schools”).

112. *Hazelwood*, 484 U.S. at 271–73.

113. *Id.* at 271.

114. *Id.*

115. *Id.* at 272–73.

116. *Id.* at 272.

117. *Id.* at 274–75.

judges.”¹¹⁸

Although the Court distinguished *Tinker* as involving personal, political expression that coincidentally took place on school premises,¹¹⁹ had *Tinker* come before the Court in 1989 rather than 1969 it is far from certain that the Court would have treated *Tinker*'s facts as beyond *Hazelwood*'s reach. The students in *Tinker* expressed their opinions about the Vietnam War during school-sponsored activities because they wore their armbands to class—the quintessential supervised learning experience. Parents or members of the public visiting the school could reasonably have concluded that the armbands were authorized by the school, and thereby may have associated the school with a non-neutral position regarding a controversial political issue. The school board's finding that the armbands would disrupt classroom instruction would surely qualify as reasonably related to a legitimate pedagogical objective under *Hazelwood*'s deferential approach. After *Hazelwood*, it is no wonder that some courts and commentators started questioning whether *Tinker* retained much vitality in the public schools.¹²⁰

Thanks to the opinion's imprecise reasoning, some courts and commentators also misclassified *Hazelwood* as a puzzling application of the public forum doctrine rather than as a relatively straightforward example of a government speech analysis.¹²¹ The confusion occurred because in refuting the lower court's conclusion that the newspaper constituted a public forum, the Court cited *Perry Education Association v. Perry Local Educators' Association*¹²² as the source for its “reasonableness” test.¹²³ In *Perry*, the Court held that speech could be

118. *Id.* at 273.

119. *Id.* at 270–71.

120. *See, e.g.,* *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 737 (7th Cir. 1994) (stating that the Court's decisions in *Bethel* and *Hazelwood* cast doubt on whether students retain free speech rights in school settings); Erwin Chemerinsky, *Do Students Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?* 48 *DRAKE L. REV.* 517, 530 (2000) (“[I]n the three decades since *Tinker*, the courts have made it clear that students leave most of their constitutional rights at the schoolhouse gate.”). *But see* Andrew D. M. Miller, *Balancing School Authority and Student Expression*, 54 *BAYLOR L. REV.* 623, 673–74 (2002) (stating that *Tinker* remains good law despite the Court's later decisions limiting student speech).

121. *See supra* note 23 and accompanying text; *see also* *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 631 (2d Cir. 2005) (observing that while *Hazelwood* ostensibly relied on the Court's public forum cases, the opinion was unclear about whether those cases' insistence on viewpoint neutrality was part of the *Hazelwood* reasonableness test), *cert. denied*, 547 U.S. 1097 (2006).

122. 460 U.S. 37 (1983).

123. Citing *Perry*, the *Hazelwood* Court held that “school officials were entitled to regulate the contents of [the newspaper] in any reasonable manner” because school officials had “reserve[d] the forum for its intended purpos[e]” . . . as a supervised learning experience for journalism students.” *Hazelwood*, 484 U.S. at 270.

excluded from a “non-public forum”¹²⁴ only if such exclusion was both reasonable and “not an effort to suppress expression merely because public officials oppose the speaker’s view.”¹²⁵ If by citing *Perry*, the Court meant to indicate that it considered the student newspaper in *Hazelwood* a non-public forum, scholars wondered why the Court then failed to complete the analysis by scrutinizing the principal’s actions for viewpoint discrimination.¹²⁶ Uncertainty with respect to the Court’s intentions resulted in conflicting decisions among the circuits regarding whether school officials could constitutionally restrict school-sponsored student speech on the basis of viewpoint,¹²⁷ and inspired calls by commentators either for or against imposition of a viewpoint neutrality requirement in student speech cases.¹²⁸ Recognizing that the Court in *Hazelwood* intended to go beyond the public forum doctrine to classify the school-sponsored newspaper as the school’s own speech—government speech—clears the confusion: when the government speaks, it is entitled to advance its own

124. In *Perry*, the Court categorized speech that occurs on government-owned property or within government facilities into three categories, each subject to its own set of First Amendment rules: the traditional public forum, the limited public forum, and the non-public forum. *Perry*, 460 U.S. at 45–46. In all three forum types, the government is supposed to honor the ban against viewpoint discrimination. *Id.* at 46.

125. *Id.* (citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 131 n.7, *appeal dismissed and cert. denied*, 453 U.S. 917 (1981)).

126. See, e.g., William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 533–34, 541 (1989) (questioning why the *Hazelwood* Court failed to apply the viewpoint neutrality prong of the *Perry* test, but ultimately concluding that the Court treated the newspaper as part of the curriculum rather than as a non-public forum); R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175, 189 (2007) (“The *Hazelwood* case itself does not explicitly require that the schools’ restrictions of apparently school-sponsored speech be viewpoint-neutral, even though *Hazelwood* seems to rely on cases that do recognize such a requirement.”).

127. Compare *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 926 (10th Cir. 2002) (concluding that the Supreme Court intended to create an exception to viewpoint neutrality in *Hazelwood* for school-sponsored speech), and *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (stating that *Hazelwood* did not incorporate a viewpoint neutrality standard into its holding), with *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005), *cert. denied*, 547 U.S. 1097 (2006) (opining that “a manifestly viewpoint discriminatory restriction on school-sponsored speech is, *prima facie*, unconstitutional, even if reasonably related to legitimate pedagogical interests,” but acknowledging that an overwhelming state interest could justify viewpoint discriminatory censorship in some circumstances), and *Searcey v. Harris*, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989) (concluding that *Hazelwood* did not eliminate the viewpoint-neutrality requirement for school-sponsored student speech in a non-public forum).

128. See, e.g., Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools*, 32 PEPP. L. REV. 647, 668 (2005) (urging that courts prohibit school officials from restricting school-sponsored student speech based on students’ political, religious, or racial viewpoints); Wright, *supra* note 126, at 214 (arguing against imposition of a viewpoint-neutrality rule with respect to school-sponsored, student speech at the grade school level).

viewpoint.¹²⁹

Hazelwood's counterpart in the Court's public employee speech jurisprudence was not decided for almost two more decades. In 2006, the Court ruled in *Garcetti* that a public employee's expression made pursuant to an official job duty can be regulated as speech belonging to the employer and not the employee,¹³⁰ just as in *Hazelwood*, where the Court found that a public student's speech delivered in the course of a school-sponsored activity is subject to control as speech belonging to the school rather than the student. After *Garcetti*, public employees who speak pursuant to their job responsibilities have no First Amendment protection against employer retaliation, even when that speech reveals corruption, wrongdoing, or other matters of clear public interest.

Garcetti involved a retaliation claim brought by a deputy district attorney, Richard Ceballos, against the Los Angeles District Attorney's office.¹³¹ The controversy arose after a criminal defense lawyer challenged the accuracy of statements made by a deputy sheriff in a search warrant affidavit.¹³² As part of his regular duties, Ceballos investigated the claim, concluded that the deputy falsified the affidavit, discussed his findings with his superiors, and followed up with a disposition memo recommending that the charges be dismissed.¹³³ After a contentious meeting between the district attorney's office and the sheriff's department, Ceballos's superiors

129. In *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), the Court indicated in dicta that *Hazelwood* applied the government speech, rather than the public forum, doctrine:

When the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message It does not follow, however . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead . . . encourages a diversity of views from private speakers. A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles.

Id. at 833–34.

See also Buss, *supra* note 126 at 513 (stating that *Hazelwood* is best explained “in terms of the school's power to control its communicative resources”); Mark G. Yudoff, *Tinker Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365, 375 (1995) (recognizing that *Hazelwood* dealt with a “school system's ability to promote its own message”).

130. 547 U.S. 410, 421–22 (2006) (“Restricting speech that owes its existence to a public employee's professional responsibilities . . . simply reflects the exercise of employer control over what the employer itself has commissioned or created.”).

131. *Id.* at 415.

132. *Id.* at 413.

133. *Id.* at 414.

decided to continue with the prosecution.¹³⁴ Believing he had a professional ethical obligation to do so under *Brady v. Maryland*,¹³⁵ Ceballos gave a redacted copy of his memo to defense counsel and was called to testify by the defense at the suppression hearing.¹³⁶ Ultimately, the warrant was upheld on unrelated grounds,¹³⁷ but shortly thereafter Ceballos claimed he was demoted, transferred to a distant office, and denied a promotion as punishment for his speech.¹³⁸

In its previous employee speech cases, the Court appeared to have linked “speaking as a citizen” and speaking “on a matter of public concern” together, as if to insinuate that by bringing a matter of public interest to light, a public employee did, in fact, behave as a citizen.¹³⁹ A number of circuit courts of appeals adopted this interpretation, and looked to the speech content as well as the speaker’s personal motivation to determine whether the employee’s expression was protected by the First Amendment.¹⁴⁰ If the employee’s speech revealed government incompetence or wrongdoing, and was inspired at least in part by the desire to expose such behavior, most lower courts held that the employee had acted “as a citizen.”¹⁴¹ However, a few courts understood the phrase as

134. *Id.*

135. 373 U.S. 83 (1963) (holding that in a criminal case, due process requires that a prosecutor disclose exculpatory evidence to the defense).

136. *Garcetti*, 547 U.S. at 442 (Souter, J., dissenting).

137. *Id.*

138. *Id.* at 415.

139. The Court’s language in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), is ambiguous, stating that “[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Id.* at 568. In *Connick v. Myers*, 461 U.S. 138 (1983), the assistant district attorney wrote and distributed her questionnaire in her role as an employee, but the Court nevertheless proceeded to the *Pickering* balancing test after determining that one question addressed a matter of public concern. *See supra* notes 70–86 and accompanying text. It therefore appeared from *Connick* that an employee could speak both as an employee and as a citizen, if the speech in question touched on a matter of public interest. A more recent Court decision, *City of San Diego v. Roe*, 543 U.S. 77 (2004), focused on whether a police officer’s indecent videotapes dealt with a matter of public concern, not on whether he spoke “as a citizen” in making them. *Id.* at 80–84.

140. *See, e.g.*, *Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178, 191 (5th Cir. 2005) (holding that a public employee who spoke on the phone about a personnel matter of public interest was speaking as a citizen under *Connick* even though her job duties included answering the phone); *Rodgers v. Bank*, 344 F.3d 587, 599–601 (6th Cir. 2003) (concluding that an employee who wrote a critical memo about patient care in a mental hospital spoke as a citizen under *Connick* because the speech addressed a matter of public concern, even though memo was part of the employee’s official duties).

141. *See, e.g.*, *Wallace v. County of Comal*, 400 F.3d 284, 289 (5th Cir. 2005) (holding that health inspectors who were dismissed after reporting county health violations as part of their duties spoke on a matter of public concern); *Taylor v. Keith*, 338 F.3d 639 (6th Cir. 2003) (concluding that internal affairs report about police

imposing a two-part test, and ruled that even employees who revealed matters of clear public importance did not conduct themselves as citizens if their speech stemmed from their job responsibilities.¹⁴²

The *Garcetti* Court resolved this conflict in the government employer's favor by uncoupling the phrase into two separate inquiries, holding that the roles of "citizen" and "employee" are mutually exclusive whenever an employee engages in job-required speech.¹⁴³ The "controlling factor" identified by the Court in determining whether an employee engaged in citizen speech was neither the speech's importance nor the speaker's incentive, but rather whether the speech was made pursuant to the employee's official duties.¹⁴⁴ The Court established a new categorical rule: "[W]hen 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."¹⁴⁵ *Hazelwood* had established that student speech was subject to almost unlimited regulation when it occurred in a school-sponsored context; *Garcetti* now made clear that public employee speech falls outside the First Amendment when the expression takes place in the context of official duties.

In his opinion for the five-member *Garcetti* majority, Justice Kennedy interpreted *Pickering* as granting public employees First Amendment rights to participate in civic debate that were coextensive with, but no greater than, the free speech rights belonging to workers employed by private businesses.¹⁴⁶ The fact that Ceballos was an assistant district attorney did not, in the Court's eyes, entitle him to greater First Amendment rights with respect to on-the-job speech than he would have possessed were he an associate at a private law firm.¹⁴⁷ The Court's private-sector analogy was faulty, however, on two counts. First, the Court indicated that had Ceballos delivered his disposition memo to the press rather than to his superiors, it

brutality was speech on a matter of public concern, even if report made in the course of employment); *Baldassare v. New Jersey*, 250 F.3d 188, 196–200 (3d Cir. 2001) (determining that investigators who, as part of their duties, filed an internal report revealing fraud and illegality in law enforcement were protected by the First Amendment).

142. See, e.g., *Urofsky v. Gilmore*, 216 F.3d 401, 407–09 (4th Cir. 2000) (holding that state can regulate public employees' access to sexually explicit material in the course of their job duties on state-owned computers, even if those job responsibilities involve matters of public concern); *Buazard v. Meridith*, 172 F.3d 546, 548–49 (8th Cir. 1999) (concluding that a police official who refused to alter witness statements alleging officer misconduct was not entitled to First Amendment protection because he spoke as an employee, not as a citizen).

143. *Garcetti*, 547 U.S. at 421.

144. *Id.*

145. *Id.*

146. *Id.* at 423.

147. *Id.*

would have qualified as “citizen speech,” because “that is the kind of activity engaged in by citizens who do not work for the government.”¹⁴⁸ The Court failed to explain, however, why a government employer’s status as a state actor depends on whether its employee speaks internally or externally. This result clearly does not correspond to the private sector, where workers can be disciplined for maligning the boss irrespective of whether they do so through internal channels or on the nightly news.

Second, the Court drew a constitutional distinction between internally communicated, official-duty speech, which receives no First Amendment protection, and other internally communicated, job-related (but not job-required) speech, which the Court said may be shielded under the former *Pickering-Connick* analysis.¹⁴⁹ This convoluted conclusion has no equivalent in the private workplace, where employees may be disciplined by their employer indiscriminately for either type of speech.¹⁵⁰ The distinction appears to have stemmed from the Court’s desire to distinguish *Givhan v. Western Line Consolidated School District*,¹⁵¹ which held that the First Amendment protected a teacher who complained directly to the principal regarding discriminatory school hiring policies.¹⁵² According to the *Garcetti* majority, the teacher’s speech in *Givhan* may have pertained to her job, but it was not required by it; therefore, the teacher’s speech was protected by the First Amendment even though she communicated her concerns through internal channels.¹⁵³ Both Justice Stevens and Justice Souter pointed out the absurdity of this conclusion in their dissents.¹⁵⁴ “[I]t is senseless,” Justice Stevens wrote, “to let constitutional protection for exactly the same words hinge on whether they fall within a job description.”¹⁵⁵

Community benefits associated with public employee speech, so important to the Court in *Pickering*, were virtually ignored in *Garcetti*, in a way reminiscent of how the *Hazelwood* Court overlooked *Tinker*’s eloquent call for free student debate in the public schools. Although the *Garcetti* majority paid lip service to the societal value of public employee

148. *Id.*

149. *Id.* at 420–21.

150. The Court nevertheless tried to maintain its analogy on this point by noting that “[m]any citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like ‘any member of the general public’ to hold that all speech within the office is automatically exposed to restriction.” *Id.* (internal citation omitted). The flaw in the Court’s analysis is apparent—in a private workplace, all employee speech is potentially subject to restriction.

151. 439 U.S. 410 (1979).

152. *Id.* at 414

153. *Garcetti*, 547 U.S. at 421.

154. *Id.* at 427 (Stevens, J., dissenting); *Id.* at 430 (Souter, J., dissenting).

155. *Id.* at 427 (Stevens, J., dissenting).

speech,¹⁵⁶ its holding mandates that courts ignore the content of employee speech altogether in evaluating its constitutional status. Employees who, in the scope of their employment, discover and report government corruption, fraud, illegality, or other misconduct to their superiors are entitled to less First Amendment consideration than office loudmouths who engage in the worst sort of gossip; whistleblowers cannot proceed past the *Garcetti* gate if their speech falls within their regular job responsibilities, whereas rumormongers advance as far as the *Pickering-Connick* balancing test.¹⁵⁷ The Court rationalized that because public employees can go to the media with their concerns, the public will still learn whatever it needs to know about shady government operations.¹⁵⁸ This argument fails to recognize that the end result for government employees will almost certainly be the same: one who prevails on the “citizenship” test by talking to the media about a matter of public interest will almost certainly fall short on the *Pickering-Connick* balancing of interests for being insubordinate, disruptive, or guilty of bad judgment in failing to report concerns up the chain of command. Rather than acknowledge this Catch-22, the Court instead evidenced a Pollyanna-like faith in the integrity of low-level bureaucrats by predicting that government employers would adopt policies “that are receptive to employee criticism” as a way to discourage aggravated employees from tattling to the press.¹⁵⁹

Even if public employee work-product speech has societal value, the Court considered that value to be outweighed by the litigation and workplace efficiency costs said to result from a contrary holding. Government employers should be free to discipline employees for work-required speech, the Court said, to comport with “sound principles of federalism and the separation of powers,”¹⁶⁰ just as *Hazelwood* had held that student speech limits should be determined by school officials and not federal judges. Denying First Amendment protection to all job-required speech, the Court noted, would eliminate the need for judicial oversight of these employee speech cases¹⁶¹—a benefit which, if accepted as a valid justification for limiting constitutional rights, could be used by the Court to decimate the Bill of Rights in its entirety.

In his dissent, Justice Souter suggested that the litigation cost savings

156. *Id.* at 418–20.

157. In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Court held that a deputy constable was protected by the First Amendment when, after learning about an assassination attempt on President Reagan, she remarked to a co-worker, “If they go for him again, I hope they get him.” *Id.* at 380. *Garcetti* would not change the result in *Rankin*, because the deputy constable’s speech was not made pursuant to her official duties. *Id.* at 380–81.

158. *Garcetti*, 547 U.S. at 422.

159. *Id.* at 424.

160. *Id.* at 423.

161. *Id.*

touted by the Court were almost certainly illusory, given the majority's refusal to adopt specific guidelines defining what constitutes a "job duty."¹⁶² Apparently in response to the dissent's argument that public employers could insulate themselves from whistleblower speech simply by imposing a universal duty on employees to report misconduct,¹⁶³ the majority said courts should look at what falls within an employee's job responsibilities on a case-by-case basis.¹⁶⁴ As a result, Justice Souter predicted that the Court's decision would not eliminate public employee speech litigation, but would merely shift the battlefield to whether an employee's speech occurred in the course of his official duties.¹⁶⁵

Addressing the majority's government speech argument head on, Justice Souter also objected that the majority mischaracterized Ceballos's speech as belonging to his employer.¹⁶⁶ Justice Souter argued that the government speech doctrine assumes a predetermined government message, such as the clearly outlined policy the doctors in *Rust* had been hired to advance.¹⁶⁷ Here, however, Justice Souter noted that Ceballos was employed not to read from a script, but rather to exercise his best judgment as a professional prosecutor on his employer's behalf—a distinction that should have led the Court to recognize that Ceballos retained a personal interest in his speech.¹⁶⁸

The majority also thought First Amendment protection for employee speech was duplicative and unnecessary because of what it described as a "powerful network" of whistleblower protection acts¹⁶⁹—another overstated conclusion set straight by Justice Souter's dissent. In reality, state and federal whistleblower laws provide what Justice Souter rightly described as no more than "patchwork" protection, giving limited and inconsistent levels of coverage for public employees that varies by jurisdiction, industry, and the type and manner of disclosure.¹⁷⁰ For

162. *Id.* at 435–36 (Souter, J., dissenting).

163. *Id.* at 430–31, n.2 (Souter, J., dissenting).

164. *Id.* at 425.

165. *Id.* at 436 (Souter, J., dissenting).

166. *Id.* at 436–38 (Souter, J., dissenting).

167. *Id.* at 435 (Souter, J., dissenting).

168. *Id.* (Souter, J., dissenting). As a prosecutor, Ceballos was subject to independent constitutional and professional obligations to turn over what he believed to be exculpatory evidence in a criminal prosecution, which formed the basis of Justice Breyer's dissent. *Id.* at 446–48 (Breyer, J., dissenting).

169. *Id.* at 425.

170. *Id.* at 440–43 (Souter, J., dissenting). For an example at the state level, see *Williams v. Riley*, 481 F. Supp. 582, 585 (N.D. Miss. 2007) (holding that the Mississippi whistleblower statute did not protect a prison officer who reported a co-worker's abuse of an inmate to a supervisor rather than to a "state investigative body"), *aff'd in part and vacated in part on other grounds*, *Williams v. Riley*, No. 07-60252, 2008 U.S. App. LEXIS 8990 (5th Cir. Apr. 25, 2008); see also Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers and the Implications of the*

example, had Ceballos been a U.S. Attorney who tried to invoke the Federal Whistleblower Protection Act of 1989 (“Act”),¹⁷¹ his attempt would have been in vain. Although the Act’s language appears to protect “any disclosure” that a federal employee reasonably believes reveals wrongdoing,¹⁷² rulings by the Federal Circuit Court of Appeals have ensured that whistleblowers are almost never shielded by the statute. Ironically, in 2001, the court ruled that the Act does not protect employees who disclose misconduct in the course of their job duties, meaning that Ceballos’ speech would fall outside both the Act and the First Amendment.¹⁷³ The court, which exercises exclusive subject-matter jurisdiction over whistleblower appeals, has also held that the Act does not cover disclosures made to co-workers, supervisors, or those suspected of misconduct, among other exceptions.¹⁷⁴ A recent study showed that of the 3,561 whistleblower cases brought under the Act since 1994, whistleblowers lost almost ninety-seven percent of the time.¹⁷⁵ The Federal Whistleblower Protection Act starkly illustrates why statutes, which often cover only narrow situations and can always be repealed, modified, or judicially interpreted out of existence, can never serve as an adequate substitute for a constitutional right.

Garcetti’s bottom line establishes that employees who speak as part of their official duties are no longer engaged in citizen-speech within the ambit of the First Amendment, but rather act solely as governmental mouthpieces whose speech is subject to complete state control. Writing for the Court, Justice Kennedy explained that “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”¹⁷⁶ In the same manner that school officials were empowered by *Hazelwood* to regulate student speech that might be considered part of the school’s own curricular message, *Garcetti* allows public employers to restrict official duty speech in any manner and for any reason, regardless of the expression’s content or the employee’s motivation for speaking. As will be shown in the next section of this Article, the after-effects of both cases have been swift, dramatic, and far-

Sarbanes-Oxley Act for Employment Law, 79 WASH. L. REV. 1029, 1046–47 (2004) (noting the inconsistent levels of protection provided by state whistleblower statutes).

171. Pub. L. No. 101–12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.).

172. 5 U.S.C. § 2302(b)(8)(A) (2006).

173. *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1351 (Fed. Cir. 2001).

174. *Horton v. Dep’t of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995).

175. See James Sandler, *The war on whistle-blowers*, SALON.COM, Nov. 11, 2007, <http://www.salon.com/news/feature/2007/11/01/whistleblowers/> (reporting the findings of a joint study by the Center for Investigative Reporting and Salon magazine).

176. *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006).

reaching.

II. AFTER *HAZELWOOD* AND *GARCETTI*: WHAT REMAINS OF THE FIRST AMENDMENT INSIDE THE GOVERNMENT'S GATE?

Censorship has always been an issue for the high school student press; studies have shown that officials at many high schools exercised control over their student publications long before *Hazelwood* was decided.¹⁷⁷ Nevertheless, during the two decades following *Hazelwood*, anecdotal reports, empirical studies, and lower court holdings document the decision's significant chilling effect on public school student speech, especially with respect to student newspapers at both the high school and even college and university level. As troubling as *Hazelwood* has been in the schools, however, its effect on student speech may pale in comparison to the potential danger to public employee speech, as well as to the democratic process, presented by *Garcetti*. Although decided much more recently than *Hazelwood*, *Garcetti*'s government speech approach has already been applied by lower courts throughout the country to justify employer retaliation against public employees who report waste, fraud, or corruption in the course of their employment.¹⁷⁸ This Part explores the ramifications of these two decisions.

A. *Hazelwood*'s Effect on Student Media Outlets

To appreciate the chilling effect that *Hazelwood* has had on student journalism, it is important to realize that most cases involving official censorship of student publications never go to court. Quite simply, this is because the *Hazelwood* standard of review stacks the deck in favor of school officials, giving them a free hand to censor school-sponsored newspapers, magazines, and yearbooks in almost any way they please. Unless a student publication can prove by policy and practice that it qualifies as a public or open forum for student expression, a lawsuit protesting school censorship is almost certainly doomed to fail. Additionally, students may lack the support, resources, and motivation to pursue a legal action that has only a marginal chance of success. To illustrate, consider the following three examples of school censorship of student media, all of which occurred in January 2007:

When the St. Francis High School newspaper tried to publish a photograph that had hung for weeks in the Minnesota school's performing arts center, the principal threatened legal action and froze the newspaper's

177. See Salomone, *supra* note 23, 307–09 (summarizing studies indicating that school newspapers were often subject to prior review even before the *Hazelwood* decision).

178. See *infra* notes 260–329 and accompanying text.

funds.¹⁷⁹ The picture depicted a scene from the previous semester's school play in which a student held up what appeared to be a shredded American flag, but was actually a piece of a patterned tablecloth.¹⁸⁰ School district policy stated that "[o]fficial school publications are free from prior restraint by officials except as provided by law," and the school district cited *Hazelwood* as the applicable law—despite the newspaper's own mission statement, which provided that "*The Crier* is an open forum for student expression."¹⁸¹ Following the incident, the school district appointed a committee to review its publications policy while the student staff shut down the paper's web site, but continued to publish a print edition devoid of any controversial content.¹⁸² Ironically, the Cold-War-era play that started the controversy was a cautionary tale about the dangers of totalitarianism.¹⁸³

The principal of Indiana's Woodlan Junior-Senior High School implemented a mandatory prior review policy and declared himself the publisher of the student newspaper after it printed an editorial advocating tolerance for homosexuals.¹⁸⁴ Although the piece contained no vulgarities and produced no complaints from students or parents,¹⁸⁵ the school placed the newspaper's faculty adviser on administrative leave and forbade her from teaching journalism for three years.¹⁸⁶ Not surprisingly, the newspaper's former editor told the press that she had lost her interest in newspapers. "This experience has ruined journalism for me," she said.¹⁸⁷

That same month, the student staff of an Ohio high school magazine was ordered by the principal to rip two pages out of 2,100 copies of the December, 2006, issue because of a student-written column that criticized the school football team's losing record.¹⁸⁸ When the principal threatened

179. Dave Orrick, *Photo sparks free-speech feud*, PIONEER PRESS (St. Paul, Minn.), Jan. 19, 2007, at 1B.

180. *Id.*

181. Dave Orrick, *Outcome of Minnesota censorship remains unclear*, NAT'L SCHOLASTIC PRESS ASS'N TRENDS IN HIGH SCH. MEDIA, April 30, 2007, <http://www.studentpress.org/nsipa/trends/~stfranciscrier.html>.

182. *Id.*

183. *Id.*

184. Gene Policinski, *School: 'Tolerance' editorial will not be tolerated*, FIRST AMENDMENT TOPICS, Apr. 8, 2007, <http://www.firstamendmentcenter.org/commentary.aspx?id=18382>.

185. *Id.*

186. Student Press Law Center, *Ousted adviser of high school paper finds a new home at private school*, NEWS FLASH, Sept. 10, 2007, <http://www.splc.org/newsflash.asp?id=1600>.

187. Student Press Law Center, *Ind. Paper to rely on submissions from English classes*, NEWS FLASH, Sept. 12, 2007, http://splc.org/newsflash_archives.asp?id=1602&year=2007.

188. Associated Press, *Ohio parents object to principal's censorship of son's column*, FIRST AMENDMENT TOPICS, Jan. 9, 2007, <http://www.firstamendmentcenter.org/news.aspx?id=17985>.

to implement a prior review policy, the magazine's adviser cautioned that the student writers could lose all their independence if they fought too hard against the measure.¹⁸⁹ Ultimately, the principal dropped his insistence on a prior review policy, but instead eliminated the "open forum" reference from the magazine's publication statement, ensuring that *Hazelwood* would govern any future censorship clashes with the students.¹⁹⁰

According to records maintained by the Student Press Law Center (SPLC), January 2007 was not an atypical month with respect to censorship of student publications. The SPLC, a non-profit advocacy organization for student journalists that runs a free attorney referral service, has collected countless similar instances that are documented in the SPLC's online archives.¹⁹¹ In fact, since *Hazelwood* was decided in 1988, the SPLC has reported receiving an ever-increasing number of calls from both high school and college students, and their advisers, seeking legal assistance in connection with censorship issues.¹⁹² The SPLC has noted that "[a]lthough *Hazelwood* requires that school officials who choose to censor must provide a valid educational reason for their censorship, calls to the SPLC show many administrators have apparently interpreted the [*Hazelwood*] decision as providing them with an unlimited license to censor anything they choose."¹⁹³

Empirical studies, while providing what Professor Salomone in 1992 then characterized as only "mixed support" for the claim that *Hazelwood* dramatically increased incidents of high school censorship,¹⁹⁴ have nevertheless indicated that the decision has exerted a chilling effect on high school media.¹⁹⁵ As noted above, school officials have always attempted to control student publications, and as a result, *Hazelwood* may have simply validated the way publications already operated at many schools. That *Hazelwood* discouraged student journalists from covering, or expressing opinions on, controversial issues—or anything that could reflect poorly on the school—has garnered stronger empirical support. For example, a Minnesota study found that forty-three percent of responding advisers said

189. *Id.*

190. Student Press Law Center, *Princeton High School magazine will not be subject to prior review*, NEWS FLASH, Jan. 23, 2007, <http://www.splc.org/newsflash.asp?id=1411&year>.

191. Monthly reports from 2002 through the present detailing incidents of student media censorship are available at Student Press Law Center, Current News Flashes, <http://www.splc.org/newsflash.asp> (last visited Oct. 31, 2008).

192. Brief of the Student Press Law Center et al. as Amici Curiae Supporting Petitioners, *Hosty v. Carter*, 546 U.S. 1169 (2006) (No. 05-377), 2005 U.S. S.Ct. Briefs LEXIS 1480, at *14. By the end of 2003, the number of students or advisers who called the SPLC for legal help had grown by 331 percent since 1988. *Id.*

193. *Id.*

194. Salomone, *supra* note 23, at 307.

195. *Id.* See *infra* notes 196–201 and accompanying text.

they had chosen not to cover certain stories, or had reduced the amount of controversial coverage in their papers, to avoid censorship.¹⁹⁶ Similarly, a content analysis of editorials published by a Midwestern high school newspaper from 1980 through 1996 concluded that post-*Hazelwood* editorials were less likely to criticize school policy or discuss controversial issues.¹⁹⁷

A 1999 national study of 138 high school advisers and 84 principals confirmed that at most responding schools, student journalists themselves engaged in self-censorship.¹⁹⁸ This is hardly a surprising result, given that the same study revealed that three-fourths of the respondents' newspapers are censored, with faculty advisers doing more of the actual censoring than school principals.¹⁹⁹ Furthermore, eighty-seven percent of the principals and two-thirds of the advisers said they supported the statement that "the student newspaper [should advance] public relations for the school."²⁰⁰ As a result, *Hazelwood's* chilling effect likely extends far beyond the actual reported instances of censorship by discouraging student reporters from even trying to cover stories that could damage the image of the principal or the school.²⁰¹

Those cases involving high school journalists that actually reach the courts tend to focus on whether the student publication in question qualifies as a limited public forum, which removes it from *Hazelwood's* government speech analysis.²⁰² Courts generally assume that school-sponsored publications are not public forums unless the school has affirmatively indicated its intent to create a forum for student expression.²⁰³ The more

196. Sherry Ricchiardi, *Despite the Chilling Effect, There is Life After Hazelwood*, QUILL & SCROLL, Feb.–Mar. 1990, at 8.

197. Carol S. Lomicky, *Analysis of High School Newspaper Editorials Before and After Hazelwood School District v. Kuhlmeier: A Content Analysis Case Study*, 29 J.L. & EDUC. 463 (2000).

198. Lillian L. Kopenhaver & J. William Click, *Nation's high school newspapers: Still widely censored* (Aug. 2000) (paper presented at the Association for Education in Journalism and Mass Communication, Scholastic Journalism Division, annual convention), available at http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/16/63/6e.pdf.

199. *Id.*

200. *Id.* at 13.

201. See Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons From the "College Hazelwood" Case*, 68 TENN. L. REV. 481, 483 (2001) ("However well intended, in countless jurisdictions *Hazelwood* resulted in a tyranny by school administrators that has devastated high school journalism.").

202. See, e.g., *Romano v. Harrington*, 725 F. Supp. 687, 690–91 (E.D.N.Y. 1989) (holding that whether school was entitled to complete editorial control over student newspaper under *Hazelwood* was a triable issue when paper bore a disclaimer stating that it did not express the views of the school, the board of education, or the adviser, and was not produced as part of a class).

203. The Court in *Hazelwood* quoted *Cornelius v. NAACP Legal Def. & Educ.*

control that the school exercises over a publication and its student staff, the less likely that courts will find that the school intended the publication to be a limited or open forum.²⁰⁴ As some student editors have learned to their chagrin, public forum status is a gift bestowed upon high school publications by school officials, who are free to change their minds and reassert control at the first hint of controversy.²⁰⁵

Although the *Hazelwood* opinion drew a distinction between students' personal speech that a school must tolerate under *Tinker* and school-sponsored student expression that can be controlled as the school's own speech,²⁰⁶ some courts have allowed the latter category to bleed over into the former. As a result, the increased power of school authorities under *Hazelwood* can work to weaken the *Tinker* standard for personal speech, especially if one accepts the argument that the school endorses whatever student expression it fails to prohibit. The Supreme Court itself appeared to embrace this approach in *Morse*,²⁰⁷ where it had to admit that *Hazelwood* was not controlling precedent because "no one would reasonably believe" the student's BONG HITS 4 JESUS banner bore the school's imprimatur.²⁰⁸ In the next sentence, however, the Court characterized *Hazelwood* as "nevertheless instructive" because it "acknowledged that schools may regulate some speech 'even though the government could not censor similar speech outside the school'" and because it "confirm[ed] that the rule of *Tinker* is not the only basis for

Fund, 473 U.S. 788, 802 (1985) to emphasize that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988); see also *Planned Parenthood of Southern Nev. v. Clark County Sch. Dist.*, 941 F.2d 817, 819 (9th Cir. 1991) ("[W]e must assume that school-sponsored publications are nonpublic and that unless the schools affirmatively intend to open a forum for indiscriminate use, restrictions reasonably related to the school's mission that are imposed on the content of school-sponsored publications do not violate the first amendment.").

204. In determining that the student newspaper at issue did not qualify as a public forum for student speech, the *Hazelwood* Court emphasized that the newspaper was a curricular activity that was overseen by both a journalism teacher, who exercised significant control over content and production, and the principal, who gave final approval before publication. *Hazelwood*, 484 U.S. at 268–69. *Hazelwood* indicates that the more control a school exercises over a student publication, the more likely the publication will be deemed to constitute the school's own speech. *Id.* at 270–71.

205. See, e.g., Associated Press, *Prior review prevails in Wash. school district*, FIRST AMENDMENT TOPICS, Sept. 4, 2007, available at <http://www.firstamendmentcenter.org/news.aspx?id=18998> (reporting that student editors settled their lawsuit claiming that high school newspaper was a limited public forum after new principal implemented a prior review policy and removed "student forum" designation from paper's masthead).

206. *Hazelwood*, 484 U.S. at 270–71.

207. 127 S.Ct. 2618 (2007).

208. *Id.* at 2627.

restricting student speech.”²⁰⁹ As it had in *Hazelwood*, the Court then applied a reasonableness standard to conclude that the principal was justified in ordering the banner’s removal because “failing to act would send a powerful message to the students in her charge . . . about how serious the school was about the dangers of illegal drug use.”²¹⁰ In other words, given that the student’s banner could be interpreted as glorifying a dangerous, illegal activity, school officials were entitled to convey and enhance their own message by silencing the student’s.

Perhaps *Morse* created nothing more than a narrow exception to *Tinker* that applies only to student speech advocating illegal drugs, as Justice Alito claimed in his concurrence.²¹¹ If extended to other contexts involving student health or safety, however, the Court’s “toleration equals endorsement” reasoning could permit school officials to stifle student speech that contradicts any number of official school positions, including those on alcohol; reckless driving; sexual activity; racial, ethnic, and other types of discrimination; or even bullying.

Lower courts have also used *Hazelwood* to give school officials greater control over student speech that does not bear the school’s imprimatur. For example, the Sixth Circuit applied *Hazelwood* to uphold a school’s decision to disqualify a high school student council candidate whose campaign speech included a discourteous remark about an assistant principal and criticized the school administration’s “iron grip” over the students.²¹² Although no one would misattribute the student’s speech to the school, the court noted that speech was delivered in a school-sponsored assembly and election, and that *Hazelwood* recognized teaching civility as a legitimate pedagogical concern.²¹³ Additionally, a few courts (including, again, the Sixth Circuit) have used *Hazelwood* in conjunction with *Bethel* to uphold decisions by school administrators to forbid students from wearing t-shirts or patches that the school found offensive.²¹⁴ In all these instances, no

209. *Id.*

210. *Id.* at 2629.

211. Justice Alito, joined by Justice Kennedy, wrote that he endorsed the Court’s opinion on the understanding that:

(a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as “the wisdom of the war on drugs or of legalizing marijuana for medicinal use.”

Id. at 2636 (Alito, J., concurring).

212. *Poling v. Murphy*, 872 F.2d 757, 758–59 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990).

213. *Id.* at 762–63.

214. *Wentworth Reg’l Sch. Dist. v. Henderson*, 412 F. Supp. 2d 410, 419–20 (N.H. 2006) (citing *Hazelwood* and *Bethel* as establishing “the fundamental importance of the educational mission entrusted to the public school system, and the critical necessity of

reasonable member of the public could confuse the student's expression for speech belonging to, or endorsed by, the school; nevertheless these cases show how *Hazelwood's* rationale can be used to justify regulation of student speech beyond the realm of school-sponsored student publications.

Although the Court in *Hazelwood* expressly declined to address whether its holding would extend to student speech in higher education,²¹⁵ lower courts have relied on the decision to confirm school officials' ability to control students' curricular speech at both the K-12 and college and university levels.²¹⁶ The most disturbing extension of *Hazelwood* into the realm of post-secondary speech involves college and university administrators' attempts to use the decision to censor student publications. That college and university administrators try to control student publications in the same manner as high school principals is an unfortunate fact of life at many campuses.²¹⁷ In the pre-*Hazelwood* era, however, lower courts generally granted robust First Amendment rights to student journalists at public colleges and universities, in accord with Supreme Court rulings that emphasized the importance of free and open expression on college campuses.²¹⁸ Cases decided in the 1970s and early 1980s from

maintaining an orderly environment in which learning can take place" in case upholding suspension of student who wore a "No Nazi" patch), *vacated by, remanded by* 201 Fed. App'x 7 (1st Cir. 2006); *Boroff v. Van Wert City Bd. of Ed.*, 220 F.3d 465, 468–69 (6th Cir. 2000) (citing *Hazelwood* to support school's decision prohibiting student from wearing Marilyn Manson T-shirts because they contradicted the school's educational mission), *cert. denied*, 532 U.S. 920 (2001); *Baxter v. Vigo*, 26 F.3d 728, 738 (7th Cir. 1994) (upholding grant of qualified immunity to principal who forbid elementary student from wearing t-shirts critical of school, stating that *Hazelwood* and *Bethel* held that age is a relevant factor in assessing student speech rights).

215. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273–74 n.7 (1988) ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.")

216. *See, e.g., Axson-Flynn v. Johnson*, 356 F.3d 1277, 1289 (10th Cir. 2004) (applying *Hazelwood* test to uphold university's curricular requirement that drama major read certain script lines); *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918, 924 (E.D. Mo. 1999) (upholding school superintendent's ability to control content of high school band's marching show).

217. In January 2007, the President of the Society of Professional Journalists Christine Tatum noted that college journalists are "censored all the time." Press release by the Student Press Law Center, *SPJ, Student Press Law Center partner to support Grambling State journalism students* (Jan. 26, 2007), available at www.splc.org/newsflash_archives.asp?id=1420&year=2007. Student Press Law Center reports documenting incidents of college censorship are available at Student Press Law Center, <http://www.splc.org/report.asp> (last visited Oct. 31, 2008).

218. *See Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); *Healy v. James*, 408 U.S. 169, 187–88 (1972) ("The College, acting here as the instrumentality of the State, may not restrict speech . . . simply because it finds the views expressed by any group to be abhorrent."); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (recognizing the necessity of free inquiry on college and

the Fourth, Fifth, and Eighth Circuits upheld the First Amendment rights of students at state institutions to publish literary magazines and student newspapers free from administrative control, with little or no mention of the public forum doctrine.²¹⁹ These cases recognized students' First Amendment rights even when the student publications at issue received college or university funding; as the Fifth Circuit noted, "[t]he state is not necessarily the unrestrained master of what it creates and fosters."²²⁰

Following the *Hazelwood* decision, however, courts changed their analysis and began evaluating instances of college and university media censorship in terms of public forum doctrine.²²¹ Because the *Hazelwood* opinion noted that the high school newspaper in question was not a public forum, lower courts concluded that the way to avoid *Hazelwood*'s rational basis test at the post-secondary level was to rely on the greater levels of control usually granted to college and university, as opposed to high school, journalists over their respective publications.²²² As long as the college or university media outlet qualified as a limited public forum for student expression, courts applied strict scrutiny analysis rather than the "reasonably related to a legitimate pedagogical purpose" standard of review commonly referred to as the *Hazelwood* test, and the student journalists would prevail.²²³ When college and university students won under public

university campuses, and noting that "[t]eachers and student must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die").

219. See *Stanley v. McGrath*, 719 F.2d 279, 282 (8th Cir. 1983) (holding that a university's board of regents could not withdraw or reduce the student newspaper's funding system in response to controversial content); *Schiff v. Williams*, 719 F.2d 257, 261 (5th Cir. 1975) (holding that First Amendment prohibited university president from firing student newspaper editors in an attempt to improve the publication's quality); *Joyner v. Whiting*, 477 F.2d 456, 462 (4th Cir. 1973) (holding that college president violated the First Amendment by withdrawing financial support for the student newspaper in response to its content); *Bazaar v. Fortune*, 476 F.2d 570, 574-75 (5th Cir. 1973) (drawing analogy to "open forum" cases to rule that the First Amendment prohibited university officials from withholding student literary magazine that contained offensive language). *But cf.* *Husain v. Springer*, 494 F.3d 108, 121-25 (2d Cir. 2007) (characterizing these pre-*Hazelwood* cases as having "adopted the position that the establishment of a student media outlet . . . necessarily involves the creation of a limited public forum").

220. *Bazaar*, 476 F.2d at 575.

221. See, e.g., *Lueth v. St. Clair Cmty. Coll.*, 732 F. Supp. 1410, 1415-16 (E.D. Mich. 1990) (determining that community college newspaper was a limited public forum to hold that dean could not exclude advertisement for nude dancing club).

222. See, e.g., *Husain*, 494 F.3d at 121 (noting that courts grant First Amendment protection to student media outlets at public colleges and universities because those outlets "generally operate as 'limited public fora,' within which schools may not disfavor speech on the basis of viewpoint").

223. See, e.g., *id.* at 125-28 (applying strict scrutiny analysis to invalidate decision of public college president to restrict content of student newspaper that qualified as a limited public forum).

forum analysis, commentators sometimes noted their approval in words to the effect that the court had “refused to apply *Hazelwood* to a college publication.”²²⁴

That characterization fails to recognize that by applying public forum analysis to the speech rights of college and university journalists, courts are indeed using an approach that is perfectly consistent with the *Hazelwood* decision. *Hazelwood* held that students who engage in school-sponsored, curricular speech that bears the imprimatur of the school are acting as mouthpieces of the school itself. The students have virtually no First Amendment rights because the speech is not their own, but rather belongs to the school. *Hazelwood* also implied that if a school so desires, it can create a public forum for student expression where student speech rights must be respected; however, public forum doctrine establishes that the school retains the right to set the boundaries of, or re-exert command over, the forum if it so desires.²²⁵ This means that even if a high school or college or university grants its students enough authority over a publication to create a limited public forum for student expression, the government—and not the Constitution—determines the outcome. In other words, the opposite of “government speech” (outside the First Amendment) at the high school level is not “individual speech” (protected by the First Amendment) at the college level; rather, the measure of First Amendment protection enjoyed by college journalists depends on how much student control of campus publications the college is willing to allow. Under this analysis, the First Amendment would not prevent college and university officials from establishing a “student” publication over which they retain sufficient authority that it remains the institution’s own speech.

For example, the Sixth Circuit Court of Appeals issued an en banc decision in *Kincaid v. Gibson*²²⁶ that was hailed by some commentators as refusing to extend *Hazelwood* to college and university media,²²⁷ when in fact the court applied a consistent approach but ruled in favor of the students. In *Kincaid*, the court held that Kansas State University (KSU)

224. See, e.g., Daniel A. Applegate, Note, *Stop the Presses: The Impact of Hosty v. Carter and Pitt News v. Pappert on the Editorial Freedom of College Newspapers*, 56 CASE W. RES. L. REV. 247, 249 (2005) (stating that before the Seventh Circuit’s decision in *Hosty*, “[n]either the Supreme Court nor any other federal circuit court has extended *Hazelwood* to cover college publications”).

225. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 n.7 (1983) (noting that although the state may create designated public forums “for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects,” the state “is not required to indefinitely retain the open character of the facility”).

226. 236 F.3d 342 (6th Cir. 2001) (en banc).

227. See, e.g., Ryan D. Pittman, Note, *The College Student Media as House Organ: Reflections on an Off-Key Decision in Hosty v. Carter*, 44 HOUS. L. REV. 131, 148 (2007) (citing *Kincaid* as having “explicitly declined to use the *Hazelwood* framework when analyzing the rights of the college student media”).

officials violated the First Amendment when they confiscated the student-produced yearbook because they disliked its color, theme, and content.²²⁸ The court cited *Hazelwood* to reject the students' argument that the First Amendment protected student speech at the college and university level without regard to the public forum doctrine, stating that at least in the context of a student-produced college yearbook, forum analysis was the "appropriate framework."²²⁹ The court noted that KSU policy placed control of the yearbook's content in the student editors' hands, and in practice, the University limited the adviser's role and allowed students to make editorial decisions with little oversight.²³⁰ The yearbook's purpose was expressive, as opposed to curricular, the court said, because the yearbook was not a graded classroom assignment.²³¹ Finally, the court looked to the context, noting that a college or university is expected to be a "marketplace of ideas" and that the yearbook's readers were likely to be more mature than the high school newspaper recipients in *Hazelwood*.²³² As a result, the court found that the University had created the yearbook as a limited public forum, and applied strict scrutiny to invalidate the University officials' actions as "rash, arbitrary" and "smack[ing] of viewpoint discrimination."²³³

Unlike the students in *Hazelwood*, these post-secondary yearbook editors won their case, but not necessarily because the court viewed their First Amendment rights as being substantially stronger than those of their high school counterparts. If the institution previously had exercised control over the yearbook, or had adopted a prior review policy, would the differences in mission and student age between college and university students and high school students have justified, by themselves, the court's public forum determination?²³⁴ *Kincaid* did not address this question; the court stated in a footnote that "[b]ecause we find that a forum analysis requires that the yearbook be analyzed as a limited public forum . . . we agree with the parties that *Hazelwood* has little application to this case."²³⁵

Four years later, an en banc panel of the Seventh Circuit provided its

228. *Kincaid*, 236 F.3d at 345.

229. *Id.* at 347–48. In a footnote, the court specified that its decision to apply the public forum doctrine to a student-produced yearbook "has no bearing on the question of whether and the extent to which a public university may alter the content of a student newspaper," *id.* at 348 n.6, suggesting that the court might have been willing to break out of public forum analysis in a case involving censorship of a college or university newspaper.

230. *Id.* at 349–51.

231. *Id.* at 351–52.

232. *Id.* at 352.

233. *Id.* at 356.

234. See Peltz, *supra* note 201, at 536–37 (warning that *Kincaid* could actually "provide[] a roadmap for university administrators to seize control of their student media" by establishing student media outlets as non-public forums).

235. *Kincaid*, 236 F.3d at 346 n.5.

answer in *Hosty v. Carter*,²³⁶ where it concluded that when school officials act to impose journalistic standards of quality or disassociate the school with controversial positions, “there is no sharp difference between high school and college papers.”²³⁷ *Hosty* set the risks posed by the government speech/limited public forum dichotomy to the First Amendment rights of college and university journalists in sharp relief. There, the dean of students at Governors State University imposed a prior review policy on the student newspaper, *The Innovator*, after it published articles that criticized various administrative decisions.²³⁸ The Seventh Circuit began by identifying *Hazelwood* as the controlling case, stating that nothing therein suggested the existence of an “on/off switch: high school papers reviewable, college papers not reviewable.”²³⁹ Rather, *Hazelwood* established that only those student newspapers created as limited public forums could rely on the First Amendment to escape official control, and speaker’s age, the court said, played no role in determining public forum status.²⁴⁰ Nor did the fact that students produced *The Innovator* as an extracurricular activity necessarily mean that it qualified as a limited public forum; the court cited *Rust* and *National Endowment for the Arts v. Finley*²⁴¹ for the proposition that state-subsidized expression can be subject to government control without reference to the age of the speaker or the curricular status of the speech.²⁴²

Noting that *The Innovator* relied on student activity fees for its funding, the court summarized *Hazelwood* as holding that “[w]hen a school regulates speech for which it also pays, . . . the appropriate question is whether the ‘actions are reasonably related to legitimate pedagogical concerns.’”²⁴³ The court then posed the following hypothetical: if the institution paid, or offered course credit to, student journalists to write stories for its alumni magazine, would those students have any right to control which stories the magazine ultimately published?²⁴⁴ Of course not, the court answered, because the magazine would belong to the institution and the stories—although written by students—would be government speech under the Court’s decision in *Johanns*.²⁴⁵ Citing *Johanns*, the court supported its conclusion by explaining that just because “institutions can

236. 412 F.3d 731 (7th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1169 (2006).

237. *Id.* 735.

238. *Id.* at 732–33.

239. *Id.* at 734.

240. *Id.*

241. 524 U.S. 569 (1998).

242. *Id.* at 735 (citing *Rust v. Sullivan*, 500 U.S. 173 (1991), and *Finley*, 524 U.S. 569).

243. *Id.* at 734.

244. *Id.* at 736.

245. *Id.* (citing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560–67 (2005)). See *supra* notes 10–17 and accompanying text.

speak only through agents does not allow the agents to assume control and insist that submissions graded D-minus appear under the University's masthead."²⁴⁶

The determinative issue, then, became whether the University established *The Innovator* as a public forum for student speech, or whether officials retained sufficient control over the newspaper so that it more closely resembled the hypothetical alumni magazine.²⁴⁷ If the former, the administration's prior review policy would be subject to strict scrutiny; if the latter, the court said that under *Hazelwood*, University administration need only have "legitimate pedagogical reasons" to censor the newspaper.²⁴⁸ The age difference between high school and college and university students might properly be considered, the court allowed, in determining the reasonableness of the administration's asserted justification, although the court noted that "many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools."²⁴⁹ Given the procedural posture of the case, the court held that the evidence, taken in the light most favorable to the students, would permit a reasonable jury to find that *The Innovator* operated as a limited public forum.²⁵⁰

While other courts had applied a public forum analysis to collegiate press cases, *Hosty* was the first to hold that high school newspapers and college and university newspapers are basically indistinguishable for First Amendment purposes. After the Supreme Court refused to review the Seventh Circuit's decision, some commentators predicted that it spelled the end of college and university journalism;²⁵¹ others countered that *Hosty* would have little effect because most college and university papers operate as limited public forums where administrators allow student journalists to make content choices and exercise editorial control.²⁵² The latter view, of course, misses the point that under *Hosty*, college and university journalists—even those whose publications qualify as limited public forums—have only those speech rights that their respective institutions

246. *Id.* at 736.

247. *Id.* at 737.

248. *Id.*

249. *Id.* at 734.

250. *Id.* at 737.

251. In his *Hosty* dissent, Judge Evans warned that the majority opinion "gives the green light to school administrators to restrict student speech in a manner inconsistent with the First Amendment." *Id.* at 742 (Evans, J., dissenting). See also Pittman, *supra* note 227, at 134 (predicting that *Hosty* will encourage college and university administrators to censor student media, and will impede the education of future journalists).

252. See, e.g., Jeff Sklar, Note, *The Presses Won't Stop Just Yet: Shaping Student Speech Rights in the Wake of Hazelwood's Application to Colleges*, 80 S. CAL. L. REV. 641, 642 (2007) (stating that after *Hosty*, "most student publications probably will not face a heightened risk of administrative interference because they are public forums").

deign to provide. *Hosty* implies that merely by enacting prior review policies and exercising authority over the college and university press, administrators can turn even extracurricular student publications into government speech, regardless of clear contextual differences between post-secondary institutions and high schools.

This point was certainly not lost on perceptive college administrators, who happily realized after *Hosty* that they held a stronger position vis-à-vis the student press than they had previously supposed. For example, in 2007, officials at Grambling State University in Louisiana cited *Hosty* as justification for suspending publication of its student newspaper, *The Gramblinite*, for what the student editor described as negative news coverage, even though Louisiana is outside the Seventh Circuit.²⁵³ Similarly, only ten days after *Hosty* was decided, legal counsel for the California State University system (which is also outside the Seventh Circuit) sent a memo to CSU presidents stating that *Hosty* “appears to signal that CSU campuses may have more latitude than previously believed to censor the content of subsidized student newspapers.”²⁵⁴ Had CSU presidents used general counsel’s tip to exert more control over their student press, the resulting impact would have been significant; according to a 2005 SPLC report, CSU’s 400,000 students made it the largest college system in the country.²⁵⁵

This threat to student speech in California was ultimately defused in 2006 when, as a result of both *Hosty* and the CSU legal memorandum, the state legislature prohibited public college and university administrators from disciplining students for on-campus speech that would be protected by either the federal or California constitutions outside of campus.²⁵⁶ Both the Oregon and the Illinois state legislatures also responded to *Hosty* by increasing state law protections for student publications.²⁵⁷ Over the years, so-called “anti-*Hazelwood*” laws have been passed in several states in a legislative attempt to ameliorate the decision’s effects with respect to

253. See Student Press Law Center Press Release, *supra* note 217.

254. Memorandum from Christine Helwick, Cal. State Univ. Office of Gen. Counsel, to CSU Presidents 2 (June 30, 2005), <http://www.splc.org/csuo/memo.pdf>.

255. See Evan Mayor, *Memo Linking California with Hosty Decision Worries Students*, STUDENT PRESS LAW CENTER, Sept. 15, 2005, <http://www.splc.org/newsflash.asp?id=1064>.

256. CAL. EDUC. CODE § 66301 (West 2003 & Supp. 2007). For a discussion of the reasons behind the legislation, see Assemb. Comm. On Judiciary, AB 2581 Bill Analysis 2 (May 9, 2006), available at http://info.sen.ca.gov/pub/05-06/bill/asm/ab_2551-2600/ab_2581_cfa_20060505_165444_asm_comm.html (stating that former California Assembly Member Leland Yee introduced the bill in response to *Hosty* and the CSU memorandum). California also has a statute that provides students at private, post-secondary institutions with some protection against disciplinary action for their speech or expression. See CAL. EDUC. CODE § 94367 (2002).

257. See College Campus Press Act, 110 ILL. COMP. STAT. 13/1-97 (2008); Oregon Student Free Expression Law, OR. REV. STAT. § 351.649 (2007).

public high school students within those jurisdictions.²⁵⁸ However, states with student press rights laws are clearly the exception, not the rule.

Since it was decided in 1988, *Hazelwood* has lived up to Justice Brennan's fear that it would "denude[] high school students of much of the First Amendment protection that *Tinker* itself prescribed."²⁵⁹ Even worse, the *Hazelwood* government speech analysis has had a dangerous tendency to spread beyond its original high school, curricular context. Courts today grant First Amendment protections to school-subsidized student publications at both the high school and college level only if those publications qualify as state-created limited public forums. Colleges and universities are more likely than high schools to turn control of publications and other expressive activities over to students; nevertheless, in both instances, the law assumes that student speech rights depend on the state's magnanimity. While this might be rationalized with respect to K-12 students based on their age and immaturity, it becomes less justifiable when applied to older, more mature college and university students. As will be seen in the next section, however, lower courts applying *Garcetti* have used the same government speech rationale to deny First Amendment protection to adult public employees who speak pursuant to their job duties, effectively stripping them of their citizen status altogether.

B. *Garcetti*'s effect on public employee speech

Before *Garcetti*, lower courts generally found that internal, job-related speech by public employees was protected by the First Amendment when it involved allegations of corruption, mismanagement or other malfeasance by a public employer.²⁶⁰ Most courts treated employees who reported misconduct up the chain of command as citizens, not mere employees, even when their revelations flowed from their job descriptions or applicable law.²⁶¹ Work-related speech that stemmed from policy disagreements or personal disputes between employees and their superiors, on the other hand, typically remained outside the First Amendment. In some instances, courts ruled that employee speech about mere workplace grievances failed to meet *Connick*'s public concern threshold;²⁶² in others, even if the speech

258. Anti-*Hazelwood* laws have been enacted in Arkansas, California, Colorado, Iowa, Kansas, and Massachusetts. For citations to these statutes, as well as a good summary of their provisions, see Student Press Law Center, *Understanding student free-expression laws*, Legal Analysis, Fall 2007, available at http://www.splc.org/report_detail.asp?id=1351&edition=43.

259. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 290 (1988) (Brennan, J., dissenting).

260. See *supra* notes 139–142 and accompanying text.

261. *Id.*

262. See, e.g., *Carreon v. Ill. Dept. of Human Servs.*, 395 F.3d 786, 792–94 (7th Cir. 2005) (mental health employees' complaints about office temperatures, transfers, and co-workers were internal workplace grievances and not matters of public concern);

addressed matters of public concern, it was outweighed in the *Pickering* balance by the employer's interest in preventing disruption, insubordination, or simple incompetence.²⁶³ In the pre-*Garcetti* world, public employees qualified as "citizens" when their work-related speech advanced the public interest in government accountability, but remained "employees" when that speech furthered only selfish concerns.

By holding that public employees forfeit their rights as citizens when they speak pursuant to their job duties, *Garcetti* fundamentally altered how the lower courts address First Amendment retaliation claims. Since *Garcetti*, at least eight federal circuits have held that public employees who report allegations of mismanagement, fraud or misconduct to their superiors in the course of their employment have no First Amendment protection against their employers' retaliatory actions.²⁶⁴ Only when the employee also communicates the wrongdoing to someone far enough outside the chain of command will the speech retain any chance of First Amendment protection, and then only if the adverse employment action can be attributed to the protected—as opposed to the duty-based—speech.²⁶⁵

Farhat v. Jopke, 370 F.3d 580, 593 (6th Cir. 2004) (school custodian's letter to union president expressing complaints about school officials, while made in the course of employment, was personal job grievance and not a matter of public concern).

263. See, e.g., Latham v. Office of the Attorney Gen., 395 F.3d 261, 265–67 (6th Cir. 2005), cert. denied, 546 U.S. 935 (2005) (concluding that state attorney's letter to the Attorney General about departmental operations dealt with a public concern but constituted insubordination); Lewis v. Cowen, 165 F.3d 154, 164–65 (2d Cir. 1999), cert. denied, 528 U.S. 823 (1999) (holding that lottery chief's refusal to speak in favor of policy change presented a matter of public concern, but was unprotected as disruptive and insubordinate).

264. See, e.g., Foraker v. Chaffinch, 501 F.3d 231, 241–42 (3d Cir. 2007) (reporting dangerous conditions at firing range to superiors and state auditor was among job duties of reassigned state troopers); Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 694 (5th Cir. 2007) (revealing financial improprieties in athletic accounts to principal and office manager held to be within job duties of terminated athletic director); Sigsworth v. City of Aurora, 487 F.3d 506, 510–11 (7th Cir. 2007) (alerting police chief to suspicions of corruption in drug task force within job duties of former task force investigator); Bradley v. James, 479 F.3d 536, 538 (8th Cir. 2007) (telling investigating officer that police chief was intoxicated was within job duties of fired officer); Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1329–31 (10th Cir. 2007) (reporting fraudulent Head Start enrollments to school board president and federal authorities was within job duties of demoted school superintendent); Vila v. Padron, 484 F.3d 1334, 1340 (11th Cir. 2007) (raising objections regarding fraudulent practices to college president held within job duties of former college vice president); Wilburn v. Robinson, 480 F.3d 1140, 1149–51 (D.C. Cir. 2007) (alleging discrimination within personnel office held part of job duties of former interim director); Freitag v. Ayers, 468 F.3d 528, 546 (9th Cir. 2006) (writing internal memos regarding inmates' sexual harassment and exhibitionist behavior considered within job requirements of terminated prison guard).

265. See, e.g., Casey, 473 F.3d at 1334 (holding that school superintendent acted as a citizen when she reported open meeting violations to state attorney general, but

The sea change wrought by *Garcetti* was clearly illustrated by a series of cases from the Seventh Circuit all involving former Milwaukee Police Chief Arthur L. Jones. In 2002, the Seventh Circuit ruled in *Delgado v. Jones*²⁶⁶ that a detective's internal memo about alleged criminal activities involving one of the chief's friends was protected speech even though the officer wrote the memo as part of his job.²⁶⁷ The court distinguished an earlier decision that held that internal memos written as part of the "routine discharge of assigned functions, where there is no suggestion of public motivation" did not amount to citizen speech.²⁶⁸ In *Delgado*, the court recognized that a public servant's job responsibilities can overlap with his or her obligations as a citizen—and when they do, the employee's speech should retain its First Amendment protection.²⁶⁹ According to the court, the detective's memo both demonstrated his public purpose in reporting illegal conduct, and went beyond the routine by reflecting his independent judgment and discretion.²⁷⁰ Four years later, the Seventh Circuit again distinguished discretionary employee speech from routine duty speech in another pre-*Garcetti* First Amendment retaliation case where the court ruled against Chief Jones, this time because he demoted a police officer who revealed financial and other improprieties in connection with one of the chief's pet projects.²⁷¹

Based on these Seventh Circuit precedents, Chief Jones looked like a three-time loser when he was again accused of unlawfully retaliating against two Milwaukee vice squad officers in 1998.²⁷² In that case, plaintiff officers Kolatski and Morales were demoted to street patrol after they internally reported allegations that Jones and his deputy chief, Monica Ray, had knowingly harbored Ray's fugitive brother.²⁷³ In the course of their investigation, Kolatski had repeated to Morales information from a potential witness who allegedly saw Jones, Ray, and Ray's brother together at Ray's home.²⁷⁴ After the brother's arrest, Morales provided the same

remanding to determine whether retaliation resulted from her protected or unprotected speech).

266. *Delgado v. Jones*, 282 F.3d 511 (7th Cir. 2002), *cert. denied*, 543 U.S. 925 (2004).

267. *Id.* at 519–20.

268. *Id.* at 519 (distinguishing *Gonzales v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001)).

269. *Id.*

270. *Id.*

271. *Miller v. Jones*, 444 F.3d 929, 936–38 (7th Cir. 2006) (holding that a police chief unlawfully demoted the executive director of Police Athletic League after he internally disclosed financial and other improprieties surrounding one of the chief's proposed projects).

272. *See Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 905 (2008).

273. *Id.* at 592–95.

274. *Id.* at 593.

information to the assistant district attorney assigned to the case.²⁷⁵ Morales also testified in a civil deposition (in another retaliation case against Chief Jones) that he believed Jones demoted Kolatski because of the brother's arrest.²⁷⁶ In 2005, a jury found that Jones and Ray illegally transferred the officers in violation of their First Amendment rights, and awarded the plaintiffs compensatory and punitive damages.²⁷⁷

Jones and Ray appealed the jury verdict, and by the time the case reached the Seventh Circuit in 2007, the Supreme Court had issued its ruling in *Garcetti*.²⁷⁸ Chief Jones' luck now took a dramatic turn for the better, as the Seventh Circuit's main focus changed in response to the high court's decision. No longer did it matter that officer Morales exercised discretion in providing information to the assistant district attorney, nor that both officers furthered the public interest with their speech rather than just their personal concerns. *Garcetti* reduced the inquiry to a simple question of whether public employees spoke as part of their official responsibilities, and the Seventh Circuit held that the vice officers had a duty to apprise their comrades, as well as the district attorney's office, of all pertinent information concerning an investigation.²⁷⁹ To foreclose all doubt about the official nature of the officers' speech, the court pointed out that all Milwaukee police officers operated under a blanket obligation to report potential crimes.²⁸⁰ Kolatski and Morales were caught in a trap that Chief Jones could spring at his pleasure: they could be demoted or disciplined whether they opted to report the allegations or keep silent. Only officer Morales retained a chance to ultimately prevail, based on his auspicious decision to testify at the civil deposition. Although the court noted that Morales testified *about* his job responsibilities, his job did not *require* him to testify.²⁸¹ The court therefore remanded the case for a new trial to determine whether Morales' demotion resulted from his protected deposition testimony, or his unprotected allegations of misconduct to the district attorney's office.²⁸²

Officer Morales' deposition testimony illustrates the one escape route

275. *Id.* at 594.

276. *Id.* at 595.

277. *Id.*

278. *Id.* at 596 n.2.

279. *Id.* at 596–98.

280. *Id.* at 597.

281. *Id.* at 598. Citing *Morales*, the Third Circuit has expanded this exception to hold that a public employee who testifies truthfully in court pursuant to his or her job duties is entitled to First Amendment protection from retaliation because “the employee is acting as a citizen and is bound by the dictates of the court and the rules of evidence.” *Reilly v. City of Atl. City*, 532 F.3d 216, 230–31 (3d Cir. 2008). *But see Tamayo v. Blagojevich*, 526 F.3d 1074, 1092 (7th Cir. 2008) (holding that an employee's testimony at a legislative hearing was not protected because it “was given as an employee and not as a citizen”).

282. *Morales*, 494 F.3d at 598.

public employees can use to avoid application of *Garcetti*'s per se rule: did the employee speak as part of his or her job? Just as Justice Souter predicted in his *Garcetti* dissent,²⁸³ this question has become the focal point of post-*Garcetti* employee retaliation litigation as a result of the Court's failure to clarify how courts are to determine the scope of an employees' "official duties." In *Garcetti*, the Court merely instructed lower courts to conduct a "practical" inquiry into whether the speech at issue falls into the duties the employee "actually is expected to perform," and cautioned courts against over-reliance on formal job descriptions.²⁸⁴ Although some commentators suggested that this definitional deficiency would give lower courts an opportunity to curb *Garcetti*'s reach,²⁸⁵ the following analysis of appellate decisions shows that the federal courts of appeals, at least, have defined duty speech broadly rather than narrowly.

Given the lack of instruction from the Supreme Court, how have lower courts determined the extent of public employees' job duties in applying *Garcetti*? In a surprising number of cases, federal appellate courts have relied on employees' own admissions that they spoke as part of their job responsibilities. For example, a narcotics investigator who reported evidence of task force corruption to the police chief stated in his complaint that he acted pursuant to his obligation to maintain communication and cooperation between drug agencies.²⁸⁶ In denying the investigator's retaliation claim, the court noted that his "allegations indicate that in reporting his suspicions, he was merely doing what was expected of him as a member of the task force."²⁸⁷ In another case, a school consultant alleged in a letter to a school commissioner that the district engaged in fraudulent and illegal procedures to award disability benefits.²⁸⁸ Holding that the consultant spoke as an employee and not a concerned citizen, the court relied on the employee's letter to his employer where he stated that "I consider any time I spend addressing this matter with you or the agency to be services I am giving the state as a consultant."²⁸⁹

Along with employees' own admissions, appellate courts have also looked to applicable law to delineate the scope of an employee's official responsibilities. A university financial aid counselor, for example, who

283. *Garcetti v. Ceballos*, 547 U.S. 410, 431 n.2 (2006) (Souter, J., dissenting).

284. *Id.* at 425.

285. See, e.g., Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in Garcetti as Further Evidence of Connick's Unworkable Employee/Citizen Speech Partition*, 8 J.L. Soc'y 45, 51 (2007) (predicting that the *Garcetti* Court's failure to define employment duties could "open[] the door for lower courts to evade *Garcetti* or at least mitigate its potential harshness").

286. *Sigsworth v. City of Aurora*, 487 F.3d 506, 510-11 (7th Cir. 2007).

287. *Id.* at 511.

288. *Bailey v. Dep't. of Elementary and Secondary Educ.*, 451 F.3d 514, 517 (8th Cir. 2006).

289. *Id.* at 520.

was terminated after reporting improprieties in a supervisor's handling of federal funds to the university president, was found by the Eleventh Circuit to have acted within the scope of her employment.²⁹⁰ The court noted that not only had the plaintiff admitted in a deposition that reporting fraud fell within her employment duties, but that Department of Education guidelines also required financial aid counselors to reveal improper financial aid awards.²⁹¹ A state audit later confirmed the school had engaged in serious noncompliance with federal regulations, and the supervisor in question ultimately resigned.²⁹² In another case, the Tenth Circuit held that a school superintendent who reported improper Head Start enrollments to the school board president acted pursuant to her job duties, both as admitted by the superintendent and as imposed by federal law.²⁹³ The court nevertheless held that a jury question existed as to whether the superintendent had been fired for alerting the state attorney general that the school board met in violation of the open meetings act.²⁹⁴ The court reasoned that while the superintendent acted as an employee when she informed the board about meeting irregularities, she had no employment duty to notify the attorney general and therefore acted as a citizen to that limited extent.²⁹⁵

Courts have also looked to job descriptions, job evaluations, or actual orders issued by employers, to determine the extent of an employee's job responsibilities. In a case where a district worker was terminated after accusing the personnel office of racial discrimination, the D.C. Circuit relied on the plaintiff's formal job description, as well as her own statements, to conclude that because eliminating racial discrimination was within her job responsibilities, she spoke as an employee.²⁹⁶ State troopers argued unsuccessfully to the Third Circuit that they acted outside the scope of their employment when they notified their supervisor and the state auditor about safety hazards at the state weapons training unit.²⁹⁷ The troopers insisted that their job duties were limited to teaching students how to fire weapons; however, the court looked to their annual performance evaluations to conclude that because they had previously been involved in workplace safety issues, their revelations constituted unprotected duty speech.²⁹⁸ In a Sixth Circuit case, a park ranger who complied with her employer's instructions to give honest answers to an outside consultant about departmental morale argued that she was then unlawfully terminated

290. *Battle v. Bd. of Regents*, 468 F.3d 755, 757–62 (11th Cir. 2006).

291. *Id.* at 761–62.

292. *Id.* at 759.

293. *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1329–31 (10th Cir. 2007).

294. *Id.* at 1332–33.

295. *Id.*

296. *Wilburn v. Robinson*, 480 F.3d 1140, 1150–51 (D.C. Cir. 2007).

297. *Foraker v. Chaffinch*, 501 F.3d 231, 241–43 (3d Cir. 2007).

298. *Id.* at 238, 241–42.

for her responses.²⁹⁹ Although the court admitted that the firing “may seem highly illogical or unfair,” it held that under *Garcetti*, the ranger spoke pursuant to her employer’s orders and therefore in connection with her official duties.³⁰⁰

In his *Garcetti* dissent, Justice Souter objected that the Court’s holding would enable savvy employers to enlarge the range of unprotected duty speech by saddling their workers with a general obligation to report untoward activities,³⁰¹ a warning that was given little credence by Justice Kennedy and the majority.³⁰² As it turns out, Justice Souter’s fear appears to have been well-founded. Most lower courts have been quick to conclude that employees who have been charged either by law or by their employer with broad compliance activities act within the scope of their employment whenever they report malfeasance.³⁰³ For example, a community college’s vice president of legal affairs was held to have spoken within her job responsibilities when she reported illegal and fraudulent acts by the college’s president, as well as violations of the public meetings law, to people within the institution.³⁰⁴ The Eleventh Circuit reasoned that pursuant to her job title, the vice president had a comprehensive duty to advise the college on any and all legal matters.³⁰⁵ And in what surely must be the most expansive definition of official-duty speech yet devised, a federal district court held that because Georgia law imposes an obligation to act in the employer’s best interests on all employees, the executive director of the Atlanta Workforce Development Agency spoke as an employee, not a citizen, when he revealed gross financial mismanagement to his superiors.³⁰⁶ Based on this ruling, any public employee in Georgia who internally discloses official misconduct—regardless of his or her

299. *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 542 (6th Cir. 2007).

300. *Id.* at 545.

301. *Garcetti v. Ceballos*, 547 U.S. 410, 431 n.2 (2006) (Souter, J., dissenting).

302. *Id.* at 424 (stating that the Court “reject[s] . . . the suggestion that employers can restrict employees’ rights by creating excessively broad job descriptions,” and calling instead for a “practical” inquiry).

303. For a rare example of a court taking a narrower approach, see *Marable v. Nitchman*, No. 06-35940, 2007 U.S. App. LEXIS 29741, at *22 n.13 (9th Cir. Dec. 26, 2007) (holding that chief ferry engineer had no official duty to report financial improprieties of his superiors, despite broad language in the employment manual).

Another federal appeals court has held that the existence of a written policy requiring employees to report unlawful conduct did not automatically justify summary judgment for a public employer faced with a retaliation claim. See *Williams v. Riley*, No. 07-60252, 2008 U.S. App. LEXIS 8990 (5th Cir. Apr. 25, 2008) (holding that whether jailers had an official duty to report witnessing another officer beat an inmate presented a genuine issue of material fact despite a sheriff’s department written policy requiring officers to disclose unlawful conduct).

304. *Vila v. Padron*, 484 F.3d 1334, 1340 (11th Cir. 2007).

305. *Id.*

306. *Springer v. City of Atlanta*, No. CIVA 1:05CV0713 GET, 2006 U.S. Dist. LEXIS 54326, at *9-*10 (N.D. Ga. Aug. 4, 2006).

actual assigned tasks—is potentially fair game for retaliation based on that speech, unless he or she can claim protection under an applicable whistleblower statute.

Courts have gone so far as to infer that employees have an obligation to report misconduct or mismanagement even when such a duty has not explicitly been assigned either by law or the employer. In a Fifth Circuit case, a high school coach was terminated after he disclosed financial irregularities in the athletic department's accounts in a series of memos to the district's office manager.³⁰⁷ Even though the coach was not required to write the memos as part of his job, the court theorized that accurate account information was needed to properly execute his job functions; therefore, the court held that the memos constituted speech as an employee and not a citizen.³⁰⁸ Similarly, the Tenth Circuit ruled that although a lab technician who raised concerns about the accuracy of a drug screening test and arranged a confirmation test did not act pursuant to her explicit job requirements, her actions nevertheless amounted to “the type of activities she was paid to do.”³⁰⁹ By extension, then, the court held that she spoke as an employee, without the protection of the First Amendment.³¹⁰

A public employee's off-the-job expression can also amount to official duty speech, according to a Tenth Circuit case involving a school principal who directed teachers not to associate with one another or discuss workplace concerns outside the school.³¹¹ Defining job-related speech as any expression that “reasonably contributes to or facilitates the employee's performance of the official duty,” the court held that teachers' discussions of student behavior, school curriculum, and pedagogical concerns constituted employee speech for which they could be disciplined under *Garcetti*, even though those discussions occurred off school premises and outside of school hours.³¹² The only topics from the after-hours meetings that the court recognized as citizen speech were those that the teachers had no duty to report, or over which the teachers had no supervisory control, such as their opinions about the principal, school board, or school spending.³¹³ The holding's potential ramifications are most disturbing: were this definition of official duty speech to be adopted by other courts and in other contexts, public employees would have no First Amendment right to engage in private, after-hours discussions about their job-required tasks.

307. *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 690–91 (5th Cir. 2007).

308. *Id.* at 693–94.

309. *Green v. Bd. of County Comm'rs*, 472 F.3d 794, 800–01 (10th Cir. 2007).

310. *Id.*

311. *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1199 (10th Cir. 2007).

312. *Id.* at 1203.

313. *Id.*

As employees who work in the public schools, teachers reside at the intersection of both *Hazelwood* and *Garcetti*, which has led to some confusion in the lower courts as to which line of cases to apply to their speech.³¹⁴ Non-curricular K-12 teacher speech, such as that at issue in the Tenth Circuit case described above, has usually been analyzed by courts both pre- and post-*Garcetti* pursuant to *Pickering*, *Connick* and the other employee speech cases (including *Garcetti* itself).³¹⁵ Classroom speech, on the other hand, was analyzed in most pre-*Garcetti* decisions pursuant to *Hazelwood*: schools were entitled to regulate teachers' instructional speech because it both made up the curriculum and bore the school's imprimatur.³¹⁶ Following *Garcetti*, however, some courts have applied that decision's employee/citizen distinction instead of *Hazelwood* in the context of in-class, curricular speech. For example, an elementary school teacher who shared her personal opinion about the Iraq war in response to a student's question was found by the Seventh Circuit to have been engaged in her official duty to teach current events.³¹⁷ As a result, the court relied on *Garcetti* rather than *Hazelwood* to hold that the teacher's speech was not protected by the First Amendment.³¹⁸ Ultimately, however, whether a court applies *Hazelwood* or *Garcetti* matters very little; in either instance, the teacher's curricular speech belongs to the government and can be controlled.

Lower courts have been somewhat more reluctant to apply *Garcetti* to speech by college professors,³¹⁹ no doubt as a result of the Court's explicit refusal to address how *Garcetti* will affect issues of academic freedom at

314. See Walter E. Kuhn, *First Amendment Protection of Teacher Instructional Speech*, 55 DUKE L.J. 995, 1001 (2006) (noting that lower courts have difficulty determining whether to apply *Pickering* or *Hazelwood* to teachers' in-class speech).

315. See, e.g., *Brammer-Hoelter*, 492 F.3d at 1202; *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 514 (9th Cir. 2004), *cert. denied*, 543 U.S. 979 (2004) (holding that teacher's letters about treatment and facilities for disabled students dealt with a matter of public concern under *Connick*).

316. See, e.g., *Miles v. Denver Pub. Schs.*, 944 F.2d 773, 775–78 (10th Cir. 1991) (applying *Hazelwood* to in-class, curricular speech of high school teacher). *But cf. Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 228–29 (6th Cir. 2005) (using both *Pickering-Connick* and *Tinker* to protect teacher who, after parents complained, was fired for teaching board-approved novels).

317. *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 478–79 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 160 (2007).

318. *Id.* at 480.

319. See, e.g., *Stotter v. Univ. of Tex.*, 508 F.3d 812, 824–27 (5th Cir. 2007) (holding that a college professor's memo about his wages did not constitute a matter of public concern under *Connick*, without invoking *Garcetti*). *But see Gorum v. Sessoms*, No. 06-565 (GMS), 2008 U.S. Dist. LEXIS 10366 (Del. Feb. 12, 2008) (holding that professor who criticized university's presidential selection process spoke pursuant to his official duties as a faculty member; therefore, his speech was unprotected under *Garcetti*).

the university level.³²⁰ No such reticence was displayed, however, by the Seventh Circuit Court of Appeals when it held in 2008 that a public university professor who obtained a National Science Foundation (NSF) grant spoke as a faculty member and not a citizen when he alerted University officials that his dean had proposed to use grant funds in violation of NSF regulations.³²¹ The court rejected the professor's argument that the grant itself, rather than his job, required him to disclose the misuse of grant funds.³²² Although the University did not require its faculty members to apply for grants, the court reasoned that proper grant administration nevertheless fell within the professor's teaching and research responsibilities.³²³ Accordingly, the court concluded that the professor's claim that the University reduced his pay and terminated the grant in retaliation for his speech was properly dismissed in summary judgment.³²⁴

To retain a chance of winning a retaliation claim after *Garcetti* with respect to the disclosure of workplace corruption, employees must direct their revelations of misconduct to an entity sufficiently outside their chain of command so it can be argued that their speech exceeded the scope of their job responsibilities. For example, a police officer who reported departmental corruption to the FBI, rather than to his immediate superiors, had his retaliation claim analyzed by the Sixth Circuit pursuant to the *Pickering-Connick* test, with no mention of *Garcetti*.³²⁵ More typically, employees tend to communicate their suspicions to an immediate supervisor; they only approach an external entity as a last resort. This occurred in a Ninth Circuit case where a female prison guard first wrote internal memos about sexual harassment by male inmates.³²⁶ When nothing was done, she finally contacted a state senator and the inspector general's office before ultimately being fired.³²⁷ Although the court held that the internal memos were official, job-required speech, it ruled that the guard spoke as a citizen in reporting the matter to an elected official and an independent state agency.³²⁸ Whether the guard's expression was entitled to First Amendment protection would depend on whether she was dismissed because of her internal (employee) or external (citizen)

320. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

321. *Renken v. Gregory*, No. 07-3126, 2008 U.S. App. LEXIS 18908, at *12-13 (7th Cir. Sept. 4, 2008).

322. *Id.* at *13-14.

323. *Id.*

324. *Id.* at *9, *15.

325. See *v. City of Elyria*, 502 F.3d 484, 492-94 (6th Cir. 2007).

326. *Freitag v. Ayers*, 468 F.3d 528, 533-34 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1918 (2007).

327. *Id.* at 535-36.

328. *Id.* at 543-46.

speech.³²⁹ Even if the guard spoke as a citizen under *Garcetti*, to be protected by the First Amendment she still would have to pass the *Pickering-Connick* test, pursuant to which her employer would almost certainly argue that by going to an outside agency, the guard created an intolerable amount of workplace disruption that justified her termination.³³⁰

Employees who reveal workplace concerns to the press, rather than to their superiors, also speak as citizens under *Garcetti* unless those public statements are required by the job.³³¹ It follows that a public official's press secretary speaks as an employee, and not a citizen, when he or she delivers a regular press briefing, because talking to the media falls within the secretary's normal job responsibilities. *Garcetti*'s scope, then, will also depend on how lower courts determine whether an employee's job duties include communicating with the press. In addressing this question, the Fifth Circuit held that a uniformed, on-duty police officer who gave an unauthorized critical statement to the media about the department's high speed chase policy at an accident site spoke as an employee, noting that departmental policy directed all officers to inform the media "[i]n emergency or scene related situations."³³² Less justifiably, the court went on to hold that the same officer's off-duty, critical comments to radio talk shows and television news programs the next day were also made pursuant to his job duties because they were a "continuation of [the officer's] accident-scene statements."³³³ This finding demonstrates, again, how lower courts have used an expansive definition of job-required speech in interpreting *Garcetti*, and leads one to wonder whether public employees who interact with the press in an official capacity have forfeited their right to speak to the media as citizens, at least with respect to workplace-related issues.

Although *Garcetti* was decided much more recently than *Hazelwood*, the ruling has already had a similarly detrimental effect on the First Amendment rights of individuals who express themselves within public

329. *But see* Andrew v. Clark, 472 F. Supp. 2d 659, 662 (D. Md. 2007) (holding that police official who first reported possible police misconduct to his supervisor and then to the press did not speak as a citizen under *Garcetti*).

330. *See, e.g.,* Gilbrook v. City of Westminster, 177 F.3d 839, 868 (8th Cir. 1999) (holding that a factor to consider when balancing interests under *Pickering* is "whether the speaker directed the statement to the public or the media, as opposed to a governmental colleague").

331. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006) ("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.").

332. *Nixon v. City of Houston*, 511 F.3d 494, 499 (5th Cir. 2007).

333. *Id.* Perhaps recognizing that its reasoning was less-than-solid on this point, the court also held that "even if [the officer's next day] . . . media statements constitute citizen speech, such speech . . . is not afforded First Amendment protection under *Pickering*. *Id.*

authoritarian institutions. The *Garcetti* majority purported to recognize the value of employee speech, but argued that the need for judicial economy justified a per se rule categorizing official duty speech as government expression, paid for and subject to complete control by the public employer. By refusing to define the contours of job-related speech, however, the Court ensured that lower courts would still need to engage in factual inquiries to determine whether an employee's speech falls within his or her employment duties, belying the Court's "judicial economy" justification for its holding. Following *Garcetti*, federal appellate courts have interpreted duty speech broadly, with the result that even speech that exposes governmental malfeasance has no chance of advancing to the *Pickering-Connick* balancing test. Although both cases use a government speech rationale to limit individuals' First Amendment rights, *Hazelwood* at least requires that official censorship reasonably relate to a legitimate pedagogical concern. *Garcetti*, on the other hand, lacks even a bare reasonableness limitation; employees are stripped of their citizenship whenever they speak in connection with their employment duties, even when the resulting retaliation is based on the public employer's desire to conceal his or her own misconduct. Consequently, the First Amendment rights of adult public servants are arguably weaker than those belonging to public school children. In both contexts, these unfortunate results stem from the Court's failure to recognize that speech by public students and public employees constitutes not pure government speech, but a hybrid of public and private speech interests. That the Court previously has acknowledged the concept of hybrid speech is discussed in Part III of the Article.

III. HYBRID SPEECH AS A CONSTITUTIONAL CONCEPT

The Supreme Court's holdings in its government speech cases rest on the notion that speech is either private or governmental in character, and not both. The distinction is one of critical constitutional significance, because when the government itself is the speaker, it is entitled to make viewpoint-based distinctions that would be unconstitutional in the realm of private speech.³³⁴ In *Rust*, for example, the Court held the government could constitutionally prevent doctors who worked at federally funded family planning clinics from discussing abortion with their patients, reasoning that when the government pays for a program that includes speech, it is entitled to dictate the speaker's message.³³⁵ Although the

334. See *infra* notes 5–8 and accompanying text.

335. *Rust v. Sullivan*, 500 U.S. 173, 193–95 (1991). Although the *Rust* Court never specifically mentioned the government speech doctrine, later cases have interpreted *Rust* as holding that the doctors were employed to disseminate a government message. See, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the

Court professed that “traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government,” it nevertheless found that no such relationship existed in these facts to diminish the governmental character of the doctors’ speech.³³⁶ More recently, the Court held in *Johanns* that promotional messages developed by private industry representatives were entirely government speech despite being attributed to “America’s Beef Producers” rather than the government.³³⁷ At least in the compelled subsidy context presented by *Johanns*, expression belongs to the government whenever “the government sets the overall message to be communicated and approves every word that is disseminated,” apparently with little consideration of countervailing private speech interests or political accountability concerns.³³⁸

The Court’s “either/or” approach was even more apparent in *Garcetti*’s holding that public workers cannot be both citizens and employees when they speak “pursuant to their official duties.”³³⁹ *Garcetti*’s counter-intuitive result means that the office gossip in one department who repeats second-hand rumors of corruption in another speaks “as a citizen,” while a worker with first-hand knowledge and a duty to report that same misconduct forfeits all First Amendment protection. As Justice Souter explained in his dissent, this is a strange distinction for the Court to draw, given that the First Amendment value of the expression to both the speaker and the public is most certainly greater in the latter example—“when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties”—than the former.³⁴⁰

The Court’s categorical approach in these cases is disappointing, given that in other mixed speech scenarios, the Court has recognized that expression can present both government and private speech interests. For example, in holding that a public employee cannot speak both as a citizen and as an employee for First Amendment purposes, the *Garcetti* majority failed to acknowledge that the Court had come to the opposite conclusion in an employment-related case twenty years before. In *Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*³⁴¹—cited by Justice Souter in his *Garcetti* dissent to no avail³⁴²—the Court held

doctors . . . amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.”).

336. *Rust*, 500 U.S. at 200.

337. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 559–67 (2005).

338. *Id.* at 562. See *supra* notes 10–17 and accompanying text.

339. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

340. *Id.* at 431 (Souter, J., dissenting).

341. 429 U.S. 167 (1976).

342. *Garcetti*, 547 U.S. at 429 (2006).

that a public schoolteacher who addressed an open meeting of the school board regarding a collective bargaining issue “appeared and spoke both as an employee and a citizen exercising First Amendment rights.”³⁴³ The *Madison* Court cited *Pickering* for the proposition that teachers may not be “compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work,”³⁴⁴ and concluded that it would “strain First Amendment concepts extraordinarily” to hold that teachers could not communicate their views directly to the school board when they could, without question, take their concerns to the news media.³⁴⁵ *Garcetti*, of course, turned that logic on its head, stating that while the First Amendment protects employees who take official-duty-related issues to the press, it applies not at all to those who report the same issues to their superiors, because only the former “is the kind of activity engaged in by citizens who do not work for the government.”³⁴⁶

Rather than distinguish *Madison*, the *Garcetti* Court chose to ignore it; however, *Madison* was not the only First Amendment case where the Court previously relied on a mixed speech approach. This Part examines how the Court (as well as at least one federal circuit court of appeals) has recognized the concept of hybrid speech in the license plate context, and suggests that the Court may have implicitly, although inadequately, acknowledged the private speech rights of public high school journalists in *Hazelwood* itself.

A. License Plates and Specialty Plates

Almost thirty years before *Garcetti*, in a far different context, the Court in *Wooley v. Maynard*³⁴⁷ recognized that speech can possess both individual and government components. The Court in *Wooley* held that a New Hampshire law requiring drivers to display license plates bearing the state motto “Live Free or Die” violated the First Amendment rights of complaining drivers.³⁴⁸ Under the test announced in *Johanns*, the plates’ message unquestionably would constitute government speech, as the state perforce chose its motto and “exercise[d] final approval authority over every word” of it,³⁴⁹ and, accordingly, the First Amendment’s prohibition against viewpoint discrimination would not apply.³⁵⁰ This, in fact, was the

343. *City of Madison*, 429 U.S. at 177 n.11.

344. *Id.* at 175 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

345. *Id.* at 176 n.10.

346. *Garcetti*, 547 U.S. at 423.

347. *Wooley v. Maynard*, 430 U.S. 705 (1977).

348. *Id.* at 713.

349. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 561 (2005).

350. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (“[W]hen the State is the speaker, it may make content-based choices.”).

analysis advanced by Justice Rehnquist in his *Wooley* dissent, where he insisted that the license law did not force New Hampshire drivers to say anything at all.³⁵¹ The state could certainly use taxpayer money to erect billboards featuring its motto, and, in Justice Rehnquist's view, the license plates were no different: in either case, the message was visibly attributable to the state rather than to an individual.³⁵²

In its majority opinion, however, the Court disagreed, holding that the drivers' First Amendment rights were indeed in play. While the license plate and its motto clearly belonged to the state, the law nevertheless converted a citizen's private vehicle into what the Court described as a "mobile billboard" for the State's ideological message.³⁵³ Because the state's asserted justification for the law—to communicate "an official view as to proper appreciation of history, state pride, and individualism"—was not viewpoint neutral, the Court held the drivers' First Amendment rights must prevail.³⁵⁴ In *Wooley*, the Court acknowledged that both the government and a citizen can speak through the same mechanism, and that the governmental aspect of such hybrid speech does not automatically negate the concomitant First Amendment rights belonging to the individual.

That same hybrid speech analysis has been applied by at least one federal circuit court of appeals in the related context of "Choose Life" specialty license plates.³⁵⁵ Legislatures in at least seventeen states have authorized the issuance of specialty plates that promote adoption as an alternative to abortion;³⁵⁶ however, some of those same state legislatures have turned down requests for a "pro-choice" tag.³⁵⁷ As a result, challenges to the "Choose Life" plates have been brought in several states

351. *Wooley*, 430 U.S. at 720 (Rehnquist, J. dissenting).

352. *Id.* at 721–22.

353. *Id.* at 715.

354. *Id.* at 717.

355. See *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 793 (4th Cir. 2004), *cert. denied*, 543 U.S. 1119 (2005).

Most states allow groups to apply for and purchase specialty license plates that display the organization's name, logo, and/or slogan. A state-by-state summary of the statutes governing specialty plates is available at Bill Kennworthy, *State-by-State Statutes Governing License Plates*, FIRST AMENDMENT CENTER, January 20, 2006, http://www.firstamendmentcenter.org/analysis.aspx?id=16337&SearchString=specialty_plates. The profits from the plates generally either go to a designated charitable cause, or are shared between the state and the sponsoring organization. See Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 424 (2001).

356. An updated list of states where "Choose Life" plates are sold is available on the Choose Life, Inc., <http://www.choose-life.org/newsletter.html> (last visited Oct. 31, 2008).

357. For example, while the Tennessee legislature authorized a Choose Life plate, it refused to approve a pro-choice alternative. See *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 371–72 (6th Cir. 2006).

by abortion-rights advocates, who argue that the plates' issuance amounts to unconstitutional viewpoint discrimination that advances one side of the abortion debate at the expense of the other.³⁵⁸ Pro-life groups in several states have also objected on the same grounds when their applications for "Choose Life" plates were rejected by state legislatures or commissions that were attempting to avoid the controversy altogether.³⁵⁹ In either case, the success of the viewpoint discrimination argument depends on whether courts categorize specialty license plates as government speech that permissibly favors a state-endorsed policy, or private/hybrid speech that triggers the First Amendment's viewpoint neutrality requirement.

When confronted with this issue in *Planned Parenthood of South Carolina v. Rose*, the Fourth Circuit looked to an earlier case where it used a four-factor test to rule that specialty plates issued on behalf of the Sons of the Confederate Veterans ("SCV") were purely private speech.³⁶⁰ Concurring in a denial of a rehearing en banc in *SCV*, Judge Luttig had proposed a different analysis, calling specialty license plates the "quintessential example of speech that is both private and governmental because the forum and the message are essentially inseparable."³⁶¹ Any determination that the SCV plate was entirely government or private speech was both "overly simplistic" and utterly unconvincing, Judge Luttig reasoned, because both parties undeniably used it to communicate a message.³⁶² Recognizing that the plate constituted hybrid speech, Judge Luttig then evaluated the strength of the respective speakers' interests. After finding the plate's private speech component "significant" and the government speech interest "less than compelling," Judge Luttig concluded that "at a minimum . . . the government may not engage in viewpoint discrimination" in the specialty license plate program.³⁶³ Any other conclusion would require that speech by private individuals in traditional

358. See, e.g., *Henderson v. Stalder*, 407 F.3d 351, 352 (5th Cir. 2005); *Rose*, 361 F.3d at 787–88; *Women's Emergency Network v. Bush*, 323 F.3d 937, 940–42 (11th Cir. 2003).

359. See, e.g., *Ariz. Life Coal., Inc. v. Stanton*, No. 05-16971, 2008 U.S. App. LEXIS 1795 (9th Cir. Jan. 28, 2008); *Choose Life Ill., Inc. v. White*, No. 04-c-4316, 2007 U.S. Dist. LEXIS 21863 (N.D. Ill. Jan. 19, 2007).

360. *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 792–95 (4th Cir. 2004) (citing *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002)). In determining that the plates were private speech, the court examined (1) the purpose of the specialty plate program; (2) the degree of editorial control exercised by government or private entities over the plates' wording; (3) the identity of the "literal speaker" affiliated with the plates; and (4) the identity of the party who would bear "ultimate responsibility" for the plates' message. *Id.* at 792–93.

361. *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., concurring from denial of rehearing en banc).

362. *Id.*

363. *Id.* at 247.

public forums, such as public parks or streets, also be treated as government speech, a result that Judge Luttig noted would run counter to established First Amendment forum law precedents.³⁶⁴

Two years later in *Rose*, a three-judge panel of the Fourth Circuit, with each judge writing separately, agreed that South Carolina's "Choose Life" plate was a blend of private and government speech.³⁶⁵ The court was troubled that by approving the plate, the South Carolina legislature had favored its own position in a way that could be misperceived by the public. Citizens who saw the "Choose Life" plate might mistakenly believe that its existence was the result of popular support, rather than legislative action.³⁶⁶ Furthermore, the court believed that the sheer number of specialty plates available in South Carolina would discourage citizens from associating them with the state, thereby reducing elected officials' political accountability for supporting the "Choose Life" tag.³⁶⁷ Accordingly, the court held that by authorizing the plate, the state engaged in unconstitutional viewpoint discrimination, noting that "[t]he government speech doctrine was not intended to authorize cloaked advocacy that allows the State to promote an idea without being accountable to the political process."³⁶⁸

Although a few other courts have applied a hybrid speech analysis to specialty license programs,³⁶⁹ the Sixth Circuit in 2006 instead extended *Johanns* outside the compelled subsidy context to uphold the constitutionality of Tennessee's "Choose Life" plate as a purely governmental message.³⁷⁰ Drawing a parallel to the beef promotion scheme at issue in *Johanns*, the court said that the state legislature both "chose the 'Choose Life' plate's overarching message and approved every word to be disseminated," and, therefore, the plate "must be attributed to [Tennessee] for First Amendment purposes."³⁷¹ The court analogized the

364. *Id.* at 246.

365. *Rose*, 361 F.3d at 794 (opinion of Michael, J.); *Id.* at 800 (Luttig, J., concurring in judgment); *Id.* at 801 (Gregory, J., concurring in judgment). Because Judge Michael announced the court's judgment, I refer to his opinion as that of the court.

366. *Id.* at 798.

367. *Id.* at 799.

368. *Id.* at 795–96.

369. In an unpublished opinion in 2006, the Second Circuit also recognized that specialty plate programs "involve, at minimum, some private speech." *Children First Found., Inc. v. Martinez*, 169 F. App'x 637, 639 (2d Cir. 2006). Additionally, at least one federal district court has concluded that specialty license plates constitute hybrid private/government speech. *See Women's Resource Network v. Gourley*, 305 F. Supp. 2d 1145, 1161 (E.D. Cal. 2004). The Ninth Circuit recently ruled that Arizona's specialty plate program constituted a public forum for private speech in *Arizona Life Coalition, Inc. v. Stanton*, No. 05-16971, 2008 U.S. App. LEXIS 1795 (9th Cir. 2008).

370. *ACLU v. Bredesen*, 441 F.3d 370, 375–76 (6th Cir. 2006).

371. *Id.* at 376, 375.

plates to “government-printed pamphlets or pins” handed out by private volunteers who not only agreed with the state’s message, but were also willing to pay a premium to express it.³⁷² *Rose* was an unpersuasive precedent, the court said, primarily because it predated *Johanns*.³⁷³ As it had in *Rose*, the Supreme Court denied certiorari, leaving the circuits divided on the issue.

Did Tennessee’s “Choose Life” plate really express a state message comparable to the “Live Free or Die” motto embossed on the New Hampshire plates at issue in *Wooley*? Tennessee had authorized more than 100 specialty plates supporting organizations as diverse, and as unrelated to any perceptible state interest, as the Fellowship of Christian Athletes, Ducks Unlimited, the Sons of Confederate Veterans (including its Confederate flag logo), and various out-of-state colleges and universities, including the University of Florida.³⁷⁴ Why, the dissent asked, would Tennessee enlist private volunteers to support the University of Florida when the Gators are well-known as the University of Tennessee’s football arch-rivals?³⁷⁵ The dissent also questioned why the state would require at least 1,000 pre-paid plate orders before authorizing its own message, and noted that the plate application form encouraged citizens to “support your cause and community,” not to “support the government’s message.”³⁷⁶ By considering the program as a whole, the dissent correctly concluded that the plates were not pure government speech, but rather a mixture of a private message expressed through a government medium.³⁷⁷ Through its plate program, the state voluntarily opened a forum for the expression of private views, and as such, the First Amendment’s prohibition on viewpoint discrimination should not have been ignored.³⁷⁸

Recognizing that both government and private individuals speak together in the specialty license plate context, some judges and scholars have suggested that the government has its own expressive interest in avoiding “speech by attribution.”³⁷⁹ That is, given that specialty plates

372. *Id.* at 379.

373. *Id.* at 380.

374. *Id.* at 382–83, 384 n.8 (Martin, J., dissenting).

375. *Id.* at 382 n.4 (Martin, J., dissenting).

376. *Id.* at 384, 384 n.7 (Martin, J., dissenting).

377. *Id.* at 389–90 (Martin, J., dissenting).

378. *Id.* at 390 (Martin, J., dissenting).

379. *See, e.g., Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 305 F.3d 241, 252 (4th Cir. 2002) (Gregory, J., dissenting from denial of rehearing en banc) (“I would have hoped, if rehearing were granted, that we would consider the government’s interest in avoiding ‘speech by attribution;’ that is, the government’s right not to be compelled to speak by private citizens.”); Helen Norton, *Not For Attribution: Government’s Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1349 (2004) (concluding that in hybrid speech situations, the government should be allowed to refuse to disseminate messages with which it disagrees).

contain both government and private expression, the government should have veto power over the messages expressed so it can disassociate itself from speech with which it disagrees. Requiring a state to exercise viewpoint neutrality in a specialty license plate program abridges the government's own speech interest, according to this argument, because it leaves the state powerless to avoid issuing plates for hate groups or others whom the state does not want to endorse.³⁸⁰ Under this rationale, specialty license plates are no different from postage stamps that honor various causes or organizations that may be proposed by private individuals, but are ultimately approved or rejected by the government.³⁸¹

While a detailed analysis of this argument falls outside this Article's scope,³⁸² the fatal flaw in this position should be apparent: allowing the government to dissociate itself from speech whenever it provides the medium of expression, and not the message, would gut the public forum doctrine—in each instance where private views are expressed in a state-provided venue, the government would win.³⁸³ Supreme Court precedent establishes that although the state may prefer to keep the Ku Klux Klan from demonstrating in a public park, the government must allocate assembly permits on a viewpoint-neutral basis.³⁸⁴ When the state allows its

380. See, e.g., *ACLU v. Bredesen*, 441 F.3d 370, 376–77 (6th Cir. 2006) (rejecting the argument that if “Choose Life” plate were found to be constitutional, the state would be required to provide specialty plates for hate groups such as the KKK and the American Nazi Party).

381. *Id.* at 379; see also James C. Colling, Casenote, *General Lee Speaking: Are License Plate Designs Out of the State's Control? A Critical Analysis of the 4th Circuit's Decision in Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 12 GEO. MASON L. REV. 441, 467 (2003) (analogizing specialty license program to U.S. Postal Service Semipostal Stamp Program).

382. For a thorough review of this and other issues surrounding both specialty and vanity license plates (on which drivers select their own letter/number combination), see Marybeth Herald, *Licensed to Speak: The Case of Vanity Plates*, 72 U. COLO. L. REV. 595 (2001), and Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419 (2001). For a detailed discussion of government's “negative expressive interests” in general, see Norton, *supra* note 379.

383. See *Sons of Confederate Veterans, Inc.*, 305 F.3d at 246 (Luttig, J., concurring in denial of rehearing en banc) (“No one, upon careful consideration, would contend that, simply because the government owns and controls the forum, all speech that takes place in that forum is necessarily and exclusively government speech. Such would mean that even speech by private individuals in traditional public fora is government speech, which is obviously not the case.”).

384. See, e.g., *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45–46 (1983) (describing “streets and parks” as examples of traditional public forums, and noting that in the forum context, the state may not restrict speech “merely because public officials oppose the speaker's view”); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (finding that, in the context of a picketing ordinance, the “government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views”).

property to be used for private, expressive purposes, it may not prefer one viewpoint to another, even at the risk that some taxpayers may wrongly fault the state for any resulting offensive speech.³⁸⁵ Just as most citizens ascribe parade banners to the sponsoring group, most drivers rightfully attribute the message on specialty license plates to vehicle owners, not to the state.³⁸⁶ When substantial private speech interests are at stake, the function of the First Amendment should be to safeguard the individual's, not the government's, right to speak. Conversely, postage stamps, while displayed on private letters, are much more closely associated by citizens with the government's own decision to commemorate a person, organization, or event, and therefore the government's interest in controlling its speech should prevail.³⁸⁷

B. *Hazelwood* (Briefly) Revisited

The argument advanced in the specialty license plate context that the government must be allowed to disassociate itself from speech with which it disagrees, is a familiar one, of course. In *Hazelwood*, it will be recalled, the Court relied on this reasoning to hold that a principal's removal of certain articles from a student publication did not violate the First Amendment. Censorship by school officials of student newspapers "and other expressive activities that students, parents, and the members of the public might reasonably perceive to bear the imprimatur of the school" was justified, the Court said, to ensure that "the views of individual speakers are not erroneously attributed to the school."³⁸⁸ *Hazelwood* categorized student expression as either private speech that the public school must tolerate under *Tinker*, or school-sponsored speech that the school affirmatively chooses to promote and therefore considers its own, and over which school officials retain editorial control as long as their actions "are

385. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995) (stating that the government may not suppress contrary messages because of their viewpoint in a forum designed "to encourage a diversity of views from private speakers").

386. See *Herald*, *supra* note 382, at 650 (stating that reasonable viewers would not attribute the message on vanity license plates to the government); *Jacobs*, *supra* note 382, at 454 (asserting that specialty plates are "generally understood by purchasers and viewers to be private speech"). But see *Colling*, *supra* note 381, at 471 (claiming that citizens will hold the state accountable for specialty plates that contain offensive symbols such as the Confederate flag).

387. However, personalized custom postage or stamps featuring business brands or logos are more likely to be viewed as private speech, and therefore would be more analogous to specialty license plates. See Beth Snyder Bulik, *Advertising Goes Postal: USPS Cancels Law Against Branded Stamp Art*, *ADVERTISING AGE*, May 2006, at 4, 40 (describing the postal service's attempt to raise revenues by selling personalized and branded "stamp art").

388. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

reasonably related to legitimate pedagogical concerns.”³⁸⁹ Student expression within a school-sponsored activity would also be attributed to the school for First Amendment purposes under the “test” for government speech announced by the Court in *Johanns*. Under that test, student speech properly belongs to the school whenever school officials design the underlying curricular program (“set[] the overall message to be communicated”) and reserve the right to exercise prior review of student speech within that program (“approve[] every word that is disseminated”).³⁹⁰

As with specialty license plates, however, student expression that occurs within a school-sponsored media outlet contains an undeniable element of private speech. Articles in a student newspaper, for example, are generally conceived, reported and written by student authors, not dictated to them in final form by school administrators. School newspapers are commonly held out to contain student work, even though individual stories may be edited by a journalism teacher and approved by the principal at the K-12 level, or reviewed by a faculty adviser at a college or university publication. Professional journalists, too, produce stories that are edited for style, substance, and length at various levels within a media organization; nevertheless, the original author in both professional and student newspapers is usually given byline credit for his or her efforts. Accordingly, public student expression within a school-sponsored publication should be recognized as another example of mixed or hybrid speech that presents both private and governmental speech interests, rather than simply considered to be “the school’s own speech.”³⁹¹

Granted, a school’s interest in determining its curriculum, maintaining high publication standards, instilling values, protecting the sensibilities of younger students, and avoiding misattribution of student views constitute significant interests weighing in favor of limited government control over student expression at the K-12 level. The Court has emphasized that public school students do not possess First Amendment rights that are equal to those of adults,³⁹² and even the *Tinker* Court recognized the “special characteristics of the school environment.”³⁹³ Nevertheless, the First Amendment values advanced by protecting student journalism are also substantial. Free student expression serves First Amendment interests belonging both to the speaker and the audience by furthering individual

389. *Id.* at 273.

390. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005).

391. *Morse v. Frederick*, 127 S. Ct. 2618, 2637 (Alito, J., concurring) (describing *Hazelwood* as “allow[ing] a school to regulate what is in essence the school’s own speech”).

392. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986).

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

autonomy and the search for truth,³⁹⁴ educating students about constitutional principles,³⁹⁵ and promoting toleration of diverse views.³⁹⁶ Student newspapers, as well as professional media outlets, also implement the checking function of the First Amendment by acting as a watchdog and informing the community about the activities of teachers and other school officials.³⁹⁷

That public high school students may also possess an individual interest in a curricular-based student publication arguably was acknowledged in *Hazelwood*, but only to the extent that the Court required that limitations on school-sponsored student speech be reasonably related to legitimate pedagogical concerns. The Court may have implicitly recognized the hybrid nature of school-sponsored student speech by obliging school officials to provide some minimal justification to control it. By then applying this “reasonableness” test with such great deference to the judgment of school authorities,³⁹⁸ however, the Court granted full recognition to the government speech interests presented by school-sponsored speech, and provided next to nothing in the way of First Amendment protection to the student portion of the hybrid equation.

Part IV calls for courts to apply a genuine hybrid speech analysis, rather than the government speech doctrine, in cases involving both the student press and public employees. Using this approach, courts should recognize that while truly valid pedagogical concerns may justify official control of K-12 school-sponsored publications, student journalists’ First Amendment rights should be paramount at the public university level. Likewise, while public employees who are “hired to speak from a government manifesto”³⁹⁹ may have little individual interest in their speech, those who

394. See, e.g., *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503–04 (1984) (“[T]he freedom to speak one’s mind is not only an aspect of individual liberty . . . but also is essential to the common quest for truth and the vitality of society as a whole.”).

395. See, e.g., *Chemerinsky*, *supra* note 120, at 545 (“Schools cannot teach the importance of the First Amendment and simultaneously not follow it.”).

396. See LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 9–10 (1986) (arguing that free speech promotes self-restraint and tolerance of diverse views).

397. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RES. J. 521, 529–44 (asserting that a free press promotes the First Amendment value of checking the abuse of official power).

398. The *Hazelwood* Court listed some examples of what would constitute a valid educational purpose in this context, including censorship of student expression “to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988); see Peltz, *supra* note 201, at 508 (stating that after *Hazelwood*, censorship of student media “runs rampant regardless of whether school officials can demonstrate educational objectives”).

399. *Garcetti v. Ceballos*, 547 U.S. 410, 437 (2006) (Souter, J., dissenting).

choose to report government corruption to their superiors should not forfeit their citizenship status simply because those reports are made pursuant to their jobs.

IV. A CONCLUSION IN FOUR PARTS: APPLYING A HYBRID SPEECH ANALYSIS TO STUDENT JOURNALISTS AND PUBLIC EMPLOYEES

This Article has argued that the Supreme Court has overextended the government speech doctrine to deny First Amendment protection to speech that implicates important private, as well as public, interests. Specifically, the Article has focused on expression by student journalists and public employees, and shown how the Court has applied a government speech rationale to eviscerate individual rights in both contexts. With respect to the student press, lower courts, as well as public school and college and university administrators, have used the *Hazelwood* ruling to stifle critical and/or controversial student speech. After *Garcetti*, public employees have no First Amendment protection against retaliation when they speak internally as part of their official duties, even when their speech exposes serious government malfeasance. I conclude by outlining how courts should use the hybrid speech concept to strengthen individual First Amendment rights belonging to public-school student journalists at the K-12 and university levels, as well as to public employees who engage in judgment-based speech as part of their official duties. Finally, I provide an alternate reading of *Garcetti* that is consistent with a hybrid speech analysis, and would return citizen status to public employees who engage in true whistleblowing as part of their official duties.

A. Student Journalism as Hybrid Speech at the K-12 Level

Instead of deferring exclusively to educators' decisions with respect to school-sponsored expressive activities at the K-12 level, courts should acknowledge a constitutional obligation to provide some meaningful protection for student speech rights in this hybrid context. This could be done within *Hazelwood's* existing legal framework by requiring courts to engage in a serious inquiry into whether school censorship decisions are justified by truly valid educational concerns.⁴⁰⁰ The pedagogical purpose behind a student newspaper, for example, is to provide hands-on training in journalism: to instruct students to recognize, report and write newsworthy stories. Courts must acknowledge that this purpose cannot be achieved when student journalists are relegated to propagandizing school-approved positions, because real journalism requires independence from official

400. Note that in its *Hazelwood* decision, the Court carefully examined the reasons advanced by the principal for censoring the student newspaper. *Hazelwood*, 484 U.S. at 274–76.

sources as well as the exercise of critical thought.⁴⁰¹ While teaching budding journalists the importance of accurate reporting, proper grammar, concise writing, and respect for audience members are all bona fide pedagogical objectives, this Article proposes that the First Amendment should prevent school administrators from censoring school-sponsored student expression merely because it reveals accurate and newsworthy information that reflects critically on the school, its policies, or its personnel.

This more rigorous approach was applied in *Dean v. Utica Community Schools*,⁴⁰² a federal district court case where a high school principal removed an article from the student newspaper about a lawsuit that had been filed against the school district.⁴⁰³ In the lawsuit, a couple who lived on property adjoining the district's bus garage alleged that diesel fumes from idling buses had harmed their health.⁴⁰⁴ The student reporter interviewed the plaintiffs, watched a videotape of a school board meeting where the issue was discussed, researched the effects of diesel fume inhalation on the internet, and attempted to interview various school district officials, who all declined to comment.⁴⁰⁵ The principal forwarded a draft of the article to school district officials, who instructed him to pull it from the newspaper.⁴⁰⁶ The district argued that the article was inadequately researched, inaccurate, and biased.⁴⁰⁷

In analyzing the student reporter's First Amendment claim, the district court first concluded that school created the student newspaper as a limited public forum for student expression, and that the article's suppression constituted unconstitutional viewpoint discrimination.⁴⁰⁸ Alternatively, the court held that even if the newspaper was, in fact, a non-public forum, the district's reasons for censoring the article did not rise to the level of legitimate pedagogical concerns.⁴⁰⁹ The court pointed out that several factors emphasized by the *Hazelwood* Court in conducting its reasonableness analysis were not at issue here; the article did not present privacy concerns, or contain either sexual "frank talk" or grammatical errors.⁴¹⁰ No reasonable reader would attribute the article to the school, the court determined, because the reporter duly noted in the article that school

401. See, e.g., *Dean v. Utica Cmty. Schs.*, 345 F. Supp. 2d 799, 804 (E.D. Mich. 2004) ("It is often the case that this core value of journalistic independence requires a journalist to question authority rather than side with authority.").

402. 345 F. Supp. 2d 799.

403. *Id.* at 802–03.

404. *Id.* at 802.

405. *Id.*

406. *Id.* at 802–03.

407. *Id.* at 809 n.4.

408. *Id.* at 806, 813.

409. *Id.* at 806, 809–13.

410. *Id.* at 810–11.

officials declined to comment on the lawsuit, making clear that the reporter herself was neither speaking on the school's behalf nor delivering the school's message.⁴¹¹

As to the journalistic quality of the story itself, a journalism professor and a professional journalist both testified that the story was newsworthy, well written, unbiased, and cited appropriate sources.⁴¹² Any lack of balance in the story was the district's own fault, the court observed, because district officials had refused to be interviewed.⁴¹³ The court found that the only alleged "inaccuracy" in the article was the district's disagreement with the plaintiffs' claim that diesel fume exposure was hazardous to human health. In other words, the article correctly summarized the plaintiffs' legal claim, but the district simply disagreed that the claim was meritorious—a type of "inaccuracy" the court considered immaterial.⁴¹⁴ While not specifically identifying the student article in question as hybrid expression, the court nevertheless properly concluded that the district's desire to minimize publicity about an unfavorable lawsuit did not rise to the level of a valid educational purpose sufficient to justify censorship of school-sponsored student speech.

B. Student Journalism at Public Colleges and Universities as Hybrid Speech

At the college and university level, student expression within an institution-sponsored student media outlet also qualifies as a type of hybrid speech; however, it should be clear that the government interest in regulating that speech is entitled to significantly less weight than in the K-12 context. Both the student writers and the intended audience for campus newspapers, yearbooks, literary magazines, and broadcast programs are young adults who are mature enough to have no further need of state protection from potentially sensitive or offensive topics. Whereas compulsory education laws in each state require children to attend school until at least age sixteen,⁴¹⁵ no laws mandate college or university attendance. Therefore, the state's window of opportunity to teach basic skills and information, or to inculcate values in the nation's youth, has effectively closed. The state's interest in shielding young minds has been replaced at the college and university level with the need to encourage free inquiry, an interest that has been recognized by the Supreme Court as

411. *Id.* at 813–14.

412. *Id.* at 810–12.

413. *Id.* at 810.

414. *Id.* It should be remembered that Pickering's letter to the editor retained First Amendment protection despite much more serious inaccuracies. *See supra* notes 52–54 and accompanying text.

415. MARK G. YUDOF ET AL., EDUCATION POLICY AND THE LAW 1 (4th ed. 2002).

essential for both true scholarship and social progress.⁴¹⁶ College and university journalists, in particular, work for student media outlets as part of their professional training, as a way to gain hands-on, “real world” experience necessary for a career in journalism. The value of that experience, and indeed the overall worth of any college or university journalism program, would seriously be compromised if administrators could turn supposedly “independent” student media outlets into mere purveyors of noncontroversial content and officially-approved propaganda.

At the same time that the state’s interest in regulating post-secondary student speech has diminished, the student’s own right to speak freely has accordingly increased. The great majority of college students have reached the age of eighteen,⁴¹⁷ when they are treated by law as adults for almost all purposes.⁴¹⁸ Among other things, typical college and university students are able to vote, marry, enlist in the armed forces, sign a contract, view an NC-17-rated movie, and live independently from their parents. Students freely choose to continue their education and play a large role in determining their individual course of study. They expect to be exposed to a wide range of potentially controversial ideas and opinions, which makes up an essential part of their college or university experience. Accordingly, the First Amendment rights of college and university students should be recognized as not only stronger than those of high school students, but co-equal to those of adults—positions with which the Supreme Court has already evidenced agreement.⁴¹⁹

Furthermore, the disassociation argument advanced in *Hazelwood* is much weaker at the college and university level, where the public is less

416. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 267–68 n.5 (1981) (“The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’”) (citing *Healy v. James*, 408 U.S. 169, 180 (1972)); *Sweezy v. N.H.*, 354 U.S. 234, 250 (1957) (“The essentiality of freedom in the community of American universities is almost self-evident 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.”).

417. According to a U.S. Census Bureau report, only about one percent of college and university students enrolled as of October 2003 were under eighteen. See HYRON B. SHIN, SCHOOL ENROLLMENT—SOCIAL AND ECONOMIC CHARACTERISTICS OF STUDENTS: OCTOBER 2003 10, Table E (U.S. Census Bureau, 2005), <http://www.census.gov/prod/2005pubs/p20-554.pdf>.

418. See *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (“The age of 18 is the point where society draws the line for many purposes between childhood and adulthood.”).

419. See, e.g., *Bd. of Regents v. Southworth*, 529 U.S. 217, 238 n.4 (2000) (“[T]he right of teaching institutions to limit expressive freedom of students have been confined to high schools whose students and their schools’ relation to them are different and at least arguably distinguishable from their counterparts in college education.”); *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”).

likely to misattribute controversial expression in a student media outlet to the institution itself. Junior high and even high school newspapers are unlikely to be considered truly independent, given that they are often produced as part of a class and subject to prior administrative review. While college and university publications and broadcast programs may be funded through student activity fees, housed in campus facilities, and/or overseen by a faculty adviser, they are generally student-operated extracurricular activities that are perceived as expressing student viewpoints. For example, when the University of Illinois student newspaper republished cartoons depicting the Prophet Muhammad in 2006, angry students directed their protests against the paper, with the Muslim Student Association president expressing disbelief that “our own student-based newspaper would be so ignorant and disrespectful.”⁴²⁰ Similarly, after Colorado State University’s student newspaper published a four-word, expletive-containing editorial critical of President George W. Bush, the paper and its editor were praised by some, but also shouldered significant popular indignation.⁴²¹ The newspaper received more than 780 online comments from readers and lost thousands of dollars in cancelled advertising, and student petitions both supported the editor and called for his removal.⁴²² This is not to deny that college and university officials may also receive numerous complaints when student publications engage in questionable behavior or express controversial opinions; however, officials can effectively distance themselves from student media by releasing statements criticizing those actions and clarifying their own positions, a step which was taken by both the chancellor of the University of Illinois,⁴²³ and the president of Colorado State⁴²⁴ in the examples mentioned above.

As noted in Part II, most college and university media outlets will qualify as limited public forums for First Amendment purposes because institutional publication policies often grant substantial control to student editors and staff. The problem with relying on a public forum analysis to protect student journalists’ First Amendment rights at the college and university level, however, is that it allows college administrators to determine the extent of student speech rights by simply manipulating those

420. Monica Davey, *Illinois Student Paper Prints Muhammad Cartoons, and Reaction is Swift*, N.Y. TIMES, Feb. 17, 2006, at A14.

421. See Student Press Law Center, *Editorial at Colo. State Curses Bush, Puts Editor’s Job in Jeopardy*, NEWS FLASH, Sept. 24, 2007, http://www.splc.org/newsflash_archives.asp?id=1612&year=2007; Trevor Hughes, *CSU Collegian Editor Offers No Apology for Editorial*, THE COLORADOAN, Sept. 27, 2007, available at <http://www.coloradoan.com/apps/pbcs.dll/article?AID=/20070927/CSUZONE01/709270386/1002/NEWS01>.

422. See *supra* n.424.

423. See Davey, *supra* note 420, at A14.

424. President Penley’s statement objecting to the newspaper editorial is available at http://www.president.colostate.edu/index.asp?page=letter_21sept07.

very publication policies. Public forum precedent establishes that the Court will not hold that a public forum has been created “in the face of clear evidence of a contrary intent.”⁴²⁵ As a result, college and university journalists are vulnerable under this rationale to the claim that merely by enacting a prior review policy or exercising content control, administrators can turn an otherwise student publication into government speech. Assume, for example, that state college or university officials prohibit the student newspaper from criticizing the institution in print, limit student reporters’ access to the institution’s administration, and then threaten disciplinary action against a student editor who speaks out against those policies.⁴²⁶ It is debatable whether courts would consider the newspaper sufficiently independent to constitute a limited public forum, especially given the Sixth Circuit’s holding in *Hosty* that college and university newspapers are essentially no different from high school publications, and that the speaker’s age is irrelevant to public forum status.⁴²⁷

The First Amendment should prevent the government from creating what appears to be a student media outlet while at the same time reserving the right to control speech within that outlet at its discretion. Student speech in institution-sponsored student publications should be treated as hybrid expression where significant private speech rights cannot be ignored when the government’s asserted speech interest is “less than compelling.”⁴²⁸ Under this analysis, uninhibited college and university journalism unquestionably advances a veritable smorgasbord of First Amendment values on behalf of both the student speakers and the intended audience: it furthers autonomy interests by providing an outlet for self-expression, it teaches respect for constitutional ideals and toleration of different viewpoints, it informs the community about current events, and it acts as a watchdog by revealing and critiquing activities of both student government and administration.⁴²⁹ Furthermore, a hybrid approach would require courts to recognize—as they did pre-*Hazelwood*—that free expression on college and university campuses also advances the government’s interest in encouraging unfettered debate and scholarship in higher education.⁴³⁰ Given that the government’s countervailing argument that it must be allowed to disassociate itself from student expression to

425. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985).

426. This example is modeled after a real incident at Quinnipiac University, which is a private college. See Jeff Holtz, *A Student Editor Finds Himself at the Center of the News*, N.Y. TIMES, Dec. 2, 2007.

427. *Hosty v. Carter*, 412 F.3d 731, 735 (7th Cir. 2005) (en banc). See *supra* notes 237–250 and accompanying text.

428. *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 305 F.3d 241, 247 (4th Cir. 2002) (Luttig, J., concurring).

429. See *supra* notes 389–394 and accompanying text.

430. See *supra* notes 389–394 and accompanying text.

avoid misattribution of views is much weaker in the college and university scenario than at the high school or elementary level,⁴³¹ a hybrid analysis would entitle student journalists at public universities to the full-strength speech rights based on the First Amendment, not the institution's benevolence.

This is not to say that a public college or university that creates an alumni magazine and enlists student writers, as the *Hosty* court hypothesized,⁴³² should be forbidden to control the content of that magazine. An alumni magazine held out as an official institutional publication will be perceived by the public as speech properly belonging to the school itself, even when student authors are paid or volunteer contributors. The state would therefore possess a compelling interest in controlling its own speech, whereas the student writers would be analogous to the doctors in *Rust*, who were merely hired to advance a pre-approved government message.⁴³³ Even under a hybrid analysis, then, the state would retain control of official publications that are clearly attributable to the government itself.

C. Discretionary, Duty-Based Speech of Public Employees as Hybrid Expression

Just as student speech in school-sponsored, student media outlets presents both private and governmental interests, employment-related speech by public employees also constitutes a type of hybrid expression. As a result, public employees should not automatically and entirely forfeit their First Amendment rights every time they speak as part of their employment duties. When a public employee reveals official misconduct, fraud or other wrongdoing, even internally as part of his or her employment tasks, the court should recognize that that employee has come forward as a citizen. As such, his or her speech should be eligible for First Amendment protection if it satisfies the *Pickering-Connick* test.

Admittedly, *Garcetti's* constitutional distinction between speech that is "related to," versus speech that is "required by," a public employee's job responsibilities possesses some superficial appeal. It clearly makes no sense, for example, to allow a public information officer directed to design a state anti-smoking appeal to hide behind the First Amendment after being reprimanded for delivering instead a campaign emphasizing the joys of tobacco. Similarly, requiring courts to perform a full *Pickering-Connick* analysis unquestionably looks like a waste of judicial resources when an

431. See *supra* note 217 and accompanying text.

432. *Hosty v. Carter*, 412 F.3d 731, 736 (7th Cir. 2005) (en banc). See *supra* notes 387–389 and accompanying text.

433. *Rust v. Sullivan*, 500 U.S. 173, 193-95 (1991). See *supra* notes 331–332 and accompanying text.

assistant attorney general is disciplined for writing a brief in support of the defendant, rather than the state, in a criminal appeal.

While these particular examples would be easily decided in the public employer's favor under *Garcetti*, a hybrid speech analysis would also reach the same common-sense result. When a public employee is hired to advance a specific government message, the state has a compelling interest in ensuring that the resulting work product conforms to its explicit instructions. As long as those instructions are not purposefully designed to cover up fraud or other misconduct, and the scripted message is not misattributed to a private speaker or entity,⁴³⁴ a worker employed to develop or deliver that message on the state's behalf has a correspondingly minimal individual interest in the speech. He or she is more appropriately subject to the Court's rule that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."⁴³⁵

More difficult to resolve are those instances where public employees exercise discretion in fulfilling their assigned tasks, and suffer retaliation related to their reasonable speech choices. The assistant attorney general in the example used above may, in writing the state's brief in a criminal appeal, elect to omit an argument that he or she determines is unsupported by the facts. The attorney has used personal and professional discretion in complying with a government employer's expectations. This category obviously would encompass assistant district attorney Ceballos, who wrote his disposition memo in the exercise of his best judgment pursuant only to a duty to act "honestly, competently, and constitutionally."⁴³⁶ Justice Souter correctly noted in his dissent that because Ceballos was neither employed to "promote a particular policy" nor to "speak from a government manifesto," his speech did not amount to pure government speech as exemplified by *Rust*.⁴³⁷ An employee has an undeniably stronger individual interest in unscripted or otherwise discretion-based expression, than in predetermined, employment-required speech. However, as Justice Souter recognized, that interest may be outweighed by the employer's need to run an efficient workplace.⁴³⁸ A hybrid analysis would recognize that when an employee fulfills an assigned, discretionary speech task, the government employer has a substantial managerial interest in being able to discipline that employee if the work is performed incompletely,

434. An example of this is the pro-beef message attributed to "America's Beef Producers" in *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560–64 (2005). See *supra* notes 10–17 and accompanying text.

435. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

436. *Garcetti v. Ceballos*, 547 U.S. 410, 437 (2006) (Souter, J., dissenting).

437. *Id.*

438. *Id.*

incompetently, or simply not to the employer's liking. Internal squabbles about the adequacy of an employee's work product amount to mere workplace grievances, and would fail *Connick's* threshold "public concern" test, or would easily be outweighed under *Pickering* by the employer's efficiency interests.⁴³⁹

Sometimes, as Justice Stevens noted in his *Garcetti* dissent, a public employer simply may not like an employee's duty-based speech because it reveals fraud or other wrong-doing that the employer would prefer to hide or ignore.⁴⁴⁰ When this occurs, the employee's hybrid expression presents significant individual speech interests that should at least raise the possibility of First Amendment protection under the *Pickering-Connick* test. By bringing perceived misconduct to an internal supervisor's attention, a whistleblower furthers his or her civic duty as a public servant and a responsible employee, and promotes the public interest by advancing true workplace efficiency and accountability. An employee who reveals potential corruption or illegalities to his or her public employer speaks to the government, not as the government, and often does so at great personal risk.⁴⁴¹ And unlike *Hazelwood*, an employee who reports wrongdoing internally as part of his or her job can never be misperceived by the public as an official government spokesperson, nor can the speech ever "bear the imprimatur" of the state.

The *Garcetti* Court, of course, ignored the "private" side of the hybrid speech balance sheet, preferring to grant public employers broad discretion to control their operations, and to speed retaliation cases through the courts with minimal judicial oversight. Public employees who uncover workplace corruption should go to the press, the Court suggested, because making public statements is "the kind of activity engaged in by citizens who do not work for the government."⁴⁴² The Court's comparison between private and public sector employees in this context is neither complete nor fair. Private sector employees who take complaints of government misconduct to the press have full First Amendment protection for their speech only because they do not work for the government. A public employee who takes a similar course of action may escape the perils of *Garcetti* but will nevertheless be subject to discipline for insubordination or failure to follow internal reporting procedures under the *Pickering-Connick* test. The Court's conclusion that public employees' individual speech rights are somehow preserved by their ability to take reports of government misconduct to the press is simply disingenuous.

439. See *supra* notes 70–86 and accompanying text.

440. *Garcetti*, 547 U.S. at 430 (Stevens, J., dissenting).

441. See generally Nikki Troia, *Law, retaliation doom whistleblowers, panelists say*, FIRST AMENDMENT CENTER ONLINE, March 17, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16654> (describing retaliation suffered by whistleblowers).

442. *Garcetti*, 547 U.S. at 423.

In fact, the Court's insistence that its *Garcetti* holding does not diminish the speech rights to which public employees are entitled as private citizens turns out to be entirely insupportable. According to the Court, "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict . . . the liberties employees enjoy in their capacities as private citizens."⁴⁴³ Nevertheless, the *Garcetti* rule does exactly that—it allows public employers to use their positions of authority to stifle a citizen's right to report government waste or ineptitude to the responsible official. Consider a private sector employee who witnesses or uncovers official misconduct in the course of his or her daily life—what action would a responsible citizen likely take in response? Rather than run straight to the press, that private person would almost certainly first report his or her observations to the appropriate government supervisor or manager. Assume, for example, that through his or her business dealings, a private sector employee discovers evidence of corruption in a local drug task force. That private employee would have not only a right, but perhaps also a duty, to report those suspicions to the local police chief. Or consider a parent who learns through interaction with the school district that district employees engaged in fraudulent procedures when awarding federal disability benefits. Most assuredly that parent would have a First Amendment right to detail those allegations in a letter to the school commissioner.

Under *Garcetti*, however, drug task force members or school district employees who discover the same evidence of wrongdoing and take the same respective actions have no First Amendment protection for their speech.⁴⁴⁴ The employee who discloses improprieties to her supervisor in accordance with her job duties risks retaliation under *Garcetti* if she reveals what her employer prefers to hide; the employee who, instead, contacts the press risks dismissal for being disruptive or failing to follow internal procedures under *Pickering-Connick*; the employee who says nothing risks termination for incompetence. *Garcetti*'s per se rule removes the right a public employee would otherwise possess, as a citizen, to report government misconduct to the appropriate authority. Therefore, contrary to the Court's assertion, *Garcetti*'s holding does indeed infringe on "liberties employees enjoy in their capacities as private citizens"⁴⁴⁵ and leaves that employee with no viable outlet for speech of potentially great public importance. As shown in Part I, the Court's so-called "powerful network" of whistleblower statutes looks more like a sieve than a safety net,⁴⁴⁶ and

443. *Id.* at 419.

444. See *Sigsworth v. City of Aurora*, 487 F.3d 506, 507 (7th Cir. 2007); *Bailey v. Dept. of Elementary and Secondary Educ.*, 451 F.3d 514, 520 (8th Cir. 2006), and *supra* notes 286–289 and accompanying text.

445. *Garcetti*, 547 U.S. at 411.

446. See *supra* notes 169–176 and accompanying text.

the Court's naïve belief that employers will choose to protect, rather than punish, employees who report wrongdoing has been repeatedly contradicted by the facts of the post-*Garcetti* employment cases discussed in Part II.

A hybrid analysis would allow the Court to recognize that public employees speak both as citizens and employees when their official duty speech reveals potential fraud or other government misconduct. Accordingly, speech reporting possible wrongdoing would not fall completely outside the First Amendment's scope, but would rather be protected pursuant to the *Pickering-Connick* balancing test. Nevertheless, the employee would not, under this approach, be entitled to assert an unlimited right to speech protection even after the employer investigated the underlying claims and found them wanting. As long as the public employer can show that he or she engaged in a bona fide inquiry into the employee's allegations, rather than just a perfunctory dismissal or sham investigation of the claims, the employer's need to control the workplace necessitates that the employer be given the "last word" in resolving any continuing disputes. So, for example, if an employee refuses to revise an official report detailing suspected wrongdoing after her supervisor in good faith determines that no misconduct occurred, the employer must prevail. The employee has now been given specific, scripted instructions regarding how to write her report, and has only a minimal private interest in the content of her speech. If the employee declines to follow those instructions, the employer should be allowed to discipline the employee for insubordination or incompetence without having to invoke the *Pickering-Connick* test.

D. Fitting *Garcetti* into the Hybrid Mix

Although the Court in *Garcetti* wrongly characterized Ceballos' disposition memo as pure government speech, the result in the case can nevertheless be read in accordance with my suggested approach. Recall that Ceballos' disposition memo to his supervisors recounted what he considered to be serious misrepresentations in a search warrant affidavit prepared by a sheriff's deputy.⁴⁴⁷ Defense counsel in the case was aware of the affidavit's possible deficiencies, having brought the matter to Ceballos' attention in the first place.⁴⁴⁸ Based on Ceballos' memo, a "heated" meeting was held among representatives of both the sheriff's department and the district attorney's office to discuss the affidavit.⁴⁴⁹ Following the meeting, Ceballos' supervisors rejected Ceballos' concerns

447. *Garcetti*, 547 U.S. at 413–14.

448. *Id.* at 413.

449. *Id.* at 414.

and elected to continue with the prosecution.⁴⁵⁰ Ceballos then informed his superiors that he was required by his professional and constitutional obligations as a prosecutor to provide defense counsel with a copy of his memo.⁴⁵¹ In other words, Ceballos continued to behave as if the affidavit was fraudulent, even after his superiors had determined otherwise.

Had Ceballos been subject to retaliation immediately after he delivered his memo alleging misconduct by a deputy sheriff, rather than after his superiors determined that the affidavit was legally sufficient, the Court may have been significantly more sympathetic to his plight. Based on comments by several Justices at oral arguments, the majority saw Ceballos as a whiner, not a whistleblower. At the first set of oral arguments in the case,⁴⁵² Chief Justice Roberts disputed the seriousness of Ceballos' allegations,⁴⁵³ and Justice Breyer expressed some doubt as to their accuracy.⁴⁵⁴ At the second set of oral arguments, Justice Alito remarked that, even under the *Pickering-Connick* test, an employee who continued to insist on his own way after being overruled by his employer could be disciplined for insubordination—a telling comment about how he viewed Ceballos' behavior.⁴⁵⁵ Justice Scalia, too, pounced on Ceballos' attorney when she described Ceballos as having “exposed police misconduct.”⁴⁵⁶ Justice Scalia responded that “[t]hat’s not established at all. His supervisor obviously thought he didn’t. . . . And as I understood the case, the supervisor said, ‘Wow, I don’t want loose cannons around down there who are accusing perfectly honest and respectable police officers of violating the law.’”⁴⁵⁷ The majority’s per se rule that official duty speech falls outside the First Amendment was an inartfully crafted short-cut, meant to make it easier for employers to discipline insubordinate employees without having to negotiate what the Court perceived as *Pickering-Connick*’s attendant fuss and bother.

Speculation about the Court’s intent aside, the *Garcetti* per se rule cuts too broadly by denying First Amendment protection to genuine whistleblowers, as well as whiners, who speak pursuant to their

450. *Id.*

451. *Id.* at 442 (Souter, J., dissenting).

452. *Garcetti* was first argued in 2005, but was held over for reargument in 2006 after Justice Alito replaced Justice O’Connor on the Court.

453. Transcript of Oral Argument at 53–54, *Garcetti v. Ceballos*, 547 U.S. 410 (No. 04-473) (Oct. 12, 2005) (“[U]nder the supervisor’s view, it may come down to simply whether there were tire tracks or tire rim tracks. And that’s not as serious, in one view, as your client thinks it’s serious.”).

454. *Id.* at 36 (noting that after examining the record, he concluded that “we have two sides to this argument: the deputies, who might reasonably contend that they did nothing wrong; your client, who thinks they were lying”).

455. Transcript of Oral Argument at 25, *Garcetti v. Ceballos*, 547 U.S. 410 (No. 04-473) (March 21, 2006).

456. *Id.* at 35.

457. *Id.* at 43.

employment responsibilities. The Court justified this unfortunate result as necessary to avoid creating a “constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.”⁴⁵⁸ A hybrid speech analysis can provide a middle ground, where an employee who reveals fraud or misconduct in official duty speech is entitled to a presumption that he or she speaks as a citizen, not as the government, and therefore is protected by the First Amendment if he or she can satisfy the *Pickering-Connick* test. If the government concludes, after a bona fide investigation, that the employee’s claims are groundless, the employer should then have the ability to discipline an employee who continues to assert those claims in official duty speech. If an employee, such as Ceballos, thereafter brings a First Amendment retaliation claim, the employer’s interest in managing its official communications should prevail without the need for a full *Pickering-Connick* evaluation. This approach recognizes that government employees cannot be stripped of their First Amendment rights as citizens to report possible government misconduct to the appropriate authorities, yet gives employers a freer hand to discipline employees who are truly insubordinate.

A hybrid analysis, admittedly, would exact a higher litigation cost than *Garcetti*’s per se rule, given that cases involving alleged retaliation for whistleblowing would still require application of the *Pickering-Connick* test. Even in a case like *Garcetti* where an employer determines that an employee’s misconduct claim is groundless, disputes will arise about the adequacy of the employer’s investigation. Courts should not simply defer to employers’ decisions on that score, but should acknowledge a constitutional obligation to meaningfully review the adequacy of an employer’s investigation—just as courts should engage in a serious inquiry as to whether school censorship of K-12 student media outlets is justified by valid pedagogical concerns rather than school administrators’ desire to stifle criticism. Given the undeniable social value of whistleblower speech, the Court should recognize that these litigation costs are easily offset by corresponding gains in public health, welfare and safety, political accountability, public confidence in government, and true workplace efficiency. By restoring citizenship status to public employees who reveal official wrongdoing in the course of their employment duties, the Court would encourage, rather than discourage, public servants to truly serve the public interest. As Chief Justice Roberts himself has observed, without a strong judiciary willing to give it substance, the First Amendment contains “nothing but empty promises.”⁴⁵⁹

458. *Garcetti v. Ceballos*, 547 U.S. 410, 412 (2006).

459. John Roberts, Chief Justice, Keynote Address at Syracuse University (Sept. 19, 2007), (transcript available at http://blog.syracuse.com/specialreports/2007/09/newhouse_iii_audio_of_john_rob.html).

PECULIAR MARKETPLACE: APPLYING *GARCETTI V. CEBALLOS* IN THE PUBLIC HIGHER EDUCATION CONTEXT

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INTRODUCTION

In *Garcetti v. Ceballos*,¹ the United States Supreme Court modified the test for determining whether speech by a public employee receives the protection of the First Amendment. *Garcetti* has been the subject of considerable attention and analysis, mostly unflattering. The criticism has been sharp: *Garcetti* has been accused of standing First Amendment doctrine on its head and of offending the fundamental principle that speech on matters of public interest should receive expansive protection.² And the criticism has been comprehensive: indeed, the *Garcetti* court has been chided for imposing a categorical rule,³ for imposing a rule that does not operate categorically,⁴ and for doing both these things at once.⁵

Critics have further argued that the standard endorsed in *Garcetti* would lead to serious practical and constitutional difficulties if applied to employees of state institutions of higher education, particularly faculty members. Some have taken limited comfort from the fact that the Court expressly reserved the question of whether the standard it announced “would apply in the same manner to a case involving speech related to scholarship and teaching.”⁶ But others have voiced grave concerns about the implications of *Garcetti* for academic freedom and its potential impact

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1. 547 U.S. 410 (2006).

2. See Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561 (2008); Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463 (2007).

3. See Nahmod, *supra* note 2.

4. See Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in Garcetti as Further Evidence of Connick’s Unworkable Employee/Citizen Speech Partition*, 8 J.L. IN SOC’Y 45, 66 (2007).

5. See Charles W. Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173 (2007).

6. *Garcetti*, 547 U.S. at 425; see, e.g., Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1500 (2007) (noting that “[a]lthough *Garcetti* is not entirely reassuring, the Court’s apparent unwillingness to extend the rule in that case to the academic context signals a continuing recognition that something about universities demands a different approach”).

on the higher education environment, which the Supreme Court has described as “peculiarly the ‘marketplace of ideas.’”⁷ Because those concerns emerged hard on the heels of the *Garcetti* decision, and therefore were based largely on the text of the opinion itself, it was impossible to know whether they would be borne out by the lower court decisions that would follow. Enough cases have now been decided to make at least a preliminary assessment.

This article attempts to evaluate the impact of *Garcetti* on higher education law through an analysis of the cases decided to date. This necessarily requires some speculation because we still do not have a substantial number of lower court decisions applying *Garcetti* in that context, particularly with respect to faculty members. Nevertheless, the existing case law reflects some patterns that may signal the significance of *Garcetti* for public institutions of higher education and their employees. In general, those patterns suggest that *Garcetti* is likely to have the effect of substantially limiting the First Amendment protection afforded to speech by employees and perhaps even the academic freedom enjoyed by faculty members.

I. THE *GARCETTI* DECISION

Richard Ceballos served as a deputy district attorney in Los Angeles.⁸ In February of 2000, a defense attorney informed Ceballos that an affidavit used to obtain a critical search warrant included inaccuracies.⁹ Ceballos looked into the matter, concluded the affidavit did indeed contain serious misrepresentations, and sent a memorandum to his superiors outlining his concerns and recommending dismissal of the case.¹⁰ Ceballos’s superiors nevertheless decided to proceed with the prosecution.¹¹ The defense attorney challenged the warrant, even calling Ceballos as a witness, but the trial court ruled for the prosecution.¹² Ceballos claimed that, after these

7. *Healy v. James*, 408 U.S. 169, 180–81 (1972) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). For early critical analyses of *Garcetti*, see Barbara K. Bucholtz, *What Goes Around Comes Around: Legal Ironies in an Emergent Doctrine for Preserving Academic Freedom and the University Mission*, 13 TEX. WESLEYAN L. REV. 311, 316 (2007) (arguing that, “[w]ithout question, [*Garcetti*’s] statement of the First Amendment rights of public employees baldly threatens the academic freedom of scholars in public universities”), and Risa L. Lieberwitz, *The Assault on Academic Freedom in the Academy: Exploring the Intersectionalities of Race, Religion, and Gender in Higher Education: Linking Professional Academic Freedom, Free Speech, and Racial and Gender Equality*, 53 LOY. L. REV. 165, 169 (2007) (contending that “[a]fter *Garcetti*, the constitutional viability of individual rights of academic freedom is even more questionable”).

8. *Garcetti*, 547 U.S. at 413.

9. *Id.*

10. *Id.* at 414.

11. *Id.*

12. *Id.*

events, the district attorney's office took a number of actions against him in retaliation for his speech, including his memorandum.¹³

Ceballos filed a lawsuit in federal court alleging a violation of 42 U.S.C. § 1983.¹⁴ The district court granted the defendants' motion for summary judgment but the Ninth Circuit reversed, holding that "Ceballos's allegations of wrongdoing in [his] memorandum constitute protected speech under the First Amendment."¹⁵ In so ruling, the Ninth Circuit relied on the standard for assessing the protection afforded public employee speech that the Supreme Court set forth in *Pickering v. Board of Education*¹⁶ and *Connick v. Myers*.¹⁷ In sum, the *Pickering-Connick* standard focuses on two issues when public employee plaintiffs claim that their employer retaliated against them in violation of the First Amendment: first, whether the speech addressed an issue of public concern or simply an individual personnel matter; and, second, whether the employees' interest in making the statement outweighed the employers' interest in regulating the speech.¹⁸ Applying this standard, the Ninth Circuit concluded that Ceballos's memorandum, which recounted alleged governmental misconduct, qualified as speech regarding a matter of public concern.¹⁹ The Ninth Circuit further held that the defendants had failed to identify any countervailing consideration that might outweigh Ceballos's interests, such as disruption or inefficiency within the district attorney's office.²⁰ The defendants appealed and the Supreme Court granted certiorari.²¹

The Supreme Court reversed and remanded, with Justice Kennedy delivering the opinion of the Court.²² The Court began by describing the *Pickering-Connick* line of cases and then announced its new and central

13. *Id.* at 415.

14. *Id.*

15. *Ceballos v. Garcetti*, 361 F.3d 1168, 1173 (9th Cir. 2004).

16. 391 U.S. 563 (1968) (holding that a teacher's comments concerning school funding touched on a matter of public concern and could not, consistent with the First Amendment, provide a basis for dismissal).

17. 461 U.S. 138 (1983) (holding that the question of whether a public employee's speech is constitutionally protected turns on the "public" or "private" nature of such speech). For an extended discussion of *Pickering*, *Connick*, and their progeny, see Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 J.C. & U.L. 313 (2007).

18. *Ceballos*, 361 F.3d at 1173.

19. *Id.* at 1173-78.

20. *Id.* at 1178-80.

21. *Garcetti v. Ceballos*, 543 U.S. 1186, 1186 (2005).

22. Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. In part, *Garcetti* has attracted so much attention because Supreme Court observers have taken it as a signal of how the new conservative majority may approach a variety of constitutional issues. See, e.g., Mark C. Rahdert, *The Roberts Court and Academic Freedom*, CHRON. HIGHER EDUC. (Wash., D.C.), July 27, 2007, at B16.

holding: “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.”²³ The Court reasoned that:

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.²⁴

In a critical passage, the Court stressed that “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”²⁵

Applying this test, the Court concluded Ceballos’s memorandum did not constitute protected speech.²⁶ “The controlling factor in Ceballos’ case,” the Court held, “is that his expressions were made pursuant to his duties as a calendar deputy.”²⁷ “Ceballos did not act as a citizen when he went about conducting his daily professional activities,” the Court observed, and “[t]he fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.”²⁸

This left the question of how, in future cases, lower courts were expected to go about determining whether a public employee plaintiff spoke pursuant to her or his official duties. The Court declined to “articulate a comprehensive framework”²⁹ that would answer this question. Instead, the Court declared that “[t]he proper inquiry is a practical one.”³⁰ Further, the Court stressed that many of the considerations that common sense suggests should inform such an inquiry do not dispose of it.³¹ Thus, the Court said that whether the speech occurred inside or outside the office “is not dispositive.”³² Similarly, the Court observed that whether the

23. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

24. *Id.* at 423.

25. *Id.* at 421–22.

26. *Id.* at 422.

27. *Id.* at 421.

28. *Id.* at 422.

29. *Id.* at 424.

30. *Id.*

31. As the later discussion implicitly demonstrates, by including these “non-dispositive” factors in the opinion the Court provided a list of considerations to the lower courts, which those courts have in effect treated as dispositive.

32. *Garcetti*, 547 U.S. at 420.

expression concerns the subject matter of the plaintiff's employment "is nondispositive."³³ In addition, the Court took a somewhat dismissive approach to job descriptions, pointing out that they may "bear little resemblance to the duties an employee actually is expected to perform."³⁴

Four members of the Court dissented, but for present purposes Justice Souter's opinion raised the most significant objection.³⁵ In his dissent, Justice Souter worried over the impact the Court's ruling might have on the protection afforded academic freedom. Specifically, he expressed the "hope" that the Court's ruling "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.'"³⁶

Although the majority did not attempt to rebut every point made in the various dissents, it responded to this one. The Court acknowledged that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests."³⁷ Accordingly, as noted above, the Court declared that it did not need to decide, and was not deciding, the question of whether the newly announced test "would apply in the same manner to a case involving speech related to scholarship or teaching."³⁸

From the first, the majority's response to Justice Souter offered little comfort to those who shared his concern. After all, the majority did not say that the *Garcetti* test does not apply when it conflicts with faculty academic freedom; rather, the majority simply said that it did not need to decide that issue.³⁹ In addition, whether academic freedom poses an obstacle to application of the *Garcetti* test depends on the weight and parameters of that freedom; unfortunately, however, few Supreme Court cases have addressed academic freedom and those that have done so offer only limited guidance.⁴⁰ And, finally, certain statements made at the oral argument of *Garcetti* seem to suggest that at least some of the Justices find nothing troublesome in the idea that a college or university could terminate a

33. *Id.* at 421. Indeed, the Court expressly left room for the possibility that public employees "may receive First Amendment protection for expressions made at work . . . or related to the speaker's job." *Id.* at 420–21.

34. *Id.* at 424–25. As some commentators have noted, this offers little predictability to employers, employees, and the attorneys who advise them. *See* Rhodes, *supra* note 5, at 1194–95.

35. Justices Stevens and Breyer also filed dissenting opinions. Justices Stevens and Ginsburg joined in Justice Souter's dissent.

36. *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting).

37. *Id.* at 425 (majority opinion).

38. *Id.*

39. *Id.*

40. Indeed, Justice Souter cited only three cases in support of his academic freedom point, and one of those cases, *Grutter v. Bollinger*, 539 U.S. 306 (2003), concerns the prerogatives of educational institutions. Of course, for purposes of applying *Garcetti*, those institutions stand in the position of the employer.

faculty member based on the content of his or her lectures because they make those statements in the fulfillment of their job duties.⁴¹

II. AFTER *GARCETTI*: GENERAL PATTERNS

To date, hundreds of lower court cases have cited and relied on *Garcetti*. It is still too soon to provide a comprehensive assessment of the impact of the case. Nevertheless, several general patterns have emerged through these decisions.

A. The Constitutional Protection Afforded Public Employee Speech Has Changed.

Although one court has declared that *Garcetti* did not affect the law in its circuit,⁴² a majority of courts have concluded that the case significantly changed the test that applies to First Amendment retaliation claims.⁴³ Some courts have described this shift as dramatic,⁴⁴ others less so,⁴⁵ but most have acknowledged that a meaningful change in the applicable analysis has occurred. Indeed, some courts have explicitly stated that *Garcetti* compelled them to reach a different result from the one that they would have reached applying only the *Pickering-Connick* inquiries.⁴⁶

41. For a discussion of the exchanges at oral argument, see Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 147 (2006).

42. See *Black v. Columbus Pub. Sch.*, No. 2:96-CV-326, 2006 WL 2385359, at *4 (S.D. Ohio Aug. 17, 2006) (finding that *Garcetti* did not change the law in the Sixth Circuit).

43. It will be some time before it is possible to determine empirically whether the overall protection afforded employees has changed because state and federal statutes may provide viable causes of action to employees who have no First Amendment claim after *Garcetti*. Indeed, the *Garcetti* majority pointed to “the powerful network of legislative enactments[,] such as whistle-blower protection laws and labor codes,” as a source of “checks on supervisors who would order unlawful or otherwise inappropriate actions.” *Garcetti*, 547 U.S. at 425–26. In addition, contractual concepts like tenure may provide some protection to the academic freedom of faculty members.

44. See, e.g., *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1325 (10th Cir. 2007) (declaring that *Garcetti* “profoundly alters how courts review First Amendment retaliation claims”); *Salas v. Wis. Dep’t of Corrs.*, 493 F.3d 913, 925 n.8 (7th Cir. 2007) (observing that *Garcetti* “significantly limits First Amendment protection of public employees’ speech”); *Broderick v. Evans*, No. 02-CV-11540-RGS, 2007 WL 967861 (D. Mass. Mar. 30, 2007) (holding that *Garcetti* represents “something of a sea change in First Amendment law”).

45. See, e.g., *Dennis v. Putnam County Sch. Dist.*, No. 5:05-CV-07 (CAR), 2007 WL 891517, at *4 (M.D. Ga. Mar. 21, 2007) (describing *Garcetti* as adding a “new element to the traditional analysis”); *Logan v. Dep’t of Corrs.*, No. 1:04-CV-0797-SEB-JGP, 2006 WL 1750583, at *1 (S.D. Ind. June 26, 2006) (describing *Garcetti* as simply “add[ing] a new test”).

46. See, e.g., *Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007) (describing a complicated case history: district court granted summary judgment to defendants; plaintiff appealed and Seventh Circuit reversed; jury returned verdict for plaintiff and

B. The *Garcetti* Test Raises a Distinct Threshold Question.

Most courts have viewed *Garcetti* as adding a new and initial consideration in determining whether public employee speech receives constitutional protection.⁴⁷ This makes logical and practical sense: after all, if the court concludes that the speech occurred as part of the employee's official duties then the First Amendment does not protect it and the court need not reach the public concern and balancing issues presented by the *Pickering-Connick* standard. A few courts seem to have understood *Garcetti* in a somewhat different sense, and have incorporated it as a clarification of the public concern inquiry of the *Pickering-Connick* standard.⁴⁸ At present, however, this appears to reflect a minority approach.

C. It Is Unclear How Broadly *Garcetti* Applies.

Courts have differed in how they have framed and applied the threshold inquiry. Some courts have embraced a fairly expansive interpretation.

defendants appealed; Seventh Circuit vacated verdict in light of *Garcetti*, decided while case was pending); *Williams v. Riley*, 481 F. Supp. 2d 582 (N.D. Miss. 2007) (overturning initial denial of defendants' motion to dismiss but reconsidered and dismissed in light of *Garcetti*); *Ruotolo v. City of N.Y.*, No. 03 Civ. 5045(SHS), 2006 WL 2033662 (S.D.N.Y. July 19, 2006) (describing how *Garcetti* changed the court's actions). In *Williams*, the court even went so far as to note that it was "gravely troubled" by the result dictated by the new *Garcetti* standard. *Williams*, 481 F. Supp. 2d at 584. In *Williams*, county police officers who were terminated after filing a report detailing beatings of prisoners by fellow officers were judged to have no claim because they had issued the report as part of their official duties. *Id.*

47. See, e.g., *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 692 (5th Cir. 2007) (holding that *Garcetti* "added a threshold layer to the *Pickering* balancing test"); *Spiegla*, 481 F.3d at 965 (holding that, after *Garcetti*, "the threshold inquiry is whether the employee was speaking as a citizen"); *Bowman-Farrell v. Coop. Educ. Serv. Agency*, No. 02-C-818, 2007 U.S. Dist. LEXIS 77283, at *34 (E.D. Wis. Oct. 16, 2007) (holding that "[i]n the wake of *Garcetti*, the threshold inquiry is whether the public employee was speaking as a citizen or, by contrast, pursuant to his duties as a public employee"); *Jennings v. County of Washtenaw*, 475 F. Supp. 2d 692, 702 (E.D. Mich. 2007) (holding that "[t]he threshold inquiry is whether Plaintiff was speaking in her capacity 'as a citizen'"); *Dennis*, 2007 WL 891517, at *4 (ruling that "before analyzing whether Plaintiff has established the *Pickering* elements, the Court will first determine whether Plaintiff made her disclosures of financial irregularities pursuant to her official duties").

48. See, e.g., *Nolan v. Terry*, No. Civ.A. 7:04CV00731, 2006 WL 2620002, at *3 (W.D. Va. Sept. 13, 2006) (discussing the "capacity of the speaker" as a dimension of the *Pickering-Connick* inquiry); *Healy v. N.Y. Dep't of Sanitation*, No. 04 Civ. 7344(DC), 2006 WL 3457702, at *4 (S.D.N.Y. Nov. 22, 2006) (observing that "[t]he U.S. Supreme Court recently clarified the applicable test in *Garcetti*"); see also *D'Angelo v. Sch. Bd.*, 497 F.3d 1203, 1209 (11th Cir. 2007) (describing how the Seventh, Tenth, and Eleventh Circuits have addressed *Garcetti* by "refin[ing]" their "analys[es] of the first step of the *Pickering* test"). It is not clear that this difference actually makes a difference because under this formulation the court still asks whether the plaintiff "spoke as a citizen" on a matter of public concern. *Id.*

Under this approach, a plaintiff's job duties are broadly construed and communications that in any way stem from those duties qualify as official speech.⁴⁹ Other courts seem to have construed *Garcetti* more narrowly.⁵⁰ In the view of this author, it is too soon to assess the depth of the disagreement among the circuits or to identify the approach that will ultimately prevail.

D. Whether the Communication Was Made to an External or Internal Audience Plays a Very Significant Role in the Analysis.

Several patterns have emerged in lower court efforts to engage in the prescribed "practical inquiry" into the plaintiff's employment duties. So far, written job descriptions have not figured significantly in the courts' analyses.⁵¹ Courts have instead paid greater attention to such factors as the tenor and substance of the speech, and, in the case of written communications, whether the employee's signature appears over his official title and whether the statements were made using official forms or letterhead stationery.⁵² The most significant factor, however, has been whether the employee made the communication to an internal or external audience.

49. See, e.g., *Green v. Bd. of County Comm'rs*, 472 F.3d 794, 800–01 (10th Cir. 2007) (finding that the employee's communications with superiors regarding concerns about drug testing procedures were within her official duties even though she had no responsibility to advocate for better testing and that her communications "stemmed from" what she was paid to do); see also *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007); *infra* notes 147–156 and accompanying text.

50. See, e.g., *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006) (holding that plaintiff "does not lose her right to speak as a citizen simply because [the communications] concerned the subject matter of her employment"); *Barber v. Louisville and Jefferson County Metro. Sewer Dist.*, No. 3:05-CV-142-R, 2007 WL 121361 (W.D. Ky. Jan. 12, 2007) (holding that *Garcetti* applies where the speech in question is part of a directed duty of employment).

51. It is difficult to know what to make of this. It may indicate that parties have shied away from emphasizing such descriptions in light of the Supreme Court's skepticism about them. Or it may indicate that such descriptions tend to be terse, ambiguous, plainly disconnected from reality, or nonexistent, and therefore of little use to either party. Courts have, however, attended to them at some length where they have been sufficiently specific and/or dictated by state law. See, e.g., *Jackson v. Jimino*, Civ. No. 1:03-CV-722, 2007 WL 189311 (N.D.N.Y. Jan. 19, 2007) (holding that the scope of plaintiff's duties as director of a state tax bureau were defined by statute and by an opinion of counsel for that public office); *Renken v. Gregory*, No. 04-C-1176, 2007 U.S. Dist. LEXIS 55640 (E.D. Wis. July 31, 2007); *infra* notes 122–131 and accompanying text.

52. See, e.g., *Jaworski v. N.J. Tpk. Auth.*, No. 05-4485 (AET), 2007 WL 275720, at *5 (D.N.J. Jan. 29, 2007) (alluding to the "tenor" and details of the written communication, along with the fact that plaintiff signed it over his official title); *DeLuzio v. Monroe County*, No. 3:CV-00-1220, 2006 WL 3098033, at *7 (M.D. Pa. Oct. 30, 2006) (noting that plaintiff "wrote the memorandum [at issue] on his own paper, rather than [on] official complaint forms").

As one would expect, courts have generally treated communications made to external audiences as the speech of a citizen rather than an employee.⁵³ Of course, this pattern admits of some exceptions. For example, the analysis changes where an employee's official duties include responsibilities for external communications.⁵⁴ Also, speech made through government-owned media will often flow from the performance of an official duty even though it may reach an external audience and otherwise resemble speech made through privately owned media.⁵⁵

In contrast, courts have typically found that communications made within the workplace and addressed solely to fellow workers were made pursuant to the employee's official duties.⁵⁶ Still, this pattern does not amount to a rule, and factual nuances have led courts in some cases to conclude that speech occurring entirely within the workplace nevertheless qualified as the speech of a citizen.⁵⁷ In one case that presented an

53. See, e.g., *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006) (dealing with external communications with state senator and state office of inspector general); *Kokomo v. Kern*, 852 N.E.2d 623 (Ind. Ct. App. 2007) (discussing statements made in newspaper article by member of fire department); *Sassi v. Lou-Gould*, No. 05 Civ 10450 (CLB), 2007 WL 635579, at *3 (S.D.N.Y. Feb. 27, 2007) (regarding a police chief's public letters written to the city council "as a resident taxpayer"); *Barber v. Louisville and Jefferson County Metro. Sewer Dist.*, No. 3:05-CV-142-R, 2006 WL 3772206 (W.D. Ky. Dec. 20, 2006) (discussing a sewer department employee's letter to state attorney general); *Hailey v. City of Camden*, Civ. No. 01-3967, 2006 WL 1875402, at *16 (D.N.J. July 5, 2006) (addressing statements made by public employees to newspapers and at city council meetings). Indeed, in *Myles v. Richmond County Bd. of Educ.*, No. CV 106-66, 2007 WL 2453588 (S.D. Ga. Aug. 22, 2007), *aff'd*, No. 07-14468, 2008 WL 596772 (11th Cir. 2008), the court declared that "where a plaintiff does not address her concerns to the public or in a public forum, the speech is generally not protected, barring extraordinary circumstances." *Myles*, 2007 WL 2453588, at *8.

54. See, e.g., *Kougher v. Burd*, Civ. No. 1:04-CV-2209, 2007 WL 216844, at *10 (M.D. Pa. Jan. 25, 2007) (holding that plaintiff's "action in responding to media inquiries about a pending matter falls squarely within the scope of his employment").

55. See, e.g., *Hogan v. Twp. of Haddon*, Civ. No. 04-2036 (JBS), 2006 WL 3490353 (D.N.J. Dec. 1, 2006) (holding that statements made by township commissioner in a township's monthly newsletters, on the township's cable channel, and on the township's official website were unprotected).

56. See, e.g., *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007) (focusing on an internal memoranda from athletic director and football coach to school's office manager and principal); *Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007) (analyzing an internal memoranda regarding personnel training issues); *Iott v. Carter*, No. 06-6001-TC, 2007 WL 764321 (D. Or. Mar. 8, 2007) (analyzing statements made at work to fellow employees); *Thampi v. Collier County Bd. of Comm'rs*, 510 F. Supp. 2d 838 (M.D. Fla. 2007) (looking at internal communications regarding waste, personality conflicts, and management style); *Posey v. Lake Pend Oreille Sch. Dist.* No. 84, No. CV05-272-N-EJL, 2007 WL 420256 (D. Idaho Feb. 2, 2007) (looking at internal communications by school parking lot attendant about school safety and security concerns).

57. For example, in *Wilcoxon v. Red Clay Consol. Sch. Dist.*, 437 F. Supp. 2d 235 (D. Del. 2006), the court concluded that a journal prepared by a physical education instructor to document the tardiness and absenteeism of a fellow instructor was "not

interesting twist, a court held that an employee did not transform “official duty speech” into “private citizen speech” by preparing a memorandum as part of his job but then providing a copy of it to the media.⁵⁸

E. Whether Speech Was Made Pursuant to an Employee’s “Official Duties” May Raise a Fact Question the Court Cannot Resolve in the First Instance.

In his *Garcetti* dissent, Justice Souter cautioned that the Court’s opinion invited “factbound litigation” over the question of whether the employee’s statements were made “pursuant to . . . official duties” in light of “the totality of employment circumstances.”⁵⁹ Certainly, courts in a number of cases have reviewed the undisputed facts and have ruled that the employee did or did not speak as part of her or his official duties.⁶⁰ In a substantial number of cases, however, courts have concluded that material factual questions existed as to whether a communication was made as part of an employee’s official duties.⁶¹

written pursuant to [plaintiff’s] official duties as a teacher.” *Id.* at 243. Interestingly, the court went on to hold that although the speech was “private” and “personal” in nature it nevertheless addressed a matter of “public concern” and so was entitled to First Amendment protection. *Id.* at 245; *see also* *Harris v. Tunica County*, No. 2:05CV 126, 2007 WL 397056 (N.D. Miss. Feb. 1, 2007) (holding that statements of jail employee to internal affairs investigators were not made pursuant to official job duties); *Rohrbough v. Univ. of Colo. Hosp. Auth.*, No. 06-CV-00995-REB-MJW, 2006 WL 3262854, at *3 n.2 (D. Colo. Nov. 9, 2006) (holding that reports created by the employee at the direction of the hospital’s risk management department were not “necessarily” within the plaintiff’s duties); *DeLuzio v. Monroe County*, No. 3:CV-00-1220, 2006 WL 3098033 (M.D. Pa. Oct. 30, 2006) (holding that employee’s communications challenging her supervisors were not made pursuant to official job duties). In one interesting case, a plaintiff contended his workplace was so rife with retaliation that it created a duty *not* to communicate. *Batt v. City of Oakland*, No. C 02-04975 MHP, 2006 WL 1980401, at *4 (N.D. Cal. Oct. 12, 2006). The plaintiff argued that raising complaints in such an environment necessarily falls outside an employee’s job duties. *See id.*

58. *Andrew v. Clark*, 472 F. Supp. 2d 659, 663 (D. Md. 2007).

59. *Garcetti*, 547 U.S. at 436 (Souter, J., dissenting).

60. *See, e.g., Ryan v. Shawnee Mission Unified Sch. Dist.*, 437 F. Supp. 2d 1233, 1249–52 (D. Kan. 2006) (holding there was “not room for serious debate” that numerous statements were made by plaintiff pursuant to her official duties). In some cases the parties have simply stipulated that the communications in question were not made pursuant to the employee’s official duties, leaving the court to conduct the traditional *Pickering-Connick* analysis. *See, e.g., Benvenisti v. New York*, No. 04 Civ. 3166(JGK), 2006 WL 2777274 (S.D.N.Y. Sept. 23, 2006); *Coles v. Moore*, No. 3:04-CV-1623(JCH), 2007 WL 2790436 (D. Conn. Sept. 25, 2006). In *Bessent v. Dyersburg State Cmty. Coll.*, 224 Fed. App’x 476 (6th Cir. 2007), the plaintiff’s counsel conceded at oral argument that his client’s statements had been made pursuant to her official duties. *Id.* at 479.

61. *See, e.g., Caruso v. Massapequa Union Free Sch. Dist.*, 478 F. Supp. 2d 377 (E.D.N.Y. 2007); *Gordon v. Marquis*, Civ. No. 3:03CV01244(AWT), 2007 WL 987553 (D. Conn. Mar. 31, 2007); *Burke v. Nittman*, Civ. Action No. 05-CV-01766-

The various patterns described above are generally apparent in the lower court cases applying *Garcetti* in the higher education context. In those cases, courts have recognized that *Garcetti* changed the law, have pursued the *Garcetti* inquiry as an initial and distinct issue, and have paid close attention to whether the plaintiff communicated with an external or internal audience. Interestingly, courts applying *Garcetti* in the higher education context have tended to view the plaintiffs as having broad job duties and have usually *not* found a factual issue that required further development. This may be a function of the facts of those specific cases. Or this may signal a coming trend for the application of *Garcetti* in higher education, where the culture often fosters broad notions of institutional involvement and responsibility.

III. HIGHER EDUCATION CASES APPLYING *GARCETTI*

Most of the higher education cases decided to date have involved non-faculty employees and therefore have not implicated the specific academic freedom concerns articulated by Justice Souter. As a result, the courts in those cases have applied *Garcetti* in a fairly straightforward manner and with unspectacular results. Interestingly, and for some observers distressingly, courts have applied *Garcetti* in much the same way in cases involving faculty speech.

WYD-PAC, 2007 WL 691206 (D. Colo. Mar. 2, 2007); Abbatiello v. County of Kauai, Civ. No. 04-00562 SOM/BMK, 2007 WL 473680 (D. Haw. Feb. 7, 2007); Jackson v. Jimino, Civ. No. 1:03-CV-722, 2007 WL 189311 (N.D.N.Y. Jan. 19, 2007); Barclay v. Michalsky, 451 F. Supp. 2d 386 (D. Conn. 2006); Kodrea v. City of Kokomo, 458 F. Supp. 2d 857 (S.D. Ind. 2006); Shrewbridge v. El Dorado Irrigation Dist., No. CIV. S-05-0740 FCD EFB, 2006 WL 3741878 (E.D. Cal. Dec. 19, 2006); Cheek v. City of Edwardsville, No. 06-2210-JWL, 2006 WL 2802209 (D. Kan. Sept. 29, 2006); Skrutski v. Marut, No. 3: CV-03-2280, 2006 WL 2660691 (M.D. Pa. Sept. 15, 2006); Milde v. Greenwich Hous. Auth., Civ. No. 3:00-CV-2423 (AVC), 2006 WL 2583086 (D. Conn. Sept. 5, 2006). It is worth noting that when *Garcetti* was decided the parties in some pending cases made an abrupt about-face regarding their version of the “undisputed” facts. Thus, plaintiffs who initially claimed they were speaking pursuant to their official duties (perhaps so they did not look like uninformed rabble rousers) suddenly changed their story and claimed their speech had nothing to do with their jobs. *See, e.g.,* Dennis v. Putnam County Sch. Dist, No. 5:05-CV-07 (CAR), 2007 WL 891517 (M.D. Ga. Mar. 21, 2007); Levy v. Office of Legislative Auditor, 459 F. Supp. 2d 494 (M.D. La. 2006); Yatzus v. Appoquinimink Sch. Dist., 458 F. Supp. 2d 235 (D. Del. 2006); Dunleavy v. Wayne County Comm’r, Civ. Action No. 04-CV-74670-DT, 2006 WL 2375679 (E.D. Mich. Aug. 16, 2006). In at least one case, the plaintiff even sought leave to amend her complaint so she could remove some troublesome concessions from it. *See* McLaughlin v. Pezzolla, No. 06-CV-00376, 2007 WL 676674 (N.D.N.Y. Feb. 28, 2007). Of course, defendants who had sought to paint plaintiffs as troublemakers acting outside the scope of their authority also had to reverse course, and these tensions came to a head in *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007), where the court observed that after *Garcetti* came down the parties literally swapped positions on the question of whether plaintiff’s speech had been made within her official duties. *Id.* at 1330.

A. Lower- and Mid-Level Non-Faculty Employees

*Bradley v. James*⁶² offers a good example of the application of *Garcetti* to a lower-level non-faculty employee of an institution of higher education. In that case, Arch Bradley, a police officer at the University of Central Arkansas, allowed others to respond when a shooting incident occurred at a university dormitory.⁶³ James, the university police chief, ordered his second-in-command to investigate Bradley's failure to respond.⁶⁴ In the course of that investigation, Bradley alleged that James was intoxicated on the night of the incident.⁶⁵ Bradley was subsequently fired.⁶⁶ Bradley sued, alleging that he had been retaliated against for exercising his First Amendment rights when he said that James had been intoxicated.⁶⁷ The court rejected Bradley's claim that the First Amendment protected his statements regarding James.⁶⁸ The court concluded that Bradley had made those statements as an employee and not as a citizen: "[a]s a police officer, Bradley had an official responsibility to cooperate with the investigation."⁶⁹

As in the non-university context, lower- and mid-level university employees whose jobs include monitoring compliance with legal requirements may find that *Garcetti* poses an insurmountable obstacle for them.⁷⁰ Thus, in *Miles v. Baruch College*,⁷¹ the plaintiff held positions that

62. 479 F.3d 536 (8th Cir. 2007).

63. *Id.* at 537.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 538.

69. *Id.* One of the earliest cases decided under *Garcetti* also involved a lower-level non-faculty employee. See *Battle v. Georgia*, 468 F.3d 755, 761 (11th Cir. 2006) (holding that the plaintiff, who worked in a university financial aid office, "had a clear employment duty" to report fraud in a work-study program and therefore was not speaking as a citizen when she made these statements). *Bowers v. Univ. of Va.*, No. Civ. 3:06CV00041, 2006 WL 3041269 (W.D. Va. Oct. 24, 2006), involved an interesting issue around a lower-level non-faculty member's use of e-mail. *Id.* at *2. In that case, plaintiff became concerned that her university employer had decided to restructure its pay scale system to the detriment of some other workers. *Id.* The local chapter of the NAACP (of which plaintiff was a member) held a meeting and distributed materials in opposition to the plan. *Id.* A friend of plaintiff's who could not attend the meeting asked her to forward the materials distributed by the NAACP; plaintiff did so, using her university computer and university e-mail account. *Id.* The university argued that in light of her use of university resources she was not speaking as a citizen when she sent the e-mail and the First Amendment did not protect her communication. *Id.* at *7. Plaintiff countered that she sent the documents before working hours, labeled the documents as materials from the NAACP, and sent them at the request of a friend and not as part of her job duties. *Id.* The court concluded that, for purposes of a motion under FED. R. CIV. P. 12(b)(6), the plaintiff had alleged sufficient facts to survive a motion to dismiss. *Id.* at *8.

70. *E.g.*, *Dennis v. Putnam County Sch. Dist.*, No. 5:05-CV-07 (CAR), 2007 WL 891517 23598 (M.D. Ga. Mar. 21, 2007) (holding that a school district's Head Start

included responsibility for formulating affirmative action plans and other compliance activities.⁷² She claimed that in the course of discharging her duties she uncovered alleged financial improprieties, which she reported to the President of Baruch, and that the college subsequently terminated her in retaliation for doing so.⁷³ The court found her speech analogous to the memorandum at issue in *Garcetti* and concluded the First Amendment did not protect it.⁷⁴

A more complicated scenario involving an employee who handled compliance matters arose in *Davis v. McKinney*.⁷⁵ In that case, Cynthia Davis oversaw computer-related audits and created audit summaries and reports for the University of Texas Health Science Center in Houston (UTHSC).⁷⁶ At the request of a UTHSC vice-president, Davis initiated an investigation into whether employees were viewing pornography on work computers in violation of technology use policies.⁷⁷ Davis found evidence that more than three hundred employees of UTHSC had accessed such material.⁷⁸ As authorized, she then confiscated the computers of employees where the evidence suggested they had viewed these sites intentionally.⁷⁹

Davis believed that upper management at UTHSC subsequently lost its enthusiasm for this investigation.⁸⁰ She claimed that her superiors declined to meet with her about the matter and directed her to return the confiscated computers to the employees.⁸¹ She sent a letter complaining about these developments, and also about budgetary issues and alleged discriminatory employment practices, to the President of UTHSC and the Chancellor of the entire UT system.⁸² She also contacted the FBI concerning possible child pornography on eight computers and the EEOC about her discrimination allegations.⁸³

Davis filed suit against several arms of the University of Texas system

fiscal officer's employment duties included monitoring for and reporting on financial misconduct).

71. No. CV-07-1214(CPS) (RLM), 2008 U.S. Dist. LEXIS 5534 (E.D.N.Y. Jan. 24, 2008).

72. *Id.* at *5 n.5.

73. *Id.* at *5-*6.

74. *Id.* at *20.

75. 518 F.3d 304, 307 (5th Cir. 2008).

76. *Id.* at 307.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 308.

81. *Id.*

82. *Id.* at 308-09.

83. *Id.* at 309 n.1. The FBI examined the hard drives of ten confiscated computers and found no child pornography. *Id.* at 310.

and a number of University of Texas officials, alleging that they had taken a variety of retaliatory actions against her as a result of these communications and had thereby forced her to resign.⁸⁴ The district court found that Davis wrote her complaint letter as a citizen, rather than an employee, and that the First Amendment therefore protected that communication from retaliation.⁸⁵ Defendants appealed, and the Fifth Circuit affirmed in part and reversed in part.⁸⁶

Following the approach endorsed by the Seventh Circuit, the court announced that it would treat the *Garcetti* inquiry as a threshold one into “whether the plaintiff was speaking ‘as a citizen’ or as part of her public job.”⁸⁷ The court further endorsed the approach of focusing on the internal or external nature of the communication.⁸⁸ The court pointed out that other circuits had recognized that “when a public employee raises complaints or concerns up the chain of command at his [or her] workplace about his [or her] job duties [then] that speech is undertaken in the course of performing his [or her] job,” but that if “a public employee takes his [or her] job concerns to persons outside the work place” then “those external communications are ordinarily not made as an employee, but as a citizen.”⁸⁹ In this case, however, the court noted that its task was complicated by the fact that Davis’s communications concerned multiple topics, some of which related to her job duties and others of which did not.⁹⁰

The court therefore disaggregated Davis’s communications and applied *Garcetti* to their various component parts.⁹¹ The court concluded that statements made to her immediate superiors about her pornography investigation were “clearly made as an employee.”⁹² This also held true for the statements in her letter to the President and the Chancellor that concerned her pornography investigation and management’s response to it.⁹³ On the other hand, statements in that same letter about her other concerns were “not written as part of her job duties as an internal auditor” and were therefore “made as a citizen.”⁹⁴ Similarly, since Davis’s job function did not include reporting to outside police authorities or other agencies, her communications with the FBI and the EEOC were not made

84. *Id.*

85. *Id.*

86. *Id.* at 318.

87. *Id.* at 312 (quoting *Mills v. City of Evansville*, 452 F.3d 646, 647–48 (7th Cir. 2006)).

88. *Id.*

89. *Id.* at 313.

90. *Id.* at 314.

91. *Id.* at 315.

92. *Id.*

93. *Id.* at 315–16.

94. *Id.* at 315.

in her capacity as an employee.⁹⁵ The Fifth Circuit remanded with instructions for the district court to apply the *Pickering-Connick* standard to those of Davis's communications that were not job-related.⁹⁶

B. High-Level University Administrators

Two cases have involved the application of *Garcetti* to high-ranking university administrators. In both cases, the court concluded that the speech in question fell within those administrators' broad responsibilities. These decisions may signal the direction of future cases involving high-level university administrators, whose job portfolios tend to be large and diverse.

*Vila v. Padron*⁹⁷ concerned a licensed attorney who served as the Vice President of External Affairs for the Miami-Dade Community College.⁹⁸ Pursuant to this broad policy-making position, Adis Vila supervised the college-wide units of grants, governmental affairs, legal affairs, and cultural affairs, and provided high-level strategic planning counsel.⁹⁹ Vila objected to a number of actions taken by the college and its president, which she believed to be unethical or illegal.¹⁰⁰ After she was informed that her contract would not be renewed, she sued the college for retaliatory discharge in violation of the First Amendment.¹⁰¹ The district court entered judgment as a matter of law for the defendant.¹⁰² On appeal, the Eleventh Circuit, noting that Vila admitted at trial that all of her communications related to the college and were under her jurisdiction and authority, concluded she was not speaking as a citizen when making her complaints.¹⁰³

In *Johnson v. George*,¹⁰⁴ Marguerite Johnson served as a Vice-President of the Delaware Technical and Community College and as Director of one of its campuses.¹⁰⁵ After receiving complaints about Johnson's behavior, the President placed her on an administrative leave.¹⁰⁶ Johnson filed suit, alleging that these actions were in fact taken in retaliation against her for making statements regarding the information technology system at a

95. *Id.* at 316.

96. *Id.* at 318.

97. 484 F.3d 1334 (11th Cir. 2007).

98. *Id.* at 1336.

99. *Id.*

100. *Id.*

101. *Id.* at 1337–38.

102. *Id.* at 1338.

103. *Id.* at 1339.

104. No. 05-157-MPT, 2007 U.S. Dist. LEXIS 35344 (D. Del. May 15, 2007).

105. *Id.* at *2–*4.

106. *Id.* at *5.

meeting of the school's department chairs.¹⁰⁷

Johnson claimed that those statements did not fall within her job duties because she did not supervise, manage, direct, or control the information technology department and she did not regularly attend meetings of the department chairs.¹⁰⁸ The district court summarily dismissed these arguments, ruling that in making her statements "Johnson was acting in her capacity as the Campus Director, with overall responsibility for the needs of students and faculty of the campus," including information technology.¹⁰⁹

C. Coaches

Applying *Garcetti* to coaches may at some point raise interesting issues in light of the teaching that can take place as part of college and university athletics. Resolution of those issues will have to wait, however, because the only decision concerning a coach so far does not require much analysis.

*Potera-Haskins v. Gamble*¹¹⁰ involved statements made by the head women's basketball coach at Montana State University-Bozeman, one Robin Potera-Haskins.¹¹¹ In the spring of 2003, concerns arose regarding the university's women's basketball program.¹¹² As a result, the university's Athletic Director issued a series of instructions to Potera-Haskins.¹¹³ Potera-Haskins responded through several memoranda, all of which indicated she had sent them in her official capacity,¹¹⁴ all of which were directed to university administrators, and all of which related to her performance as head women's basketball coach.¹¹⁵

The university fired Potera-Haskins, who sued.¹¹⁶ Among other things, Potera-Haskins alleged that she had been terminated in retaliation for statements made in those communications and that this violated her First Amendment rights.¹¹⁷ Unsurprisingly, the court concluded that the record allowed "but one conclusion": that Potera-Haskins made these statements "in her official capacity as a public official."¹¹⁸

107. *Id.* at *1.

108. *Id.* at *17-18.

109. *Id.* at *17.

110. 519 F. Supp. 2d 1110 (D. Mont. 2007).

111. *Id.* at 1114.

112. *Id.*

113. *Id.*

114. All the memoranda stated they were from the "Head Coach, Women's Basketball, Montana State University." *Id.*

115. *Id.*

116. *Id.* at 1114-15.

117. *Id.* at 1115.

118. *Id.* at 1117.

D. Faculty Members

As noted briefly above, a number of commentators have argued that the application of *Garcetti* to college and university faculty members raises serious constitutional concerns. It has been posited that institutions of higher education do not simply transmit knowledge and values but also develop critical intellectual faculties, and that this mission requires “a great deal of speech autonomy” for both faculty and students—more autonomy than *Garcetti* appears to afford.¹¹⁹ In a similar vein, it has been maintained that *Garcetti* reflects the current Supreme Court majority’s view that management should enjoy broad prerogatives in the employment relationship—a view that does not fit well with academic freedom’s protection of such “core values” as “dissent, disputation, experimentation, and expression of controversial ideas in teaching and research.”¹²⁰ And it has been argued that “much of what academic freedom exists to protect” is the precise speech that *Garcetti* leaves unprotected: “speech by university employees, as employees, discharging job responsibilities as employees,” including classroom lecturing, serving on academic panels, providing continuing education for graduates, communicating on behalf of professional organizations, and publishing.¹²¹

Very few cases have applied *Garcetti* to retaliation claims brought by faculty members. Still, the cases that have been decided are somewhat remarkable. They are not remarkable because they reveal the tension between *Garcetti* and academic freedom. Rather, they are remarkable because the discussion of any such tension is almost wholly absent. This may mean very little in light of the factually idiosyncratic nature of these cases; indeed, reading them may leave one with the impression that the forces of the universe conspired to generate decisions that have little use as

119. See Nahmod, *supra* note 2, at 585–86. Nahmod contends that this difference in purpose distinguishes the higher education setting from the public primary and secondary school setting, along with the fact that college and university students are older and not a captive audience. *Id.* at 585. Nahmod acknowledges that autonomy in the higher education setting is still “subject to two uncontroversial educational requirements: first, discussion in the classroom must be related, even if loosely, to the subject matter, and second, the educational process must not be impeded by disruptive tactics.” *Id.*

120. Lieberwitz, *supra* note 7, at 168–69.

121. See R. George Wright, *The Emergence of Academic Freedom*, 85 NEB. L. REV. 793, 820–21 (2007); see also Cope, *supra* note 17, at 333 (“[F]aculty members disseminating their scholarship nearly always do it pursuant to their ‘official duties.’ If this is true, then the Supreme Court’s current academic freedom jurisprudence would provide faculty scholarship with almost no First Amendment protection whatsoever.”); Spurgeon, *supra* note 41, at 149 (“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.”). Wright also points out that the *Garcetti* test does not allow for the fact that some activities—for example, blogging by a faculty member on an academic topic—might qualify as speech by a citizen *and* as job-related speech. Wright, *supra*, at 820–21.

precedent. Or it may mean a great deal; perhaps the courts' unblinking application of *Garcetti* to cases involving such core academic functions as conducting research, obtaining grants, selecting presidents, advising students, arranging speeches, and evaluating peers serves as an omen of what will follow.

A good place to begin is with *Renken v. Gregory*,¹²² which involved core academic activity. Kevin Renken served as an associate professor at the University of Wisconsin–Milwaukee.¹²³ The National Science Foundation awarded him a grant to establish a thermal engineering laboratory, provided the university would share in the cost.¹²⁴ The university agreed to do so, but Renken disagreed with the school's proposed use of the grant money.¹²⁵ He expressed the opinion that the school's proposed use would violate federal law and filed complaints with several university committees.¹²⁶ He later sued in federal court, alleging that as a result of his speech various university administrators had unconstitutionally retaliated against him by refusing to pay his student assistants and by proposing to reduce his compensation.¹²⁷

The district court granted summary judgment to the defendants and dismissed Renken's complaint.¹²⁸ Citing a provision of the Wisconsin Administrative Code, the court found that "[t]he primary duties of a [state university] faculty member are teaching, research, and service."¹²⁹ The court noted that Renken had criticized the university's proposed use of the grant money "because he wanted to use the grant for his research and teaching."¹³⁰ "Thus," the court reasoned, Renken "made the statements at issue as part of his effort to carry out two of his primary duties, research and teaching."¹³¹

*Gorum v. Sessoms*¹³² concerned speech by a tenured faculty member while performing quasi-administrative functions.¹³³ In that case, Wendell Gorum served as a tenured professor and Chair of the Mass

122. No. 04-C-1176, 2007 U.S. Dist. LEXIS 55640 (E.D. Wis. Jul. 31, 2007).

123. *Id.* at *1.

124. *Id.*

125. *Id.*

126. *Id.* at *1–2.

127. *Id.* at *2.

128. *Id.* at *7.

129. *Id.* at *4.

130. *Id.* at *4–*5.

131. *Id.* at *5. The court also highlighted some of the allegations of the plaintiff's complaint, for example that by terminating the grant defendants had "prevented [him] from fulfilling his job responsibilities to solicit education and research funds" and that his statements were made during the grant application process and implementation of the project. *Id.* (quoting Amended Complaint at P 1, *Renken*, 2007 U.S. Dist. LEXIS 55640 (No. 04-C-1176)).

132. No. 06-565 (GMS), 2008 WL 399641 (D. Del. Feb. 12, 2008).

133. *Id.* at *1.

Communications Department of Delaware State University.¹³⁴ In 2003, he participated in the faculty senate's search process for the next president of the university.¹³⁵ When the senate narrowed its search to three finalists (including Allen Sessoms, whom the university ultimately selected) Gorum spoke out in protest and proposed reopening the process.¹³⁶ Gorum also acted as an official advisor to a fraternity and helped organize its 2004 Martin Luther King, Jr. Prayer Breakfast.¹³⁷ When another member of the speaker's committee asked President Sessoms to address the gathering Gorum revoked the invitation because he had already made arrangements for someone else to speak.¹³⁸ Finally, Gorum served as an advisor to students with disciplinary problems, including DaShaun Morris, an All-American football player who was suspended for being in possession of a firearm on campus.¹³⁹ But Gorum did not just advise Morris with respect to the suspension proceedings—he urged Morris to hire a lawyer, he suggested to Morris that he sue the university, and he paid the lawyer's \$600 retainer.¹⁴⁰ The university subsequently terminated Gorum when it discovered he had improperly altered many students' final grades in violation of controlling policies and procedures—conduct to which Gorum admitted.¹⁴¹

Gorum nevertheless sued the President and Board of Trustees of the university, arguing they had terminated him in retaliation for engaging in constitutionally protected speech.¹⁴² Gorum claimed that this protected speech included his statements regarding the candidates, his revocation of the invitation to speak at the breakfast, and the assistance he provided to Morris.¹⁴³ Gorum stressed the fact that the Board and President had elected to terminate him even though the university disciplinary committee that had reviewed his offense had recommended placing him on two years of probation.¹⁴⁴

Applying *Garcetti*, the district court had no difficulty concluding that the statements Gorum made in the course of the presidential search, with respect to the Prayer Breakfast arrangements, and while advising Morris fell within the ambit of his official duties.¹⁴⁵ The court therefore granted

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at *2.

138. *Id.*

139. *Id.* at *1.

140. *Id.*

141. *Id.* at *2.

142. *Id.* at *3.

143. *Id.*

144. *Id.*

145. Gorum made this a good deal easier by conceding the operative facts and failing to discuss *Garcetti* in his briefs. *Id.* at *5. The court did not apply *Garcetti* to

the defendants' motion for summary judgment.¹⁴⁶

*Hong v. Grant*¹⁴⁷ concerned speech by a faculty member made in the process of evaluating his fellow teachers.¹⁴⁸ In that case, Juan Hong, a professor in the Department of Chemical Engineering and Materials Science at the University of California, Irvine, participated in a peer review process that evaluated faculty members seeking appointment and promotion within his department.¹⁴⁹ Hong made critical statements in connection with the mid-career review of one faculty member, opposed another faculty member's application for an accelerated merit increase, and protested when the department extended an informal offer to a candidate before the faculty had voted.¹⁵⁰ In addition, he complained that six of the eight Materials Department classes were taught by lecturers rather than by tenured faculty members.¹⁵¹ When the department denied Hong a merit increase he sued, alleging the institution had retaliated against him for his speech.¹⁵²

The court applied *Garcetti* and had no difficulty in finding Hong engaged in this speech as part of his official duties.¹⁵³ The court stressed that "[a]n employee's official duties are not narrowly defined, but instead encompass the full range of the employee's professional responsibilities."¹⁵⁴ The court noted that "in accordance with [the university's] self-governance principle" the plaintiff's "official duties [were] not limited to classroom instruction and professional research" but also included "a wide range of academic, administrative and personnel functions."¹⁵⁵ Hong's statements about fellow faculty and teaching assistants easily met this standard. The court accordingly granted summary

plaintiff's involvement with Morris's lawsuit, ruling that the defendants had shown they would have terminated plaintiff even if he had not engaged in those activities. *Id.* at *6.

146. *Id.* at *7.

147. 516 F. Supp. 2d 1158 (C.D. Cal. 2007).

148. *Id.* at 1160.

149. *Id.* at 1161–62.

150. *Id.* at 1162.

151. *Id.* at 1162–63.

152. The claim of retaliation seems deeply curious in light of the admissions Hong made in the course of the merit increase evaluation process. He acknowledged his success in attracting extramural research grants was "zero"; he described his participation in peer-reviewed publications as "average" and "minimal"; and he listed no achievements under "Professional Recognition and Activity," "Honors, Awards, Election," "Contracts, Grants or Fellowships," "Other Professional Service," or a number of other categories. *Id.* at 1164.

153. *Id.* at 1168.

154. *Id.* at 1166.

155. *Id.* The court based this conclusion on this institution's strong self-governance principle. In light of the strong traditions around faculty governance at many institutions, however, the same analysis may apply even where such responsibility is not formally or finally vested in the faculty.

judgment in favor of the defendants.¹⁵⁶

To date, *Garcetti* has not been applied to a statement made by college or university faculty member as part of their classroom pedagogy. The closest case is *Piggee v. Carl Sandburg College*.¹⁵⁷ *Piggee* involved a part-time instructor of cosmetology at a community college who lost her post after distributing anti-homosexual literature to one of her students, who complained that she had created a hostile learning environment.¹⁵⁸ She sued, alleging violation of her due process rights, and her rights under Free Exercise, Equal Protection, and Free Speech clauses of Constitution.¹⁵⁹ The district court granted summary judgment in favor of the defendants.¹⁶⁰ On appeal, the Seventh Circuit, affirming the dismissal of *Piggee*'s claim of unlawful retaliation, held that *Garcetti* was "not directly relevant" to the case, but invoked it to show that courts must "give appropriate weight to the public employer's interests."¹⁶¹

It should be noted, however, that several courts have concluded—without apparent hesitation—that under *Garcetti* the First Amendment does not protect statements made in the classroom by secondary school teachers. Consider, for example, *Panse v. Eastwood*.¹⁶² In that case, an art teacher made statements to his class about the portfolio requirements of college art programs, including the necessity for providing sketches of male and female nudes.¹⁶³ After the school superintendent took disciplinary action against him, the teacher sued, claiming that his statements were constitutionally protected.¹⁶⁴

Applying *Garcetti*, the court reasoned that "[t]he official duties of high school teachers certainly encompass not only the formal lessons of the subject curriculum, but also . . . broader classroom discussions about the assigned subject[s]."¹⁶⁵ The court therefore concluded that this speech "was not the speech of a 'citizen' for the purposes of First Amendment

156. *Id.* at 1170.

157. 464 F.3d 667 (7th Cir. 2006).

158. *Id.* at 668.

159. *Id.*

160. *Id.*

161. *Id.* at 672. The court's decision includes a brief discussion of academic freedom that concludes with this observation: "Classroom or instructional speech, in short, is inevitably speech that is part of the instructor's official duties, even though at the same time the instructor's freedom to express her views on the assigned course is protected." *Id.* at 671. It is unnecessary to divine what the court had in mind here—or to guess at which principle the court believed prevailed if these principles came into conflict—since *Piggee*'s speech was done for purposes of proselytizing and not for purposes of teaching.

162. No. 06 Civ. 6697(SCR), 2007 U.S. Dist. LEXIS 55080 (S.D.N.Y. July 20, 2007).

163. *Id.* at *3.

164. *Id.* at *2.

165. *Id.* at *12.

analysis, and [was] not entitled to constitutional protection.”¹⁶⁶

Other cases have reached similar conclusions.¹⁶⁷ Good grounds exist in reason and precedent to assume courts will provide greater protections to speech in college and university environs than they will to speech in K-12 environs.¹⁶⁸ To date, however, the most striking quality of the cases from these diverse settings is the similarity of the analysis employed by the courts.

As noted above, the faculty speech cases decided to date involve unique factual scenarios. Any attempt to extrapolate future patterns from them therefore carries with it a substantial risk of error. Nevertheless, this much might be said: if the courts decide a dozen or so more faculty speech cases through a simple application of *Garcetti*—with no consideration of competing academic freedom considerations—then a precedential consensus will begin to emerge. That consensus would probably have no impact on *institutional* academic freedom. But it could effectively extinguish constitutionally based faculty academic freedom in the classroom. Such a result would leave faculty members with a perfectly symmetrical “Catch-22.” On one hand, if their classroom speech does *not* pertain to their job then the First Amendment will not protect it because “discussion in the classroom must be related . . . to the subject matter.”¹⁶⁹ On the other hand, if their classroom speech *does* pertain to their job then the First Amendment will not protect it because of *Garcetti*.

In Ernest Hemingway’s novel *The Sun Also Rises*, a character is asked how he went bankrupt. He explains that it happened two ways: gradually and then suddenly.¹⁷⁰ If current trends continue, this is how constitutionally based faculty academic freedom may end as well.

166. *Id.* at *13.

167. See, e.g., *Mayer v. Monroe Cmty. Sch. Corp.*, 474 F.3d 477, 478–79 (7th Cir. 2007) (finding that a teacher’s statements to students regarding current political events were part of the teacher’s official duties); cf. *Lee v. York County Sch. Div.*, 484 F.3d 687, 695 (4th Cir. 2007) (declining to apply *Garcetti* to a case involving a public school teacher sanctioned for posting religious material on a classroom bulletin board in light of the Supreme Court’s express reservation of the question of whether the analysis would apply in the same manner to a case involving speech related to teaching); *Caruso v. Massapequa Union Free Sch. Dist.*, 478 F. Supp. 2d 377 (E.D.N.Y. 2007) (holding that fact issues prevented court from resolving question of whether teacher’s display of presidential portrait was done pursuant to official duties).

168. The Supreme Court has generally provided a somewhat lower level of protection to speech in K-12 environs because of the unique pedagogic goals of K-12 education and because of the presence of minors. For a general discussion of these issues, see RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 211–16, 328 (1992).

169. Nahmod, *supra* note 2, at 585.

170. ERNEST HEMINGWAY, *THE SUN ALSO RISES* 136 (Charles Scribner’s Sons Ed., 1970).

CONCLUSION

There is no question that *Garcetti* has had, and will continue to have, a significant affect on the ability of public employees to maintain retaliation claims under the First Amendment. The cases decided to date suggest that *Garcetti* may prove particularly important in the higher education environment, where the duties of many lower- and mid-level employees include some element of compliance oversight and where higher-level employees often have a broad spectrum of responsibilities. Still, if there is no principled basis on which to distinguish these employees from those who work in analogous positions in other environments, then this result seems fair and sensible.

The matter is more complicated with respect to faculty members. The small number and idiosyncratic nature of the existing faculty cases render it substantially more difficult to predict how the courts will apply *Garcetti* to First Amendment retaliation claims involving employees who teach, research, and publish. We often think of college and university faculty members as having a unique position in a unique environment, as being the purveyors of thought in the peculiar marketplace that is the college or university campus. To date, however, courts have applied *Garcetti* to these employees much as they would to any others. Whether this continues, and ultimately becomes the controlling approach, may depend more on accident than on principle. So far no case has involved facts that presented a direct conflict between *Garcetti* and core issues of academic freedom, such as a statement made in a scholarly article. But this may have little significance if, by the time such a case arrives on a court's docket, a robust body of precedent dictates that the *Garcetti* standard applies to faculty members in the same way it applies to everyone else.

SOME FUNNY THINGS HAPPENED WHEN WE GOT TO THE FORUM: STUDENT FEES AND STUDENT ORGANIZATIONS AFTER *SOUTHWORTH*

PATRICIA A. BRADY
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INTRODUCTION

The mandatory student fees imposed by colleges and universities for the support of student organizations, student newspapers, and student governments have long been a source of controversy and litigation. Predictably, given the broad array of student groups operating on campuses nationally and the wide range of ideologies and viewpoints they represent, some students have found the activities of some fee-funded student groups to be offensive. From the early 1970s through the 1990s, objecting students filed numerous lawsuits seeking to be exempted from paying for the support of student organizations and activities with which they disagreed.

In *Board of Regents v. Southworth (Southworth I)*,¹ however, the United States Supreme Court, applying principles drawn from cases involving access to limited public forums, held that colleges and universities are entitled to impose mandatory student fees to support the expressive activities of student organizations—without having to create refund or avoidance mechanisms for objecting students—so long as the fees are allocated in a viewpoint neutral manner. While the decision confirmed colleges' and universities' ability to maintain mandatory fees programs, the Court's extension of forum analysis and viewpoint neutrality principles to a forum consisting of money has proved difficult in practice, generating new and complex controversies.

In pre-*Southworth I* cases, objecting students had based their claims for fees exemptions on compelled speech cases involving mandatory union and bar association dues, where members were allowed to avoid paying those portions of their dues used in lobbying and other expressive activities not directly related to the organization's principal mission.² In *Southworth I*,

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1. 529 U.S. 217 (2000) (*Southworth I*).

2. See, e.g., *Keller v. State Bar*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of*

the Court declined to adopt this approach, instead expanding on forum analysis principles applied in *Rosenberger v. Rector and Visitors of the University of Virginia*,³ a case in which a religious student newspaper was denied access to mandatory fees funding.

Comparing the mandatory fees program in *Southworth I* to the “metaphysical” forum of funding for free expression in *Rosenberger*,⁴ the Court determined that a college or university is entitled to impose a mandatory fee for the purpose of affording students the means to engage in a wide array of expressive activities.⁵ While noting that a student fees fund is “not a public forum in the traditional sense of the term,”⁶ the Court held that, as with other public forums, the institution could not prefer, in this context, some viewpoints over others.⁷ So long as the fees were allocated in a viewpoint neutral manner, however, the institution could sustain its program.⁸ The rights of objecting students, the Court concluded, would be adequately protected by the viewpoint neutral operation of the program, and there would be no need to exempt students from paying the fees: “The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support.”⁹

The forum analysis framework and viewpoint neutrality requirements set forth in *Southworth I* initially appeared to offer a straightforward, workable means of assessing whether a college or university’s mandatory fees program operated properly and provided adequate protections for the First Amendment interests of all students. In practice, however, the application of forum analysis in the context of student fees programs has proved to be much more difficult, resulting in new disputes and further litigation.

Immediately following the Supreme Court’s decision, the *Southworth I* litigation was resumed on remand to the lower courts. The dispute in this phase¹⁰ shifted to the meaning of viewpoint neutrality in the context of a student fees program.¹¹ Expanding on forum principles applicable in the

Educ., 431 U.S. 209 (1977).

3. 515 U.S. 819 (1995).

4. “The SAF [Student Activities Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.” *Id.* at 830.

5. *Southworth I*, 529 U.S. at 233–34.

6. *Id.* at 230.

7. *Id.* at 234.

8. *Id.* at 221.

9. *Id.* at 233.

10. The *Southworth* litigation finally concluded with a third case involving the award of some attorneys fees to plaintiffs. *Southworth v. Bd. of Regents*, 376 F.3d 757 (7th Cir. 2004) (*Southworth III*).

11. Although the parties had originally stipulated that the university’s program was operated in a viewpoint neutral manner, the plaintiffs were permitted to withdraw their stipulation and proceed to trial on the question of whether the university’s fee program in fact satisfied the requirement of viewpoint neutrality. *Southworth v. Bd. of*

context of permits for the use of traditional, spatial public forums, the U.S. Seventh Circuit Court of Appeals incorporated into the viewpoint neutrality standard a prohibition on “unbridled discretion” in the allocation of student fees funds.¹² Avoiding unbridled discretion in the allocation of student fees, the court determined, required the adoption of elaborate procedural safeguards similar to those used by officials considering permit applications for parks, parades, news racks, and other physical public forums.¹³

The level of procedural protection thus required to prevent “unbridled discretion” has in practice made it virtually impossible to deny or impose limits on funding requests, thus encouraging more requests for support from a wider array of student groups and for a wider array of purposes. Student fees have become a readily available source of funding for student organizations, paving the way for aggressive efforts by student groups to claim a share of the monies. With these efforts have come new pressures and demands on fees programs, and new disputes involving difficult legal issues, competing constitutional interests, and conflicts between and among other state and federal laws.

Applications for fees support by student groups that had not previously sought funding, or had been excluded from access to fees funds,¹⁴ have been particularly problematic. Requests for funding from religious student organizations have raised sensitive and complex questions about the interplay of competing constitutional principles and other legal and policy interests in the context of a forum of money.¹⁵ Among these are potential conflicts between certain college or university requirements for recognition as a student organization (a prerequisite to access to fees funding) and the expressive activities of certain religious student organizations, as well as issues involving the Establishment Clause implications of providing state funds for specifically religious activities. Other difficult questions of state and federal law are posed by requests for fees funding for the activities of political student organizations. Further, some issues not fully resolved by *Southworth I*, such as the viability of certain fee allocation mechanisms, have continued to generate litigation.

In his concurring opinion in *Southworth I*, Justice Souter agreed that the university’s fees program was permissible, but presciently noted that he did

Regents, 307 F.3d 566, 570 (7th Cir. 2002) (*Southworth II*).

12. *Id.* at 575.

13. *See id.* at 575–80.

14. Before *Rosenberger*, religious and political student organizations were often prohibited, under college and university policies, from receiving fees funding.

15. Ironically, the early opponents of mandatory fees programs were often, as in *Southworth I*, self-described conservatives and members of religious groups who opposed providing support for left-leaning groups. These are, however, often the groups that have been most active in seeking access to fees funding post-*Southworth I*, receiving benefits and pursuing litigation where funding has been denied.

“not believe that the Court should take the occasion to impose a cast-iron viewpoint neutrality requirement to uphold it.”¹⁶ The controversies and lawsuits that have followed *Southworth I* illustrate the complexities of applying forum analysis and strict viewpoint neutrality principles in the context of a mandatory fees program. The expansion of principles governing traditional, spatial physical forums has proved awkward when applied to money forums, stimulating ongoing struggles over access to student fees, continued confusion about the processes for their allocation, and new conflicts between forum principles and other constitutional provisions. This article reviews the history of student fees litigation, including the development of forum analysis and the viewpoint neutrality standard, discusses recent litigation and related problems confronting colleges and universities in this area, and suggests the need for reconsideration of the extent to which forum analysis provides adequate guidance for resolving disputes arising in the metaphysical forum of money.

I. HISTORY OF MANDATORY STUDENT FEES LITIGATION

A. Early Cases: Compelled Speech and Agency-Shop Theories

Well before the *Southworth I* litigation, from the 1970s through the 1990s, legal challenges to mandatory student fees programs of public colleges and universities were common. A number of these earlier cases involved the imposition of fees to fund student newspapers whose editorial views were offensive to some students.¹⁷ Other cases involved challenges to the use of mandatory fees for the support of student groups engaged in expressive activities with which some students disagreed.¹⁸

The plaintiffs in these pre-*Southworth I* matters—like the plaintiffs in *Southworth I*—relied on compelled speech precedents in support of their contention that being forced by a public college or university to fund speech with which they disagreed was an impermissible infringement on their First Amendment speech and associational rights. Compelled speech and compelled association had long been recognized as violating the First Amendment.¹⁹ Objecting students relied on these precedents in claiming

16. *Southworth I*, 529 U.S. 217, 236 (2000).

17. See, e.g., *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994) (*Carroll II*); *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992); *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992) (*Carroll I*); *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985); *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983); *Veed v. Schwartzkopf*, 353 F. Supp 149 (D. Neb. 1973), *aff'd* 478 F.2d 1407 (8th Cir. 1973); *Smith v. Regents*, 844 P.2d 500 (Cal. 1993) (en banc); *Lace v. Univ. of Vermont*, 303 A.2d 475 (Vt. 1973); *Good v. Associated Students of the Univ. of Wash.*, 542 P.2d 762 (Wash. 1975) (en banc).

18. See, e.g., *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996); *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982); *Uzzell v. Friday*, 547 F.2d 801 (4th Cir. 1977).

19. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that state could

their constitutional rights were violated by the payment of mandatory fees.

As a remedy for the claimed infringement on their rights, the students, citing “agency-shop” precedents, sought exemption from paying that part of the mandatory fee that supported organizations whose viewpoints they found offensive. The agency-shop cases involved complaints by union and bar association members about the use of compulsory dues for lobbying and other activities with which the members disagreed. Although the courts in these cases had affirmed the government’s ability to compel the payment of dues, they also recognized the constitutional implications of such compelled funding systems. To protect the constitutional rights of objecting members, courts approved “opt-out” and refund mechanisms that allowed members to avoid paying that part of their dues funding potentially offensive activities, while requiring them to pay for activities “germane” to the organization’s mission, justified by important governmental policy interests, and not constituting a significant burden on speech.²⁰ Challengers to mandatory student fees programs urged the adoption of similar protections in the college and university fees context.

Prior to *Southworth I*, consideration of the compelled speech and agency-shop theories in the context of fees litigation had produced varying interpretations of the First Amendment interests involved, and mixed practical results in terms of the appropriate means of protecting those interests. In the earliest cases, the plaintiffs had little success in persuading courts that their constitutional rights were infringed, or infringed to a degree that required any special protection.²¹ In *Kania v. Fordham*,²² sustaining the use of mandatory fees to support a student newspaper, the court noted that government may abridge incidentally rights of free speech and association when engaged in furthering the constitutional goal of “uninhibited, robust, and wide-open expression.”²³

not compel an objecting citizen to display the state’s motto “Live Free or Die” on license plates); *Elrod v. Burns*, 427 U.S. 347 (1976) (holding that dismissal of Republican employees by a Democratic sheriff violated the employees’ protected freedom of association); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding that state could not compel civil servants to affirm a belief in God); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that public school student could not be required to salute the flag).

20. See, e.g., *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991); *Keller v. State Bar*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

21. See, e.g., *Veed*, 353 F. Supp. 149 (upholding use of student fees to support a student newspaper, a student association, and a speaking program); *Lace*, 303 A.2d 475 (holding that there was no justiciable controversy presented by plaintiffs’ claims that their rights of free association were violated where fees were used to support expression of views with which they disagreed); *Good*, 542 P.2d 762 (finding that university could properly impose mandatory activities fees, so long as the fees were used in accordance with the purposes specified in the state statute authorizing the fees).

22. *Kania*, 702 F.2d 475.

23. *Id.* at 480 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Cf. *Southworth I*, 529 U.S. 217, 236 (2000) (Souter, J., concurring)

In somewhat later cases, however, greater deference was accorded to the interests of objecting students, and the courts established more extensive protections for them. In *Galda v. Rutgers*,²⁴ for example, the court held that the university had failed to demonstrate a compelling interest in funding the New Jersey Public Interest Research Group (PIRG) that would override plaintiffs' First Amendment rights, and enjoined the collection of a mandatory fee.²⁵ Similarly, the court in *Carroll I* concluded that the institution could constitutionally allocate mandatory fees to groups whose speech some students found offensive, but required that the groups receiving the fees spend the monies on campus, rather than on activities that took place elsewhere, like lobbying the state legislature.²⁶ Later, clarifying *Carroll I*, the court in *Carroll II* determined that, while student fees for the New York PIRG did not have to be expended on the campus in a geographic sense, they had to be used to foster the marketplace of ideas at the campus, to provide students with hands-on educational experiences, and to fulfill the institution's educational objectives.²⁷ In *Smith v. Regents of the University of California*,²⁸ the California Supreme Court acknowledged the institution's compelling interest in supporting student activities with a mandatory fee, but held that the rights of dissenting students required protection in the form of refund procedures.²⁹

B. *Southworth I* and Forum Analysis

The *Southworth I* plaintiffs sought to build on the compelled speech and agency-shop precedents in bringing their challenge to the mandatory student fees program of the University of Wisconsin System. The original plaintiffs, three University of Wisconsin Law School students and self-described conservatives, objected to the allocation of mandatory fees for the support of several liberal student organizations with whose political and ideological views they disagreed. Among the groups plaintiffs found objectionable were Wisconsin PIRG ("WISPIRG"); UW Greens; the Lesbian, Gay, Bisexual Campus Center; and the Madison AIDS Support Network.³⁰ The students requested that the institution refund that portion of their student fees they calculated had been used to fund these and other named organizations (approximately \$12 per semester). When the fees

(suggesting that the First Amendment interest claimed by the students was insufficient to merit anything more than the kind of protection then being provided by the university).

24. 772 F.2d 1060 (3d Cir. 1985).

25. *Id.* at 1068.

26. *Carroll v. Blinken*, 957 F.2d 991, 1002-03 (2d Cir. 1992).

27. *Carroll v. Blinken*, 42 F.3d 122, 128 (2d Cir. 1994).

28. 844 P.2d 500 (Cal. 1993).

29. *Id.*

30. *Southworth v. Grebe*, 151 F.3d 717, 720-21 (7th Cir. 1998).

were not refunded, they filed suit, demanding that they be exempted from payment of fees to the organizations with which they disagreed.

Although the institution maintained that its mandatory fees program could be sustained even under the compelled speech and agency-shop decisions, it also looked to a different line of cases on which to ground its defense. The year before *Southworth I* was commenced, the United States Supreme Court had decided *Rosenberger*, a challenge to the University of Virginia's denial of student fee funding to a religious student newspaper on grounds that such funding would violate the Establishment Clause of the First Amendment.³¹

Reviewing the University of Virginia's action in *Rosenberger*, the Supreme Court determined that the denial of funding violated the newspaper's right of free speech and was not justified by the university's concern that granting the funds would offend the Establishment Clause.³² The Court characterized the University of Virginia's fees fund as a kind of forum for free expression and analyzed the denial of funding under the principles applicable to government-created limited public forums.³³ Once a state has opened a limited forum, the Court noted, it "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,' . . . nor may it discriminate against speech on the basis of its viewpoint . . ." ³⁴ In this case, the university had engaged in unlawful viewpoint discrimination by refusing to fund a newspaper expressing religious views, while allowing funding for newspapers expressing other viewpoints.³⁵

Moreover, the Court held, the institution's concerns about contravening the Establishment Clause did not provide a basis for the denial of funding.³⁶ Discussing *Widmar v. Vincent*³⁷ and other cases involving the use of college and university facilities by religious student groups,³⁸ the

31. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

32. *Id.* at 845–46.

33. For cases analyzing government-created limited public forums, see, e.g., *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (access to public school facilities), *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985) (access to government-operated charitable contribution program), and *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983) (access to public school mail system).

34. *Rosenberger*, 515 U.S. at 829 (internal citations omitted).

35. *Id.* at 837.

36. *Id.* at 845–46.

37. 454 U.S. 263 (1981).

38. In *Widmar*, the Supreme Court held that when the institution creates a physical forum for the expression of views, it cannot discriminate against student organizations seeking to use the forum on the basis of the viewpoints they express, even when such expressive activities might include prayer or worship. See also *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–72 (1988).

Court in *Rosenberger* held that the Establishment Clause is not violated when a public college or university grants access to its resources on a viewpoint neutral basis to a wide array of student groups, including sectarian groups.³⁹

Although *Rosenberger* involved a *denial* of funding to a specific student organization, as opposed to the *required* funding of a number of organizations at issue in *Southworth I*, the forum analysis approach of *Rosenberger* suggested an additional ground for sustaining the institution's fees program in *Southworth I*. That is, if a mandatory fees program could be analogized to a limited forum for the support of the expressive activities of a variety of groups of all political and ideological persuasions, then contributing to the fund supporting such an array of activities would not result in forced support for any particular activities, and so would not violate the First Amendment rights of the contributors.

This theory proved unpersuasive at the initial stages of the *Southworth I* litigation, where the lower courts applied the compelled speech and agency-shop precedents to conclude that the institution's fees program was not germane to its mission, did not further a vital policy interest, and unduly burdened the plaintiffs' First Amendment rights. Based on this analysis, the Seventh Circuit, in *Southworth v. Grebe*,⁴⁰ enjoined the institution from requiring objecting students to pay that part of the fee used to fund organizations engaged in political or ideological expression.⁴¹

The Seventh Circuit's decision, however, created a conflict with the Ninth Circuit's decision in *Rounds v. Oregon State Board of Higher Education*.⁴² The court in *Rounds*, building on *Rosenberger*, had applied forum analysis in holding that the institution's mandatory fee program created a limited public forum, and the distribution of funds to a PIRG in that context did not violate the First Amendment speech rights of students objecting to the PIRG's views.⁴³ The conflict between the Seventh and Ninth Circuits, as well as the conflicting precedents from earlier student fee litigation, led to the Supreme Court's grant of certiorari in *Southworth I*.⁴⁴

Addressing the constitutionality of the fees program at issue in *Southworth I*, the Supreme Court turned to *Rosenberger* for the proper analytical framework. Recognizing that objecting students are entitled to certain safeguards with respect to the expressive activities that they are required to support with their student fees, the Court held that the standard of viewpoint neutrality found in the public forum cases provides the means of protecting the constitutional interests of students in a mandatory fees

39. *Rosenberger*, 515 U.S. at 834.

40. 151 F.3d 717 (7th Cir. 1998), *rev'd* 529 U.S. 217 (2000).

41. *Id.* at 735.

42. 166 F.3d 1032 (9th Cir. 1999).

43. *Id.* at 1039.

44. *Bd. of Regents v. Southworth*, 526 U.S. 1038 (1999).

program:

While *Rosenberger* was concerned with the rights a student has to use an extracurricular speech program already in place, today's case considers the antecedent question, acknowledged but unresolved in *Rosenberger*: whether a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech in the first instance. When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others. There is symmetry then in our holding here and in *Rosenberger*: Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.⁴⁵

The Court also determined that, while the institution might choose to create a refund or "opt-out" mechanism for student fees, such a system is not constitutionally required.⁴⁶

On a related issue, the Court briefly addressed the use of referenda to allocate mandatory fee funds, a practice sometimes followed by the University of Wisconsin.⁴⁷ The Court noted that the record was not fully developed on that point, but suggested that such a process was not likely to afford adequate protection for viewpoint neutrality since a referendum, by its nature, substituted majority determinations for viewpoint neutrality.⁴⁸

Having established forum analysis as the correct basis for reviewing the constitutionality of mandatory student fees programs, the Court remanded the case for further proceedings on the referendum question in light of the other principles discussed in its decision.⁴⁹

II. FORUM FALL-OUT: NEW PROBLEMS, UNRESOLVED ISSUES

Concurring in the judgment in *Southworth I*, Justice Souter agreed that the institution's fee system was permissible, but expressed concern about imposing a rigid viewpoint neutrality requirement to uphold it.⁵⁰ Events following *Southworth I* soon proved his point well-taken. The *Southworth I*

45. *Southworth I*, 529 U.S. 217, 233–34 (2000).

46. *Id.* at 232.

47. *Id.* at 235.

48. *Id.*

49. *Id.* at 236.

50. *Id.* (Souter, J., concurring).

decision led immediately to further litigation between the parties over the meaning of the viewpoint neutrality standard, and whether the institution's fee system was in fact viewpoint neutral.⁵¹ And, in a series of more recent disputes and cases, new issues have arisen involving eligibility for access to funding from the "forum of fees," requirements for recognition as a student organization (the usual prerequisite for access to the fees forum), funding requests from religious organizations for the support of religious activities, and funding for campaign activities of student political groups. In addition, lingering questions have remained as to when, if ever, it might be appropriate to use a referendum as a means of allocating fees. As these ongoing concerns demonstrate, in the context of a limited metaphysical forum of money, forum analysis with strict viewpoint neutrality as the operational principle has been fraught with problems. The analytical approach adopted in *Southworth I* and expanded upon in *Southworth II* has not only failed to prevent further controversies, but has actually spurred an increase in fees disputes and litigation.

A. *Southworth II* and the Meaning of Viewpoint Neutrality

The parties in *Southworth I* had stipulated that the institution's fees program operated in a viewpoint neutral manner. The Supreme Court remanded the case, however, to deal with the question whether a referendum could be used to allocate fees, and for reconsideration "in light of the principles we have discussed."⁵² Following the Supreme Court's decision, the institution amended its policies to prohibit the use of the referendum as a basis for the allocation of student fees.⁵³ Based upon the stipulation and the institution's action on the referendum matter, the case might have been concluded at this stage.⁵⁴ The plaintiffs, however, immediately sought and were granted relief from the viewpoint neutrality stipulation, and a new phase of the litigation began over the meaning of viewpoint neutrality, and whether the institution's system for the allocation of student fees was, in fact, viewpoint neutral.

Looking to forum cases for guidance, the appeals court in *Southworth II* relied on precedents involving permitting and licensing schemes for the use of traditional, spatial public forums.⁵⁵ In such cases, the courts had held

51. *Southworth II*, 307 F.3d 566 (7th Cir. 2002).

52. *Southworth I*, 529 U.S. at 236.

53. University of Wisconsin System Administrative and Financial Policies F20 and F37 (2000) [hereinafter Wisconsin Policies] (revised and renumbered as Policy F50, effective December 2007) (on file with author), available at <http://www.uwsa.edu/fadmin/fppp/fppp50.htm>.

54. As stated by the majority in *Southworth I*, "The parties have stipulated that the program . . . respects the principle of viewpoint neutrality. If the stipulation is to continue to control the case, the University's program in its basic structure must be found consistent with the First Amendment." *Southworth I*, 529 U.S. at 234.

55. See, e.g., *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002) (addressing park

that viewpoint neutrality in granting access to spatial public forums is threatened where decision-makers have “unbridled discretion” in deciding who should receive access.⁵⁶ Such “unbridled discretion” in the hands of decision-makers creates either a risk of self-censorship on the part of those seeking access to the forum, or a risk that the decision-maker might use its authority to favor or disfavor speech based on its viewpoint or content. Noting that unbridled discretion in the allocation of student fee funds poses the same type of threat to viewpoint neutrality, the court of appeals in *Southworth II* concluded that the unbridled discretion standard was a part of the viewpoint neutrality requirement applicable to an institution’s mandatory student fees program and reviewed the institution’s fee distribution system against this standard.⁵⁷

The institution opposed including a prohibition on unbridled discretion as part of the viewpoint neutrality standard, arguing that a simple standard of actual nondiscrimination in the operation of its program was the proper measure of viewpoint neutrality in the limited forum of a fees fund. The court of appeals, however, emphasized that the issue was not whether there were actual *incidents* of viewpoint discrimination, but rather whether the fees *system* itself satisfied the viewpoint neutrality requirement. Although the court sustained the institution’s program, it based its decision on the numerous procedural protections for those seeking access to the fees afforded under institutional policies, including specific criteria for fee allocation decisions, a requirement to provide written reasons for funding denials, and an elaborate appeals process.⁵⁸ Based on these protections, the court concluded that the institution’s program curtailed the discretion of the student government in the allocation of fees sufficiently to meet the unbridled discretion standard.⁵⁹ Stating that the unbridled discretion standard does not require the elimination of *all* discretion in regulating access to a forum, the court of appeals found that the institution’s

permits); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (addressing parade permits); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (addressing permits for news-racks).

56. *See Southworth II*, 307 F.3d at 575–80.

57. *Id.* at 578–79. Indeed, the Seventh Circuit went on to suggest that the unbridled discretion standard could stand as a constitutional requirement separate and distinct from the viewpoint neutrality requirement. *See id.* at 580.

58. Following the trial in *Southworth II*, university administrators and student government leaders worked together to make additional policy modifications that further narrowed the discretion available to student government in the allocation process. These amendments required the student government to develop written criteria for the allocation of student fee funds, to take an oath promising to allocate funds in a viewpoint neutral manner, to set minimum base funding levels for all eligible student organizations, to provide written reasons for the denial of funding, and to clarify the appeals process, at all levels, from the student government to the campus administration and the Board of Regents. *See id.* at 581–87.

59. *Id.* at 587.

narrowing of the discretionary elements of the fees allocation process was adequate to withstand constitutional scrutiny.⁶⁰

Despite the court's approval of the fees program and its acknowledgment that some discretion in the administration of fees is permissible, the unbridled discretion standard has in practice greatly limited the ability to deny or limit funding requests. The extensive process protections required to bridle discretion not only add administrative complexity to the operation of fees programs, but also encourage lengthy disputes and appeals if funding is denied or restricted.⁶¹ As a consequence, there is considerable pressure on students and staff charged with managing the funds to grant virtually all funding requests, rather than face further internal controversy or litigation. This ready availability of fees has, in turn, encouraged more aggressive demands for support from an ever-expanding number of student organizations.⁶²

B. Access to the Forum: Recognition as a Student Organization

With the easier availability of fees funding made possible by the unbridled discretion standard have come new requests for fees support. In addition, the number of groups eligible to seek funding has grown, as a result of the elimination of earlier prohibitions on access to fees funds by religious and political student groups. Before *Rosenberger*, religious and political student organizations were commonly prohibited by institutional policies from receiving fees. *Rosenberger*, however, suggested that such blanket funding prohibitions could constitute viewpoint discrimination under forum analysis, and led to the elimination of such restrictions at many institutions.⁶³ While some of these student organizations had not

60. *Id.* at 592.

61. See also *Child Evangelism Fellowship v. Anderson School District Five*, 470 F.3d 1062 (4th Cir. 2006), and *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 457 F.3d 376 (4th Cir. 2006), for cases applying the unbridled discretion standard in the context of public school restrictions on access to "forums" for the distribution of organization flyers and facility fee-waivers, respectively. Both cases follow *Southworth II*, emphasizing that not only must school practices be free of viewpoint discrimination, but also that school policies must ensure viewpoint neutrality by adequately bridling discretion.

62. This problem may be further exacerbated if a fees program does not include any limit or cap on the total amount of the fees that may be available for distribution to student organizations, but rather determines the total amount needed to fund all approved requests and then assesses that sum to the students.

63. At the time *Southworth I* went to the United States Supreme Court, the University of Wisconsin had in place such a policy, but had not enforced it following *Rosenberger*. Although plaintiffs in *Southworth I* suggested that this policy would render the fees program not viewpoint neutral, the Court did not address the issue, based on the parties' stipulation that the program was administered in a viewpoint neutral manner. Subsequent to the Court's decision in *Southworth I*, the policy was repealed. See *Southworth I*, 529 U.S. 217, 225–26 (2000); Wisconsin Policies, *supra* note 53. Similar policies have since been challenged. See *Sklar v. Clough*, No. 1:06-

sought funding prior to *Rosenberger* or *Southworth I* because they disapproved of mandatory fees generally or were simply unfamiliar with the programs, they have since become active participants in the funding forum.

Requests for support from student religious organizations have proved to be especially problematic in this new environment. Difficult questions have arisen over eligibility for official recognition as a student organization, the prerequisite for access to fees funding. Requirements that student organizations comply with institutional policies prohibiting discrimination on the basis of protected characteristics have become the focus of numerous disputes. In a coordinated national effort,⁶⁴ religious student organizations have challenged such requirements, arguing that they cause viewpoint discrimination in the forum, violate constitutionally protected organizational interests in expressive association, and infringe on other First Amendment rights. A series of recent cases illustrates the difficulties of applying forum analysis and viewpoint neutrality principles in this context, while assuring that other important legal and policy interests are protected.

Recognition or registration⁶⁵ as a student organization has long been the sine qua non of eligibility for funding from student fees. Failure to satisfy recognition requirements means, in effect, denial of funding, as well as other important benefits.⁶⁶ Although recognition may appropriately be

CV-0627 (N.D. Ga. dismissed July 25, 2008); *Christian Legal Soc'y v. Sorenson*, No. 3:08-CV-00701 (D.S.C. dismissed June 24, 2008). In *Sklar*, the university defendants argued that it is constitutionally permissible to prohibit funding of religious and political activities. Although the court there did not reach the issue, its opinion suggested that the policy would not likely withstand constitutional scrutiny under *Rosenberger* or *Southworth I*.

64. The Alliance Defense Fund and the Christian Legal Society have spearheaded this effort, leading many of the challenges that have been brought. See, e.g., *Christian Legal Soc'y v. Sorenson*, No. 3:08-CV-00701 (D.S.C. dismissed Jun. 24, 2008); *Christian Legal Soc'y v. Eck*, No. 9:07-CV-00154 (D. Mont. filed Dec. 14, 2007); *DiscipleMakers, Inc. v. Spanier*, No. 4:04-CV-02229 (M.D. Penn. dismissed Oct. 3, 2005); *Christian Legal Soc'y v. Crow*, No. 2:04-CV-02572, 2006 U.S. Dist. LEXIS 25579 (D. Ariz. dismissed Sept. 7, 2005); *Christian Legal Soc'y v. Farley*, No. 5:04-CV-04120 (D. Kan. dismissed Apr. 6, 2005); *Christian Legal Soc'y v. Ohio State Univ.*, No. 2:04-CV-00197 (S.D. Ohio dismissed Nov. 19, 2004). Additional information on the work of these national organizations is published through such websites as Alliance Defense Fund: Defending Our First Liberty, University Life, www.alliancedefensefund.org/issues/ReligiousFreedom/UniversityLife.aspx (last visited Oct. 31, 2008), and Press Release, Christian Legal Society, Center for Law & Religious Freedom Sues Ohio State University Over Discriminatory "Non-Discrimination" Policy (Mar. 12, 2004), available at http://www.clsnet.org/clrfPages/pr_2004-03-12.php.

65. For ease of reference, the term "recognition" is used here to include registration and similar designations that indicate a student organization has been deemed eligible to receive funding and other benefits from the institution.

66. See *Southworth I*, 529 U.S. 217; *Rosenberger v. Rector & Visitors of the Univ.*

conditioned on an organization's affirmation of intent to comply with institutional policies, when recognition is denied, the school bears a "heavy burden" to demonstrate that the denial is appropriate.⁶⁷ While most recognition requirements are noncontroversial,⁶⁸ student religious organizations have frequently challenged institutional enforcement of nondiscrimination policies, seeking to be excused from conditions on recognition that require adherence to certain aspects of such policies.

Adopted to assure compliance with state and federal anti-discrimination laws and institutional policies, nondiscrimination requirements for student organizations are common at colleges and universities.⁶⁹ The list of protected characteristics under such policies typically includes age, race, color, national origin, disability, religion, sex, and sexual orientation. Some student religious organizations, however, maintain membership and leadership requirements that discriminate, or might be considered to discriminate, on the basis of religion or sexual orientation, in violation of institutional policies. These organizations may require that their members or leaders be members of their religion, thus conflicting with policies prohibiting religion-based discrimination. Less directly, religious groups may require their members and leaders to agree to adhere to a faith statement that would effectively preclude approval of sex outside of marriage, including homosexuality, or engaging in homosexual conduct. Such required faith statements might be construed to conflict with policies

of *Va.*, 515 U.S. 819 (1995); *Healy v. James*, 408 U.S. 169 (1972). In addition to the ability to seek student fee funding, official recognition typically provides a student organization with such benefits as the opportunity to describe itself as officially recognized and affiliated with the college or university, access to college or university facilities, and such office resources as telephones and computers.

67. *Healy*, 408 U.S. at 182, 184, 193. In *Healy*, a college president refused to grant official recognition to a student organization based on his view that the organization's philosophy was "antithetical" to the school's policies. Noting that denial of recognition to a student organization may abridge the right of expressive association, the Court held that the university had the burden of demonstrating that its denial was appropriate. While finding the denial of recognition on the facts presented in *Healy* was not justified, the Court did note that restrictions on an organization's activities—as opposed to its views—could be sustained upon a proper factual showing, and further that a college or university might require, as a condition of recognition, that a group affirm its intention to comply with reasonable campus regulations. *Healy*, 408 U.S. at 193–94.

68. E.g., requirements that student organizations be comprised of and directed by students, that their activities and services be made widely available to the campus community, and that there be some minimal level of institutional supervision, such as a faculty or staff advisor. See, e.g., UW-Madison Student Organization Office Handbook: Student Organization Eligibility & Registration, http://soo.studentorg.wisc.edu/handbook/08-09/eligibility_and_registration.html (last visited Oct. 31, 2008).

69. See, e.g., WIS. STAT. § 36.12 (2005); University of Wisconsin Board of Regents, Policy Document 30-6, <http://www.uwsa.edu/bor/policies/rpd/rpd30-6.htm> (last visited Oct. 31, 2008).

prohibiting sexual orientation discrimination.⁷⁰

Faced with actual or threatened denial of recognition and funding because of failure to comply with institutional nondiscrimination policies, religious student groups have lodged complaints and brought suits contending that the policies violate various constitutional rights, including the First Amendment rights of free speech, expressive association, and free exercise of religion. The plaintiffs in these cases contend, relying on forum analysis principles, that the nondiscrimination policies violate viewpoint neutrality by effectively depriving them of access to the forum because of their religious views. Additionally, the organizations argue that the forced inclusion of certain individuals in their leadership or membership undermines their ability to communicate their own messages, infringing on their right of expressive association as articulated in such cases as *Boy Scouts of America v. Dale*,⁷¹ *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*,⁷² and *Roberts v. United States Jaycees*.⁷³

Several of these disputes over recognition have been resolved before being fully litigated, with the adoption of modified institutional nondiscrimination policies that attempt to accommodate the desires of student organizations to maintain belief requirements for members and leaders, while still banning discrimination on the basis of protected statuses or characteristics. In *Alpha Iota Omega Christian Fraternity v. Moeser*,⁷⁴ for example, a religious organization complained that the University of North Carolina's nondiscrimination policy imposed a condition on its receipt of benefits that was not imposed on non-religious organizations, thus violating its constitutional rights. The trial court granted a preliminary injunction against the institution's enforcement of its nondiscrimination policy, and the institution subsequently amended its policy to resolve the matter. The revised policy, in effect, allows student organizations to require commitment to a set of *beliefs* as a condition of membership or participation, but continues to prohibit discrimination on the basis of *status*, including sexual orientation. The policy provides:

70. While homosexuality or homosexual conduct is of particular concern to these student religious groups, in at least one case the focus was on gender discrimination. See *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of New York*, 443 F. Supp. 2d 374 (E.D.N.Y. 2006).

71. 530 U.S. 640 (2000) (holding that admission of an avowed homosexual as a scout leader prevented the Boy Scouts organization from expressing its message). Other potential claims involve violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

72. 515 U.S. 557 (1995) (holding that requiring private organizers of a parade to include a homosexual group violated the organizers' First Amendment right to free expression).

73. 468 U.S. 609 (1984) (applying state human rights law to all male charitable organization to compel admission of women to membership did not violate male members' First Amendment right to freedom of association).

74. No. 1:04-CV-00765, 2005 WL 1720903 (M.D.N.C. dismissed May 4, 2006).

Student organizations that select their members on the basis of commitment to a set of beliefs (e.g., religious or political beliefs) may limit membership and participation in the organization to students who, upon individual inquiry, affirm that they support the organization's goals and agree with its beliefs, so long as no student is excluded from membership or participation on the basis of his or her age, race, color, national origin, disability, religious status or historic religious affiliation, veteran status, sexual orientation, or, unless exempt under Title IX, gender.⁷⁵

A similar approach was taken in *Intervarsity Christian Fellowship v. Walsh*,⁷⁶ in which application of the University of Wisconsin System's nondiscrimination policy to the InterVarsity Christian Fellowship, a religious student group at the University of Wisconsin-Superior campus, was challenged. The institution amended its policy following the North Carolina model and the case was settled.⁷⁷ Other colleges and universities, too, have resolved litigation or threats of litigation by making these kinds of policy changes.⁷⁸

Whether these changes to nondiscrimination policies are legally required or adequately address the competing constitutional interests involved, however, remains unsettled. Two recent cases considering these issues in some detail, *Christian Legal Society v. Kane*⁷⁹ and *Christian Legal Society v. Walker*,⁸⁰ have reached conflicting results, in one instance supporting the institution's ability to require compliance with its nondiscrimination policy,⁸¹ and in the other finding—in the context of a request for a preliminary injunction—that the plaintiff religious organization would likely succeed on its claimed First Amendment rights violations.⁸² Both cases are somewhat problematic as precedents, since one is not officially reported and the other was the result of a ruling on a preliminary injunction

75. University of North Carolina Policy on Nondiscrimination, <http://www.unc.edu/campus/policies/studentorgnondiscrim.html> (last visited Oct. 31, 2008).

76. Agreed Order of Settlement, No. 06-C-0562-S (W.D. Wis. Apr. 11, 2007) available at <http://www.telladf.org/UserDocs/UWSuperiorSettlement.pdf>.

77. *Id.* See also Univ. of Wisconsin-Madison Roman Catholic Found. v. Walsh, No. 3:06-CV-00649 (W.D. Wis. dismissed May 03, 2007), which raised similar questions about application of the university's nondiscrimination policy, as well as the student organization's failure to satisfy an additional university recognition requirement that the organization be directed and controlled by students. This case was also settled.

78. See, e.g., *Christian Legal Soc'y v. Crow*, No. 2:04-CV-02572, 2006 U.S. Dist. LEXIS 25579 (D. Ariz. dismissed Sept. 7, 2005).

79. No. C 04-04484, 2006 WL 997217 (N.D. Cal. Apr. 17, 2006), *appeal docketed*, No. 06-15956 (9th Cir. May 17, 2006)

80. 453 F.3d 853 (7th Cir. 2006).

81. See *Kane*, 2006 WL 997217.

82. See *Walker*, 453 F.3d 853.

motion.⁸³ They do, however, reflect the divergent analytical approaches that might be applied where compliance with nondiscrimination policies is a condition of recognition as a student organization. The results in these cases reflect the complexities associated with applying forum analysis principles in the context of fees requests by religious organizations, and suggest that disputes over these issues are far from over.⁸⁴

1. Christian Legal Society v. Kane

In *Christian Legal Society v. Kane*,⁸⁵ plaintiff Christian Legal Society (“CLS”) sued the Hastings Law School, asserting, among other claims,⁸⁶ that its rights to freedom of expressive association and free speech were violated when Hastings refused to grant it recognition as a student organization. Hastings prohibits discrimination on the basis of race, color, religion, national origin, ancestry, disability, age, sex, or sexual orientation in admission, access, and treatment in Hastings-sponsored programs and activities.⁸⁷ Recognized student organizations are required to abide by this policy and must allow any student to participate, become a member, or seek a leadership position, regardless of status or beliefs.⁸⁸

CLS requires its members to sign a statement of faith and prohibits

83. See *id.* (result of a preliminary injunction); *Kane*, 2006 WL 997217 (not officially reported).

84. Compare Charles J. Russo & William E. Thro, *The Constitutional Rights of Politically Incorrect Groups: Christian Legal Society v. Walker as an Illustration*, 33 J.C. & U.L. 361, 386 (2007) (concluding the “constitutional rights of the politically incorrect student organizations largely trump a public college or university’s desire to prevent student groups from engaging in discrimination”), and Mark Andrew Snider, *Viewpoint Discrimination by Public Universities: Student Religious Organizations and Violations of University Nondiscrimination Policies*, 61 WASH. & LEE L. REV. 841, 882 (2004) (concluding that U.S. Supreme Court jurisprudence suggests that “a public university may not use its nondiscrimination policy to derecognize a student religious organization that chooses its members based on its religious beliefs”), with Ralph D. Mawdsley, *Student Organizations and Nondiscrimination Policies in Higher Education: How Much “Play in the Joints” Is Permissible Under the Free Speech Clause?*, 215 ED. LAW REP. 203, 225–26 (2007) (noting that “[h]ow forum and viewpoint discrimination analyses will apply to viewpoint neutral nondiscrimination policies is not yet clear,” and that “courts will have to determine how much ‘play in the joints’ is necessary under the First Amendment to both allow a university to fulfill its mission of providing nondiscriminatory educational opportunities and to permit divergent student organization perspectives that seem to be at odds with that mission”).

85. 2006 WL 997217, *appeal docketed*, No. 06-15956 (9th Cir. May 17, 2006). Oral argument in *Kane* is postponed pending the Ninth Circuit’s en banc review of *Truth v. Kent School Dist.*, 499 F.3d 999 (9th Cir. 2007), *superseded* by 524 F.3d 957 (9th Cir. 2008).

86. Plaintiffs also contended that their rights to the free exercise of religion and equal protection were violated. *Kane*, 2006 WL 997217 at *4.

87. *Id.* at *2.

88. *Id.*

students who do not sign from becoming members or officers.⁸⁹ It also bars from membership or leadership posts those who engage in homosexual conduct or belong to religions having tenets differing from the CLS statement of faith.⁹⁰ Hastings concluded that CLS's requirements did not comply with the nondiscrimination policy and denied recognition.⁹¹ CLS sued, claiming violations of its constitutional rights, including the First Amendment rights to free speech and expressive association.⁹²

The trial court granted summary judgment to Hastings on all issues.⁹³ The court framed the central question in the case as whether a religious student organization may compel a public college or university to fund its activities and allow it to use the institution's name and facilities, even though the organization admittedly discriminates in its membership and leadership on the basis of religion and sexual orientation.⁹⁴

The *Kane* court characterized the school's nondiscrimination policy as a regulation of conduct having only an incidental, rather than direct, effect on speech.⁹⁵ As a result, the court applied the test of *United States v. O'Brien*⁹⁶ to analyze whether the policy infringed CLS's free speech rights.⁹⁷ Under *O'Brien*, a government regulation of conduct is valid, even where it incidentally restricts speech, if (1) the regulation is within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) the interest is unrelated to the suppression of free expression; and (4) the incidental restriction on speech is no greater than is essential to furtherance of the governmental interest.⁹⁸ The court concluded that the Hastings nondiscrimination policy was within the authority of the institution to adopt, that it furthered an important governmental interest, and was narrowly drawn to achieve the goal of eliminating discrimination.⁹⁹ Thus, under the *O'Brien* test, the policy did not violate CLS's freedom of speech.¹⁰⁰

Alternatively, the court reviewed the nondiscrimination policy as a direct regulation of speech.¹⁰¹ Here, too, the court determined that the nondiscrimination policy did not violate CLS's speech rights.¹⁰² Relying

89. *Id.* at *3.

90. *Id.*

91. *Id.*

92. *Id.* at *3–*4.

93. *Id.* at *27.

94. *Id.* at *5.

95. *Id.* at *8.

96. 391 U.S. 367 (1968) (involving a prosecution for draft-card burning).

97. *Kane*, 2006 WL 997217 at *8.

98. *O'Brien*, 391 U.S. at 377.

99. *Kane*, 2006 WL 997217 at *10.

100. *Id.*

101. *Id.*

102. *Id.*

on *Southworth I*, *Rosenberger*, and *Rounds*, the court found that Hastings had created a limited public forum with its student fees fund.¹⁰³ The level of scrutiny to be applied to restrictions on forum access depends on the type of forum.¹⁰⁴ Restrictions on speech in traditional public forums, such as streets and parks, must be narrowly drawn to achieve a compelling state interest. For a limited public forum, however, restrictions on access may be sustained if they are viewpoint neutral and reasonable in light of the purpose served by the forum. Because nondiscrimination statutes have been held to be viewpoint neutral,¹⁰⁵ the court concluded that the Hastings policy was likewise neutral and did not discriminate against the religious viewpoints expressed by CLS.¹⁰⁶ The policy was, moreover, reasonable and consistent with the school's educational mission and interest in complying with federal and state laws prohibiting discrimination.¹⁰⁷ As a result, under forum analysis and viewpoint neutrality principles, the policy did not infringe on CLS's freedom of speech.¹⁰⁸

With regard to CLS's contention that the policy violated its freedom of expressive association, the court again sustained the institution.¹⁰⁹ The court first noted that *Healy* is the most instructive precedent for analyzing CLS's claim in this regard.¹¹⁰ Under *Healy*, the measure for whether a restriction on student organization recognition passes constitutional scrutiny is the substantial interest standard for conduct regulations having only an incidental effect on speech set forth in *O'Brien*.¹¹¹ Since the court had already determined that the Hastings nondiscrimination policy did not violate CLS's speech rights under *O'Brien*, it reached the same conclusion with regard to its expressive association interests.¹¹² Moreover, the court held, the institution had sufficiently justified its denial of recognition to be consistent with *Healy*, rejecting CLS's argument that denial of recognition is per se an unconstitutional infringement of associational rights under *Healy*.¹¹³

Addressing CLS's argument that the correct framework for analysis was

103. *Id.*

104. *Cf.* *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006). The courts use a sometimes confusing variety of terms to differentiate types of public forums and determine the level of scrutiny to be applied to restrictions on access.

105. *See, e.g., Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003).

106. *Kane*, 2006 WL 997217 at *13.

107. *Id.* at *14.

108. *Id.*

109. *Id.* at *16.

110. *Id.*

111. *Healy v. James*, 408 U.S. 169, 189 n.20 (1972).

112. *Kane*, 2006 WL 997217 at *16.

113. *Id.* at *18–19.

that applied in expressive association cases such as *Dale* and *Roberts*, the court further held that even under those precedents, the nondiscrimination policy was constitutional.¹¹⁴ *Dale* established a three-part test for determining whether the right of expressive association has been violated: (1) an organization must engage in expressive association; (2) the state action challenged must significantly affect the group's ability to advocate its viewpoints; and (3) the court must determine whether the state's interest justifies the infringement on expressive association.¹¹⁵ In the court's view, there was no dispute that CLS engaged in expressive association.¹¹⁶ The court found, however, that compliance with the institution's nondiscrimination policy would not significantly impair CLS's ability to express its views and that any incidental intrusion on its rights was justified by the importance of the nondiscrimination policy.¹¹⁷

Although *Kane* is a district court decision and is not reported, the trial court's application of forum analysis and viewpoint neutrality principles is similar to the analytical approach taken recently by the Ninth Circuit Court of Appeals in *Truth v. Kent School District*.¹¹⁸ At issue in *Truth* was a public school district's denial of recognition to a student Bible club based on the conflict between the club's membership requirements, which effectively excluded non-Christians from general membership, and the district's nondiscrimination policies.¹¹⁹ The court of appeals concluded that the school's program on access to recognition, and thus funding, qualified as a limited public forum.¹²⁰ Relying on *Rosenberger*, the court framed the question before it as whether the policy of restricting access to the forum based on compliance with nondiscrimination policies was viewpoint neutral and reasonable in light of the purposes of the forum.¹²¹ The court found that the purpose of the funding program was to advance the school's basic pedagogical goals, and determined that the decision to restrict access to the program based on compliance with nondiscrimination policies was reasonable in light of the purposes of the forum.¹²² The court then considered whether the restriction was viewpoint neutral, holding that a regulation on access to a forum is not viewpoint neutral if it is "an effort

114. *Id.* at *20.

115. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648–49 (2000).

116. *Kane*, 2006 WL 997217 at *20.

117. *Id.* at *24.

118. 524 F.3d 957 (9th Cir. 2008) (*Truth II*), amended and superseded by 542 F.3d 634 (9th Cir. 2008). A previous decision by the Ninth Circuit, *Truth v. Kent School District*, 499 F.3d 999 (9th Cir. 2007) (*Truth I*), superseded by 524 F.3d 957 (9th Cir. 2008), was withdrawn and replaced by this decision, which also rendered moot a petition for rehearing en banc.

119. *Truth II*, 524 F.3d at 960–63.

120. *Id.* at 970.

121. *Id.* at 972.

122. *Id.* at 972–73.

to suppress expression merely because public officials oppose the speaker's view."¹²³ Because the school did not deny access to the forum based solely on the organization's religious viewpoint, the court held that it had not engaged in viewpoint discrimination.¹²⁴ The case was remanded, however, because there remained a triable issue of fact as to whether the school granted exemptions to the nondiscrimination policy based on the content of the speech of certain groups.¹²⁵

As noted above,¹²⁶ *Kane* is currently on appeal to the Ninth Circuit. The decision in the *Truth II* case suggests that the result in *Kane* is likely to be sustained, although the analytical framework that will be approved may vary from that of the trial court.

2. Christian Legal Society v. Walker

In contrast to the *Kane* decision and the approach suggested by *Truth*, the court of appeals in *Christian Legal Society v. Walker*,¹²⁷ concluded that the plaintiff student organization there was likely to prevail on its claims that its rights were violated by application of the nondiscrimination policy in place at the Southern Illinois University School of Law.¹²⁸ The CLS chapter at Southern Illinois had its recognition revoked following complaints that its membership and leadership requirements precluded homosexuals from becoming voting members or officers of the organization, contrary to the school's nondiscrimination policy.¹²⁹ CLS brought suit alleging that de-recognition violated its constitutional rights of expressive association, free speech, and free exercise of religion, and seeking a preliminary injunction.¹³⁰

The trial court denied the injunctive relief, but the court of appeals reversed.¹³¹ Addressing the claimed violation of the First Amendment right of expressive association, the court applied the *Dale* test, concluding that forced inclusion of those who engage in or affirm homosexual conduct would significantly affect CLS's ability to express its disapproval of

123. *Id.* at 973 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)) (internal citations omitted).

124. *Id.*

125. *Id.* at 973–74. Compare with the court's earlier decision, *Truth I*, 499 F.3d 999 (9th Cir. 2007), which more closely parallels the trial court's analysis in *Kane*.

126. *See supra* note 85.

127. 453 F.3d 853 (7th Cir. 2006).

128. *Id.* at 867. The *Truth I* court acknowledged that Walker had applied the forced-inclusion cases to a similar set of facts, but declined to express an opinion on whether the Seventh Circuit employed the appropriate legal framework. *Truth I*, 499 F.3d at 1015.

129. *Walker*, 453 F.3d at 858.

130. *Id.*

131. *Id.* at 867.

homosexual activity, and so violated its rights.¹³² Further, the court held, the university's interest in preventing discrimination did not outweigh CLS's interest in expressing its views.¹³³ In order to justify interfering with CLS's freedom of expressive association, the university's policy would have to serve a compelling state interest not related to the suppression of speech.¹³⁴ While acknowledging the university's interest in eliminating discrimination, the court could find no basis for forcing CLS to accept members whose activities violated its creed, except a desire to induce CLS to modify the content of its expression.¹³⁵ This, in the court's view, was insufficient to justify de-recognition of CLS.¹³⁶

While—as in *Kane*—the court invoked the *Healy* case, finding it to be “legally indistinguishable,” it reached the opposite conclusion from the *Kane* court.¹³⁷ Suggesting that CLS, like the plaintiff student organization in *Healy*, was denied recognition by reason of policies directed at advocacy or philosophy, rather than conduct or activities, the court concluded that CLS was likely to prevail on its claimed violation of expressive association rights.¹³⁸

With respect to forum analysis, the court determined that the otherwise viewpoint neutral nondiscrimination policy had not been applied to CLS in a viewpoint neutral manner.¹³⁹ CLS presented evidence that other student organizations had contravened the nondiscrimination policy, but had not been de-recognized.¹⁴⁰ This, the court determined, constituted viewpoint discrimination.¹⁴¹ Based upon its analysis of all the issues, the court remanded the case to the trial level for entry of a preliminary injunction against the university.¹⁴² The university did not appeal entry of the injunction, and the case was settled.

The different outcomes in *Kane* and *Walker* reflect divergent analytical approaches to the legal issues presented where forum and viewpoint neutrality principles, expressive association rights, and other First Amendment interests conflict with important institutional policies

132. *Id.* at 863.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Compare id.* at 864 (holding that the plaintiff has a reasonable likelihood of success against the dean of the law school for violating its right of expressive association), with *Christian Legal Soc'y v. Kane*, No. C 04-04484, 2006 WL 997217, at *24 (N.D. Cal. Apr. 17, 2006) (holding that the law school did not infringe on the plaintiff's right to expressive association by denying its request for funding).

138. *Walker*, 453 F.3d at 864.

139. *Id.* at 866.

140. *Id.*

141. *Id.* at 867.

142. *Id.*

governing fees programs. The contrary results can be explained in part by the different postures of the two cases (the preliminary injunction in *Walker*, as opposed to the fuller record in *Kane*), as well as by key factual differences (the differential treatment of student organizations in *Walker*, as opposed to the consistent application of the nondiscrimination policy in *Kane*). There remain, however, fundamental differences in the analyses applied, including how to frame the fundamental issue for determination, whether to focus primarily on expressive association concerns or forum principles, what level of scrutiny to apply to conditions on recognition as a student organization, whether to characterize nondiscrimination policies as conduct regulations or direct regulations of speech, and whether the fees funding constitutes a limited public forum.

The uncertainty resulting from such competing analytical approaches assures continuing controversies over eligibility for recognition as a student organization, and thus for fee funding. Until these differences are resolved, administrators of fees programs will struggle to find practical means of balancing college and university interests in compliance with nondiscrimination and other policies against the asserted constitutional rights of student groups seeking official recognition and financial support for the expression of their views.

C. Funding Requests: Establishment Clause Issues and Other Problems with a “Forum” of Public Funds

In addition to the problems presented by college and university requirements for recognition as a student organization, specific requests for funding by officially recognized organizations may raise complex legal issues. Requests from religious student organizations for the financial support of their religious activities have been of particular concern given the Establishment Clause issues they raise. The requests of student political organizations, however, also hold the potential for controversy under state campaign and election laws.

1. Establishment Clause Issues

Rosenberger made clear that the Establishment Clause is not violated where a college or university grants access to funding on a viewpoint neutral basis to a wide array of student organizations, including those expressing religious viewpoints.¹⁴³ Not addressed in the case, though, was the question whether fees could be used for the direct support of overtly religious activities or expenses. Noting the “special Establishment Clause dangers” where the government makes direct money payments to sectarian institutions, the *Rosenberger* Court stated: “We do not confront a case

143. *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995).

where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity [N]o public funds flow directly to [the student newspaper's] coffers."¹⁴⁴

Although *Southworth I* built on the forum analysis principles of *Rosenberger*, the case did not involve specific expenditures of fee funds, but rather the question whether students could be compelled to contribute to the support of the expressive activities of student organizations.¹⁴⁵ As a result, *Southworth I* provided little direct guidance on the Establishment Clause implications of making direct money payments to student religious groups.¹⁴⁶

The increased participation of student religious organizations in college and university fees programs since *Southworth I*, however, inevitably raises complex questions about the applicability of Establishment Clause principles in the context of a forum of fees, and about how to address the question left unanswered by *Rosenberger*.

Establishment Clause jurisprudence teaches that government financial support for religion is prohibited. Intended to protect against state sponsorship of, financial support for, or active involvement in religious activity,¹⁴⁷ the Establishment Clause means "at least this: No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."¹⁴⁸ As emphasized by the court in *School District of City Grand Rapids v. Ball*,¹⁴⁹ while characterized by few

144. *Id.* The Court further stated, "It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse." *Id.* at 844. Justice O'Connor's concurring opinion in *Rosenberger* also emphasized that state funding of religious activities is constitutionally prohibited, but suggested that the fees fund there was "a fund that simply belongs to the students." *Id.* at 851 (O'Connor, J., concurring).

145. *Southworth I*, 529 U.S. 217, 221 (2000).

146. It was clear on remand, however, that questions about the application of the Establishment Clause in the context of the fees forum would arise. *Southworth II*, 307 F.3d 566, 591 (7th Cir. 2002). Plaintiffs in *Southworth II* were concerned that the university's fee system made it possible to discriminate against religious organizations. *Id.* They pointed to a meeting between university officials and student government representatives in which the students were directed to contact legal counsel if they had concerns about funding religious activities. *Id.* at 591–92. The court of appeals was quick to dismiss this argument, noting that this sort of consultation did not constitute viewpoint discrimination, and would actually serve as another check on the student government's discretion in the allocation of funds. *Id.* at 592. The court went no further, though, on the subject of funding for religious organizations, and offered no suggestions related to the Establishment Clause implications of state funding for the religious activities of religious groups.

147. See *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

148. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

149. 473 U.S. 373 (1985).

absolutes, the Establishment Clause “does *absolutely* prohibit government-financed . . . indoctrination into the beliefs of a particular religious faith.”¹⁵⁰

Consistent with these principles, courts have prohibited, on Establishment Clause grounds, direct governmental subsidies for religious activities and institutions. Government aid that is distributed to a religious organization through the single choice of government with the effect of providing a direct subsidy to the organization is forbidden.¹⁵¹ In contrast, those types of indirect support that may result from the provision of governmental resources that benefit both secular and religious organizations have been allowed.¹⁵² Also permitted have been the kinds of indirect benefits that flow to religious organizations through the “genuinely independent and private choices of aid recipients.”¹⁵³

In the context of participation in public forums for the purpose of engaging in speech from a religious viewpoint, the courts have acknowledged that a state’s interest in avoiding Establishment Clause violations may be compelling enough to justify a content-based limitation on access.¹⁵⁴ Indeed, such content-based distinctions in spatial public forums have recently been sustained in two cases where churches were denied the use of public school facilities for worship services.¹⁵⁵ In addition, *Lamb’s Chapel v. Center Moriches Union Free School District*¹⁵⁶ and *Good News Club v. Milford Central School District*¹⁵⁷ suggest that there is an open question as to whether, or to what degree, the state’s interest in avoiding an Establishment Clause violation can justify viewpoint discrimination in a limited public forum.¹⁵⁸

Nevertheless, applying First Amendment speech principles and forum

150. *Id.* at 385 (emphasis added).

151. *See, e.g.,* *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002); *Mitchell v. Helms*, 530 U.S. 793, 888 (2000).

152. *See, e.g.,* *Walz*, 397 U.S. at 672–73 (tax exemptions for nonprofit entities, including churches); *Everson*, 330 U.S. at 18–19 (transportation benefits provided to public and private school students, including religious school students).

153. *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 488 (1986); *see also* *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); *Freedom from Religion Found., Inc. v. Bugher*, 249 F.3d 606, 611–12 (7th Cir. 2001).

154. *See* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

155. *See* *Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 131 (2d Cir. 2007); *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 918 (9th Cir. 2007).

156. *Lamb’s Chapel*, 508 U.S. 384.

157. *Good News Club*, 533 U.S. 98.

158. *Lamb’s Chapel* and *Good News Club* point out that it is not clear whether the interest in avoiding an Establishment Clause violation can justify viewpoint discrimination. *Id.* at 113; *Lamb’s Chapel*, 508 U.S. at 394–95.

analysis, courts have frequently sustained the use of public resources to support the expression of religious viewpoints in public forums. Characterizing various religious activities as constituting speech, and emphasizing the need to avoid discrimination against speech from a religious viewpoint in forums otherwise open to a variety of speakers and expressive activities, courts have permitted religious organizations broad access to spatial public forums, and to the mechanisms for gaining access to other public resources.¹⁵⁹ Governmental agencies denying access to such resources based on the Establishment Clause have been generally unsuccessful when challenged.¹⁶⁰ The courts considering these issues have minimized Establishment Clause concerns, concluding that no Establishment Clause violation occurs where the government program at issue is overall neutral toward religion, there is no endorsement—or perceived endorsement—of religion on the part of the state entity, the program is available to a wide variety of groups, and events sponsored under the program are open to members of the public as well to the sponsoring group.¹⁶¹

The fact patterns in these cases, however, did not involve providing

159. See, e.g., *Good News Club*, 533 U.S. at 108 (use of school room for meetings of religious club); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842–43 (1995) (access to student newspaper funds); *Lamb's Chapel*, 508 U.S. 384 (use of school room after hours to show film on family values reflecting Christian viewpoint); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (use of university facilities for prayer and worship meetings of recognized student organization).

160. In this connection there remains a further question whether worship, proselytizing, and faith inculcation activities are simply speech from a religious viewpoint, or belong to a different category of religious activity that is not speech or is not protected speech, and so may be treated differently from other kinds of expressive activities in a limited public forum. Compare Justice Stevens's dissent in *Good News Club*, 533 U.S. at 130 (Stevens, J., dissenting), discussing three categories of religious speech: speech about a particular topic from a religious point of view; speech that is simply worship; and an "intermediate category" that includes proselytizing or inculcating belief in a particular religious faith. *Id.* Justice Stevens suggests that the different classes of religious speech may justify different treatment in terms of access to limited public forums. *Id.* at 130–34. In contrast, Justice Scalia has opined that religious expression cannot violate the Establishment Clause where it is purely private and occurs in a traditional or designated public forum. See *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Good News Club*, 533 U.S. at 121–22 (Scalia, J., concurring).

161. In *Widmar*, for example, the Court found no Establishment Clause problem because the university's forum was already available to a wide variety of student groups and there could be no danger that the public would perceive there was any endorsement by the university of a particular religion or creed. *Widmar*, 454 U.S. at 274–75. Similarly, in *Lamb's Chapel*, the Court found that showing the film series in question would not have occurred during school hours, would have been open to the public and not just church members, and was not sponsored by the school, thus creating no impression that the school endorsed the viewpoints being expressed. *Lamb's Chapel*, 508 U.S. at 395. *Good News Club* was decided on virtually identical grounds. *Good News Club*, 533 U.S. at 113–14.

direct payments of public funds to religious groups for religious activities in the context of a student fees forum. As a result, the courts in these matters did not have occasion to address the Establishment Clause issue left unresolved by *Rosenberger*. This issue has been presented in a case currently being litigated, *Roman Catholic Foundation v. Regents (RCF)*.¹⁶² In that case, the University of Wisconsin-Madison denied the requests of a student organization, the Roman Catholic Foundation, UW-Madison (“RCF”) to fund activities conceded to be religious in nature, including worship, proselytizing, and faith inclusion.¹⁶³ The university based its denial on its conclusion that providing state funds for these activities would violate the Establishment Clause, and further that the activities were not consistent with the purposes of the fees funding forum, identified in *Southworth* as the stimulation of open dialogue and the free exchange of ideas.¹⁶⁴ Relying on forum analysis and the viewpoint neutrality principles of *Rosenberger* and *Southworth*, and characterizing its religious activities as speech from a religious perspective, RCF filed suit alleging that the denial of its requests¹⁶⁵ violated its rights to free speech, expressive association, and free exercise of religion.¹⁶⁶

Because the student fees in *RCF* are state funds—collected by the university and exacted from students in a manner similar to taxation,¹⁶⁷ deposited in the state treasury, and appropriated to the university for expenditure in accordance with state law—and were sought to be paid directly to a religious organization for the support of its religious activities, the case presented the Establishment Clause question left unanswered by *Rosenberger* and *Southworth*. Ruling on the parties’ cross-motions for summary judgment, the court noted that there is no simple way of distinguishing between speech from a religious viewpoint and worship, proselytizing or sectarian instruction, and emphasized that the government

162. No. 07-C-0505, 2008 WL 4378466 (W.D. Wis. Sept. 24, 2008) (*RCF*).

163. *Id.* at *1. The specific activities included an Alpha-Omega worship and praise service, an Evangelical Catholic Institute Catholic ministry training and worship event, the publication of Lenten booklets, the publication of pamphlets on how to pray the rosary, vocational, and spiritual guidance sessions, and guided prayer and counseling retreats. *Id.* at *2. Plaintiffs admitted that these were religious activities. *Id.*

164. *Id.* at *9.

165. The funding denials apply to two academic years, 2006–2007 and 2007–2008. For the 2006–2007 year, the university denied RCF requests for reimbursement of the activities; for 2007–2008, the university refused, prospectively, to include the requested support in the budget. The denial of reimbursements for past activities has led to claims in this litigation of a breach of the settlement agreement reached in *RCF v. Walsh, et al.* *Id.* at *17.

166. *See id.* at *4–*12.

167. Compare Justice Souter’s concurring opinion in *Southworth*: “[T]he university fee at issue is a tax. The state university compels it; it is paid into state accounts; and it is disbursed under the ultimate authority of the State.” *Southworth I*, 529 U.S. 217, 241 (2000) (Souter, J., concurring).

does not violate the Establishment Clause when it grants religious groups equal access to a public forum, even when the religious activity in the forum can be described as worship.¹⁶⁸ The court thus concluded that the Establishment Clause “does not compel the University to categorically exclude worship, proselytizing or sectarian religious instruction from its segregated fee forum.”¹⁶⁹

The court went on, however, to determine that “nothing in the Constitution requires the University to fund all such activities.”¹⁷⁰ In this regard, the court pointed out that the University need not open its forum to every conceivable student activity, and that it may create content-based restrictions on access to the fees forum that are reasonable in light of the forum’s purposes. Further, the court held, the university may decide that some activities are more valuable than others in light of the forum’s purposes, and on that basis restrict access to funding.¹⁷¹ While finding that the university’s content-based decision to deny funding to the specified activities in issue in the case was not required by the Establishment Clause and was not reasonable in light of the stated purposes of the forum,¹⁷² the court concluded that the denial of funding did not constitute viewpoint discrimination, since there was no evidence that the university excluded religious viewpoints from its forum.¹⁷³

It is unclear whether the trial court’s decision will be the final ruling in this matter. While providing some guidance on issues related to forum access, the decision raises a new series of questions regarding what are appropriate content-based limitations on forum access, how to define the purposes of a student fees forum, and how to manage inherently subjective determinations on the value of certain activities to the forum without violating the *Southworth* requirement of viewpoint neutral administration of funds. Would it be possible, for example, to exclude worship, proselytizing, or faith inculcation activities if none of them serve some narrowly re-defined purpose for a forum? How would the relative value of such activities be assessed, as against the forum’s stated purposes of stimulating the free exchange of ideas and open dialogue? These and similar questions illustrate the practical difficulties of applying the principles announced by the court, and may lead to the parties to seek further guidance on appeal.

At a minimum, however, the *RCF* case reflects the complex and difficult legal problems that lie at the intersection of forum analysis and Establishment Clause principles in the student fees context. Until the case

168. *RCF*, 2008 WL 4378466, at *7–*8.

169. *Id.* at *8.

170. *Id.*

171. *Id.* at *10.

172. *Id.* at *11.

173. *Id.* at *12.

law is more fully developed in this area, specific requests for student fees funding for religious student organizations will continue to generate controversy and questions about the meaning and applicability of the Establishment Clause in relation to forum analysis in a forum of fees.

2. Political Organizations

Religious student organizations, of course, are not the only groups whose requests for funding may raise difficult issues. Funding requests for the activities of student political organizations, too, hold the potential for disputes.

Like student religious organizations, student political groups were often excluded from access to fees funding before *Southworth I*. Since then, however, funding applications from these groups have generated concerns about the applicability of state election laws and related restrictions on the use of state resources, including facilities and funding, for campaign or election purposes.

For example, Wis. Stat. § 11.36(3) prohibits the entry of any person into a state building for the purpose of making a campaign “contribution.”¹⁷⁴ As defined in the statute, “contribution” includes not only financial donations and support, but also an act done for the purpose of influencing the election or nomination for election of a person to national office.¹⁷⁵ Such broad statutory language could be interpreted to prohibit the use of college or university funds, resources, or facilities by student political organizations active in national campaigns, raising questions about how to reconcile the state law with forum principles governing access to student fees funding for expressive activities. As in the case of purely religious activity, the college or university’s interest in avoiding violations of election laws might arguably be sufficient to justify some degree of discrimination against, or restrictions on, speech in the context of access to student fees. Similarly, it might be argued that certain political campaign activities can appropriately be excluded from the funding forum because they do not serve the forum’s primary purpose of stimulating the exchange of ideas, debate, or dialogue. While such issues have not yet been presented in litigation, specific fees funding requests from politically-affiliated groups for the support of specific campaigns could well trigger disputes about the impact of state election laws on access to the funding forum.¹⁷⁶

A related problem involves the application of institutional policies to the

174. WIS. STAT. ANN. § 11.36(3) (West 2004).

175. § 5.

176. For those public institutions that have also received tax exempt status under I.R.C. § 501(c)(3), the political activities of student organizations receiving institution funds may raise questions about the institution’s tax exempt status. See I.R.C. § 170 (West 2008).

funding of student political activity. In *Associated Students of the University of California at Santa Barbara v. Regents of the University of California*¹⁷⁷ the plaintiff student government associations filed suit when the University of California refused to disburse funds from student fee accounts to print flyers and educate voters about a state ballot initiative.¹⁷⁸ The university's policies prohibit use of student fees for ballot initiative advocacy.¹⁷⁹ The student groups sued, seeking a declaratory judgment that the institutional policies violated their speech rights under the U.S. Constitution.¹⁸⁰

Finding that the student fees involved in the case were public money that belonged to the university, the court concluded that the students had no right to receive funds for the purpose of ballot initiative campaigning.¹⁸¹ Relying on *Regan v. Taxation With Representation of Washington*,¹⁸² the court characterized the fees funding as a subsidy for speech and held that the university's "decision to not fund the plaintiffs' ballot activity is simply a 'decision not to subsidize the exercise of a fundamental right [which] does not infringe the right.'"¹⁸³

While the analysis in *Associated Students* neatly side-steps application of forum principles, the case leaves unanswered underlying questions about whether the university's policy is an appropriate restriction in the limited forum comprised of student fees. As this result suggests, there remains a significant potential for future disputes about the denial of funding for student political organizations.

D. Advisory Referenda and Fee Distribution

An additional aspect of forum analysis that has led to litigation involves the use of referenda as a student fees distribution mechanism.¹⁸⁴ Both *Southworth I* and *Southworth II* cast serious doubt on the validity of using a referendum as the means of distributing student fees for expressive activities. In *Southworth I*, the Supreme Court indicated that it was unlikely that a referendum system for the allocation of student fees could meet the requirement of viewpoint neutrality, since a referendum is

177. No. C 05-04352, 2007 WL 196747 (N.D. Cal. Jan. 23, 2007) (*Associated Students*).

178. *Id.* at *1.

179. *Id.*

180. *Id.*

181. *Id.* at *7-8.

182. 461 U.S. 540 (1983).

183. *Associated Students*, 2007 WL 196747, at *8 (quoting *Regan*, 461 U.S. at 549).

184. See *Southworth I*, 529 U.S. 217, 230 (2000); *Southworth II*, 307 F.3d 566, 570 (7th Cir. 2002).

inherently a reflection of majoritarian views.¹⁸⁵ In *Southworth II*, the Seventh Circuit held that considering the popularity of particular viewpoints is an impermissible factor for guiding discretion in the distribution of fees.¹⁸⁶ Neither case, however, directly presented the question whether an advisory referendum might be used in connection with a fee distribution scheme.

This issue was recently litigated in a case involving the State University of New York at Albany, *Amidon v. Student Association of State University of New York*.¹⁸⁷ The trial court there concluded that an advisory referendum failed to satisfy the viewpoint neutrality standard as articulated in *Southworth I* and *Southworth II*, holding that the “student referendum is a content-based criterion that cannot be saved by its advisory nature or the fact that it is only used to set the amount of funding as opposed to the question of funding or defunding altogether.”¹⁸⁸ The appeals court agreed, and noted that, although “content-based regulations are not necessarily prohibited by the First Amendment . . . they are subject to a strict scrutiny analysis.”¹⁸⁹ Because the university had not demonstrated any compelling state interest in using referenda the strict scrutiny standard could not be met.¹⁹⁰

III. CONCLUSION

The ongoing controversies over student fee programs are a natural outgrowth of the holding in *Southworth I*, with its expansive application of forum principles in the context of compelled financial support for expressive activities and concomitantly strict adherence to viewpoint neutrality requirements in the allocation of fees funds. The attractiveness of mandatory fees as a source of organization support has paved the way for the aggressive efforts of religious, political, and potentially other student groups to seek recognition or to claim a share of fees funding. With increasing numbers of funding requests have come disputes involving difficult legal issues, competing constitutional interests, and conflicts between and among other state and federal laws. These struggles over student fees have greatly increased the complexities of administering a mandatory student fees program. The associated legal problems require not only clarification and guidance from the courts, but some re-evaluation of the extent to which strict adherence to forum principles provides an adequate framework for analysis for the issues that can arise in a forum of money.

185. *Southworth I*, 529 U.S. at 235.

186. *Southworth II*, 307 F.3d at 594–95.

187. 399 F. Supp. 2d 136 (N.D.N.Y. 2005), *aff'd*, 508 F.3d 94 (2d Cir. 2007).

188. *Id.* at 150.

189. *Id.*

190. *Id.* at 151.

While the analogy of a money forum to a physical forum seems reasonable on its face, a forum of state funds presents unique problems. This sort of “metaphysical” forum is plainly distinguishable from spatial forums, thus calling into question whether it is appropriate to require rigid adherence to or expansion of traditional forum analysis principles in this context. The adoption of strict spatial forum principles for use in defining unbridled discretion in the allocation of student fees in *Southworth II*, for example, appears unnecessarily restrictive and deprives student governments of the opportunity to exercise virtually any discretion in funding decisions. Moreover, the application of principles based on rules for access to traditional, spatial forums fails to take into account that funding is a limited, non-traditional, public forum in which some reasonable restrictions on access are appropriate and necessary. Re-examination and clarification of these issues would alleviate some of the existing pressures on the administration of fees funds.

Also of critical importance is the ongoing need for clarification of the impact of the Establishment Clause in the administration of a student fees forum comprised of state funds. Access to a financial forum is different from access to rooms and other physical settings made available for the purposes of expressing ideas, and these differences need to be acknowledged and reconciled with Establishment Clause requirements.

Further, as the post-*Southworth I* cases suggest, guidance as to the appropriate analytical approach to problems with student organization recognition would be beneficial. Adherence to viewpoint neutral institutional policies appears to be an appropriate condition for receiving state funding, but how to accommodate other competing constitutional interests remains problematic.

Further consideration and refinement of the analytical framework for these issues could provide greater certainty in the administration of fees programs. If past is prologue, however, the answers from the current set of lawsuits will likely engender new and different controversies.

BRINGING CASES TO LIFE: *EDUCATION LAW STORIES*

FERNAND N. DUTILE*

Law professors regularly teach through the use of appellate-court opinions. This device provides a kind of legal laboratory that efficiently exposes students to hundreds of enlightening “experiments” that have the priceless characteristic of depicting real-world situations. But the appellate process largely rinses out of these cases their humanity, grittiness, legal technique, and culture. This aspect creates a daunting dilemma for legal education. On the one hand, our students cannot (and should not) fully identify with all the human emotions, concerns, and interests implicated in those hundreds of cases, even if there were time to provide all the relevant factual details. This emotional overload would foster technical dysfunction, if not psychological breakdown. (Similarly, I don’t want doctors who perform surgery on me to care so much that they sob into my incision.) In addition, especially in light of the constant expansion of the law, we do not have the time (or even the ability) to put every appellate-court case into its procedural and historical context or provide all the developments and refinements flowing in the wake of that case.

On the other hand, we do not want our students to see cases so clinically that the people involved become nothing more than faceless, bloodless robots who merely provide the setting for our legal magic, manipulation, or mistakes. Nor do we want them to assume that the distilled factual account and the summarized lower-court holdings set out in the appellate-court opinion mark the beginning of the case rather than the (current) culmination of countless factors—human hurt or disappointment, legal tactics good and bad, evidentiary rules, historical coincidence, and the like. At least to the partial rescue, for us teachers of the Law of Education, comes this marvelous little book, *Education Law Stories*,¹ which provides context—human, cultural, and legal—for a select number of highly important cases.

This book of “stories” is one of a series of about two dozen such books that Foundation Press has produced addressing discrete areas of the law from Antitrust to Torts.² Underlying the series is the intent to “tell the

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1. EDUCATION LAW STORIES (Michael A. Olivas & Ronna Greff Schneider eds., 2008).

2. Besides Education Law, subjects include Administrative Law, Antitrust, Bankruptcy, Business Law, Civil Procedure, Civil Rights, Constitutional Law,

stories behind the leading cases in important areas of law—the parties to the dispute, the legal and historical context, the immediate impact of the case as well as the continuing importance of the case in shaping the law.”³ This particular collection comprises thirteen chapters, one dedicated to the editors’ introduction and each of the others addressing a specific and important case⁴ from the history of the Law of Education.

The lineup of authors is impressive.⁵ For example, Professor Leland Ware, co-author of *Brown v. Board of Education: Caste, Culture and the Constitution*,⁶ wrote the book’s fine chapter on *Brown v. Board of Education*;⁷ Professor Laura Rothstein, perhaps the foremost American scholar dealing with Disability Law, contributed the chapter on *Southeastern Community College v. Davis*;⁸ Robert M. O’Neil, former President of the University of Virginia and Director of the Thomas Jefferson Center for the Protection of Free Expression, provided the account of *Keyishian v. Board of Regents*,⁹ a landmark case involving a loyalty-oath law that unexpectedly intersected his own employment situation and his participation in the legal challenge;¹⁰ and Erwin Chemerinsky, a Constitutional Law icon who has written four books and more than 100 law review articles, supplied the account of the Establishment Clause challenge to religious invocations at Texas public-school football games.¹¹ Both editors are themselves distinguished scholars in the field of Education Law.¹²

Contracts, Criminal Procedure, Employment Discrimination, Employment Law, Environmental Law, Evidence, Family Law, Immigration, Intellectual Property, International Law, Labor Law, Property, Tax, and Torts. See *id.* at back cover.

3. *Id.*

4. In the order in which they appear, those cases are *Brown v. Board of Education*, 347 U.S. 483 (1954); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Lau v. Nichols*, 414 U.S. 563 (1974); *United States v. Virginia*, 518 U.S. 515 (1996); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988); *Board of Regents v. Southworth*, 529 U.S. 217 (2000); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000); and *Board of Education v. Earls*, 536 U.S. 822 (2002).

5. For a list of authors and their honors and accomplishments, see EDUCATION LAW STORIES, *supra* note 1, at 371–76.

6. ROBERT COTTROLL, LELAND WARE & RAYMOND DIAMOND, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* (2003).

7. 347 U.S. 483 (1954).

8. 442 U.S. 397 (1979).

9. 385 U.S. 589 (1967).

10. See *infra* text accompanying note 48.

11. EDUCATION LAW STORIES, *supra* note 1, at 319–36.

12. Professor Michael A. Olivas holds the William B. Bates Distinguished Chair in Law at the University of Houston Law Center and serves as Director of the Institute for Higher Education Law and Governance there. Among accomplishments and honors too numerous to mention here, Professor Olivas has authored or co-authored eight

Surely the selection of cases presents to the editors of such collections a fascinating challenge. Interestingly, despite an otherwise thorough introduction, the editors say almost nothing about why particular cases were selected,¹³ and nothing at all about their selection over particular others. (Indeed, perhaps the authors commissioned to write individual chapters were themselves given a choice among several cases.)

In any event, the intent underlying the *Stories* series, set out above, surely provides the principal criterion: “leading cases.”¹⁴ But each area of the law presumably offers many more such cases than a volume of this size can accommodate. In plans for the book under review here, then, which twelve “leading cases” should make the cut? One might consider, plain and simple, how famous the case is—either to the general public or, more likely, to those involved in that area of the law. *Brown v. Board of Education*,¹⁵ which made the cut, easily meets this standard. So too, among others in the book, do *San Antonio Independent School District v. Rodriguez* (school finance),¹⁶ *Lau v. Nichols* (discrimination relating to language),¹⁷ and *Edwards v. Aguillard* (creation science).¹⁸ One might consider a case’s original impact or perhaps its continuing day-to-day relevance. *Brown* easily would pass the former screen, but less likely the latter; its basic principle now so clearly established, its actual use today in providing legal guidance has significantly dissipated. On the other hand, though much less important historically and morally than *Brown*, *Hazelwood v. Kuhlmeier* (involving student journalism under the First Amendment),¹⁹ which is included, does daily service in constitutional assessments not only of student newspapers, but also of student plays and concerts and other forms of student (and even teacher) speech. The editors cite this factor as crucial to the case’s selection for the anthology: “For this reason [*Hazelwood*’s importance] and because of the large number of speech cases that inevitably involve school-sponsored speech, we chose to

books. He has served on the editorial boards of more than twenty scholarly journals. *See id.* at 371.

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13. For one minor exception, see *infra* text accompanying note 20.

14. *See* *EDUCATION LAW STORIES*, *supra* note 1, at back cover.

15. 347 U.S. 483 (1954). Indeed, in their Introduction, the editors refer to *Brown* as “[p]erhaps the most famous case involving education.” *EDUCATION LAW STORIES*, *supra* note 1, at 2.

16. 411 U.S. 1 (1973).

17. 414 U.S. 563 (1974).

18. 482 U.S. 578 (1987).

19. 484 U.S. 260 (1988).

tell the tale of *Hazelwood*.”²⁰ And although *Tinker v. Des Moines Independent Community School District* (the black armband case)²¹ provided the arguably seminal ruling in this area and looms historically superior, both *Tinker* and *Bethel School District No. 403 v. Fraser* (involving a sexually themed school assembly speech)²² predate *Hazelwood*, allowing the chapter’s author to consider the fuller contours of *Tinker*. (Of course, *Fraser* and *Hazelwood* could have been discussed as important sequels to *Tinker*, a methodology used in many chapters of the book.)

With regard to current applicability, several cases not chosen might have been included in the book. *Goss v. Lopez*,²³ the basic definer of what student interests warrant a hearing under the Due Process Clause, continues to exert decisional muscle in countless situations. So too do *Board of Regents v. Roth*²⁴ and *Perry v. Sindermann*,²⁵ setting out the fundamental parameters of due-process rights in educational employment contexts. And all three of these meet any historical or seminal requirements one might attach to the term “leading cases.”

One guesses too that the quest for subject variety played a significant role in the selection process.²⁶ At least six of the cases deal with various areas of discrimination: race (*Brown* and *Grutter v. Bollinger*),²⁷ national origin (*Lau*), gender (*United States v. Virginia*),²⁸ disability (*Davis*) and wealth (*Rodriguez*). Still, important areas remain uncovered. As indicated earlier, no case in the book deals directly with the important question of procedure in assessing academic or disciplinary penalties regarding teachers or students—a huge area, indeed.²⁹ While the appropriate role for religion in public schools finds expression in two cases (*Aguillard* and *Santa Fe Independent School District v. Doe*),³⁰ no case treats the important and somewhat converse question of state support of religious schools,³¹ an area that has garnered dramatic attention over the years.

20. EDUCATION LAW STORIES, *supra* note 1, at 9.

21. 393 U.S. 503 (1969).

22. 478 U.S. 675 (1986).

23. 419 U.S. 565 (1975).

24. 408 U.S. 564 (1972).

25. 408 U.S. 593 (1972).

26. “The dozen cases selected for inclusion in this book . . . address most of the significant social topics of our time.” EDUCATION LAW STORIES, *supra* note 1, at 1.

27. 539 U.S. 306 (2003).

28. 518 U.S. 515 (1996).

29. With regard to this area, the editors might have considered including *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), or *Regents v. Ewing*, 474 U.S. 214 (1985), both setting out important distinctions between academic and disciplinary interests under the Due Process Clause.

30. 530 U.S. 290 (2000).

31. Among the themes around which the volume is centered, the editors cite “the constitutionally permissible scope of religion in the public sphere,” but not the

Would *Everson v. Board of Education* (upholding the provision of transportation to private-school students),³² which scores too on the seminal-case scale, or *Lemon v. Kurtzman* (parent to the iconic “Lemon Test”)³³ have been a better choice than, say, the second race case (*Grutter*) or *Board of Regents v. Southworth*,³⁴ an important but relatively narrow case (and one not even mentioned in the casebook from which I currently teach)?³⁵ In light of these gaps, one might question filling nine of the twelve slots with six discrimination cases and three speech cases (*Hazelwood*, *Southworth*, and *Keyishian*), despite the undeniable importance of the cases selected.

Two other worthy cases not included come readily to mind. The first, *Widmar v. Vincent*, although at bottom a speech case,³⁶ delivered huge religious significance: with regard to the state providing an otherwise generally available speech-related benefit to religious institutions, *Widmar* largely changed the question from “May?” to “Must?”³⁷ *Widmar* powerfully influenced other significant cases.³⁸ *Widmar* also breathed its spirit into its secondary-school parallel, the Equal Access Act of 1984.³⁹ The second, *Pierce v. Society of Sisters*,⁴⁰ has over time come to be the all-purpose citation for any assertion of parents’ right to control some aspect or other of the education of their children.

Although other factors might account for the variance, the editors chose seminal (or near-seminal)⁴¹ cases with regard to race (*Brown*), language (*Lau*), wealth (*Rodriguez*), gender (*Virginia*), disability (*Davis*), and teacher speech (*Keyishian*). Arguably, they eschewed the seminal in choosing *Hazelwood* over *Tinker*,⁴² *Aguillard* over *Epperson v. Arkansas*,⁴³

permissible scope of public involvement in the religious sphere. See EDUCATION LAW STORIES, *supra* note 1, at 1.

32. 330 U.S. 1 (1947).

33. 403 U.S. 602 (1971).

34. 529 U.S. 217 (2000).

35. See MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, EDUCATION LAW, POLICY, AND PRACTICE: CASES AND MATERIALS (2005).

36. The fact that three other speech cases (*Hazelwood*, *Southworth*, and *Keyishian*) garner chapters in the book may have doomed *Widmar*. But *Widmar* has organizational and religious implications well beyond the typical speech case.

37. 454 U.S. 263 (1981).

38. The editors of this volume tell us that *Southworth*, selected for inclusion, “seems to be a natural outgrowth of the Supreme Court’s decision in *Widmar*” EDUCATION LAW STORIES, *supra* note 1, at 10.

39. See 20 U.S.C. §§ 4071–4074 (2006).

40. 268 U.S. 510 (1935).

41. What is seminal can itself become a matter of contention. Is *Brown* itself truly seminal in light of the several higher-education race cases setting its stage?

42. Interestingly, the editors refer to *Hazelwood* as “one of the most important school speech cases of the twentieth century.” EDUCATION LAW STORIES, *supra* note 1, at 8 (emphasis added). The author of the chapter on *Hazelwood* herself quotes an expert who calls *Hazelwood* “probably the most significant free speech case involving

*Santa Fe Independent School District over Lee v. Weisman*⁴⁴ (or even *Engel v. Vitale*)⁴⁵ and *Board of Education v. Earls*⁴⁶ over *New Jersey v. T.L.O.*⁴⁷

Of course, some choices might reflect the availability of potential authors. Securing Robert O’Neil, one of the nation’s foremost experts on speech, to discuss *Keyishian* could almost alone justify choosing that case over other speech cases. That O’Neil also filed an *amicus curiae* brief in that case and apparently became “the last applicant for New York State employment ever to encounter the Feinberg Law” (requiring a loyalty oath) surely made the inclusion of *Keyishian* irresistible.⁴⁸ Even when the cases themselves cried for inclusion, especially apt authors have been deployed. For example, to discuss *Brown*, the editors called on Leland Ware, “co-author of a behind-the-scenes book on the decision.”⁴⁹

Unsurprisingly, the twelve selected cases have in common their United States Supreme Court provenance. (Indeed, an amusing game could be made of suggesting cases from other courts that might have warranted inclusion.)⁵⁰

Whether plaintiff or defendant ultimately won obviously played no role: plaintiffs won in seven⁵¹ of the twelve decisions, a virtual split. But readers of the book learn that even the concept of “winning” is multifaceted. Kinney Kinmon Lau and his mother, though having “made civil rights history” in *Lau*, remain “ambivalent about—indeed, even estranged from—their role in the case.”⁵²

public school students since . . . *Tinker* . . .” *Id.* at 221 (quoting Bruce C. Hafen, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 685 (1988)).

43. 393 U.S. 97 (1968).

44. 505 U.S. 577 (1992).

45. 370 U.S. 421 (1962).

46. 536 U.S. 822 (2002).

47. 469 U.S. 325 (1985). Interestingly, the author of the chapter on *Earls* himself, in two separate allusions, refers to *T.L.O.* as a “landmark” and as a “seminal” case. EDUCATION LAW STORIES, *supra* note 1, at 342, 344.

48. EDUCATION LAW STORIES, *supra* note 1, at 301.

49. *Id.* at 2 (citing ROBERT J. COTTRILL, RAYMOND T. DIAMOND & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* (2003)).

50. Two candidates come readily to mind: *Pennsylvania Association for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971), *aff’d* 343 F. Supp. 279 (E.D. Pa. 1972), the first significant judicial foray into the rights of the disabled, and *Dixon v. Board of Education*, 294 F.2d 150 (5th Cir. 1961), a seminal holding requiring a hearing as a precondition to dismissal from college.

51. *Brown, Lau, Virginia, Southworth, Keyishian, Aguillard, and Santa Fe Independent School District.*

52. EDUCATION LAW STORIES, *supra* note 1, at 111. Much of their disenchantment understandably flows from the fact that delays in the case deprived Kinney of much of the benefit from the victory. *Id.* at 140. Even “winning” lawyers find disappointment

Finally, a problem familiar to most editors of collections: appropriate authors might not have been available for certain cases or, once commissioned, might not have submitted timely (or acceptable) manuscripts.⁵³

These observations regarding case selection remain quibbles, not quarrels. Recognizing the limited number of slots for the book, one should not overly second-guess the editors; after all, every case included is undeniably important.

The editors “have structured this book so that it may serve as a supplemental text for law school classes addressing issues involving K-12, higher education or both.”⁵⁴ It could also, they add, serve as either the primary or the supplemental text in a school of education or of public policy.⁵⁵ The decision to target both supplemental and primary uses has important implications. Were the book aimed only at a law school class already assigned to read the opinions in the course casebook, much less space in the book under review might have been devoted to rehearsing the Court’s holding, reasoning, concurrences, and dissents. (A few succinct “as you know . . .” paragraphs would have sufficed.) Of course, such discussions in fact included become crucial for students using the book as the primary tool in a course. Still, reading both an assigned casebook and this text as a supplement will surely do law students no harm and perhaps provide a helpful synthesis. This said, the book should enkindle interest well beyond academe—indeed, among all interested in the Law of Education or the law in general.

To this reviewer, who teaches the Law of Education, the question of how to use such an enriching and interesting book in connection with that course immediately arose. At my institution (far from alone on this score), there is but one course on the Law of Education. Because so many worthy matters already must be left out or glossed over, adding the entire book as a reading requirement might not work. (Put aside here the additional problem presented by requiring students to purchase a second course-book at a time when book costs have so justifiably captured the imagination!) But I am toying with the idea of having the law library put several copies on reserve, dividing the class into twelve groups, and assigning each group to report to the class on a separate chapter. One alternative might be to assign all students to read the two, three, or four chapters the instructor

in “victory.” In *Lau*, attorney Edward Steinman “was eager for a dramatic constitutional victory but instead prevailed on narrow statutory grounds.” *Id.* at 111.

53. In an “Acknowledgments” section, the editors, thanking “the dozen authors whose work we highlight here,” remark that “everyone came through with his or her promised best work, in timely fashion.” *Id.* at 377. This leaves open the possibility that authors could not be found for some targeted cases or that some authors who agreed to write ultimately failed to submit adequate manuscripts.

54. *Id.* at 12.

55. *Id.* at 12–13.

finds most enlightening. Still another might be to require all students to read two or three chapters of their choice. (A brief report to the instructor might be required, or the course examination might include a question—applicable, of course, to all chapters—*e.g.*, “What legal techniques seemed most effective?” or “What background aspects most surprised you?”) on those readings.

The ideal law school use would be as the principal assigned treatise for a seminar; even a one-credit course could spend at least one class period on every chapter, allowing students to explore the various aspects of each case. Alas, very few law schools have the luxury of offering such a course, which would perhaps have to be at least the third course dealing with the Law of Education. (Even if a second course on the Law of Education appears in the curriculum, splitting out K-12 from higher education likely consumes the two entries.) At institutions that allow directed readings for credit, however, using the book as the core would work marvelously.

The Introduction by the editors provides further texture for the cases discussed in the book, including subsequent judicial, legislative, or other action related to the principal case. For example, the editors provide us with the text of the state constitutional amendment⁵⁶ enacted in the wake of *Grutter* to preclude the State of Michigan’s use of race in, among other things, admissions to public education. The editors discuss the interesting questions raised by the amendment’s language, assess the high school affirmative action case decided by the U.S. Supreme Court in the wake of *Grutter*,⁵⁷ and insightfully address the pivotal role that Justice Anthony Kennedy plays as this intractable issue further sorts itself out.⁵⁸ The Introduction also relates the treated cases to one another. Indeed, one could make a case for reading this Introduction only after reading the rest of the book, that is, as effective synthesizer rather than as prelude.

As already intimated, the chapters make especially important and interesting contributions with regard to two aspects of the judicial proceedings described: the factual “backstory” of the case—what the editors call the “human drama”⁵⁹—and the legal techniques attending the judicial procedures. Concerning the former, often developed through newspaper accounts or interviews with lawyers and parties, certain chapters stand out. Robert M. Bloom’s account of *Earls*, an ultimately unsuccessful attack on the drug-testing of all students involved in competitive extracurricular activities in public schools of the district, often reads like a good novel.⁶⁰ He writes that sixteen-year-old Lindsay Earls, a sophomore

56. MICH. CONST. art. I, § 26.

57. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007).

58. EDUCATION LAW STORIES, *supra* note 1, at 5.

59. *Id.* at 1.

60. *See id.* at 337–69.

at Tecumseh High School, “was sitting in choir, her first class of the day, when the Choir Director distributed the form describing a new drug testing policy Lindsay was shocked. She thought the teacher was joking. . . . This outrage started a four-year journey for Lindsay that ended . . . after her freshman year in college.”⁶¹ The author knows that the reader cannot appreciate the courage of this young lady (because of her challenge, false rumors of drug use and even attacks on her Christianity spread through the community) without understanding more about her:

Lindsay not only knew all of the students in her own class, but also those in the classes above and below her. Lindsay is a fifth-generation Tecumseh graduate. She knew all the members of the School Board, and even called one of them “Grandma” due to connections with a childhood friend. Lindsay enjoyed high school and describes herself as pretty popular. She had a lot of friends and did well in school. She was a member of the show choir, the marching band, the Academic Team, and the National Honor Society. Until the suit was filed, Lindsay had never had a negative experience in Tecumseh schools.⁶²

The author’s description of the site of the challenge (this isn’t Manhattan, he’s telling us!) adds to the texture of the story:

Tecumseh, Oklahoma, is a small, conservative, mainly Protestant town about forty minutes from Oklahoma City. With a population just over 6,000, Tecumseh is the kind of town where everyone knows everybody’s business and news spreads quickly. . . . [T]he town is approximately 80% white; the next largest racial group is American Indian at 13%. The median household income in 2000 was \$27,202. Ten percent of the town population has a college degree. There is some farming, but most residents work in Oklahoma City.⁶³

The author follows Lindsay to Dartmouth College, where she receives strong support from the community and ultimately learns that the U.S. Supreme Court turned down her challenge to the drug-testing law.⁶⁴ The author reports Lindsay’s disappointment in some detail.⁶⁵

61. *Id.* at 337–38 (footnotes omitted).

62. *Id.* at 338. Many other parties are well described, for example the plaintiff in *Grutter*, *id.* at 89.

63. *Id.* at 338. See also the excellent descriptions of: Virginia Military Institute, *id.* at 165–68, the University of Wisconsin–Madison, *id.* at 260–62, and Santa Fe, Texas, *id.* at 320.

64. *Id.* at 341.

65. *Id.* Lindsay was especially upset that Justice Thomas wrote the opinion for the Court: “[S]he didn’t think he was paying attention at the oral arguments and he didn’t ask any questions. Lindsay said it looked like he was doing a crossword puzzle” *Id.*

It should be noted, however, that Justice Thomas asks questions from the

Other backstories spice this volume. We learn that Lloyd Gaines, a Black man who sought admission to the law school at the University of Missouri, never profited from his significant U.S. Supreme Court victory;⁶⁶ by the time the case got remanded to the district court, he had totally disappeared and “was never heard from again.”⁶⁷ Apparently and ironically, *Brown*, the most well known racial-discrimination case in history, owes its name to gender discrimination: the group aligning the plaintiffs “felt that a male should be the lead plaintiff.”⁶⁸ Oliver Brown thus became famous. (A more amusing reason underlies the lead name in *Keyishian*; explained the lawyer: “I just knew it would mean more to Harry than to any of the others.”)⁶⁹ Barbara Grutter, who lost her challenge to the affirmative-action policy at the University of Michigan Law School, never attended law school there or anywhere else.⁷⁰ The young lady who filed the complaint that generated *Virginia*, “now presumably in her mid-thirties, has remained nameless and faceless without any details of her aspirations, the sincerity of her interest, or her qualifications.”⁷¹

With regard to legal tactics and strategies, Leland Ware, in his excellent chapter on *Brown*, informs us that the plaintiff in *Plessy v. Ferguson*⁷² was selected to attack legally segregated railroad cars in New Orleans because he was “white enough to gain access to the train and black enough to be arrested for doing so.”⁷³ Mr. Ware states in dramatic detail that *Brown* was not a freestanding blockbuster case but rather the (relative) culmination of a long and deliberate fight against legal segregation.⁷⁴ In the 1930s, in order to avoid a reaffirmation of *Plessy*’s “separate but equal” pronouncement, the NAACP turned to a strategy of attacking the “equal” rather than the “separate.”⁷⁵ Southern states, the strategy theorized, could not bear the costs and other burdens of actual equalization.⁷⁶ This litigation, so heavily targeting graduate and professional schools, reflected the fact that Southern states provided virtually no post-graduate or professional education,

bench only very rarely. See Editorial, *Notable Numbers*, THE NEWS & OBSERVER (Raleigh, NC), Mar. 1, 2008, at A20 (noting that over a span of two years Justice Thomas had not asked a single question of lawyers before the Court).

66. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), *rehearing denied*, 305 U.S. 676 (1939).

67. EDUCATION LAW STORIES, *supra* note 1, at 30.

68. *Id.* at 39.

69. *Id.* at 289.

70. *Id.* at 104.

71. *Id.* at 163.

72. 163 U.S. 537 (1896).

73. EDUCATION LAW STORIES, *supra* note 1, at 19 (quoting KEITH WELDON MEDLEY, WE AS FREEMEN: PLESSY V. FERGUSON (2003)).

74. *Id.* at 19–20.

75. *Id.* at 20.

76. *Id.*

segregated or otherwise, for African-Americans.⁷⁷ Post-World War II cases in turn argued that even equalization “could not remedy the deprivations caused by racial segregation.”⁷⁸ These cases laid important groundwork for the successful attack on “separate” in *Brown* itself. Unsung heroes of great courage—parties, lawyers, witnesses, and judges—pepper the long, bumpy story.

Some readers will be surprised to learn of arguments advanced by scholars against the *Brown* result, arguments that Ware rehearses (and with which he disagrees), including Professor Michael Klarman’s view that without *Brown* segregation would have ended “in a more gradual manner,” one that would have engendered wider support from Southern whites—and therefore less violence,⁷⁹ and Professor Derrick Bell’s assertion not only that *Brown* was wrongly decided, but that Black students would have fared better had the Court required equalization rather than desegregation.⁸⁰ Ware might have added Judge Richard Posner’s (unsurprisingly) contrarian view that, “[f]rom a longer perspective,” *Brown* “seems much less important, even marginal.”⁸¹

The book sets out many other enlightening observations on legal aspects of the discussed cases. Michael Heise, in his chapter on *Rodriguez*, discusses the deliberate decision to base the attack not on race or ethnicity but on wealth.⁸² Wendy Parker, in her chapter on *Grutter*, notes the important role that intervention can play in broadening the issues.⁸³ Although lawyers might not think of themselves as media people, these chapters reflect the legal importance of public relations. *Grutter* involved a widespread media campaign, including an op-ed piece in the *New York Times* written by former President (and University of Michigan alumnus) Gerald R. Ford.⁸⁴ Lawyers in *Lau* and *Virginia* also thought it important to

77. *Id.*

78. *Id.* at 32.

79. *Id.* at 44 (citing MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004)).

80. *Id.* at 44–45 (citing DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004)).

81. Richard Posner, *Appeal and Consent*, THE NEW REPUBLIC, Aug. 16, 1999, at 36, 39. Judge Posner elaborates: “[V]ery little actual enforcement of minority rights occurred until the enactment of anti-discrimination legislation in the 1960s, and that legislation appears to have owed much more to the non-legalistic civil rights movement led by Martin Luther King Jr. than to anything the Supreme Court had done or said.” *Id.* Ware argues that *Brown* itself inspired that civil rights movement, and asserts that “[n]o other Supreme Court decision has had such lasting significance.” EDUCATION LAW STORIES, *supra* note 1, at 20–21, 46.

82. EDUCATION LAW STORIES, *supra* note 1, at 55, 64. Heise points out the complexity of arguing that money matters with regard to student academic achievement. *Id.* at 57. He also notes that “conventional litigation wisdom today is to conflate—and not separate—school finance and race and ethnicity.” *Id.* at 64.

83. *Id.* at 90–91.

84. *Id.* at 95. Defendant Lee Bollinger, President of the University of Michigan,

reach the public.⁸⁵ We learn that *Lau* presents “the rare equity case where . . . the plaintiffs urged no specific remedy, and appeared to want the issue remanded . . . to the offending Board of Education.”⁸⁶ Anne Proffit Dupre uses large doses of the Supreme Court transcript to illustrate the legal jostling between Court and lawyer surrounding the difficult governance issue presented in *Hazelwood*.⁸⁷

Readers get reminded that lawsuits do not necessarily result from a potential plaintiff seeking out a lawyer; often lawyers, working for organized groups, seek out plaintiffs. In *Grutter*, for example, the founder of the Center for Individual Rights and a Minneapolis attorney interviewed potential plaintiffs, intent on including women as named plaintiffs so that the case would not center about “angry white men.”⁸⁸ Leslie Griffin, in recounting the story of *Aguillard*, assesses the procedural importance in some cases of moving for summary judgment rather than facing a jury trial.⁸⁹ Robert O’Neil offers a nice discussion of how the role of the *amicus curiae* brief differs from that of the party’s brief.⁹⁰ Even the relatively trivial can be revealing: O’Neil points out that the plaintiffs’ lawyers get to choose the case’s caption and thus sometimes decide whom (among a plurality of plaintiffs) to immortalize and whom (among a plurality of defendants) to make notorious.⁹¹

Principles learned in law school, for example “Never ask on cross-examination a question to which you don’t know the answer,” get reinforced. In *Virginia*, a lawyer for the all-male defendant institution, which used the rigorous “adversative method,” asked an expert whether she knew of any educational authorities supporting the use of that method for women. “No,” the expert replied, “nor for men.”⁹² Reinforced also are the financial cost of litigation (the defendants in the VMI litigation apparently spent \$14 million)⁹³ and the difficulties and ambiguities involved in implementing judicial pronouncements, even those from the U.S. Supreme Court.⁹⁴ Law’s connection to popular culture receives attention: by

persuaded Mr. Ford to write the piece. *Id.*

85. *See id.* at 117 (pointing out that the lawyer for the plaintiff in *Lau* “thought it imperative to generate support in the Chinese community”); *id.* at 169–70 (“The VMI forces . . . looked to the North, hiring a Manhattan public relations firm . . .”).

86. *Id.* at 6.

87. *Id.* at 231–34.

88. *Id.* at 89 (citation omitted). *See also id.* at 117 (stating that in *Lau* the lawyer “enlisted a lead plaintiff” and “recruited other parents to allow their children to join the lawsuit”). The lawyer in *Lau* even recruited ten *amici curiae*. *Id.* at 131.

89. *Id.* at 309.

90. *Id.* at 293–96.

91. *Id.* at 289.

92. *Id.* at 173.

93. *Id.* at 183.

94. *See, e.g.,* the chapters on *Brown*, *Lau*, *Grutter*, *Virginia*, *Southworth*, and *Aguillard*.

stressing the number and diversity of individuals with disabilities now represented on television shows like “ER,”⁹⁵ Laura Rothstein, discussing *Davis*, cleverly points out “how disability discrimination law changed the way society views [such] individuals”⁹⁶

The book’s need of more rigorous editing is easily overcome by its excellent substance. Rachel Moran’s piece on *Lau* warrants special mention and, although not without competition from other offerings in the book, may well represent the exemplar for such discussions.⁹⁷ Her account of the historical context, litigation, and long-term effects of the case is deep, nuanced, and brilliant.⁹⁸ (Even her endnotes—numbering 298 and extending beyond fourteen pages—add much to the chapter.)⁹⁹ It is a joy to read. Rosemary Salomone’s discussion of the VMI case is also stunningly good.¹⁰⁰ Anne Proffitt Dupre wonderfully analyzes the impact, actual and potential, of *Hazelwood*.¹⁰¹

This book will make clear to law students (and others) just how complex the trial of a case can become, ranging from the choice of plaintiffs, intervenors, experts, and venue, to the marshaling of evidence and legal arguments. Every fork in the road creates the occasion for victory or defeat, however defined. Those exposed to this book will realize more deeply than ever that the appellate opinion often constitutes but a large-scale distillation, a mere literary narrative of what in fact is a very human story of hurt, effort, emotion, vision, competence, devotion, courage, luck, and, ultimately, liberating exhilaration, deep disappointment, or something in between. Not a bad achievement for one relatively short book!

95. EDUCATION LAW STORIES, *supra* note 1, at 197, 213.

96. *Id.* at 197.

97. *See id.* at 111–58.

98. *See id.*

99. *See id.* at 143–57.

100. *Id.* at 159–96.

101. *Id.* at 221–58.

INSTITUTES OF HIGHER EDUCATION, SAFETY SWORDS, AND PRIVACY SHIELDS: RECONCILING FERPA AND THE COMMON LAW

STEPHANIE HUMPHRIES*

INTRODUCTION

On April 16, 2007, Seung Hui Cho killed thirty-two students and faculty members at Virginia Tech, injured seventeen more, then killed himself.¹ Four months later, the expert panel commissioned by Virginia Governor Tim Kaine released its final report (“VT Panel Report”).² In hindsight, many individuals and institutions had information about Cho. His parents sought counseling for him and worked with his middle and secondary schools, which provided accommodations for his learning disabilities.³ After he left for college in 2003, his parents visited every weekend during the first semester and called every weekend thereafter, but their son never reported any problems.⁴ The admissions office knew that he had a GPA of 3.52 and an SAT score of 1160, but had no information about his accommodations or special needs.⁵

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1. See OFFICE OF THE GOVERNOR OF THE COMMONWEALTH OF VIRGINIA, MASS SHOOTINGS AT VIRGINIA TECH APRIL 16, 2007: REPORT OF THE REVIEW PANEL 1 (2007), available at <http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf> [hereinafter VT PANEL REPORT] (characterizing Cho as angry and disturbed).

2. *Id.* at vii–viii (describing, in foreword by Governor Kaine, how the panel was formed and its work).

3. See *id.* at 34–36 (explaining that Cho’s parents followed his elementary school’s recommendation to seek therapy for Cho and that after writing an English paper indicating “he wanted to repeat Columbine,” a psychiatrist diagnosed Cho with selective mutism and a single episode of major depression).

4. See *id.* at 40 (pointing out that Cho’s parents visited him every Sunday during the first semester and called him every Sunday during the second semester, but “he did not appear envious or angry about anything”).

5. See *id.* at 38–39 (noting that Virginia Tech does not require an essay or letter of recommendation, that “no one at the university ever became aware of [Cho’s] pre-

One of his English professors found his behavior disruptive and demanded that he be removed from her class.⁶ Another offered to tutor him individually, encouraged him to seek counseling,⁷ and contacted university officials, counselors, and the police.⁸ A third English professor saw a rare side of Cho when Cho became angry after the professor advised Cho to drop his course.⁹ Although his writings were disturbing, they revealed no specific threat to anyone's immediate safety.¹⁰ The university's care team, a group of administrators from various departments, discussed that Cho was removed from the English class, but considered the problem resolved.¹¹ Cho called and visited the counseling center and was triaged several times, but counselors provided no treatment sessions nor made any diagnosis.¹²

In fall 2005, after complaints from two female students about messages and visits from Cho, campus police officers warned him to leave the female co-eds alone.¹³ Following the second visit by campus police, Cho instant

existing conditions," and that, under federal disability law, disclosing a disability is voluntary).

6. *Id.* at 41–43 (narrating that creative writing instructor Nikki Giovanni told the head of the English Department that students were not coming to class because they were afraid of Cho, that Cho had been using his cell phone during class to take pictures of students without their permission, and that she no longer wanted Cho in her class).

7. *Id.* at 43–44, 52 (describing a meeting between Cho and Dr. Frances Roy, the head of the English Department, during which Roy offered to tutor Cho privately and asked if he would talk to a counselor, in addition to requests by another English professor for Cho to contact disability and counseling services).

8. See Elyse Ashburn et al., *Dark Day in Blacksburg: Sounding the Alarm*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 27, 2007, at A6 (noting that the professor "did everything but write it in the sky").

9. VT PANEL REPORT, *supra* note 1, at 50 (discussing how, after professor Carl Bean suggested to Cho that he drop Technical Writing, Cho argued loudly, and Bean asked him to leave his office).

10. See *id.* at 43 (excerpting an e-mail message from Dean Brown stating "I talked with a counselor . . . and shared the content of the 'poem' . . . and she did not pick up on a specific threat" and an e-mail message from the Judicial Affairs Director stating, "I agree that the content is inappropriate and alarming but doesn't contain a threat to anyone's immediate safety (thus, not actionable . . .)"); see also Ashburn et al., *supra* note 8, at A7–A8 (explaining that Cho's plays, but not his poems, had been released and that creative writing professors who were asked to read them reached different conclusions about how they would have reacted).

11. See VT PANEL REPORT, *supra* note 1, at 43 (stating that the Judicial Affairs Director recalled that Cho was discussed at the care team meeting, but that "[t]he perception was that the situation was taken care of and Cho was not discussed again by the Care Team").

12. *Id.* at 45–49 (noting that the first record of Cho contacting the Cook Counseling Center was November 30, 2005, and that he called and was triaged via phone on December 12, 2005, and in person on December 14, 2005).

13. *Id.* at 45–46 (discussing a complaint from one student after Cho text-messaged her then went to her room and said "I'm question mark," and another complaint from a second student prompted by messages sent via Facebook and posted on a white erase board outside her dorm room); see also Ashburn et al., *supra* note 8, at A10 (explaining

messed a suitemate that Cho “might as well kill [himself].”¹⁴ Cho’s roommate and suitemates had observed him stabbing a carpet, found a large knife in his desk and discarded it, and witnessed him making calls pretending to be his own imaginary twin brother.¹⁵ After receiving the text message in which Cho mentioned suicide, one of them reported Cho’s threat to campus police.¹⁶

Cho was taken into custody, but refused to notify his parents.¹⁷ He was evaluated by a social worker from a local facility, who determined that he was mentally ill, was an imminent danger to himself or others, was not willing to be treated voluntarily, and should be involuntarily hospitalized.¹⁸ Although an independent evaluator and psychiatrist found that Cho did not present an imminent danger to himself or others,¹⁹ a special justice presiding over the commitment hearing, which was attended by no one who knew Cho, ruled that Cho was an imminent danger to himself and ordered outpatient treatment.²⁰ After his release, Cho reported to the on-campus counseling center and was triaged, but was neither diagnosed nor treated.²¹ Because Cho was accepted as a “voluntary patient,” the counseling center allowed him to decide whether to make a follow-up appointment.²² Cho did not return to the counseling center and continued to attend classes until two weeks before the shootings.²³

These insights—gleaned from the VT Panel Report—show that with

that complaints about harassing calls and messages are common on college campuses, but that if a student’s behavior rises to the level of harassment, police can refer the case to college administrators or make an arrest).

14. VT PANEL REPORT, *supra* note 1, at 47.

15. *Id.* at 42–45 (reporting that Cho’s suitemates found a “very large knife” in fall 2005, that they stopped socializing with him after he stabbed the carpet in a female student’s room, and that “Cho would go to different lounges and call one of the suitemates on the phone,” then “identify himself as ‘question mark’—Cho’s twin brother—and ask to speak with Seung”).

16. *Id.* at 47.

17. *Id.*

18. *See id.* at 47–49 (discussing the pre-screen evaluation).

19. *Id.* at 47–48 (noting that the independent evaluator had no hospital records available for his review, that the psychiatrist’s conclusion was based on information provided by Cho, and that the psychiatrist indicated that “privacy laws impede the gathering of collateral information”).

20. *Id.* at 47 (remarking that the hearing was not attended by anyone involved in the chain of events, such as Cho’s roommate or suitemate, the police officer, the pre-screener, the independent evaluator, or the attending psychiatrist).

21. *See id.* at 49 (reporting that the triage report is missing, that it is unclear why Cho was triaged a third time rather than receiving treatment, and that the college newspaper reported on “the diminished services provided by the counseling center”).

22. *See id.* (pointing out that Cho made no follow-up appointment, but this fact was not reported to the court, to medical professionals who assessed Cho during the involuntary hospitalization process, or to Virginia Tech officials).

23. *See* Ashburn et al., *supra* note 8, at A10 (listing changes in academic performance as one sign of student distress).

resources, months of research, and hindsight, the pieces of the puzzle begin to fit.²⁴ The resulting picture suggests that institutions of higher education (“IHEs”),²⁵ students, parents, courts, and communities need a better understanding of and approach to mental health issues and information privacy on college campuses. On the one hand, as a growing number of today’s college and university students experience serious psychological illnesses, commentators recommend public health models that emphasize information sharing.²⁶ Similarly, divergent strands of college and university tort liability are converging around foreseeability as the major determinant of duty,²⁷ so that IHEs are called upon to collect, analyze, and share information with diverse stakeholders in an effort to protect students from intentional acts of self-harm or intentional acts of harm by third parties. In fact, courts increasingly demand that IHEs do so and “have been more willing to impose a responsibility to share information in an affirmative-duty context.”²⁸ At the same time, however, the Family Educational Rights and Privacy Act of 1974 (“FERPA”)²⁹ conditions federal funding on compliance with its record keeping provisions, which restrict the information IHEs can release to third parties, including parents.³⁰ These tensions have not gone unnoticed. In fact, of the seventy recommendations the VT Panel Report makes, seven concern information privacy laws, which the panel concluded are “poorly designed to accomplish their goals” and lead to “widespread lack of understanding,

24. *But see* Howard Kurtz, *For Virginia Tech Killer’s Twisted Video, Pause but No Rewind*, WASH. POST, Apr. 23, 2007, at C01 (describing how efforts to explain Cho’s behavior are tainted by hindsight bias, when “the sad truth is, there’s no surefire way to stop a determined suicidal killer, especially on a sprawling college campus”).

25. “Institutions of higher education,” as used in this Note, include colleges and universities. Furthermore, “college” and “university” are used synonymously here.

26. *See, e.g.*, MARY ELLEN O’TOOLE, FED. BUREAU OF INVESTIGATION, THE SCHOOL SHOOTER: A THREAT ASSESSMENT PERSPECTIVE 31 (2000), available at <http://www.fbi.gov/publications/school/school2.pdf> (explaining that school violence is “a pressing public health need which could be addressed through multidisciplinary collaboration”); Heather E. Moore, Note, *University Liability When Students Commit Suicide: Expanding the Scope of the Special Relationship*, 40 IND. L. REV. 423, 438–40 (2007) (suggesting that colleges and universities should train all personnel who have close contact with students, with the goal of identifying when a student is under distress).

27. *See* Peter F. Lake, *Higher Education Called to Account*, CHRON. HIGHER EDUC. (Wash., D.C.), June 29, 2007, at B8 (“Higher educational law is moving, steadily, to consolidate around paradigms of reasonableness and foreseeability—which focus much more on conduct, choices, and information—and away from the concept of colleges’ special status and their disengagement with students to avoid risk.”).

28. Peter F. Lake and Nancy Tribbensee, *The Emerging Crisis of College Student Suicide: Law and Policy Responses to Serious Forms of Self-Inflicted Injury*, 32 STETSON L. REV. 125, 147 (2002).

29. 20 U.S.C. § 1232g (2006).

30. *See infra* Part I.D.

[and] conflicting practice.”³¹

This Note argues that both FERPA and the common law contain internal tensions regarding safety and privacy that neither Congress nor the courts have adequately reconciled, and that important discrepancies regarding information sharing exist between IHEs’ practices, the common law’s demands, and FERPA’s limitations. Part I provides background on FERPA and argues that FERPA’s emergency exception is too narrow and confusing, so that IHEs default to the nondisclosure option rather than disclosing information to third parties, such as parents, when students threaten to harm themselves or others. At the same time, FERPA’s tax dependent exception operates as an overly broad bright-line rule that, coupled with FERPA’s lax enforcement mechanism, fails to adequately protect the privacy of students’ education records. Thus, FERPA’s emergency exception fails to ensure safety, while the tax dependent exception eviscerates the statute’s privacy protection.

Part II points out that, at the common law, courts have traditionally relied upon three competing strands of tort doctrines, each of which emphasizes either safety or privacy to the exclusion of the other. Thus, while the “duty” strand of premises liability uses safety as a sword and emphasizes foreseeability, the “no duty” strand of custodial relations and *in loco parentis* uses privacy as a liability shield. In the past, as the common law shifted from using safety as a sword to using privacy as a shield, FERPA responded. For example, as societal attitudes and the common law changed regarding alcohol use, Congress created a tailored exception allowing IHEs to notify parents when students violate laws or policies regarding the possession or use of controlled substances.³² Currently, another such shift is occurring, and courts are beginning to develop a concept of “duty-based-on-the-facts” as part of the special relationship between IHEs and students. As IHEs adopt public health models to address mental health issues on campuses, courts are using the safety sword to impose a duty on IHEs to use reasonable care to prevent foreseeable acts of harm to and by students, including suicide. However, FERPA has yet to respond to these increasing demands that the common law places on IHEs to share and disclose information about students’ mental health.

Part III proposes ways to resolve the tensions within the common law and FERPA regarding safety and privacy, as well as ways to align the duties the common law imposes on IHEs with the limits on disclosure that FERPA requires of IHEs. In reference to the common law, this Note argues that courts should create a coherent foreseeability framework specific to the mental health and IHE context, acknowledging the limits of foreseeability—especially for college and university personnel who are not

31. VT PANEL REPORT, *supra* note 1, at 63.

32. *See infra* Part I.D.

mental health professionals—while balancing safety and privacy concerns. Part III also argues that Congress should amend FERPA to appropriately balance safety and privacy, specifically by broadening and clarifying FERPA’s emergency exception while eliminating the tax dependent exception. Meanwhile, as these tensions within and between the common law and FERPA are resolved, the U.S. Department of Education (“U.S. Dept. of Ed.”) should make several changes regarding the guidance it provides.

This Note does not predict how future litigation related to the Virginia Tech shootings³³ might proceed, attempt to assess fault, or argue that such tragic events are preventable. Rather, it highlights doctrinal and statutory developments that might impact where courts draw the line between safety and privacy within the context of questions related to the Virginia Tech shootings. In exploring these questions, this Note suggests how safety and privacy, as well as the common law and FERPA, might be reconciled, thereby charting a clearer course going forward.

I. FEDERAL EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA)

A. Legislative History and Intent

The Federal Educational Rights and Privacy Act (“FERPA”),³⁴ Spending Clause legislation adopted in 1974, governs the maintenance and disclosure of student records.³⁵ FERPA has been criticized³⁶ and described

33. See Duncan Adams, *Lawsuit Against Tech Could Emerge*, ROANOKE TIMES, Apr. 22, 2007, at S8, available at <http://www.roanoke.com/vtreactions/wb/114130> (reporting that a parent contemplating legal action against Virginia Tech had contacted a lawyer but that the state’s doctrine of sovereign immunity would be a hurdle and that Congress had passed a law banning civil lawsuits against gun manufacturers); *Virginia Tech Lawsuit*, WHSV.COM, Oct. 13, 2007, <http://www.whsv.com/home/headlines/10517512.html> (reporting that a lawyer for families of twenty people killed or injured in the shootings filed notice with the Blacksburg town attorney of possible lawsuits and that the Virginia Attorney General’s Office had also received notice of a possible lawsuit on behalf of a student).

34. § 1232g; see also 34 C.F.R. §§ 99.1–99.67 (2000). Although FERPA is also referred to as the “Buckley Amendment,” this Note uses “FERPA” exclusively.

35. See §§ 1232g(a)(1)(A)–(B), (2); 1232g(b)(1)–(2) (2006); 34 C.F.R. § 99.67(a)(1), (3) (providing that the U.S. Dept. of Ed. may withhold funds or terminate eligibility to receive funds); see also *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278 (2002) (“Congress enacted FERPA under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records.”); Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools’ Legitimate Educational Interests: Rethinking FERPA’s Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 AM. U. L. REV. 1, 5 (2001) (“Rather than a mandate, FERPA requirements are conditions attached to the receipt of federal education funds.”).

36. See, e.g., Matthew R. Salzwedel & Jon Ericson, *Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics*, 2003 WIS. L. REV. 1053, 1065–66 (2003) (“But even the most

as a “congressional afterthought”³⁷ because it was introduced as a Senate floor amendment to other educational legislation and was adopted without public hearings or committee reports.³⁸ Because Congress passed FERPA as an attachment to another bill and passed subsequent amendments as parts of larger pieces of legislation, FERPA’s legislative history is limited.³⁹

The legislative history that does exist suggests that FERPA was, generally, a reaction to the Watergate scandal that revealed the dangers of government data collection, the use of new technology such as computers to assemble and store personal data, and a study by the Russell Sage Foundation that found most schools did not have in place a records policy that addressed the privacy of student and parent information.⁴⁰ More specifically, by introducing the bill, Senator Buckley sought to accomplish four goals: first, to establish fair information practices, so that parents and students could have access to the information maintained about them and correct inaccuracies that could adversely affect students’ academic and employment opportunities;⁴¹ second, to protect individual privacy;⁴² third,

cursory review reveals that the law was enacted hastily, poorly written, and from its adoption, has begged review [sic]. Not surprisingly, the initial reaction in higher education to the law was a combination of confusion, hostility, and panic.”); Alice Pickett Sparrow, *The Sociological Impact of the Family Educational Rights and Privacy Act on an Institution of Higher Education* 33 (Apr. 22, 1985) (unpublished M.A. thesis, University of Arizona) (on file with Law School Library, North Carolina Central University) (“The implementation of FERPA was plagued by confusion, misunderstanding and delay,” and efforts “to develop guidelines and regulations made it clear that the law had been too hastily put together.”).

37. Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 617 (1997) (“Although [FERPA’s] level of regulation is comprehensive, it has largely been a congressional afterthought.”).

38. *See id.*

39. *See id.* at 617–22 (pointing out that amendments to FERPA in 1979, 1990, 1992, and 1994 were “provision[s] inserted into a larger piece of legislation”); Daggett & Snow Huefner, *supra* note 35, at 5 (noting that “Congress has never written legislation focusing exclusively or primarily on student records”).

40. *See* 120 CONG. REC. 14,580 (1974) (statement of Sen. Buckley) (“In addition, the revelations coming out of [the] Watergate investigations have underscored the dangers of Government data gathering and the abuse of personal files, and have generated increased public demand for the control and elimination of such activities and abuses.”); 121 CONG. REC. 13,991 (1975) (Sen. Buckley’s Address Before the Legislative Conference of the National Congress of Parents and Teachers) (“[T]he growth of the use of computer data banks on students and individuals in general has threatened to tear away most of the few remaining veils guarding personal privacy, and to place enormous, dangerous power in the hands of the government, as well as private organizations.”); 121 CONG. REC. 13,990–91 (discussing a report by the Russell Sage Foundation that found students and parents did not know what information about them was kept in school records, had limited access to the records, and did not have a mechanism by which to challenge the accuracy of the information, while most schools did not have policies in place for protecting, sharing, or destroying such information).

41. 120 CONG. REC. 36,530 (1975) (Sen. Buckley’s Address Before the

to inform parents of, and give them the opportunity to consent to, psychological testing, research, or experimentation because schools were both implementing “ill-devised”⁴³ behavior- and value-modification programs as well as administering classroom surveys of a personal nature, the results to which parents had no access;⁴⁴ and fourth, the “most fundamental reason”⁴⁵ for introducing FERPA, to involve parents in education. Some of Senator Buckley’s remarks suggest antagonism between parents and schools, suggesting that people with “elitist and paternalistic attitudes”⁴⁶ had transferred too many parental rights to the state and had forgotten that “parents have the primary legal and moral responsibility for the upbringing of their children and only entrust them to the schools for basic educational purposes.”⁴⁷ However, he also stressed that parental involvement was essential for educational achievement,⁴⁸ a shared goal, and suggested that schools should form partnerships with parents rather than view parents as an intrusion.⁴⁹

Legislative Conference of the National Congress of Parents and Teachers); *see also* Diane Divoky, *Cumulative Records: Assault on Privacy*, reprinted in 120 CONG. REC. 36,530 (1974) (discussing school records suggesting that a father’s activities as a “black militant” caused his daughter to be “too challenging” and another that read: “a real sickie—absent, truant, stubborn, and very dull. Is verbal only about outside, irrelevant facts. Can barely read . . . Have fun”).

42. 121 CONG. REC. 13,991 (1975) (Sen. Buckley’s Address before the Legislative Conference of the National Congress of Parents and Teachers) (“More fundamentally, my initiation of this legislation rests on my belief that the protection of individual privacy is essential to the continued existence of a free society.”).

43. 120 CONG. REC. 14,581 (1974) (statement of Sen. Buckley) (discussing a program that sought to identify potential drug abusers among eighth-grade students and proposing that parental consent be required for special testing or programs).

44. *See* 121 CONG. REC. 13,991–92 (1975) (Sen. Buckley’s Address Before the Legislative Conference of the National Congress of Parents and Teachers) (describing the studies and explaining that this section of the bill was defeated but that “[t]he requirements of parental consent would inform parents about controversial programs, and would offer them and their children the best protection I can think of against possible educational abuses”).

45. *See id.* at 13,991 (“This brings me to the most fundamental reason for having introduced [FERPA]: and that is, my firm belief in the basic rights and responsibilities—and the importance—of parents for the welfare and the development of their children.”).

46. *See* 120 CONG. REC. 14,580 (1974) (statement of Sen. Buckley) (“Such elitist and paternalistic attitudes reflect the widening efforts of some, both in and out of Government, to diminish the rights and responsibilities of parents for the upbringing of their children, and to transfer such rights and functions to the State. . .”).

47. *See id.* at 14,581 (suggesting that some educators think they know more about the best interests of the child than the parents do and so act without regard for the beliefs and values of the parents).

48. *See* 121 CONG. REC. 13,991 (1975) (Sen. Buckley’s Address Before the Legislative Conference of the National Congress of Parents and Teachers) (discussing a study that found parental involvement may contribute more to educational achievement than intelligence, the quality of the school, or the family’s socioeconomic status).

49. *See id.* at 13,991 (noting that a school principal wrote that “[w]e are not, and

B. Application and Requirements

FERPA applies to all educational agencies or institutions that receive federal education funds directly, via grant, or indirectly through students, such as when students are awarded federal financial aid.⁵⁰ Thus, nearly all private and public elementary and secondary schools, and colleges and universities, are governed by FERPA.⁵¹ To comply with FERPA, education agencies must provide effective notice⁵² to eligible students,⁵³ or to parents⁵⁴ if the student is under the age of eighteen, of their rights under FERPA to access and inspect education records,⁵⁵ challenge and amend the records to ensure their accuracy,⁵⁶ insist that the information within the education record not be disclosed to third parties without consent,⁵⁷ and file a complaint with the U.S. Dept. of Ed.'s Family Policy Compliance Office ("FPCO") if these provisions are violated.⁵⁸

never have been, committed to the development of a partnership in education with parents. The school has too often viewed parental involvement as an intrusion . . . and in that kind of relationship many real possibilities of growth are lost").

50. See 20 U.S.C. § 1232g(a)(3) (2006); 34 C.F.R. § 99.1(a)(1)–(2) (2000) (defining educational agencies and institutions in terms of funding received and services provided).

51. See § 1232g(a)(3); 34 C.F.R. § 99.1.

52. See § 1232g(2); 34 C.F.R. § 99.7(a)(2)(i)–(iv) (requiring schools to provide notice to eligible students of their rights to inspect and review education records, request that the record be amended and corrected, consent before the information in the record is released to third parties, and file a complaint).

53. See § 1232g(a)(6); 34 C.F.R. § 99.3 (defining "student"); see also § 1232g(d)–(e); 34 C.F.R. §§ 99.3, 99.5(a) (explaining that parental rights under FERPA transfer to an eligible student and defining an eligible student as one who has reached age eighteen or enrolled in a post-secondary institution). Because the focus of this publication is college and university students, the terms "student" and "adult student" refer to "eligible student" unless otherwise noted.

54. See § 1232g(e); 34 C.F.R. §§ 99.3, 99.4 (defining "parent"); see also Daggett & Snow Huefner, *supra* note 35, at 6 (explaining that "parent" is broadly defined and applies to biological parents and some caretakers).

55. See § 1232g(a)(1); 34 C.F.R. § 99.10 (discussing rights of inspection and review of education records).

56. See § 1232g(a)(2); 34 C.F.R. § 99.20–22 (granting right to request that the school amend the education record for accuracy, to have an internal hearing to challenge the accuracy of the education record, and, if the school does not amend the record, to include a statement with the education record).

57. See § 1232g(b); 34 C.F.R. § 99.30 (outlining the requirements of prior written consent, which must specify the records to be released, to whom, and for which purposes); see also Sandra L. Macklin, *Students' Rights in Indiana: Wrongful Distribution of Student Records and Potential Remedies*, 74 IND. L.J. 1321, 1335 (1999) (explaining that schools must maintain an access log when they release, without consent, non-directory information contained in education records to third parties).

58. See § 1232g(g); C.F.R. § 99.60 (discussing enforcement procedures).

C. Education Records

FERPA applies only to education records, which must consist of some personally identifiable information (“PII”) and be created or maintained by a school, its employees, or a person acting for the school.⁵⁹

Despite common confusion and misconceptions,⁶⁰ an “education record,” which is broadly and vaguely defined,⁶¹ is not limited to academic information or information in a central or official student file. The term also includes, for example, health records that are maintained by a school and directly related to the student.⁶² Education records also encompass student information captured via a broad range of media, such as handwritten notes and video or audio tapes.⁶³ Education records do not include classwork or homework that students use for peer grading,⁶⁴ or

59. See § 1232g(a)(4)(A) (defining education records as “records, files, documents, and other materials which . . . contain information directly related to a student; and . . . are maintained by an educational agency or institution or by a person acting for such agency or institution”); 34 C.F.R. § 99.3 (listing categories of PII, which include the names or addresses of the student or family members, social security numbers, personal characteristics, or other information that would make the student’s identity easy to trace).

60. See Erin M. Sayer, *Understanding the Federal Education Privacy Act (FERPA): An Analysis of FERPA Compliance, Implementation, and Related Issues at Nebraska Colleges and Universities* 168–69 (Apr. 13, 2005) (unpublished Ph.D. dissertation, University of Nebraska, Lincoln) (on file with Biddle Law Library, University of Pennsylvania School of Law) (discussing results of empirical study regarding FERPA and colleges in Nebraska, in which participants tended to equate “education record” with academic information, so that no participants recognized that health records could be education records); Sparrow, *supra* note 36, at 35–36 (1985) (discussing a 1977 study that found school personnel were uncertain as to what constituted an academic record).

61. See Robert T. Monroe, *Chalk Talk—Balancing Student Privacy With the Public’s Right to Know: Georgia Supreme Court’s Red & Black Ruling Creates Gray Area*, 23 J.L. & EDUC. 281, 284 (1994) (“[T]he statutory definition of ‘educational records’ is vague.”); see also Daggett, *supra* note 37, at 624 (stating that records are “defined quite broadly by the statute”); see generally Kent Walker, *The Costs of Privacy*, 25 HARV. J.L. & PUB. POL’Y 87, 88 (2001) (suggesting that many privacy laws tend to be overbroad and inconsistent, as well as bureaucratic and inefficient).

62. See Moore, *supra* note 26, at 448 (explaining that once a treatment record is disclosed, including to the student, it becomes part of the education record and is governed by FERPA); *FERPA, Not HIPAA*, RECRUITMENT & RETENTION IN HIGHER EDUC., Feb. 2005, at 7 (discussing a letter from Peter K. Chan, Acting Regional Manager of the Department of Health and Human Services’ Office for Civil Rights, in which he explains that health records such as those maintained by a school clinic are education records and are governed by FERPA).

63. See § 1232g(a)(4)(A) (defining education records); 34 C.F.R. § 99.3 (noting that information may be recorded in various ways, such as handwriting, computer media, or video or audio tape).

64. See *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 430–35 (2002) (holding that peer-graded assignments were not education records under FERPA because the assignments were not yet “maintained” by the school and student-graders were not “acting” for the school, and noting that a broad interpretation of “education record”

information that is not derived from an education record, such as what teachers or administrators overhear, personally observe, or learn from an external source such as a newspaper article.⁶⁵ Nor does FERPA govern, as examples, sole possession notes—documents prepared by school employees that are not accessible to anyone else,⁶⁶ records made by employees exclusively for their professional use,⁶⁷ or records created and maintained solely for law enforcement purposes by a law enforcement unit within an education agency.⁶⁸ Although FERPA does govern directory information, schools may nevertheless release such information without consent, as long as adult students have been notified and have not objected.⁶⁹

Thus, “education records” are defined simultaneously with reference to who creates and maintains the record and for what purpose, as well as with reference to the source of the information, where the record is maintained, and who could possibly have access to the information.⁷⁰ For example, if a student commits a crime and that information is part of the disciplinary portion of the student’s education record maintained by college and university administrators, FERPA governs. However, if that information is instead created and maintained by a law enforcement unit solely for law

would “impose substantial burdens on teachers across the country”); *see also* Margaret L. O’Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679, 687–699 (2003) (discussing *Favlo* and suggesting that “the Court did not really articulate a standard that could be used by lower courts or educators to weigh future fact situations”); Salzwedel & Ericson, *supra* note 36, at 1085 (2003) (arguing that the Court’s decision in *Favlo* emphasized that FERPA is an “overly broad and heavy-handed federal law that should be interpreted reasonably to balance a student’s privacy rights against the efficient functioning of our country’s schools” and that it “is crystal clear that additional interpretation of the law is needed”).

65. *See* Daggett, *supra* note 37, at 625. *But see* 34 C.F.R. § 99.3 (explaining that oral disclosure of information contained in student records is prohibited).

66. *See* 20 U.S.C. § 1232g(a)(4)(B)(i); 34 C.F.R. § 99.3; *see also* Daggett, *supra* note 37, at 626 (describing sole possession notes as those prepared by school employees that are neither accessible nor accessed by anyone else, including other school employees, and explaining that once such notes are accessed by a third party, they are governed by FERPA).

67. *See* § 1232g(a)(4)(B)(iii).

68. *See* § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(a)(1) (defining law enforcement unit); 34 C.F.R. § 99.8(b)(1) (2000) (defining law enforcement records as those created and maintained by a law enforcement unit, for law enforcement purposes).

69. *See* § 1232g(a)(5)(A); 34 C.F.R. § 99.3 (defining directory information and providing an illustrative list, including the student’s name, address, phone number, e-mail address, photograph, date and place of birth, major, participation in activities, dates of attendance, grade level, and enrollment status).

70. *See* SUSAN GORN, WHAT DO I DO WHEN . . . THE ANSWER BOOK ON THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT 9:3–9:4 (1998) (explaining that what is a law enforcement record does not turn on content and that the same information could be maintained as both a law enforcement record and education record); *see also* Sayer, *supra* note 60, at 169 (explaining that health records may be considered education records, “depending on who creates and maintains the record”).

enforcement purposes, FERPA does not govern and the law enforcement agency may release the information pursuant to state law.⁷¹

D. Release of Information to Third Parties: Consent and Exceptions

Schools may release PII contained in education records to third parties with an adult student's consent.⁷² Absent the student's consent, schools may, but are not required to,⁷³ release education records when permitted by numerous statutory exceptions.⁷⁴ As examples,⁷⁵ schools may release education records to university employees or officials who have a legitimate educational interest in inspecting the records,⁷⁶ to the student's parents if the parents claim the student as a dependent on federal income tax returns,⁷⁷ to parents or guardians of students under twenty-one years of age who violate a law or the school's policy regarding the possession or use

71. See 34 C.F.R. § 99.8(b)(2) (explaining that records created by a law enforcement unit but maintained by another department are not law enforcement records and that records created and maintained by a law enforcement unit but used for purposes other than law enforcement, such as disciplinary action, are not law enforcement records); VT PANEL REPORT, *supra* note 1, at H-4 (summarizing privacy laws and guidance from the U.S. Department of Education); see also Daggett, *supra* note 37, at 627 (explaining that security-related records maintained by college and university administrators or employees other than law enforcement officials are not exempted from FERPA).

72. See § 1232g(b); 34 C.F.R. § 99.30(b) (noting that written consent should specify the records that may be disclosed, for which purposes, and to whom).

73. *But see* § 1232g(j); 8 C.F.R. § 214.1(h) (2008) (requiring that educational institutions report information concerning an F, J, or M nonimmigrant student that would ordinarily be protected by FERPA, when needed for anti-terrorism purposes and supported by a court order).

74. See Sara Lipka, *Officials Get Lecture on Privacy Laws*, 52 CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 24, 2006, at A45 (discussing guidance provided by the U.S. Dept. of Ed. clarifying that colleges and universities are permitted but not required to disclose student records to parents).

75. See Daggett, *supra* note 37, at 631–37 (1997) (providing a more comprehensive discussion of exceptions to FERPA's written consent requirements); see also GORN, *supra* note 70, at 7:9–7:10 (listing thirteen exceptions to the prior written consent requirement).

76. See § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1) (2000); see also GORN, *supra* note 70, at 7:13–7:14, 9:5 (clarifying that school officials may determine what constitutes a "legitimate educational interest" and may disclose education records to law enforcement officials, as long as the school has designated them to be school officials with a legitimate educational interest in the information). *But see* 34 C.F.R. § 99.8(c)(2) (2000) (providing that education records disclosed to law enforcement units retain their status as education records so that restrictions on redisclosure discussed in § 99.30 apply); GORN, *supra* note 70, at 9:6–9:7 (pointing out that law enforcement units cannot disclose information from education records as they could if the information were obtained from a law enforcement record).

77. See § 1232g(b)(1)(H); 34 C.F.R. § 99.31(a)(8); see also Daggett, *supra* note 37, at 629 (mentioning that colleges and universities may disclose education records of dependent students to parents).

of alcohol or controlled substances,⁷⁸ and, in the case of health and safety emergencies, to “appropriate” parties where “knowledge of the information is necessary to protect the health or safety of the student or other individuals.”⁷⁹

E. Enforcement

If a college student or a minor student’s parent discovers that a school has violated FERPA, the student’s options regarding enforcement and remedies are limited and arguably inadequate.⁸⁰ FERPA lacks a remedial provision, provides for no private right of action, and does not create a privacy interest that is cognizable under 42 U.S.C. § 1983.⁸¹ Instead, a

78. See § 1232g(i) (stating that an IHE may notify the parents of a student who has violated a federal, state, or local law, or institutional rule or policy regarding the use or possession of a controlled substance).

79. 34 C.F.R. § 99.36(a).

80. See *Belanger v. Nashua Sch. Dist.*, 856 F. Supp. 40, 47 (D.N.H. 1994) (“[N]either the statute nor the regulations gives an explicit remedy that would be beneficial to the plaintiff.”), *overruled by* *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Krebs v. Rutgers*, 797 F. Supp. 1246, 1257 (D.N.J. 1992), *overruled by* *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (recognizing the “complete inadequacy of the Secretary’s regulations” and the “statute’s failure to require more complete relief for aggrieved individuals”); see also GORN, *supra* note 70, at 11:4 (suggesting that schools escape real sanctioning); Macklin, *supra* note 57, at 1321–37 (suggesting that FERPA is “effectively impotent because of its lack of enforcement mechanisms,” noting that other writers have described it as a “toothless” statute, and proposing that states augment privacy protection); O’Donnell, *supra* note 64, at 712 (discussing how Princeton University accessed a Yale University website containing applicant information and arguing that the market cannot effectively regulate information privacy in higher education because students will not stop applying to Ivy League schools even if they do not have adequate record security); D. Martin Warf, Note, *Loose Lips Won’t Sink Ships: Federal Education Rights to Privacy Act After Gonzaga v. Doe*, 25 CAMPBELL L. REV. 201, 217 (2003) (suggesting that, without the threat of lawsuits and because the FPCO acts only on complaints rather than actively seeking out violators, colleges and universities may leave cost-efficient but questionable policies in place); Sparrow, *supra* note 36, at 49–50 (describing FERPA’s enforcement scheme as “enforced self-regulation” and suggesting that the sanction of withdrawal of funds is “so disproportionate . . . that the threat lacks credibility and thus serves only as a poor incentive for institutions to correct systematic violations or unfair practices”).

81. See *Gonzaga*, 536 U.S. at 283–91 (holding, in case where a dean refused to attest to a student’s good moral character, that FERPA does not confer rights enforceable under 42 U.S.C. § 1983 in light of the absence of rights-creating language, the provision for an administrative enforcement mechanism, and an aggregate rather than individual focus); see also Daggett, *supra* note 37, at 640 (“Attempts to create a private cause of action for [FERPA] violations have been singularly unsuccessful.”). *But see* *Gonzaga*, 536 U.S. at 293–303 (2002) (Stevens, J. & Ginsburg, J., dissenting) (arguing that FERPA contains the requisite rights-creating language, the administrative review enforcement mechanism is not comprehensive, and that the majority conflated the analysis for implied rights of action with whether a federal right exists for § 1983 purposes); Annie M. Horner, Note, *Gonzaga v. Doe: The Need for Clarity in the Clear Statement Test*, 52 S.D. L. REV. 537, 556–62 (2007) (criticizing the decision in *Gonzaga*, arguing that the majority misapplied the *Dole* test while the dissent correctly

student may file a complaint with the FPCO.⁸² Grounds for a complaint include that the school did not correct misleading or inaccurate information in the student's educational records or that the school released the educational records without authorization.⁸³ Upon receiving the complaint, the FPCO requests a written response from the school, investigates the complaint, and notifies the student and school in writing of its finding.⁸⁴ If the FPCO finds that a violation has occurred, it provides the school with specific guidelines and requests compliance before a stated deadline.⁸⁵ If the school fails to comply, the Secretary of Education may withhold funds, compel compliance via a cease-and-desist order, or terminate the school's eligibility for future funding under any applicable program.⁸⁶ However, the Act is designed to address policies and practices of unauthorized release rather than single unauthorized disclosures⁸⁷ and the FPCO has never attempted to withdraw federal funds based on FERPA violations.⁸⁸

F. The Tax and Emergency Exceptions

The initial amendments to FERPA included exceptions allowing the nonconsensual release of information in education records to parents of dependent students and to third parties in case of a health or safety emergency.⁸⁹

Under the tax dependent exception, schools may, but are not required to allow parental access to education records if the student is a dependent as

applied the *Blessing* test).

82. See § 1232g(g); 34 C.F.R. § 99.63; see also Daggett, *supra* note 37, at 631–42 (explaining the process in detail, including the provisions for an internal hearing).

83. See § 1232g(a), (b), (g).

84. See § 1232g(f), (g); 34 C.F.R. §§ 99.65–99.66.

85. See § 1232g(f), (g); 34 C.F.R. § 99.66.

86. See § 1232g(b)(2), (f) (2006); 34 C.F.R. § 99.67(a); see also Daggett & Snow Huefner, *supra* note 35, at 11 (discussing enforcement options, noting that the federal government may also bring a civil action).

87. See § 1232g(a)(1)(A)–(B), 1232g(b)(1)–(2) (stating that funds shall not be made available under any applicable program to educational agencies or institutions that have a *policy or practice* of denying or effectively preventing the exercise of rights assured under FERPA or of permitting the release of educational records without written consent) (emphasis added); see also *Gonzaga Univ. v. Doe*, 536 U.S. 273, 288 (2002) (“FERPA’s nondisclosure provisions further speak only in terms of institutional policy and practice, not individual instances of disclosure.”) (citations omitted); Macklin, *supra* note 57, at 1326 (“[E]very court which has addressed the issue has said that FERPA protects against systematic violations only.”).

88. See Daggett, *supra* note 37, at 642 (noting no reported decisions in which the FPCO has withdrawn funds); see also Michael Arnone, *Congress Weighs Changes in Key Student-Privacy Law*, 50 CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 3, 2003, at A22 (reporting that no college or university has ever been sanctioned with loss of federal funding).

89. See Kent M. Weeks, *Family-Friendly FERPA Policies: Affirming Parental Partnerships*, NEW DIRECTIONS FOR STUDENT SERVICES, July 2001, at 39, 41.

determined by the Internal Revenue Service.⁹⁰ Such disclosure is discretionary, so that some IHEs release information in education records after a student indicates dependent status or after the student's parents provide a copy of their federal income tax returns.⁹¹ The exception does not apply to international students⁹² or to students who are not claimed as dependents.

Congress added the emergency (or health or safety) exception to the written consent requirement when FERPA was first amended.⁹³ The exception allows IHEs to disclose PII from education records, without consent, "in connection with an emergency [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons."⁹⁴ Citing the legislative history of the provision, the FPCO notes Congress's intent to limit application of the provision to "exceptional circumstances."⁹⁵ Thus, the U.S. Dept. of Ed. has promulgated regulations that allow disclosure under the provision only in cases of emergency,⁹⁶ to appropriate parties,⁹⁷ when necessary to protect the health or safety of the student or other individuals.⁹⁸ A specific regulation emphasizes that the requirements will be "strictly construed."⁹⁹

90. *See id.* at 45 (excerpting FERPA's legislative history, illustrating that colleges were reluctant to send bills and grades home to parents).

91. *See id.* at 45–46 (explaining that many institutions did not support the release of information in this context until recently).

92. *See FERPA Questions for Lee Rooker, Director of the Family Policy Compliance Office, U.S. Department of Education, Association for Student Judicial Affairs, available at* <http://asjaonline.org/attachments/wysiwyg/525/FERPA-QUESTIONSanswered.doc>.

93. *See* 20 U.S.C. § 1232g(b)(1)(I) (2006); 34 C.F.R. §§ 99.31(a)(10), 99.36 (2000); *see also* letter from LeRoy S. Rooker, Director of the Family Compliance and Policy Office, to the University of New Mexico (Nov. 29, 2004), *available at* <http://www.ed.gov/policy/gen/guid/fpc/ferpa/library/baiseunmslc.html>.

94. Letter from LeRoy S. Rooker to the University of New Mexico, *supra* note 93, at 6.

95. *See id.* (explaining that a blanket exception for "health or safety" could result in the unneeded release of personal information, and that Congress resolved the issue by directing the Secretary of Education to promulgate regulations, with the expectation that "he will strictly limit the applicability of this exception").

96. *See id.* at 9 ("This Office will not substitute its judgment for what constitutes a true threat or emergency unless the determination appears manifestly unreasonable or irrational."); *see also* letter from LeRoy S. Rooker to the New Bremen Schools (Sept. 22, 1994), *reprinted in* VT PANEL REPORT, *supra* note 1, at G16–22 (finding that a student's statement that he wished he were dead, coupled with a threat to beat up another student and unsafe conduct constituted a health or safety emergency, but that the school violated FERPA when it later disclosed additional information to the court for the student's hearing).

97. *See* letter from LeRoy S. Rooker to the University of New Mexico, *supra* note 93, at 7 (noting that "appropriate parties" typically include law enforcement and public health officials, as well as trained medical personnel).

98. *See* 34 C.F.R. § 99.36(a).

99. *See* 34 C.F.R. § 99.36(c).

Although the FPCO previously provided four regulatory factors that schools should use to determine whether a perceived health or safety emergency warranted disclosure of PII without consent, the Secretary removed them, explaining that educational institutions should not be overburdened with the criteria and are capable of making those determinations on their own.¹⁰⁰

Operationally, before a college or university may release non-directory PII under the emergency exception, it must determine “that a *specific situation presents imminent danger or threat* to students or other members of the community, or requires an *immediate need* for information in order to avert or diffuse serious threats to the safety or health of a student or other individuals.”¹⁰¹ Information may then be released only to “parties who can address the specific emergency in question,”¹⁰² provided that the information released is “narrowly tailored considering the immediacy and magnitude of the emergency.”¹⁰³ Finally, the exception is “temporally limited to the period of emergency.”¹⁰⁴

G. Reactions to FERPA

In addition to arguing that FERPA was poorly drafted and hastily enacted without input from relevant stakeholders,¹⁰⁵ critics also claim that it is an outdated statute¹⁰⁶ that confuses, burdens, and intrudes on the domain of IHEs¹⁰⁷ while also putting them in the middle of student-parent

100. See letter from LeRoy S. Rooker to the New Bremen Schools, *supra* note 96, at G-21 (explaining that a school district need not “document its decision-making process in determining to disclose the records to meet a safety or health emergency” because “it is clear that the Secretary intends for educational agencies to use their good judgment and discretion in the matter”); see also GORN, *supra* note 70, at 7:33–7:34 (discussing the previous criteria in place).

101. Letter from LeRoy S. Rooker to the University of New Mexico, *supra* note 93, at 8.

102. *Id.*

103. *Id.*

104. *Id.*

105. See discussion *supra* Part I.A.

106. See Sayer, *supra* note 60, at 177–78 (noting that study participants viewed FERPA as a statute written at a time when schools kept one authoritative paper record, but that the Act had not adapted to an era of multiple electronic copies and IHEs’ use of technology).

107. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (Breyer, J. & Souter, J., concurring) (“Much of the statute’s key language is broad and nonspecific” and, in reference to definitions of key terms such as “education records,” “[t]his kind of language leaves schools uncertain as to just when they can, or cannot, reveal various kinds of information”); *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 437 (2002) (Scalia, J., concurring) (writing that “[t]he Court does not explain why respondent’s argument is not correct” and that its interpretation of “education record” seems to contradict FERPA, and is “incurably confusing”); VT PANEL REPORT, *supra* note 1, at 63 (explaining that privacy laws cause people to “default to the nondisclosure option”

conflicts,¹⁰⁸ indirectly weakens parental rights,¹⁰⁹ provides no real privacy protection because the exceptions nearly swallow the rule,¹¹⁰ is not adequately enforced,¹¹¹ and provides a shield behind which universities inappropriately hide.¹¹²

In reference to one of these assertions, as the VT Panel Report indicates, FERPA does indeed confuse and burden IHEs.¹¹³ In fact, both the National Education Association and National School Boards Association opposed FERPA, the latter pointing out that the intent was meritorious but that “operationally its accomplishment will generate unacceptable confusion because of the complicated legislative language and local administrative

even when the law permits disclosure and hypothesizing that this may be due to ignorance of the law); Ira Nerken, *Backbencher: Harvard Favors Secrecy, Against Candor*, HARV. L. RECORD, Nov. 8, 1974, reprinted in 120 CONG. REC. 36,528 (1974) (reporting that Harvard faculty and administrators opposed FERPA because it was poorly drafted and ambiguous, offered colleges and universities no opportunity for input, and sent the message that academics do not have ethics or common sense, and that students would be able to see negative recommendation letters); see also Daggett, *supra* note 37, at 618, 660–62 (explaining how FERPA creates burdens for colleges and universities because of the time required for training, making disclosure decisions, maintaining the access log, and determining if FERPA conflicts with other laws, but that Congress provides no funds to help schools meet FERPA’s requirements); Sparrow, *supra* note 36, at 33 (listing common misunderstandings about FERPA).

108. See Weeks, *supra* note 89, at 42 (explaining that schools can be “caught in the middle between persons who all claim they should be the sole recipients of information”); see also Sparrow, *supra* note 36, at 87 (finding in a small scale study that staff interviewed about FERPA “experienced some conflict with other normative values especially a deeply ingrained value, parental rights”).

109. See Daggett, *supra* note 37, at 662 (“Unreasonable burdens on schools also indirectly weaken parental rights. To the extent [FERPA] imposes excessive burdens on schools which cannot be effectively enforced by parents, schools may fail to comply, compromising parental rights.”).

110. See Arnone, *supra* note 88, at A23 (quoting Barmak Nassirian, Associate Executive Director of External Relations for the American Association of Collegiate Registrars and Admissions Officers, as stating that “[a]ll added up together, [the exceptions] almost eviscerate F[ERPA] to the point of meaninglessness”).

111. See sources cited *supra* note 80.

112. See Salzwedel & Ericson, *supra* note 36, at 1061 (arguing that FERPA is a defensive shield behind which IHEs hide academic corruption in college and university athletics); Courtney Leatherman, *Universities Wield Privacy Law in Clashes with T.A. Unions*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 27, 2000, at A12 (reporting concerns that colleges and universities were citing FERPA to justify withholding the names of teaching assistants from unions); see also VT PANEL REPORT, *supra* note 1, at 63 (hypothesizing that people “default to the nondisclosure option” because of ignorance of the law, a desire to serve an individual or organizational purpose by “hid[ing] behind the privacy law,” or a desire to minimize the risks to oneself); Weeks, *supra* note 89, at 49 (suggesting that “[t]oo many colleges hide behind [FERPA] to escape their responsibility to parents”).

113. See VT PANEL REPORT, *supra* note 1, at 63 (“The panel’s review of information privacy laws governing mental health, law enforcement, and educational records and information revealed widespread lack of understanding, conflicting practice, and laws that were poorly designed to accomplish their goals.”).

conditions.”¹¹⁴ Although IHEs’ initial objections might have been fueled by resentment that the federal government was intruding on their domain,¹¹⁵ their concerns appear motivated by more than a desire to use FERPA and privacy as a shield.

Instead, genuine confusion exists over the language and requirements of the Act,¹¹⁶ and such confusion leads to conservative interpretations regarding what information schools may share,¹¹⁷ especially in the case of a health or safety emergency.¹¹⁸ Furthermore, although the FPCO provides

114. See 120 CONG. REC. 14,583 (1974) (discussing the National Education Association’s opposition to the amendment); 120 CONG. REC. 14,585 (1974) (reprinting a letter from the National School Boards Association).

115. See Sparrow, *supra* note 36, at 83 (concluding that the impact of FERPA on colleges and universities was slight after they “recovered from the shock of an invasion of their domain” and regulations helped to clarify confusion).

116. See sources cited *supra* note 107.

117. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (Breyer, J. & Souter, J., concurring) (writing that the language of FERPA “is open to interpretations that invariably favor confidentiality almost irrespective of conflicting educational needs or the importance, or common sense, of limited disclosures in certain circumstances”); O’Donnell, *supra* note 64, at 687–99 (suggesting that lawyers are “cautious creatures” who ask “text-driven FERPA questions” and continue to advise clients to interpret the definition of “education record” broadly); see also VT PANEL REPORT, *supra* note 1, at 63 (explaining that privacy laws cause people to “default to the nondisclosure option” even when the law permits disclosure).

118. See *Brown v. City of Oneonta*, 106 F.3d 1125, 1132 (2d Cir. 1997) (noting that the “regulations merely repeat the words of the emergency exception”); *Improving the Safety and Security of Schools and Campuses in the United States: What Can be Done by the Federal Government?: Hearing Before the S. Comm. on Homeland Sec. & Govt. Affairs*, 110th Cong. 5 (2007) [hereinafter *Hearings*] (statement of Irwin Redlener, M.D., Prof. of Clinical Pub. Health & Pediatrics, Assoc. Dean for Pub. Health Preparedness & Dir. of the Nat’l Ctr. for Disaster Preparedness at Columbia Univ. Mailman Sch. of Pub. Health) (outlining federal strategies and mentioning that although FERPA allows for parental disclosure in some circumstances, schools still fear liability); U.S. DEPT. OF JUSTICE, REPORT TO THE PRESIDENT ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY 7–8 (2007), http://www.usdoj.gov/opa/pr/2007/June/vt_report_061307.pdf [hereinafter REPORT TO THE PRESIDENT] (noting that misunderstandings and fears about state and federal privacy laws “likely limit the transfer of information in more significant ways than is required by law” and calling for the U.S. Dept. of Ed. to develop additional guidance clarifying how information may be shared); VT PANEL REPORT, *supra* note 1, at 69 (explaining that the “strict construction” requirement is unnecessary and unhelpful, further narrows the definition of “emergency” without clarifying when an emergency exists, and “feeds the perception that nondisclosure is always a safer choice”); see also John S. Gearan, *When Is It OK to Tattle? The Need to Amend the Family Educational Rights and Privacy Act*, 39 SUFFOLK U. L. REV. 1023, 1042 (2006) (“As the law stands presently, however, the FERPA exception allowing for disclosure [to third parties such as parents] in emergencies is extremely ambiguous, and discourages notification even in dangerous and appropriate instances.”); Karin Fischer, *Report on Virginia Tech Shootings Urges Clarification of Privacy Laws*, CHRON. HIGHER EDUC. (Wash., D.C.), June 22, 2007, at A30 (quoting Michael O. Leavitt, Secretary of Health and Human Services, as stating “[p]eople don’t understand what [information about troubled students] they can share and what they can’t share”); Ann H. Franke, *When Students Kill Themselves, Colleges*

a wealth of guidance and technical assistance to IHEs regarding FERPA,¹¹⁹ the guidance has been criticized¹²⁰ and the Technical Assistance Letters are ineffective because they tend to be conclusory in nature,¹²¹ and are neither indexed¹²² nor widely disseminated by the FPCO.¹²³ Thus, although FERPA's emergency exception allows IHEs to release information to third parties such as parents when a student's safety is at risk, the standard-based exception is too narrow and confusing, so that IHEs default to the nondisclosure option. At the same time, however, FERPA's tax dependent exception operates as an overly broad bright-line rule that, coupled with FERPA's lax enforcement mechanism, fails to adequately protect the privacy of students' education records.¹²⁴ As a result, FERPA's emergency exception fails to ensure safety while the tax dependent exception eviscerates the statute's privacy protection.

Despite FERPA's shortcomings, however, some college and university

May Get the Blame, CHRON. HIGHER EDUC. (Wash., D.C.), June 25, 2004, at B18 (explaining that because colleges and universities have little guidance other than that the emergency exception will be strictly construed, they default to nondisclosure); Robert B. Smith & Dana L. Fleming, Editorial, *Student Suicide and Colleges' Liability*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 20, 2007, at B24 (calling on Congress to amend FERPA because FERPA's emergency exception "remains largely untested in the courts, makes no specific reference to self-inflicted harms, and provides no guidance about how colleges can help protect students from themselves"); Eric Hoover, *Safety Trumps Privacy in Sharing Information About Troubled Students, Panel is Told*, CHRON. HIGHER EDUC. (Wash., D.C.), July 27, 2007, at A31 (quoting Richard J. Bonnie, law professor at the University of Virginia, as stating "[g]reater clarification about this is clearly needed").

119. See Sayer, *supra* note 60, at 62–63 (explaining that a school can write a Technical Assistance Letter to the FPCO and receive a response, that the FPCO issues Letters of Finding to parties of complaints, and the FPCO posts some letters to its website or sends them to professional organizations to distribute and reprint); see also FPCO website, <http://www.ed.gov/policy/gen/guid/fpc/index.html> (last visited Oct. 26, 2008) (offering information and training).

120. See, e.g., Sayer, *supra* note 60, at 174 (quoting participant in study as saying that, "[t]he primary problem" with FERPA is that it "really doesn't accommodate today's practices, so we are constantly sort of interpreting stuff" and the answers "don't really stick with you because they are not logical in the context of today's practices").

121. See *Falvo ex rel. Pletan v. Owasso Indep. Sch. Dist.*, 233 F.3d 1203, 1214–15 (10th Cir. 2000), *rev'd*, 534 U.S. 426 (2002), *overruled in part by Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) ("[T]he Rooker letter and declaration are bereft of any reasoning underlying the rather conclusory opinion" and "lack sufficient reasoning, fail to account for the breadth of FERPA's language, and indicate the FPCO's somewhat cursory and purely hypothetical consideration of the issue . . .").

122. See Sayer, *supra* note 60, at 63 (citing JAMES S. ROSENFELD ET AL., *EDUCATION RECORDS: A MANUAL* 7 (1997)).

123. See *id.* at 63–64 (explaining that the FPCO posts Technical Assistance Letters to its website and distributes them to professional organizations only if the FPCO determines the letter would be useful to the educational community); see also GORN, *supra* note 70, at 11:5 (explaining that the FPCO neither automatically publishes its responses nor indexes them by subject, so that they remain largely unpublished).

124. See sources cited *supra* note 80.

administrators view FERPA positively, acknowledging that the privacy of students' records should be protected. Moreover, FERPA is not the only source of confusion. As Section II explains, divergent strands of tort liability have traditionally emphasized either safety or privacy to the exclusion of the other, so that the common law, like FERPA, has provided IHEs with little guidance on balancing the two. However, as a third strand of tort liability emerges in the mental health context, it is becoming increasingly evident that Congress should amend FERPA to keep pace with the demands that the common law places on IHEs to share and disclose information when students threaten to harm themselves or others.

II. IHE NEGLIGENCE LIABILITY FOR THIRD-PARTY HARM AND SELF-HARM

IHEs generally have no duty to prevent third parties from physically harming students or to prevent students from harming themselves.¹²⁵ Instead, student-plaintiffs must establish a duty to aid or protect via statute,¹²⁶ via a voluntary undertaking that was negligently performed,¹²⁷ via custom and policy,¹²⁸ or via an indirect or implied duty—such as that arising from a special relationship.¹²⁹

125. See RESTATEMENT (SECOND) OF TORTS § 315 (1965) (explaining that there is “no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless a special relationship exists”).

126. See *Jesik v. Maricopa Cmty. Coll. Dist.*, 611 P.2d 547, 549–51 (Ariz. 1980) (reversing summary judgment and holding that a legislative decision imposing upon school boards a duty to “provide for adequate supervision over pupils” was relevant in the determination of the duty the college owed to a student who was shot and killed by another student).

127. See, e.g., *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 929–30 (N.C. Ct. App. 2001) (reversing, remanding, and explaining that the “undertaking” theory involves an agreement such as a contract or gratuitous promise, and that the university’s testimony and conduct indicated that it voluntarily assumed the responsibility of teaching cheerleaders about safety); see also *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 336–37 (Mass. 1983) (finding that colleges and universities “generally undertake to provide their students with protection from the criminal acts of third parties,” that such security is part of the bundle of services colleges and universities offer, and that parents and students rely upon colleges and universities to exercise reasonable care to protect students).

128. See, e.g., *Mullins*, 449 N.E.2d at 335 (stating that duty finds its “source in existing social values and customs” and, based on the testimony of an expert witness who visited eighteen area colleges and universities, finding that the duty to use reasonable care to protect resident students was “firmly embedded in a community consensus”).

129. See, e.g., *Davidson*, 543 S.E.2d at 927–28 (discussing how special relationships often involve mutual dependence and that an injured cheerleader received benefits such as transportation and physical education credits hours from the university, while the university depended on the cheerleader for benefits such as providing entertainment at sporting events); see also *Nova Southeastern Univ. v. Gross*, 758 So. 2d 86, 87–90 (Fla. 2000) (holding that when a university exerted control over a

In reference to the latter, although the Third Restatement of Torts adds the school-student relationship to the list of special relations that can give rise to duty, it notes that courts are split as to whether this duty extends beyond the K-12 context to IHEs.¹³⁰ In contrast to the K-12 setting, the three rationales for imposing duty based on the school-student relationship—“the temporary custody that a school has of its students, the school’s control over the school premises, and the school’s functioning in place of parents”¹³¹—have received different treatment in the college and university context.

As a result, three strands of tort doctrines have emerged, each emphasizing different factors regarding whether a duty should be imposed, as well as different types of harms, different discourses, and different results. Part II discusses each line of cases in turn: the “duty” strand of premises liability that emphasizes safety and the foreseeability of harm; the “no duty” strand of *in loco parentis* and custodial relationships that emphasizes privacy; and the evolving “duty-based-on-the-facts” strand of the legally special IHE-student relationship that emphasizes safety but has yet to develop a workable concept of foreseeability as it relates to the IHE or mental health context.¹³² Part II then argues that the common law has used either a “safety sword” to impose a duty via foreseeability or a “privacy shield” to refuse to impose a duty on IHEs to protect students from intentional harm. As a result, and as the emerging third strand of tort doctrine reveals, the common law has yet to acknowledge the unique characteristics of IHEs, adapt concepts of foreseeability to specific risks such as those relevant to the mental health context, identify the diverse interests at stake, or balance privacy and safety concerns. Finally, Part II also points out that although FERPA has responded to changes in the common law in the past, it has yet to respond to the increased foreseeability demands that the common law imposes on IHEs in the mental health context.

A. Premises Liability: Safety and Foreseeability

An IHE’s legal duty to use reasonable care to prevent foreseeable student injuries from intentional acts of third parties on its premises is well

student’s conduct by requiring her to complete an off-campus practicum and assigning her to a specific location, it assumed the Hohfeldian correlative duty to use reasonable care).

130. See RESTATEMENT (THIRD) OF TORTS § 40 cmt. 1 (Tentative Draft No. 4, 2004) (“Courts are split on whether a college owes a duty to its students. Some of the cases recognizing such a duty are less than ringing endorsements . . .”).

131. *Id.*

132. See Lake, *supra* note 27, at B6 (remarking that issues such as a “significant science-and-law debate regarding effective suicide interventions . . . have kept the law from creating a unified, consistent approach to suicide responsibility” and “will continue to confuse the public and may force lawmakers to find some solutions”).

established.¹³³ IHEs, analogized in these cases to public agencies, business owners, or landlords,¹³⁴ must use reasonable care to warn students of possible risks¹³⁵ and prevent foreseeable injuries such as rapes, assaults, and homicides in dorms, parking lots, and other areas of campus. IHEs prevent such acts by, as examples, trimming foliage, installing adequate locks on dorm doors, adopting policies that exterior doors remain locked, providing security patrols, and warning students of potential harm.¹³⁶

133. See *Stockwell v. Bd. of Trs.*, 148 P.2d 405, 406 (Cal. Ct. App. 1944) (characterizing the IHE-student relationship as that of landowner-invitee because by paying tuition and fees, the student was an invitee conferring a benefit on the university); see also ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* 109 (1999) (“As we have seen, a landowner has a duty to use reasonable care in the operation and maintenance of his premises for the protection of so called ‘invitees.’ Such a relationship is legally special.”); Lake, *supra* note 27, at B6 (“Despite the rise in crime in society in large, college security forces were typically charged with the protection of property as their principal mission up through the 1970s.”).

134. See, e.g., *Stockwell*, 148 P.2d at 405–06 (reversing nonsuit for the university and characterizing the private IHE-student relationship as that of landowner-invitee, so that the university had the duty to use reasonable care to maintain its premises in safe condition and protect invitees from injury as a result of negligence); see also *Nero v. Kansas State Univ.*, 861 P.2d 768, 779 (Kan. 1993) (“[Kansas State University] has discretion whether to furnish housing to students. Once that discretionary decision is made, the university has a duty to use reasonable care to protect its tenants.”).

135. See, e.g., *Kleisch v. Cleveland State Univ.*, No. 05AP-289, 2006 Ohio App. LEXIS 1170, at *25 (Ohio Ct. App. Mar. 21, 2006) (noting that according to the university’s expert witness, the most important step was “to disseminate the information to students and staff so that people are aware that this occurred, and these are the things that one should watch out for”); see also *Peterson v. San Francisco Comm. Coll. Dist.*, 685 P.2d 1193, 1202 (Cal. 1984) (holding that the decision regarding whether to warn does not involve a policy decision that the state immunity provision was intended to protect); *Nero*, 861 P.2d at 781 (explaining that the duty to warn is imposed by law and is ministerial, not discretionary).

136. See *Peterson*, 685 P.2d at 1200–03 (reversing dismissal and holding a sexual assault in a parking lot was foreseeable and the college had a duty to trim the foliage, warn students, or take other action); *Furek v. Univ. of Del.*, 594 A.2d 506, 523–26 (Del. 1988) (reversing grant of judgment n.o.v. for the university and finding that a hazing injury at a fraternity house was foreseeable); *Nero*, 861 P.2d at 780–83 (reversing summary judgment for the university and holding that a sexual assault in a dorm recreation room was foreseeable and the university had a duty to warn the student, implement security measures, or take other reasonable measures); *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 334–35 (Mass. 1983) (affirming denial of directed verdicts and judgments n.o.v., when exterior gates were low, the college used a single key system for the dorms and no deadbolts, and only two security guards were on duty when the student was raped in her dorm room); *Sharkey v. Bd. of Regents*, 615 N.W.2d 889, 900–02 (Neb. 2000) (reversing and remanding and finding that the university owed a landowner-invitee duty to the student’s husband when an assault on him by another student was reasonably foreseeable); *Miller v. New York*, 467 N.E.2d 493, 511–14 (N.Y. 1984) (reversing and holding that the university had a duty to keep exterior dorm doors locked). *But see* *Crow v. State*, 271 Cal. Rptr. 349, 358 (Cal. Ct. App. 1990) (affirming and explaining that a “dangerous condition” under statute requires a factual showing that a defect in the dorm contributed to the plaintiff’s injury,

In determining whether a duty exists in these cases, as explained below, courts have emphasized safety and foreseeability, using either a prior similar incidents or totality of the circumstances test, both of which allow courts considerable leeway¹³⁷ and carry implications for how IHEs share and disclose information. For example, because courts apply concepts similar to the doctrine of respondeat superior,¹³⁸ IHEs are expected to share information vertically and horizontally, enabling administrators to foresee and act on potential harm communicated to or observed by campus police,¹³⁹ resident advisors,¹⁴⁰ health center staff,¹⁴¹ and students.¹⁴² This

rather than the act of a third party alone); *Agnes Scott Coll. v. Clark*, 616 S.E.2d 468, 469–72 (Ga. Ct. App. 2005) (reversing denial of summary judgment for the university and holding that a break-in of cars in a parking lot at night was not sufficiently similar to prior incidents to give notice that a kidnapping and rape would occur in a different parking lot during the daytime); *Gragg v. Wichita State Univ.*, 934 P.2d 121, 129–35 (Kan. 1997) (affirming grant of summary judgment for the university and holding that it was unforeseeable, as a matter of law, that the assailant would shoot the plaintiff during a fireworks display open to the public); *Doyle v. Gould*, 22 Mass. L. Rep. 373, 384–86 (Mass. Super. Ct. 2007) (granting summary judgment for the university and holding that the student’s homicide in an off-campus apartment building was not foreseeable); *Brown v. N.C. Wesleyan Coll.*, 309 S.E.2d 701, 702–04 (N.C. Ct. App. 1983) (affirming summary judgment for the college and explaining that there was no repeated course of criminal conduct, so that the abduction and murder of the plaintiff’s intestate was not foreseeable and no duty existed); *Kleisch*, 2006 Ohio App. LEXIS 1170, at *25 (affirming judgment for university and finding that a rape in a classroom was not foreseeable, and even if it were, the university did not breach its duty).

137. See discussion *infra* Part II.A.

138. See, e.g., *Sharkey*, 615 N.W.2d at 901–02 (reasoning that the university had notice via campus security that the student had stalked two women, and via an instructor that the couple was likely to encounter the student assailant at a particular time and place, when the instructor asked the couple to meet her before class); see also *Lake*, *supra* note 27, at B6 (suggesting that colleges and universities “may have to comply with the law of agency,” which assumes that businesses “gather and synthesize . . . information” such as what employees know “in a reasonable and efficient way” and sometimes imputes to the business “virtually real-time cognition of various events”).

139. See, e.g., *Furek*, 594 A.2d at 511 (reversing grant of judgment n.o.v. for the university and noting that campus police officers had stopped pledges engaging in a prank but did not investigate the matter, which occurred days before the hazing injury at issue); *Knoll v. Bd. of Regents*, 601 N.W.2d 757, 764 (Neb. 1999) (writing that the university was aware of several incidents involving the fraternity that abducted the student-plaintiff, given that campus police officers had been called to the fraternity house on several occasions for various violations); see also *BICKEL & LAKE*, *supra* note 133, at 141 (“One caveat: what the university knows about dangers to student safety it must use reasonable care to share among its various areas of operation. Thus campus police, student affairs administrators, and others must have clear direction and must be mutually aware of action to be taken in specific situations.”).

140. See, e.g., *Miller*, 467 N.E.2d at 495 (reversing dismissal and mentioning that the student, who was raped in the dorm, had complained to her resident advisor on two previous occasions that nonresidents were loitering in the dorm).

141. See, e.g., *Furek*, 594 A.2d at 510 (reversing grant of judgment n.o.v. for the university and pointing out that the director of student health services reported previous hazing injuries to the vice president for student affairs).

section argues that by narrowly applying a totality of the circumstances test, courts can ensure that IHEs have adequate notice of harm before a duty arises, while also offering incentives for IHEs to act proactively to ensure students safety.

Finally, and as discussed in subsequent sections, the foreseeability analysis used in premises liability cases has become increasingly influential. In light of social and legislative changes regarding high-risk alcohol use in the 1980s and 1990s, for example, the “privacy” shield in the second strand of tort doctrines lost ground to safety and foreseeability. As a result, some courts have expanded the duty of IHEs based on premises liability, holding that IHEs have a duty to prevent hazing-related injuries,¹⁴³ even when they occur off-campus.¹⁴⁴ Most recently, courts have drawn on premises liability precedent to hold, under the third strand of tort doctrines, that the IHE-student relationship is legally special and that IHEs have a duty to prevent foreseeable student self-harm such as suicide.¹⁴⁵

1. Foreseeability

In determining foreseeability, which is central to the determination of duty in these cases, courts rely on state premises liability law and use a “prior similar incidents” or “totality of the circumstances” test, the latter of which takes into account prior similar incidents, but accords them varying degrees of weight in the overall analysis.¹⁴⁶ Under the former,

142. See, e.g., *Miller*, 467 N.E.2d at 495 (reversing dismissal of claim and noting that the student newspaper had published reports about non-students trespassing and committing burglaries, armed robberies, and rapes in dorms).

143. See *Furek*, 594 A.2d at 520–21 (affirming in part, reversing in part, and basing duty on an undertaking to render service to protect another landowner-invitee relationship).

144. See *Knoll*, 601 N.W.2d at 764–65 (reversing summary judgment and finding that the university exercised control over the off-campus fraternity house where the student was injured and had notice of prior hazing injuries that occurred after students were forcibly abducted from campus and taken to the fraternity house); see also Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post In Loco Parentis College*, 37 IDAHO L. REV. 531, 547–48 (2001) (explaining how the expansion of colleges’ premises liability to include harm at off-campus fraternity houses illustrates that the concept of a “nuclear campus” is deteriorating, with students moving in and out of “zones of responsibility” in a “risk scape”).

145. See discussion *infra* Part II.C.

146. See also *Gragg v. Wichita State Univ.*, 934 P.2d 121, 134 (Kan. 1997) (using a totality of the circumstances test); *Sharkey v. Bd. of Regents*, 615 N.W.2d 889, 901 (Neb. 2000) (noting that prior similar instances are “particularly pertinent” to determinations of duty); *Kleisch v. Cleveland State Univ.*, No. 05AP-289, 2006 Ohio App. LEXIS 1170, at *21 (Ohio Ct. App. Mar. 21, 2006) (noting that Ohio courts are split on whether to use a prior similar incidents or totality of the circumstances test). Compare *Agnes Scott Coll. v. Clark*, 616 S.E.2d 468, 469 (Ga. Ct. App. 2005)

foreseeability is premised upon the fact that, based on incidents that occurred in the past, a college or university had notice that similar incidents would likely occur in the future.¹⁴⁷ In fact, some courts require evidence of prior similar incidents before they will hold that a school owed a duty of care to the student-plaintiff.¹⁴⁸ In contrast, under a totality of the circumstances approach, courts consider factors in addition to prior similar incidents,¹⁴⁹ but the harm must have been foreseeable due to some combination of factors that put the college or university on notice.¹⁵⁰

In evaluating foreseeability, whether under a prior similar incidents test or totality of the circumstances test, courts consider the existence, location, time of occurrence, frequency, and similarity of prior incidents as they relate to the plaintiff's harm. Although seemingly straightforward, this analysis varies according to how broadly or narrowly courts define the geographic area, relevant time frame, or similarity of the acts.¹⁵¹

(requiring proof of prior similar incidents), *with* *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 337 (Mass. 1983) (using a totality of the circumstances test, with prior similar incidents only one factor).

147. *See, e.g.,* *Nero v. Kansas State Univ.*, 861 P.2d 768, 780 (Kan. 1993) (“Prior similar acts committed upon invitees furnish actual or constructive notice to a landowner.”); *Brown v. N.C. Wesleyan Coll.*, 309 S.E.2d 701, 703 (N.C. Ct. App. 1983) (finding that there was no “repeated course of criminal activity” to put the college on notice).

148. *See, e.g., Clark*, 616 S.E.2d at 469 (“Since the trial court’s ruling is contrary to the Supreme Court of Georgia precedent requiring that prior similar crimes must occur before a landowner can be held liable for injuries suffered in connection with a future crime on its premises, we are constrained to reverse.”); *see also* *Mason v. Metro. Gov’t of Nashville*, 189 S.W.3d 217, 222–23 (Tenn. Ct. App. 2005) (stating, in a K-12 case involving a razor attack, that “[o]ther jurisdictions, such as New York, hold that misconduct is not to be anticipated in the absence of proof of prior misconduct” and that Tennessee also follows this approach).

149. *See, e.g., Kleisch*, 2006 Ohio App. LEXIS 1170, at *20 (explaining that the totality of the circumstances test allows for consideration of factors such as the location and nature of the business).

150. *See Mullins*, 449 N.E.2d at 337 (affirming judgment for the student-plaintiff, explaining that the court uses a totality of the circumstances test, with prior similar incidents only one factor); *Knoll v. Bd. of Regents*, 601 N.W.2d 757, 764 (Neb. 1999) (reversing summary judgment for the university, stating that “[i]t is the totality of the circumstances, not solely the number or location of prior incidents, that must be considered in determining foreseeability”); *see also Kleisch*, 2006 Ohio App. LEXIS 1170, at *22–23 & n.12 (explaining that “there is no danger to guard when there is no danger reasonably to be apprehended” and that the rape at issue was not foreseeable).

151. *See Mullins*, 449 N.E.2d at 337 n.12 (writing that “[t]he rule requiring evidence of prior criminal acts often leads to arbitrary results and distinctions,” that “[i]t is not clear how serious the prior acts must be to satisfy the rule,” and that “[i]t is also not clear how close in time the criminal acts must be”). *Compare* *Peterson v. San Francisco Cmty. Coll. Dist.*, 685 P.2d 1193 (Cal. 1984) (reversing dismissal and holding that the college had a duty to warn, trim foliage, or take other reasonable measures when the college had notice of frequent assaults and the plaintiff was attacked at the same stairway in the same parking lot by a perpetrator using the same modus operandi), *with* *Brown v. N.C. Wesleyan Coll.*, 309 S.E.2d 701, 703–04 (N.C.

For example, in *Kleisch v. Cleveland State University*,¹⁵² a student had been raped in the women's restroom of a building on campus approximately sixteen months before the plaintiff was raped in an unlocked classroom in an adjacent building. Although a policy of keeping doors unlocked has resulted in potential liability in other cases when applied to a dorm,¹⁵³ the court here used a totality of the circumstances test and held that the rape in the classroom was not foreseeable.¹⁵⁴ The act was the same; however, the frequency was low, when the court referenced both a four-to-five year time span and the sixteen months that had elapsed between rapes.¹⁵⁵ Furthermore, the locations, when defined as different rooms in different buildings rather than a particular area on campus, were distinct.¹⁵⁶ Similarly, in *Gragg v. Wichita State University*,¹⁵⁷ the court, using a totality of the circumstances test, found that two fatal shootings at a fireworks display on campus were not foreseeable, given the absence of any violent acts in the event's seventeen-year history.¹⁵⁸ At the same time, however, a person had been fatally shot while attending a different on-campus event open to the public two years earlier.¹⁵⁹ Thus, though the acts were again the same, the court distinguished the two events and calculated frequency using a seventeen-year rather than a two-year time span.¹⁶⁰

In contrast, in *Sharkey v. Board of Regents of University of Nebraska*,¹⁶¹ the court defined the relevant geographic area as a "zone" on campus and found prior incidents of harassment to be sufficiently similar to assault.¹⁶²

Ct. App. 1983) (affirming summary judgment for the university and concluding that scattered break-ins and one attempted rape five years earlier did not suggest that the university should have foreseen that a college cheerleader would be abducted from campus after a basketball game, taken to a rock quarry, raped, and murdered).

152. 2006 Ohio App. LEXIS 1170.

153. See *Miller v. New York*, 467 N.E.2d 493, 497 (N.Y. 1984) (reversing and holding that the university had a duty to keep exterior dorm doors locked, when it had notice of likely criminal intrusions and the student-plaintiff was confronted in the laundry room by a man with a knife, blindfolded, taken out of the room through an unlocked outer door then back in via an unlocked dorm door, and raped).

154. See *Kleisch*, 2006 Ohio App. LEXIS 1170, at *22–26.

155. See *id.* at *23 ("Here, the evidence suggests that in the four or five years prior to plaintiff's rape, only one rape occurred" and "we cannot conclude that a rape at CSU nearly one and one-half years before plaintiff's rape is sufficient as a matter of law to give the university reason to know the plaintiff would be raped in a classroom").

156. See *id.*

157. 934 P.2d 121 (Kan. 1997).

158. See *id.* at 129–35 (affirming grant of summary judgment for the university and rejecting the plaintiff's argument that the high crime rate in the area made the shooting more foreseeable).

159. See *id.* at 127 (noting that a person was shot and killed in the parking lot at a Blacks Arts Festival two year earlier, but that this was the only violent assault at an on-campus, public event in the previous twenty-three years).

160. See *id.* at 127–35.

161. 615 N.W.2d 889 (Neb. 2000).

162. See *id.* at 896, 901 (discussing reported criminal activity in "Zone 4,"

The court held that an assault by a student on another student's husband was foreseeable, given the likelihood that stalking and harassment of female students "could escalate into violence when the harasser [was] confronted, even though [the student] had not displayed prior violent tendencies."¹⁶³ The law, the court explained, "does not require precision in foreseeing the exact hazard or consequences which happens: it is sufficient if what occurs is one of the kinds of consequences which might reasonably be foreseen."¹⁶⁴ Thus, given the student's "persistent pattern of harassment, an escalation into violence [was] clearly one of the consequences which may [have] reasonably be[en] foreseen from such behavior."¹⁶⁵ Similarly, other courts have imposed a duty on colleges and universities on the basis that property crimes are sufficiently similar prior incidents to provide notice of crimes of personal violence.¹⁶⁶

Hence foreseeability, although a unifying concept in premises liability and, increasingly, in IHE negligence liability,¹⁶⁷ may be broadly or narrowly construed depending on the type of test courts use and how courts define the location, frequency, and similarity of prior incidents.

Perhaps a middle course, such as a narrowly applied totality of the circumstances test, is the best approach. While a prior similar incidents test assures fairness in that IHEs must have notice before they are required to take reasonable measures to protect students, it discourages affirmative action "until after a substantial number of one's own patrons have fallen victim to violent crimes."¹⁶⁸ In contrast, under the totality of the circumstances test, "negligence is gauged by the ability to anticipate,"¹⁶⁹ so that IHEs have incentives to take proactive measures. Furthermore, a totality of the circumstances test for general risks would be consistent with threat assessment models for identifying specific risks of school violence,

including violent incidents during intramural sports games).

163. *See id.* at 901.

164. *See id.*

165. *See id.*

166. *See Sturbridge Partners v. Walker*, 482 S.E.2d 339, 340–41 (Ga. 1997) (overruling a decision in which a university prevailed, to the extent that it held that property crimes, such as thefts from automobiles and vandalism, were not sufficiently similar to incidents of personal violence, such as carjacking and kidnapping, to be foreseeable as a matter of law, and explaining that the question is not if the specific crime was foreseeable, but if the prior incidents were sufficiently similar to draw the defendant's attention to the condition that, if corrected, could have prevented the injury at issue). *But see Doyle v. Gould*, 22 Mass. L. Rep. 373, 384–86 (Mass. Super. Ct. 2007) (holding that four non-violent burglaries at quasi-university off-campus housing did not make the fatal shooting there foreseeable when university control of the housing was at issue and the decedent's roommates allowed the perpetrators into the apartment).

167. *See sources cited supra* note 27.

168. *Gragg v. Wichita State Univ.*, 934 P.2d 121, 134 (Kan. 1997).

169. *Kleisch v. Cleveland State Univ.*, No. 05AP-289, 2006 Ohio App. LEXIS 1170, at *22 n.12 (Ohio Ct. App. Mar. 21, 2006)

which also use a totality of the circumstances approach.¹⁷⁰

At the same time, however, courts should not so broadly apply the totality of the circumstances test that mere media reports of school shootings or other events that are statistically rare¹⁷¹ make a particular event more foreseeable.¹⁷² Instead, even under the totality of the circumstances test, “[r]easonable apprehension does not include anticipation of every conceivable injury,” so that the question is not whether “in this day and time” “misconduct is to be expected whenever a group of students is brought together.”¹⁷³ Rather, courts should focus on the underlying rationale, keeping in mind what each party could have reasonably foreseen and which parties, if any, were in a position to assess the risks and help ensure safety.¹⁷⁴

2. Implications

As cases such as *Kleisch* suggest and as scholars have noted, what is foreseeable in some areas of campus, such as dorms, may not be foreseeable in others, such as classrooms.¹⁷⁵ However, such distinctions may be less important as students move through what one scholar has

170. See discussion and sources cited *infra* note 180 (explaining the difference between general and specific risks); see also O'TOOLE, *supra* note 26, at 10–14 (explaining that after a student makes a threat, those conducting the four pronged threat assessment consider the totality of the circumstances regarding the student's personality, family dynamics, school dynamics, and social dynamics).

171. See O'TOOLE, *supra* note 26, at 2–3 (explaining that homicides have been decreasing since 1993; that contrary to popular belief, there is no profile of a school shooter or checklist of characteristics that schools should use; and that “[s]eeking to predict acts that occur as rarely as school shootings is almost impossible”).

172. See Joel Epstein, *Breaking the Code of Silence: Bystanders to Campus Violence and the Law of College and University Safety*, STETSON L. REV. 91 (2002), 98–102 (discussing K-12 cases, suggesting that some courts appear willing to find acts foreseeable in light of highly publicized acts of school violence).

173. See *Mason v. Metro. Gov't of Nashville*, 189 S.W.3d 217, 222–25 (Tenn. Ct. App. 2005) (“Is it foreseeable, in this day and time, that some student somewhere might use a razor from their cosmetology kit as a weapon to assault another student at school? The answer to this question is also yes. The foreseeability standard stated in the two questions above appears to be the standard applied by the trial court; however, it is not the foreseeability standard to be applied in Tennessee.”).

174. Compare *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335 (1983) (“The threat of criminal acts of third parties to resident students is self-evident, and the college is the party which is in the position to take those steps which are necessary to ensure the safety of its students.”), with *Doyle v. Gould*, 22 Mass. L. Rep. 373, 374–76 (Mass. Super. Ct. 2007) (granting summary judgment to university and noting that the university “was not in the best position to take the steps necessary to ensure [the student's] safety” from a murder inside his apartment, which was privately owned and managed but rented by the university).

175. See Lake, *supra* note 27, at B7 (“Campus-violence issues often have residential and nonresidential dimensions” and “what is foreseeable and reasonable will probably differ in the two environments,” but “[d]ormitory safety policies must work in tandem with regulations of open areas on campus.”).

termed a “risk scape.”¹⁷⁶ Thus, in the wake of the Virginia Tech shootings, some safety consultants now recommend installing locks not only on dorm doors, but also on the inside of classroom doors.¹⁷⁷ Moreover, the Virginia Tech tragedy appears to have raised the security bar, with some IHEs investing in high-tech lock and communication systems,¹⁷⁸ and with organizations piloting new accreditation programs for campus security forces.¹⁷⁹

Meanwhile, a court analyzing the foreseeability of the Virginia Tech shootings under a premises liability theory would likely ask if any prior similar incidents had taken place and, similar to *Sharkey*, if college or university personnel should have foreseen that Cho’s behavior, such as harassment of female students, would have escalated into the shootings. Courts’ approaches would vary depending on whether they use a prior similar incidents or totality of the circumstances test and how they define the geographic area, frequency, and similarity of prior acts, as well as the weight they accord to the underlying policy justifications for imposing a duty on IHEs in premises liability cases.

176. See Lake, *supra* note 144, at 547–48 (explaining how the legal concept of a “nuclear campus” is deteriorating, with risks immigrating onto campus or originating on campus and emigrating to the larger community, with students moving in and out of “zones of responsibility” in a “risk scape”).

177. See Dena Potter, *Simple Safety Solution: Classroom Locks*, ABC NEWS, July 29, 2007, <http://abcnews.go.com/US/BacktoSchool/wireStory?id=3425934> (describing how Virginia Tech students barricaded a door to keep Cho from re-entering a classroom, and noting that while some experts recommend installing locks on the inside of classroom doors, others warn that locks may create other problems, such as when a man took several students hostage in Colorado and killed a girl).

178. See *Hearings*, *supra* note 118, (statement of David Ward, President, American Council on Education) (testifying that the colleges are installing school-wide messaging systems, “smart” cameras linked to local police, and “electronic access devices linked to a control center that can selectively lock and unlock doors, send emergency e-mail and phone messages, and trigger audio tones”).

179. See *id.* (statement of Steven J. Healy, President, International Association of Campus Law Enforcement Administrators) (testifying about a new accreditation program to recognize campus public safety agencies that adhere to high standards and reporting that four agencies are currently participating, while thirteen more have applied for accreditation); see also *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335 n.5 (Mass. 1983) (discussing expert witness testimony that “designing and implementing security systems on college campuses is being recognized as a separate profession”); *Kleisch v. Cleveland State Univ.*, No. 05AP-289, 2006 Ohio App. LEXIS 1170, at *23–26 (Ohio Ct. App. Mar. 21, 2006) (illustrating the importance of using policies and practices that meet relevant standards as established by professional organizations and noting that the university’s expert witness testified that the university had acceptable standards and best practices in place); Martin Van Der Werf, *Over a Decade, College Police Have Become More Professional*, CHRON. HIGHER EDUC. (Wash., D.C.), May 4, 2007, at A18 (debunking the stereotype that campus police are glorified security guards and explaining that almost all police officers on large college campuses attend the same training academies and receive the same certification as municipal police officers).

Additionally, incidents such as the Virginia Tech shootings require courts to distinguish between general risks, such as whether it was “foreseeable that a shooting may take place,”¹⁸⁰ and specific risks, such as whether it was “foreseeable that a particular shooter will shoot.”¹⁸¹ While the bulk of premises liability cases deal with the former, in cases such as *Sharkey* or cases in which IHEs house dangerous students who eventually harm others,¹⁸² IHEs have a relationship with both the alleged student-perpetrator and student-victim. Thus, these cases are more complex, and the imposition of a duty to warn, for example, creates “a continuing predicament for university administrators”¹⁸³ in that IHEs must then balance one student’s privacy and due process rights with the safety of others.

Courts, however, have not addressed privacy issues while using the “safety” sword to impose a duty on IHEs in premises liability cases.¹⁸⁴ Instead, IHEs must obtain guidance from scholars, who recommend that IHEs should “responsibly prepare themselves for dangerous students on campus”¹⁸⁵ and be prepared to not only warn, but also to assess risks and act, such as by implementing abbreviated procedures for temporarily relocating students to other dorms.¹⁸⁶ In the context of the events that

180. See Lake, *supra* note 27, at B6 (distinguishing the two and suggesting that, while “the national dialogue about the events at Virginia Tech tends to conflate these two issues,” “[c]ourts may ask colleges to assess foreseeability in both types of situations separately.”).

181. See *id.*

182. See *Crow v. State*, 222 Cal. App. 3d 192, 208–09 (Cal. Ct. App. 1990) (explaining that third party conduct alone does not constitute a dangerous condition of property and holding that an assault on a student at a beer party in a dorm room was not foreseeable when the student had assaulted a residence hall advisor six weeks prior); *Nero v. Kansas State Univ.*, 861 P.2d 768, 778 (Kan. 1993) (reversing summary judgment for the university and finding issues of material fact regarding whether the university had failed to warn the student-victim that a male student accused of rape had been relocated to the same dorm, and whether the university had instituted adequate security measures); *Rhaney v. Univ. of Md. E. Shore*, 880 A.2d 357, 366–68 (Md. 2005) (affirming reversal of jury decision for a student-plaintiff assaulted by his roommate in his dorm room, distinguishing the roommate’s previous assault in the social setting of a dining hall, and noting that the student-victim knew of the prior assault but did not request a room change).

183. *Nero*, 861 P.2d at 784 (Six, J., concurring and dissenting).

184. See *id.* at 789 (McFarland, J., concurring and dissenting) (discussing privacy as an all-or-nothing proposition, suggesting that warning students that a male student accused of rape had moved to a co-ed dorm might have required forcing the male student to wear sandwich boards stating, “I am a rapist, beware” or branding his forehead with the word “Rapist”).

185. See BICKEL & LAKE, *supra* note 133, at 142 (1999).

186. See *id.* at 140–43 (1999) (mentioning that, although colleges should not remove students automatically and permanently, many provide more process than courts require rather than using abbreviated procedures for interim housing decisions until final determinations are made). But see O’TOOLE, *supra* note 26, at 26 (“Expelling or suspending a student for making a threat must not be a substitute for a

preceded the Virginia Tech shootings, for example, after female students complain to campus security about a male student¹⁸⁷ or after a suitemate reports a peer's suicide threat, IHEs should be prepared to assess the risks of continuing the housing status quo versus temporarily relocating students.¹⁸⁸

B. In Loco Parentis and Custodial Relationships: Alcohol Abuse

After the Civil Rights Movement helped modify the legal relationships between IHEs and students in the 1960s, plaintiffs unsuccessfully attempted to establish duty on the grounds that an IHE either stands in loco parentis or has assumed custodial control over students by virtue of its rule-making and enforcement authority.¹⁸⁹ These cases typically involved alcohol use and courts emphasized the student's right to privacy rather than

careful threat assessment and a considered, consistent policy of intervention. Disciplinary action alone, unaccompanied by any effort to evaluate the threat and the student's intent, may actually exacerbate the danger . . .").

187. See generally *Carpenter v. MIT*, No. 03-2660, 2005 Mass. Super. LEXIS 246, at *2 (Mass. Super. Ct. May 17, 2005) (allowing plaintiff's motion to compel documents in a case alleging negligence in preventing a female student's suicide after she was stalked by another resident who was allowed to remain in the dorm then removed but told he could reapply to the dorm next semester); Martha Anne Kitzrow, *The Mental Health Needs of Today's College Students: Challenges and Recommendations*, NASPA J., Fall 2003, at 167, 174 (noting that the family of Trang Ho, a Harvard student stabbed to death by her roommate Sinedu Tadesse, filed suit alleging that Harvard was negligent because it failed to monitor Tadesse, failed to warn and protect Ho, and failed to maintain a "reasonably safe and secure environment").

188. See generally Epstein, *supra* note 172, at 95 (writing about privacy, safety, confidentiality, and constitutional issues involved when bystanders such as other students help colleges and universities identify who may pose a risk of harm to others).

189. See, e.g., *Bradshaw v. Rawlings*, 612 F.2d 135, 141 (3d Cir. 1979) ("We are not impressed that this regulation, in and of itself, is sufficient to place the college in a custodial relationship with its students for purposes of imposing a duty of protection in this case."); *Orr v. Brigham Young Univ.*, 960 F. Supp. 1522, 1528 (D. Utah 1994) (explaining that the student was not a custodial ward of the university by virtue of the fact that he played football); *Booker v. Lehigh Univ.*, 800 F. Supp. 234, 237-38 (E.D. Pa. 1992) (rejecting that the university acted in loco parentis when an adult student decided to consume alcohol); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 815-16 (Cal. Ct. App. 1981) 123 (holding that the right to discipline students for drinking on campus does not give rise to a duty to enforce regulations, and explaining that universities no longer stand in loco parentis); *Univ. of Denver v. Whitlock*, 744 P.2d 54, 59-60 (Colo. 1987) (stating that the mere possession of authority to regulate student conduct does not give rise to duty and noting the demise of the doctrine of in loco parentis); *Rabel v. Ill. Wesleyan Univ.*, 514 N.E. 2d 552, 560-61 (Ill. App. Ct. 1987) (holding that the university did not voluntarily assume or place itself in a custodial relationship with student via its handbook, policies, or regulations); *Bash v. Clark Univ.*, No. 06-745A, 2006 Mass. Super. LEXIS 657, at *12-16 (Mass. Super. Ct. Nov. 20, 2006) (imposing no duty and stating that the doctrine of in loco parentis no longer applies); *Beach v. Univ. of Utah*, 726 P.2d 413, 418 (Utah 1986) (refusing to hold that a modern university has a custodial relationship with adult students and stating that universities no longer stand in loco parentis).

foreseeability and safety as in premises liability cases. In doing so, courts suggested that imposing a duty on IHEs to secure the safety of students who are injured in alcohol-related injuries would be unrealistic.¹⁹⁰ In light of changing societal attitudes and legislation regarding alcohol use in the 1980s and 1990s, however, courts began to impose a duty to prevent hazing injuries, based on premises liability, when such injuries were foreseeable and could have been prevented by using reasonable care.¹⁹¹ As the common law “privacy” shield yielded to foreseeability and IHEs faced more potential liability, Congress amended FERPA in 1998 to allow IHEs to notify parents when students younger than twenty-one violated laws and policies regarding the possession and use of controlled substances.¹⁹²

1. From In Loco Parentis to the Rise of Privacy and No Duty

Before the 1960s, courts made it clear that rule-making authority as it pertained to students’ physical and moral welfare and discipline was located within the college or university.¹⁹³ IHEs derived this rule-making authority in several ways, including a delegation of authority from the father.¹⁹⁴ Under the doctrine of in loco parentis, the father delegated part of his parental authority to the school.¹⁹⁵ Thus, the college or university, acting in place of the father, enjoyed broad discretion to “make any rule or regulation for the government or betterment of [its] pupils that a parent

190. See discussion *infra* Part II.B.

191. See BICKEL & LAKE, *supra* note 133, at 156–57 (suggesting reasons for the switch from a “no-liability approach to student alcohol injuries,” such as shifts in social mores, changes in the law regarding “traditional bar and vendor categories,” concern about high-risk drinking on campuses, and a changes in attitudes suggesting that students were “not solely responsible for alcohol-related injuries”).

192. See source cited *supra* note 78.

193. See BICKEL & LAKE, *supra* note 133, at 28 (“As a technical legal doctrine, in loco parentis was not—ever—a liability/responsibility/duty creating norm in higher education law. In loco parentis was only a legal tool of immunity for universities when they deliberately chose to discipline students.”) (emphasis in original); see also Theodore C. Stamatakos, Note, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471, 471–72 (1990) (explaining that misconceptions regarding in loco parentis have lead recent commentators to suggest that the doctrine was returning to university tort law).

194. See *Gott v. Berea Coll.*, 161 S.W. 204, 206 (Ky. 1913) (noting that the college’s corporate charter “shows that its authorities have a large discretion” while the court viewed rules of “institutions supported in whole, or in part, by appropriations from the public treasury” “somewhat more critically”); see also *Bd. of Educ. v. Purse*, 28 S.E. 896, 900–01 (Ga. 1897) (suggesting that the father should delegate his authority then yield to the school’s discretion so that it would “not be impeded in discharging a duty which the parent has voluntarily placed upon [it].”).

195. See 1 WILLIAM BLACKSTONE, COMMENTARIES *453 (“[The father] may also delegate part of his parental authority, during his life, to the tutor or school master of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *vis.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed.”).

could for the same purpose.”¹⁹⁶ Using rational basis review at most, courts articulated limits while essentially deferring to the IHE’s rule-making authority.¹⁹⁷ Hence, IHEs could forbid students from a broad range of activities implicating “private” decision making, such as eating at restaurants off-campus,¹⁹⁸ marrying,¹⁹⁹ walking the streets at midnight,²⁰⁰ or engaging in conduct unbecoming of “a typical Syracuse girl.”²⁰¹

The 1960s and the civil rights era ushered in many changes, including modifications in the legal relationships between IHEs and students.²⁰² In the 1970s, college-aged students became adults endowed with the right to vote, marry, or enter into contracts without parental consent.²⁰³ At the same time, Congress enacted federal privacy laws such as FERPA that protected the confidentiality of students’ education records against disclosure to third parties such as parents. At the common law, a line of cases involving alcohol-related injuries made it clear that, as a result of these “fundamental changes in our society”²⁰⁴ and the “dramatic reapportionment of responsibilities,”²⁰⁵ IHEs no longer stood in loco parentis and that IHE regulation did not give rise to a custodial relationship

196. *Gott*, 161 S.W. at 206.

197. *See* *John B. Stetson Univ. v. Hunt*, 102 So. 637, 641 (Fla. 1924) (and cases cited therein) (interpreting away conflicts, so that, in the case of malicious expulsion, “expulsions” were mere “suspensions” and the court avoided the question); *see also* *Gott*, 161 S.W. at 206 (interpreting the college’s mission broadly, so that prohibiting students from eating off-campus was reasonable in light of its mission to “furnish an education to inexperienced country, mountain boys and girls of very little means at the lowest possible cost” and “safeguard against . . . infection”).

198. *See* *Gott*, 161 S.W. at 207–08.

199. *See* *Carr v. St. John’s Univ.*, 231 N.Y.S.2d 410, 414 (N.Y. App. Div. 1962) (finding that expulsion of a student who was married in a civil ceremony and students who served as witnesses was not arbitrary and that the regulations were sufficiently clear because “Christian education and conduct” meant “Catholic education and conduct”), *rev’d* 231 N.Y.S.2d 403 (N.Y. App. Div. 1962), *aff’d*, 187 N.E.2d 18 (N.Y. 1962).

200. *See* *Gott*, 161 S.W. at 207 (“A person as a citizen has a legal right to marry or to walk the street at midnight or to board at a public hotel, yet it would be absurd to say that a college cannot forbid its students to do any of these things.”).

201. *See* *Anthony v. Syracuse Univ.*, 224 A.D. 487, 489–91 (N.Y. App. Div. 1928) (holding that, based on undisclosed rumors, a university could determine that a student’s presence was “detrimental” because she was not “a typical Syracuse girl” and expel her immediately, if doing so safeguarded the university’s “ideals of scholarship” or “moral atmosphere”), *rev’g* 223 N.Y.S. 796 (N.Y. Sup. Ct. 1927).

202. *See* *Lake*, *supra* note 144, at 534.

203. *See* U.S. CONST. amend. XXVI, § 1 (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”); *see also* *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979) (listing more than ten “discrete rights not held by college students from decades past”).

204. *Bradshaw*, 612 F.2d at 139.

205. *Id.*

between IHEs and students.²⁰⁶ Of particular interest is that these cases used privacy as a liability shield or justification for imposing no duty on IHEs, rather than balancing safety and privacy, or using a reasoned cost-benefit approach that could have provided guidance to IHEs.²⁰⁷

In doing so, *Bradshaw v. Rawlings*²⁰⁸ and its progeny explained that IHEs no longer acted in loco parentis because the “modern college student” was “not a child of tender years,”²⁰⁹ but instead had obtained the legal status of an adult²¹⁰ and possessed rights that were “transferred” from the college or university to the student.²¹¹ While colleges and universities still possessed the authority to promulgate and enforce regulations as a discretionary matter,²¹² they had no duty to do so, and such regulations, by

206. See, e.g., *id.* at 141 (explaining that the college, by promulgating a regulation imposing sanctions on the use of alcohol by students had not “voluntarily taken custody of [the student] so as to deprive him of his normal power of self-protection”); *Orr v. Brigham Young Univ.*, 960 F. Supp. 1522, 1528 (D. Utah 1994) (explaining that the student was not a custodial ward of the university by virtue of the fact that he played football); *Booker v. Lehigh Univ.*, 800 F. Supp. 234, 237–38 (E.D. Pa. 1992) (rejecting that the university acted in loco parentis when an adult student decided to consume alcohol); *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 815–16 (Cal. Ct. App. 1981) (holding that the right to discipline students for drinking on campus does not give rise to a duty to enforce regulations, and explaining that universities no longer stand in loco parentis); *Univ. of Denver v. Whitlock*, 744 P.2d 54, 59–60 (Colo. 1987) (stating that the mere possession of authority to regulate student conduct does not give rise to duty and noting the demise of the doctrine of in loco parentis); *Rabel v. Ill. Wesleyan Univ.*, 514 N.E. 2d 552, 560–61 (Ill. App. Ct. 1987) (holding that the university did not voluntarily assume or place itself in a custodial relationship with the student via its handbook, policies, or regulations); *Bash v. Clark Univ.*, No. 06-745A, 2006 Mass. Super. LEXIS 657, at *12–16 (Mass. Super. Ct. Nov. 20, 2006) (imposing no duty and stating that the doctrine of in loco parentis no longer applies to the IHE-student relationship in a case involving a student’s death by heroin overdose); *Beach v. Univ. of Utah*, 726 P.2d 413, 418 (Utah 1986) (refusing to hold that a modern university has a custodial relationship with adult students and stating that universities no longer stand in loco parentis).

207. See RESTATEMENT (THIRD) OF TORTS § 40, cmt. 1 (Tentative Draft No.5, 2007) (suggesting that, in these cases, “there was no reasonable way for the university to have taken precautions that would have avoided the harm, and thus the no-duty decisions may be an infelicitous means for expressing the conclusion that there was no negligence as a matter of law”); see generally Walker, *supra* note 61, at 88–89 (explaining, in the context of the regulation of personal information in the New Economy, that leaping to assertions of privacy as a nonnegotiable right preempts reasoned discussion of the benefits and individual, collective, and social costs).

208. 612 F.2d 135 (3d Cir. 1979).

209. *Id.* at 140.

210. See *id.* at 138 n.7, 140 (discussing how students “have vindicated what may be called the interest in freedom of the individual will”).

211. See *id.* at 138–40 (listing the rights to move, marry, make a will, qualify as a personal representative, serve as a guardian of the estate of a minor, wager at racetracks, register as a public accountant, practice veterinary medicine, qualify as a practical nurse, drive trucks and ambulances, perform fire-fighting duties, and qualify to vote).

212. See *Beach v. Univ. of Utah*, 726 P.2d 413, 419 n.5 (Utah 1986) (affirming

themselves, did not create a custodial relationship between IHEs and students.²¹³ College and university students were neither K-12 students²¹⁴ nor motorists left stranded by police officers,²¹⁵ but instead, adults who were as aware of the risk of alcohol-related injuries as the college or university²¹⁶ and capable of protecting their own self interests.²¹⁷ By promulgating and enforcing rules, IHEs neither deprived students of their ability to protect themselves nor created a relationship of dependence.²¹⁸

The *Bradshaw* line of cases did not address foreseeability or fully analyze duty, but instead analyzed negligence,²¹⁹ finding that colleges and universities were not negligent as a matter of law.²²⁰ In doing so, these cases relied on Prosser's proposition that duty is the result of policy

summary judgment for the university and stating "[t]his is not to say that an institution might not choose to require of students certain standards of behavior in their personal lives and subject them to discipline for failing to meet those standards").

213. See, e.g., *Bradshaw*, 612 F.2d at 141 ("We are not impressed that this regulation, in and of itself, is sufficient to place the college in a custodial relationship with its students for purposes of imposing a duty of protection in this case.").

214. See *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 813 (Cal. Ct. App. 1981) (acknowledging that primary and secondary schools and their personnel "owe a duty to students who are on school grounds to supervise them and to enforce rules and regulations necessary for their protection" but that differences in the ages and educational levels between such students and college and university students are significant).

215. See *id.* at 815 (rejecting that the license agreement to live in the dorm created the type of dependent relationship "found in the traffic officer cases . . . or in the dangerously mental ill cases").

216. See *Univ. of Denver v. Whitlock*, 744 P.2d 54, 61 (Colo. 1987) (stating that although the university may have "superior knowledge of the nature and degree of risk involved in trampoline use" on campus, the student's own testimony indicated "that he was aware of the risk of an accident and injury of the very nature that he experienced").

217. See *Bradshaw*, 612 F.2d at 140 ("[T]he circumstances show that the students have reached the age of majority and are capable of protecting their own self interests.").

218. See *Baldwin*, 176 Cal. Rptr. at 814-16; *Whitlock*, 744 P.2d at 60-61 (noting that the university did not give the plaintiff reason to depend on the university for evaluating the safety of trampoline use); *Beach v. Univ. of Utah*, 726 P.2d 413, 419 n.5 (Utah 1986) ("Neither attendance at college nor agreement to submit to certain behavior standards makes the student less an autonomous adult or the institution more a caretaker.").

219. See, e.g., *Baldwin*, 176 Cal. Rptr. at 816 ("The question is whether the risk of harm is sufficiently high and the amount of activity needed to protect against harm sufficiently low to bring the duty into existence." (citation omitted)); *Whitlock*, 744 P.2d at 57 (Colo. 1987) (noting that the social utility of the actor's conduct was also a factor); *Bash v. Clark Univ.*, No. 06-745A, 2006 Mass. Super. LEXIS 657, at *12 (Mass. Super. Ct. Nov. 20, 2006) ("First, courts in other jurisdictions have balanced the foreseeability of harm with what steps would be necessary to protect students.").

220. See RESTATEMENT (THIRD) OF TORTS § 40 cmt. I (Tentative Draft No. 5, 2007) ("The no-duty decisions may be an infelicitous means for expressing the conclusion that there was no negligence as a matter of law.").

considerations,²²¹ explaining that these policy considerations should, in turn, be connected to the individual, public, and social interests implicated.²²² The plaintiff's interest, the *Bradshaw* court explained, was in "remaining free from bodily injury"²²³ while the college's interests were in the "nature of its relationship with its adult students" and in "avoiding responsibilities that it is incapable of performing."²²⁴ Moreover, IHEs had an interest in fulfilling their educational missions and a duty requiring strict supervision would "produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education."²²⁵ Thus, the court defined the educational relationship as a binary one that existed only between two parties—students and IHEs. Although cases that followed *Bradshaw* reasserted the public interest,²²⁶ the discussion of parental interests largely vanished with the doctrine of *in loco parentis*.²²⁷

The *Bradshaw* line of cases also defined the interests of IHEs and those of students as being "at war"²²⁸ with one another and irreconcilable, so that imposing a duty on IHEs to protect students from alcohol-related injuries would be "an impossible burden."²²⁹ This conflict largely stemmed from the fact that students' new status as adults and their newly established rights, especially "the expanded right of privacy that society has come to regard as the norm in connection with the activities of college students,"²³⁰ were an obstacle to the enforcement of college and university regulations.

221. See, e.g., *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d Cir. 1979) ("As Professor Prosser has emphasized, the statement that there is or is not a duty begs the essential question, which is whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.").

222. See *id.* ("These abstract descriptions of duty cannot be helpful, however, unless they are directly related to the competing individual, public, and social interests implicated in any case.").

223. *Id.*

224. *Id.*

225. *Beach v. Univ. of Utah*, 726 P.2d 413, 419 (Utah 1986).

226. See *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 818 (Cal. Ct. App. 1981) (suggesting that although lack of supervision might harm one student, the benefits of student autonomy were in the larger public interest); see also *Univ. of Denver v. Whitlock*, 744 P.2d 54, 62 (Colo. 1987) (explaining that imposing a duty would "directly contravene the competing social policy of fostering an educational environment of student autonomy and independence").

227. See *Booker v. Lehigh Univ.*, 800 F. Supp. 234, 240 (E.D. Pa. 1002) (explaining that the court was unwilling to hold universities to a stricter standard of conduct than parents, who could not be held responsible without actually furnishing alcohol to their daughter, even though they knew she was underage).

228. *Bradshaw*, 612 F.2d at 140 ("[Students'] interests and concerns are often quite different from those of the faculty. They often have values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated.").

229. *Id.* at 142.

230. *Bash v. Clark Univ.*, No. 06-745A, 2006 Mass. Super. LEXIS 657, at *17 (Mass. Super. Ct. Nov. 20, 2006).

Not only would it be difficult or impossible to “so police a modern university campus as to eradicate alcoholic ingestion,”²³¹ it would “require the institution to babysit each student,”²³² and there was no way colleges and universities could do so “except *possibly* by posting guards in each dorm room on a 24-hour, 365-day per year basis.”²³³ Even then, such measures would conflict with “expanded rights of privacy, including, liberal . . . visiting hours.”²³⁴ Thus, because students often made decisions to use alcohol or illegal substances while “in a private place”²³⁵ such as their dorm rooms, students, not colleges and universities, assumed the consequences of their “risk-taking decisions [] in their private recreation.”²³⁶

The *Bradshaw* court’s reasoning has been followed in subsequent cases involving student injuries related to alcohol consumption, such as injuries resulting from an automobile accident after a drinking party in a dorm room,²³⁷ from a fall from a cliff after consuming alcohol on a field-trip,²³⁸ from a fall from a trampoline at a fraternity house party,²³⁹ from a fall after stumbling along a path when returning home from a party,²⁴⁰ and from being crushed after an inebriated student who was carrying the plaintiff fell on top of her.²⁴¹ More recently, *Bradshaw* has been cited in a case involving a student’s death from a heroin overdose.²⁴²

Bradshaw and its progeny present privacy as a non-negotiable right, an obstacle between students and IHEs, and a liability shield resulting in no duty for IHEs. This approach provided little guidance to colleges and universities regarding how to define and balance the benefits and individual costs, collective costs, and social costs of privacy in individual cases.²⁴³

2. Privacy and No Duty Yield Some Ground to Public Health

231. *Baldwin*, 176 Cal. Rptr. at 818.

232. *Beach v. Univ. of Utah*, 726 P.2d 413, 419 (Utah 1986).

233. *Bash*, 2006 Mass. Super. LEXIS 657, at *17 (quoting *Crow v. State*, 271 Cal. Rptr. 349, 360 (Cal. Ct. App. 1990)).

234. *Id.* at *14 (quoting *Baldwin*, 176 Cal. Rptr. at 816).

235. *Id.* at *14.

236. *Univ. of Denver v. Whitlock*, 744 P.2d 54, 60 (Colo. 1987).

237. *See Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 816–19 (Cal. Ct. App. 1981).

238. *Beach v. Univ. of Utah*, 726 P.2d 413, 418–20 (Utah 1986).

239. *See Whitlock*, 744 P.2d at 59–62 (Colo. 1987).

240. *See Booker v. Lehigh Univ.*, 800 F. Supp. 234, 237–41 (E.D. Pa. 1992).

241. *See Rabel v. Ill. Wesleyan Univ.*, 514 N.E. 2d 552, 556–62 (Ill. App. Ct. 1987).

242. *See Bash v. Clark Univ.*, No. 06-745A, 2006 Mass. Super. LEXIS 657, at *12–19 (Mass. Super. Ct. Nov. 20, 2006).

243. *See Lake*, *supra* note 144, at 552 (“It is entirely clear that long term experimentation with extreme libertarian views—the bystander attitude to student life—has fostered some campus cultures with unacceptably high rates of certain dangers.”).

and Foreseeability

Bradshaw was decided at a time when college students consuming beer was not considered a “harm-producing act”²⁴⁴ or “so unusual or heinous . . . as to require . . . college administrators to stamp it out.”²⁴⁵ Indeed, all but thirteen states had a drinking age lower than twenty-one²⁴⁶ and state laws at the time held no one but the voluntary drinker responsible for his harm,²⁴⁷ imposing no, or only a limited, duty on social hosts serving alcohol to guests.²⁴⁸

In the 1980s and 1990s, however, societal attitudes changed and high-risk alcohol use and alcoholism were viewed as public health concerns, so that multiple stakeholders had a shared responsibility to address what was now seen as a harm-producing act.²⁴⁹ As states enacted Dramshop Acts²⁵⁰ and criminalized hazing,²⁵¹ a competing line of IHE cases challenged the *Bradshaw* approach to privacy and duty.²⁵² These cases, one of the first of

244. *Bradshaw v. Rawlings*, 612 F.2d 135, 142 (3d Cir. 1979) (stating that “Bradshaw does not argue that beer drinking is generally regarded as a harm-producing act, for it cannot be seriously controverted that a goodly number of citizens indulge in this activity” and noting that, unlike cigarettes and liquor, beer was still widely advertised).

245. *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 817 (Cal. Ct. App. 1981).

246. *See Bradshaw*, 612 F.2d at 142 n.33.

247. *See Lake, supra* note 27, at B6 (reviewing case law in light of the Virginia Tech shootings and offering that the question at the time was “[i]f bars, restaurants, and stores were not liable, and if office parties could soak in liquor, then why should colleges be responsible for alcohol risks among college students?”).

248. *See id.*; *see also Booker v. Lehigh Univ.*, 800 F. Supp. 234, 240 (E.D. Pa. 1992) (stating that the responsibility for compliance with state laws falls upon a social function’s host); *Baldwin*, 176 Cal. Rptr. at 817–18 (citing a statute to draw a distinction between “giving” and “furnishing” alcoholic beverages).

249. *Furek v. Univ. of Delaware*, 594 A.2d 506, 522–23 (Del. 1991) (“Even though the policy analysis of *Bradshaw* has been followed by numerous courts, the justification for following that decision has been seriously eroded by changing societal attitudes toward alcohol use and hazing.” (footnote omitted)).

250. *See Bradshaw*, 612 F.2d at 141 n.29 (discussing the state’s Dram Shop Act); *Beach v. Univ. of Utah*, 726 P.2d 413, 417 n.3 (Utah 1986) (discussing Utah law and Dramshop Act); *see also Peter F. Lake, Modern Liability Rules and Policies Regarding College Student Alcohol Injuries: Reducing High-Risk Alcohol Use Through Norms of Shared Responsibility and Environmental Management*, 53 OKLA. L. REV. 611, 614–15 (2000) (explaining that by the 1970s, states had adopted dram shop legislation pertaining to civil liability and alcohol-related injuries).

251. *See Furek*, 594 A.2d at 523 n.18 (“Many states have passed laws making hazing a criminal offense.” (citation omitted)).

252. *See id.* at 516–23 (holding that where there is “direct university involvement in, and knowledge of, certain dangerous practices of its students” such as hazing, “the law imposes upon the relationship between a university and students a duty, on the part of the university”); *Knoll v. Bd. of Regents*, 601 N.W.2d 757, 764–65 (Neb. 1999) (reversing summary judgment for the university and holding that it was foreseeable that “pledge sneaks” could result in serious harm when the plaintiff was injured when trying to escape from a window of a fraternity house after being abducted and handcuffed to a

which was *Furek v. University of Delaware*,²⁵³ did not hold that IHEs acted in loco parentis or that regulation resulted in custodial control.²⁵⁴ Instead, these cases questioned the rationale of the *Bradshaw* cases²⁵⁵ and reframed privacy concerns as safety concerns, thereby expanding the duty of IHEs as landowners, which now included using reasonable care to prevent harm from foreseeable alcohol-related injuries.²⁵⁶

In rejecting the *Bradshaw* line of cases, the *Furek* line of cases defined the interest at stake as the health and safety of students—an interest shared by IHEs and students,²⁵⁷ as well as by parents and the public. Thus, supervision by the college or university was in the best interest of the college or university and the student.²⁵⁸ Furthermore, courts justified imposing a duty because “[t]he likelihood of injury during fraternity activities occurring on university campuses is greater than the utility of university inaction. The magnitude of the burden placed on the university is no greater than to require compliance with self imposed standards.”²⁵⁹

Thus, because “[d]uty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection,”²⁶⁰ tort law responded to and reflected social expectations regarding high-risk alcohol use on college and university campuses. As a result, the no duty “privacy shield” has been pierced to some degree by the “safety sword” as some courts apply the foreseeability analysis of premises liability to previously “private” choices involving alcohol consumption.²⁶¹

toilet pipe).

253. 594 A.2d 506.

254. *Id.* at 506.

255. *See id.* at 518–23 (noting that cases rely on *Bradshaw* “without considering the factual validity of its premises or the accuracy and consistency of its logic” and that “the justification for following [*Bradshaw*] has been seriously eroded by changing societal attitudes toward alcohol use and hazing”).

256. *See id.*; *see also Knoll*, 601 N.W.2d at 761–62 (finding that the university owed the plaintiff a duty as landowner because “UNL students, such as Knoll, are clearly the University’s invitees” (citation omitted)).

257. *See Furek*, 594 A.2d at 518 (“It seems equally reasonable to conclude that university supervision of potentially dangerous student activities is not fundamentally at odds with the nature of the parties’ relationship, particularly if such supervision advances the health and safety of at least some students.”).

258. *See id.*

259. *Id.* at 523.

260. *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d Cir. 1979) (quoting W. PROSSER, LAW OF TORTS 333 (3d ed. 1964)).

261. *See, e.g., Furek*, 594 A.2d at 510–12, 522 (finding that the jury had sufficient evidence to determine whether the plaintiff’s injury was foreseeable when campus security witnessed indications of hazing, the student health center director reported hazing injuries, and the university issued public statements regarding hazing); *see also Knoll*, 601 N.W.2d at 764 (noting that prior similar incidents need not have involved the same suspect or have occurred on the premises and finding that the harm was

In turn, as IHEs faced more potential liability,²⁶² their policies and initiatives shifted.²⁶³ For example, after being held liable for a student's hazing injuries, the University of Delaware worked with the local community to reduce the illegal service of alcohol to students, instituted harsher disciplinary action, and began notifying parents when students violated alcohol policies.²⁶⁴ In reference to the last of these, Congress amended FERPA in 1998 to permit IHEs to notify parents when students under twenty-one years old violate laws or institutional policies regarding the possession and use of alcohol and other controlled substances.²⁶⁵ In doing so, Congress followed the recommendation of a Virginia task force reporting on the effects of binge drinking.²⁶⁶

In summary, as societal expectations changed regarding hazing and high-risk alcohol use, the common law responded by emphasizing safety over privacy, thereby expanding IHEs' duty based on premises liability and the foreseeability of harm.²⁶⁷ In turn, Congress kept pace with the demands the common law placed on IHEs, creating a tailored exception allowing IHEs to notify and involve parents in order to advance a mutual interest in the student's well being.²⁶⁸

foreseeable because the university exercised control over the fraternity house and had notice of fraternity abductions). *But see* *Bash v. Clark Univ.*, No. 06-745A, 2006 Mass. Super. LEXIS 657, at *15-18 (Mass. Super. Ct. Nov. 20, 2006) (concluding that "[t]he burden of protecting against the risks associated with the illegal use of drugs is far more like the burden associated with maintaining the moral well being of students than it is like the burden of protecting the physical integrity of dormitories" (citation omitted)).

262. *See* Lake, *supra* note 250, at 617-18 (writing that, in the 1990s, courts began "to reimagine responsibility for alcohol risks in terms of shared responsibility" and showed a "willingness to expand the sphere of accountability for high-risk college drinking").

263. *See id.* at 619-23 (writing about the popularity of the environmental approach to reducing college drinking, which is rooted in public health and emphasizes shared responsibility for the physical, social, cultural, and institutional forces that affect health).

264. *See* BICKEL & LAKE, *supra* note 133, at 197 (discussing the University of Delaware program).

265. *See supra* note 78; Family Educational Rights and Policies Act, Pub. L. No. 105-244, § 952, 112 Stat. 1581, 1835 (1998).

266. *See* Weeks, *supra* note 89, at 47-48 (noting that the task force was commissioned after five alcohol-related deaths at universities in Virginia and mentioning the effects of binge drinking on others, as related to rape and violent crimes).

267. *See supra* note 262.

268. *See* Lydia Hoffman Meunier & Carolyn Reinach Wolf, *Mental Health Issues on College Campuses*, NYSBA HEALTH L. J., Spring 2006, 42, 46-47 (discussing several trends, including the "swinging of the societal pendulum back toward parental involvement" and an increase in the drinking age from age eighteen to twenty-one that contributed to the amendment).

C. The IHE-Student Relationship as Legally Special: Mental Health

Similar to high-risk alcohol use in the 1980s and 1990s, a growing number of today's college and university students experience serious psychological disabilities and mental illnesses.²⁶⁹ As a result, some IHEs are adopting public health models to identify and support students at risk,²⁷⁰ while some states require that students have health insurance that meet minimum coverage standards²⁷¹ and are increasing funding for student mental health services.²⁷² At the same time, other IHEs argue that students' families should provide mental health care²⁷³ and that IHEs cannot substitute for "residential treatment centers for students with unstable mental health problems."²⁷⁴ Today, roughly sixty percent of

269. See Elizabeth Fried Ellen, *Suicide Prevention on Campus*, PSYCHIATRIC TIMES, Oct. 1, 2002, available at <http://www.psychiatrictimes.com/p021001a.html> ("Today's colleges and universities also are drawing many more students who arrive on campus with diagnosed mental illnesses. Thanks to advances in medication, many students with major depression, bipolar disorder and even schizophrenia are able to attend college.").

270. See RICHARD D. KADISON & THERESA FOY DIGERONIMO, COLLEGE OF THE OVERWHELMED: THE CAMPUS MENTAL HEALTH CRISIS AND WHAT TO DO ABOUT IT 155 (2004) (discussing different arguments and points of view, explaining that eventually, "many schools must ask, 'How much is enough?'").

271. See Elizabeth F. Farrell, *A False Safety Net*, CHRON. HIGHER EDUC. (Wash., D.C.), July 21, 2006, at A30 (discussing how colleges and universities can spread risks and obtain better insurance rates by using a hard waiver policy, and how one company has established a niche market by allowing student health centers to conduct third-party billing so that they can accept students' private insurance).

272. See Moore, *supra* note 26, at 437–41 (explaining that MIT improved mental health services after settling a lawsuit and that, in addition to improving services, colleges and universities should increase the visibility of mental health centers by including them as part of freshman orientation and making sure that information is available on-line); Lyndsey Lewis, *The Campus Killings Spur States to Act to Protect Students*, CHRON. HIGHER EDUC. (Wash., D.C.), July 27, 2007, at A16 (explaining that California financed \$60 million for mental health via a one percent tax on millionaires and quoting State Senator Darrell Steinberg as stating "[t]he tragedy did bring to light the fact that, just like in a larger society, mental-health services on college campuses are not what they should be"); see also Rick DelVecchio, *Virginia Tech Massacre: Mental Health Services: State's Universities Re-examine Programs for Struggling Students*, SAN FRANCISCO CHRON., Apr. 19, 2007, at A13 (writing that studies at California campuses had revealed too few counselors and counseling session to meet student needs, with graduate students and international students particularly vulnerable). See generally, Meunier & Wolf, *supra* note 268, at 50–51 (calling for increased funding for counseling centers and providing a list of other considerations for colleges and universities).

273. See Josh Keller, *Virginia Legislature Votes to Bar Colleges from Dismissing Suicidal Students*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 9, 2007, at A41 (noting that, regarding a matter unrelated to the Virginia Tech shootings, administrators at Washington and Lee University sent a letter to Virginia Governor Kaine stating "[i]t is the responsibility of the student's family—not the university community—to provide appropriate care").

274. KADISON & DIGERONIMO, *supra* note 270, at 155 (providing possible different

colleges and universities offer psychiatric services on campus²⁷⁵ and on average there is only one full-time clinical mental health provider for every 1,697 students.²⁷⁶ Moreover, most student health insurance plans do not comply with the American College Health Association's standards and do not provide adequate coverage for mental-health treatment, suicide attempts, alcohol-related injuries or even catastrophic illnesses or prescription medication.²⁷⁷

Just as attitudes toward high-risk alcohol use in the 1980s and 1990s shifted, societal attitudes and tort doctrines relevant to mental health issues are evolving. For example, courts no longer view suicide as a deliberate or criminal act and instead consider those who commit or attempt suicide the victims of mental illness.²⁷⁸ As they did when attitudes toward hazing shifted, courts that impose a duty on IHEs to prevent student self-harm such as suicide emphasize safety and foreseeability. However, this duty is not premised on IHEs' status as business owners or landlords. Rather, a third doctrinal strand has emerged in which courts have found the IHE-student relationship itself sufficient, under some circumstances, to impose a duty on IHEs to prevent foreseeable acts of student self-harm, such as suicide.

This section argues that as courts recognize the IHE-student relationship is legally special and therefore impose a duty on IHEs to prevent foreseeable acts of harm, existing doctrines prove inadequate. Specifically, because courts have typically relied on safety swords and privacy shields,

points of view).

275. See Valerie Kravets Cohen, Note, *Keeping Students Alive: Mandating On-Campus Counseling Saves Suicidal College Students' Lives and Limits Liability*, 75 *FORDHAM L. REV.* 3081, 3085 (2007) ("According to the 2005 National Survey of Counseling Center Directors, which surveyed 366 colleges and universities across the United States and Canada, 58.5% of colleges offered psychiatric services on campus, which was up 4.5% since 2004." (footnotes omitted)).

276. See *Hearings*, *supra* note 118, (statement of Russ Federman, Director of Counseling & Psychological Services at the University of Virginia) (discussing a 1996 study that revealed colleges and universities do not have adequate on-campus mental health resources).

277. See D. Blom & Stephen L. Beckley, *6 Major Challenges Facing Student Health Programs*, *CHRON. HIGHER EDUC.* (Wash., D.C.), Jan. 28, 2005, at B25 (suggesting that colleges can reduce risks by making sure that students understand the limits of campus counseling services before they enroll and requiring students to have insurance that covers mental health services and medications that the college or university does not provide); see also Farrell, *supra* note 271, at A30 (explaining that many student health insurance plans have inadequate benefit levels and numerous exclusions and limitations, so that students who experience serious illnesses are left with five- or six-figure medical bills).

278. See Lake & Tribbensee, *supra* note 28, at 146 ("[The] law has clearly moved away from a moralistic attitude regarding suicide. Suicidal individuals are now regarded as victims, not wrongdoers, reflecting a dramatic shift in the law and mental-health paradigms. This attitudinal shift alone most likely accounts for the movement in the law.").

they have yet to adapt foreseeability concepts to the IHE or mental health context, identify the competing interests at stake, or balance safety and privacy concerns. As a result, courts are increasing foreseeability demands and inappropriately expanding the scope of the special relationship to impose a duty on college and university personnel who are not mental health professionals. Finally, this section argues that, in light of both the various interests at stake and current research, neither the common law nor FERPA should impose upon IHEs a mandatory duty to notify parents when students threaten to harm themselves. However, FERPA should keep pace with IHEs' practices and the demands the common law places on IHEs by clearly permitting IHEs to contact parents and allowing them adequate leeway, especially when students threaten to harm others.

1. The Special Relationship: Suicide Case Law

At common law, courts traditionally considered suicide, like alcohol use, an intentional act and the sole proximate cause of the resulting harm.²⁷⁹ However, courts no longer view suicide as a deliberate or criminal act; rather, those committing suicide are victims of mental illness.²⁸⁰ Thus, a third party may now be held liable for another's suicide if the third party either caused the suicide or had a duty to prevent it.²⁸¹ Although courts have declined to find that IHEs owe a duty of care to prevent suicide or to notify parents under other tort theories,²⁸² two prominent cases illustrate that the IHE-student relationship can give rise to a duty to prevent suicide under some circumstances.

For example, in *Schieszler v. Ferrum College*,²⁸³ a federal district court applying Virginia law denied the college's motion to dismiss and found that a special relationship existed between the college and the student,

279. *See id.*

280. *See id.*

281. *See id.* at 129–30 (explaining that the first exception applies in circumstances such as when a tortious act causes a mental condition that results in an uncontrollable urge to commit suicide).

282. *See Jain v. State*, 617 N.W.2d 293, 300 (Iowa 2000) (rejecting the theory of a negligently performed voluntary undertaking because the IHE's "limited intervention . . . neither increased the risk that [the student] would commit suicide nor led him to abandon other avenues of relief from his distress"); *Bogust v. Iverson*, 102 N.W.2d 228, 233 (Wis. 1960) (concluding that, even if the defendant had secured treatment for the student, had "advised her parents of her emotional condition or . . . not suggested termination of the interviews—it would require speculation for a jury to conclude that under such circumstances [the student] would not have taken her life"); *White v. Univ. of Wyo.*, 954 P.2d 983, 987 (Wyo. 1998) (dismissing, holding that the IHE was immune from suit under statute and concluding that the individuals involved did not subject the institution to potential liability because their jobs did not include "treating or diagnosing physical or mental illness").

283. 236 F. Supp. 2d 602 (W.D. Va. 2002).

based on the facts of the particular case.²⁸⁴ The deceased student, who had some disciplinary problems his first semester and was required to complete anger management counseling,²⁸⁵ had an argument with his girlfriend the following semester that prompted a call to campus police and the residence life assistant.²⁸⁶ After the student sent a note to his girlfriend indicating that he was going to hang himself, she shared the note with his resident advisor and the campus police, who responded and found him with bruises on his head.²⁸⁷ The student signed a statement that he would not harm himself,²⁸⁸ but continued to write notes to his peers indicating he was under distress.²⁸⁹ Although his girlfriend relayed the messages, college personnel took no action and the student hung himself in his dorm room.²⁹⁰

Similarly, in *Shin v. Massachusetts Institute of Technology*,²⁹¹ the court found a special relationship on the basis that university medical professionals, the student's former physician, and university administrators could have reasonably foreseen that the deceased student would hurt herself without proper supervision.²⁹² As a freshman, the student was hospitalized after an overdose, at which time she admitted to engaging in cutting behavior while in high school.²⁹³ After obtaining her consent, residence life staff contacted her parents, who came to visit and were advised of treatment options.²⁹⁴ Despite the school's recommendation that the student be treated by a psychiatrist off-campus on a weekly basis, she refused and began on-campus treatment.²⁹⁵ Over the next fourteen months, the student continued to experience difficulties,²⁹⁶ and professors and students relayed information to residence life staff about her suicidal remarks.²⁹⁷ Although the student continued to see psychiatrists on-campus, there was discontinuity in the care and she received several different

284. See *id.* at 610 (restricting holding to "under the facts alleged"); see also Lake & Tribbensee, *supra* note 28, at 136 (explaining that the duty arose based on the facts of the case, not on theories that the IHE assumed a duty or exerted custodial control, and that the "case will be closely watched and could, if it stands, rewrite college-suicide law").

285. See *Schieszler*, 236 F. Supp. 2d at 605.

286. See *id.*

287. See *id.*

288. See *id.*

289. See *id.* (mentioning that the student wrote notes to a friend, stating that he would "always love [his girlfriend]" and that "only God can help me now," which were again relayed to university personnel).

290. See *id.*

291. No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).

292. See *id.* at *13.

293. See *id.* at *1.

294. See *id.*

295. See *id.*

296. See *id.* at *2-*3.

297. See *id.*

diagnoses.²⁹⁸

Concerned for her well-being, the university again contacted the student's parents,²⁹⁹ but within a month, the student's condition deteriorated, her roommates and peers reported her suicidal threats,³⁰⁰ and her medical team made an appointment for her at an out-patient treatment program off-campus and considered hospitalizing her.³⁰¹ In light of reports that she was erasing computer files and had threatened to kill herself the next day, administrators contacted the mental health center and were advised that she did not need to return to the center, but that the administrators should check on her, which they did via e-mail, phone, and a visit to her dorm room.³⁰² At a "deans and psychs" meeting, the care team decided to reschedule the student's appointment at the off-campus treatment center to the next day and relayed this to the student via voicemail.³⁰³ Later that night, however, the fire alarm sounded and campus police found the student engulfed in flames.³⁰⁴

The court denied summary judgment for the university's mental-health professionals on the claim that they individually and collectively failed to coordinate the deceased student's care,³⁰⁵ as well as for a medical professional who had not treated the student for six months but whom the court ruled might still be considered part of the "treatment team" because she was present at "deans and psychs" or care team meetings where the student was discussed.³⁰⁶ The court also denied summary judgment for university administrators on the claim of negligence and gross negligence, concluding that they were part of the "treatment team" and failed to "formulat[e] and enact[] an immediate plan to respond to [the student's] escalating threats to commit suicide."³⁰⁷

Although both *Schieszler* and *Shin* settled,³⁰⁸ the cases suggest that when students threaten self-harm, college and university personnel should closely supervise the students, as well as ensure that they receive immediate,

298. *See id.*

299. *See id.* at *3.

300. *See id.*

301. *See id.* at *4.

302. *See id.* at *5 (discussing the events and noting that during the phone conversation, Shin "accused [administrators] of wanting to send her home[:]' 'You won't have to worry about me any more'").

303. *See id.*

304. *See id.*

305. *See id.* at *9.

306. *See id.* at *11.

307. *Id.* at *14.

308. *See* Cohen, *supra* note 275, at 3097-99 (writing that the \$10 million and \$27 million suits settled for undisclosed sums of money, with the *Schieszler* settlement also including an acknowledgement by the college that they shared responsibility for the student's suicide and an agreement that the institution would modify its crisis intervention and counseling policies).

adequate, coordinated counseling that responds to escalating threats.³⁰⁹ Meanwhile, scholars and practitioners advise IHEs to provide incentives for students to disclose mental health information,³¹⁰ assess the campus environment for dangerous features or possible sites of suicide attempts,³¹¹ and recognize that alcohol and substance abuse are major risk factors for suicide.³¹² Additionally, as with high-risk alcohol use in the 1980s and 1990s, scholars also advise IHEs to adopt public health models, which emphasize shared responsibility for students' mental health and for preventing acts of self-harm and harm to others.³¹³

2. Expansion of the Special Relationship

As IHEs adopt such recommended public health models, they must do more than formulate, communicate, and consistently implement suicide- and violence-prevention plans.³¹⁴ Instead, IHEs must train faculty, staff, parents, and the larger community³¹⁵ to recognize "leakage,"³¹⁶ indications of distress such as changes in behavior,³¹⁷ and threats,³¹⁸ then report them

309. See Moore *supra* note 26, at 438 ("In *Shin*, the court emphasized the lack of coordinated effort among university personnel to address [the student's] short-term needs and to develop an effective treatment program for her.").

310. See Carrier Elizabeth Gray, Note, *The University-Student Relationship Amidst Increasing Rates of Student Suicide*, 31 LAW & PSYCHOL. REV. 137, 137-145 (discussing how Harvard has handed out free iPods to encourage students to take part in psychological screenings and how Johns Hopkins has required students who visit the campus counseling center to complete a questionnaire designed to screen for depression and suicide).

311. See Lake & Tribbensee, *supra* note 28, at 153-54 (suggesting that colleges and universities survey campuses for dangers such as tall buildings and sites of previous suicide attempts).

312. See *id.* at 154.

313. See Kitzrow, *supra* note 187, at 175 (emphasizing that everyone at colleges and universities has a role in prevention and support); Moore, *supra* note 26, at 438-40 (explaining that the goal of public health models is to prevent ineffective responses to foreseeable harm).

314. See Moore, *supra* note 26, at 438-42 (suggesting that IHEs adopt suicide prevention plans that detail a protocol for everyone on campus to follow if a student threatens self-harm, such as contacting a coordinator who then contacts the student, ensures that the student receives counseling, and follows up with the counselor, student, and possibly the student's parents).

315. See *id.* at 439-40 (explaining that IHEs should train all personnel who have close contact with students, with the goal of identifying indications that a student is under distress and taking appropriate actions).

316. See O'TOOLE, *supra* note 26, at 16-17 (explaining that "[l]eakage" occurs when a student intentionally or unintentionally reveals clues to feelings, thoughts, fantasies, attitudes, or intentions that may signal an impending violent act" and "is considered to be one of the most important clues that may precede an adolescent's violent act").

317. See Lake & Tribbensee, *supra* note 28, at 155 (2002) (listing classic signs of suicide risk, including (1) verbal expressions such as that others do not care or that life is not worth living, and (2) nonverbal indications such as giving away possessions,

to a designated coordinator or caseworker.³¹⁹ To facilitate the communication of leakage and threats, approximately seventy percent of IHEs utilize care teams, or groups of representatives from different departments on campus who meet to discuss students who may be experiencing psychological distress.³²⁰ After learning of the care team's concerns, a case manager or coordinator then assesses the risk or threat.³²¹ Thus, as in *Shin*, care teams or "deans and psychs" meetings³²² can provide a way for IHEs to synthesize information, and identify students who may be at risk or pose risks to others, then to formulate and enact a plan.

Care teams, however, may fail to identify students who are at risk or, as in the case of the Virginia Tech shootings, may be "ineffective in connecting the dots or heeding the red flags."³²³ For example, although some professors suspected that Cho was under distress, some of his peers had witnessed troubling behavior, campus police knew that he had threatened self-harm and recommended involuntary hospitalization, and officers of the court knew that he was obligated to undergo counseling, no one person or entity had all of the information.³²⁴ Instead, the care team discussed Cho's difficulties in an English class, considered the matter resolved, and did not revisit his case.³²⁵

Furthermore, even when care teams do initially identify a student who is

using drugs or alcohol, receiving poor grades, or giving less attention to personal appearance or friends). *But see* Meunier & Wolf, *supra* note 268, at 42 (explaining that students may be slow to recognize the symptoms of mental health disorders because "[m]ost symptoms . . . are probably an aspect of most students' experiences at college").

318. *See* Moore, *supra* note 26, at 442 (noting that students often make suicide threats to peers and faculty members).

319. *See supra* note 313.

320. *See* Elizabeth Bernstein, *Bucking Privacy Concerns, Cornell Acts as Watchdog*, WALL ST. J., Dec. 28, 2007, at A1 (reporting on Cornell University's program; mentioning that approximately half of colleges and universities used care teams and a quarter more added them after the Virginia Tech shootings; and explaining that therapists attend the meetings to receive information and give general advice, but not to share patient information); *see also* Lake, *supra* note 27, at B6 ("Acting independently, no department is likely to solve the problem. In short, colleges must recognize that managing an educational environment is a team effort, calling for collaboration and multilateral solutions."); O'TOOLE, *supra* note 26, at 31 ("This is a pressing public health need which could be addressed through multidisciplinary collaboration by educators, mental health professionals and law enforcement.").

321. *See* O'TOOLE, *supra* note 26, at 26 (explaining the need for and the role of a threat assessment coordinator who has the authority to act quickly and activate the school's emergency response plan).

322. *See* *Shin v. MIT*, No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).

323. *See* VT PANEL REPORT, *supra* note 1, at 52.

324. *See id.* at 53 (concluding that "the totality of the reports would have and should have raised alarms").

325. *See id.* at 52-53.

at risk and receive ongoing information, as in *Shin*, they might fail to recognize when the risk of harm is escalating or might fail to follow through with a coordinated action plan.³²⁶ Thus, although IHEs can take several steps to increase the probable effectiveness of care teams,³²⁷ they cannot foolproof their care teams or any other mechanisms designed to identify students at risk. Moreover, care teams are not without their costs and drawbacks. As examples, IHEs must train staff to ensure that their disclosures do not violate FERPA, students may resent having their behavior secretly monitored and discussed, and fewer students might receive services as IHEs reallocate resources to high-risk students.³²⁸

Especially troubling for IHEs is that when care teams do fail to connect the dots or recognize the red flags, as *Shin* and *Schieszler* illustrate, courts are expanding the scope of the special relationship to impose a duty on care team members. Traditionally, courts imposed a duty to prevent suicide only on those who exerted custodial control, such as hospitals, jails, reform schools, or mental health professionals.³²⁹ In *Shin* and *Schieszler*, however, both courts expanded the scope of the special relationship, imposing a duty on college personnel who had contact with the students but who had no formal training or licensure in mental health.³³⁰

326. See *Shin*, 2005 WL 1869101, at *14.

327. See VT PANEL REPORT, *supra* note 1, at 52 (suggesting that entities such as the campus police department and residence life division be permanent members of the care team, that mechanisms be put in place for follow-up and review, and that at least one person on the care team be trained in threat assessment).

328. See *Ashburn et al.*, *supra* note 8, at A6 (quoting one Virginia Tech student as saying that “[students] need to go to people if they have concerns about someone” but another disagreeing and saying “[t]he problem is that you do that, it sounds like you’re asking for some sort of campus-watch program”); *Bernstein*, *supra* note 320, at A1 (pointing out that students have not protested about care teams but that administrators acknowledge that they work privately so that students “know little about them” and that, because the counseling center schedules appointments based on urgency, some students must wait up to three weeks for an appointment).

329. See *Moore*, *supra* note 26, at 428; see also *Lake & Tribbensee*, *supra* note 28, at 132–33 (writing that “[i]n discussing the duty to prevent suicide, courts typically speak of special relationships in the context of custodial care” and “have been most likely to impose duties arising from such a relationship on a jail, hospital, or reform school, and on others having actual physical custody and control over individuals”).

330. See *Moore*, *supra* note 26, at 424–25 (suggesting that “universities and non-clinical administrators are entering an era where potential liability is more expansive” and going on to suggest that the public’s perception of colleges and universities as “deep pockets,” public cynicism about charitable institutions, the demise of the charitable immunity doctrine, and a more litigious society contribute to more claims against colleges and universities). This trend is also evident in the K-12 context. As an example, school counselors who had been warned of a student’s suicide threats had a duty to use reasonable means to prevent the suicide. See *Eisel v. Bd. of Educ.*, 597 A.2d 447 (Ct. App. Md. 1991). Additionally, in the litigation following the Columbine High School shootings, the Tenth Circuit noted that the events were foreseeable to a video production teacher, government and economics teacher, a school counselor, and a disciplinary assistant principal who had, for example, viewed a video in which the

Thus, while brandishing the safety sword, courts increasingly expect educators and administrators to identify students who are at risk and to then recognize and respond to threats. Yet, even when teachers are alarmed by sentiments expressed in a student's writing, the actions they can take are limited. If mental health professionals or threat assessors determine that nothing in the writing rises to the level of an actionable threat³³¹ or, as discussed below, that harm is not imminent, FERPA's emergency exception and school policies would limit the actions that professors or administrators could take. In light of these restrictions, rather than mechanically applying tort doctrines and creating disincentives for IHEs to adopt recommended public health models, courts should adapt existing tort doctrines to the social and legal context in which IHEs must operate.

3. Foreseeability

Not only did the courts in *Schieszler* and *Shin* expand the scope of the special relationship, but they also increased the foreseeability demands on IHEs. They did so, however, without articulating a coherent foreseeability framework specific to the IHE or mental-health context. Instead, the court in *Schieszler* cited *Furek* for the proposition that, when a "college or university knows of the danger to its students, it has a duty to aid or protect them;"³³² heavily relied upon premises liability cases involving motel, skating rink, and golf course owners;³³³ and discussed cases involving the liability of those providing custodial care.³³⁴ In *Shin*, the court rejected the argument that mental health professionals must have a patient in their custody before a duty can arise³³⁵ and relied on *Schieszler*, a state-premises liability case involving a college,³³⁶ and a case in which a police officer did not remove an intoxicated driver from the highway and owed a duty to the

students enacted the shootings. See *Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1164–66 (D. Colo. 2001) (addressing the issue of foreseeability, but finding that the defendants' actions did not rise to the level of willful and wanton disregard required under the Colorado Governmental Immunity Act).

331. See VT PANEL REPORT, *supra* note 1, at 43 (explaining that a counselor determined that the writing did not contain a threat to anyone's immediate safety).

332. *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 608 (W.D. Va. 2002) (citing *Furek v. Univ. of Delaware*, 594 A.2d 506, 522 (Del. 1991)).

333. See *Schieszler*, 236 F. Supp. 2d at 609 (quoting *Wright v. Webb*, 362 S.E.2d 919, 922 (Va. 1987) (discussing cases and noting that, in the case of the motel, prior incidents "did not give the defendant notice of a 'specific' or 'imminent' danger")).

334. See *Schieszler*, 236 F. Supp. 2d at 607–08 (discussing cases involving a medical facility, deputy and passerby, residential facility for mentally disabled residents, and a private boarding school).

335. See *Shin v. MIT*, No. 020403, 2005 WL 1869101, at *12 (Mass. Super. Ct. June 27, 2005) ("The law appears, however, to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence" (quoting RESTATEMENT (SECOND) OF TORTS § 314A cmt. b (1965))).

336. See *id.* at *13.

person injured as a result.³³⁷

Given the courts' reliance on premises liability cases, it is not surprising that the foreseeability analysis reaches a result similar to that of a prior-similar-incidents test, with the colleges and universities having had notice of prior similar incidents of self-harm but failing to realize that the risk of harm was escalating. Moreover, at first glance, the courts appear to have used a stringent foreseeability requirement. In both cases, college and university personnel had direct contact with the students, had identified both students as being at risk due to previous suicide attempts, and were aware that they were still under distress.³³⁸ Furthermore, both courts limited the holdings to the fact that college personnel had notice that there was an "imminent probability" that the students would attempt to harm themselves.³³⁹

However, while the holdings in *Shin* and *Schieszler* appear to be limited to imminent probability, in reality, the duty imposed on IHEs is temporally broader, necessarily beginning before harm is imminent and continuing, conceivably, for as long as an at-risk student is enrolled. In *Shin*, for example, the student had made repeated threats over a fourteen-month period and, in response to her most recent threat, mental health professionals advised college and university personnel not to bring her to the counseling center, but to observe her.³⁴⁰ Although administrators followed the advice of mental health professionals, who themselves had difficulty assessing the risk of harm, the court denied the motion for summary judgment.³⁴¹ Thus, the duty to monitor students who threaten self-harm arguably begins as soon as IHEs identify a student as being at risk and may continue, as the court suggested in *Shin*, for as long as the student is enrolled.

As in premises liability cases, both *Shin* and *Schieszler* also indicate that

337. *See id.* at *12.

338. *See id.* at *13 (basing foreseeability on the fact that administrators were aware of the student's mental health problems, had received numerous reports from students and professors including a threat to commit suicide on specific day, regularly met and communicated with the student, and attended care team meetings to discuss her care); *see also Schieszler*, 236 F. Supp. 2d at 609 (discussing foreseeability, listing facts such as that the decedent was a full-time residential student and that administrators knew the student had claimed bruises on his head were self-inflicted, had required him to attend anger-management counseling and sign a pledge not to hurt himself, and had received reports from his girlfriend of messages in which the student suggested he would kill himself).

339. *See Shin*, 2005 WL 1869101, at *14 (Mass. Super. Ct. 2005) (imposing a duty to "enact[] an immediate plan"); *see also Schieszler*, 236 F. Supp. 2d at 609 ("[A] trier of fact could conclude that there was 'an imminent probability' that [the student] would try to hurt himself, and that the defendants had notice of this specific harm." (quoting *Wright v. Webb*, 362 S.E.2d 919, 922 (Va. 1987))).

340. *See Shin*, 2005 WL 1869101, at *4-5.

341. *Id.* at *15.

college personnel must foresee when the risk of harm to students is escalating. In the mental health context, however, this burden is more onerous, leaving college administrators to grapple with questions such as how to define the similarity of prior acts, and when a threat of self-harm might escalate or morph, thereby posing a risk of harm to others. Recall that, although *Shin* and *Schieszler* both involved student self-harm, in *Schieszler*, college personnel apparently initially intervened, not because the student threatened to harm himself, but because his behavior created risks for others, prompting the college to require him to complete anger management counseling.³⁴² Thus complicating foreseeability in the mental health context are unresolved questions such as if, how, and to what degree harm to self may be related to harm to others. For example, some mental health professionals recognize that assessing the likelihood of self-harm and harm to others may be conceptually related in some cases,³⁴³ and scholars point out that suicide is only “the tip of an iceberg in a sea of wellness issues that includes depression, cutting, eating disorders, and social dysfunctions.”³⁴⁴ The larger issue, some suggest, is a rise in psychological disabilities and mental illnesses, with nearly half of undergraduate students experiencing depression at least once per year that is severe enough to make daily activities difficult.³⁴⁵

Whether viewed narrowly as suicide and self-harm, or broadly as mental health needs, even in a case of threatened self-harm, more than the student’s individual interests are at stake. Mental illness, if left untreated, can have substantial individual,³⁴⁶ interpersonal,³⁴⁷ and institutional

342. See *Schieszler*, 236 F. Supp. 2d at 605 (noting that the student was required to “enroll in anger management counseling before returning for spring semester.”).

343. See Linda C. Fentiman et al., *Current Issues in the Psychiatrist-Patient Relationship: Outpatient Civil Commitment, Psychiatric Abandonment and the Duty to Continue Treatment of Potentially Dangerous Patients—Balancing Duties to Patients and the Public*, 20 PACE L. REV. 231, 256 (2000) (stating that, “at least in a way of conceptually framing it . . . I regard [the assessment of when a patient may pose a risk of harm to others] as similar to a suicide assessment. I think you have to make an assessment about how strong you think the impulses and the likelihood to act are”). However, although this discussion addresses both suicide and school violence within the context of mental health, it is not meant to suggest that those who attempt suicide have psychiatric disorders or that such disorders themselves determine the probability someone will harm himself or others.

344. Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 656 (2005).

345. See Blom & Beckley, *supra* note 277, at B25 (attributing the rise, in part, to “psychotropic prescription medications that allow many students to attend college who might not have been able to in the past”); see also Farrell, *supra* note 271, at A30 (pointing out that students are like all other health-care consumers, in that they generate costs for insurers when treated for psychological illnesses).

346. See Kitzrow, *supra* note 187, at 171–72 (suggesting that the impact on the individual might include depression, isolation, and suicidal or homicidal thoughts, as well as changes in energy level, sleep patterns, appetite, concentration, memory, decision making, motivation, and self-esteem).

effects.³⁴⁸ For example, suicides such as the fire in *Shin*³⁴⁹ may endanger the lives of others,³⁵⁰ and in the case of mass murders in which the gunman dies in police gunfire, some commentators have suggested that the rampage is a type of provoked suicide.³⁵¹ Indeed, as the Virginia Tech shootings indicate, sometimes a previous threat of self-harm ultimately results in harm to others and eventual suicide. Thus, not only should courts recognize the complexity of issues related to foreseeability such as the escalation of harm in the mental health context, but they must also identify the full range of interests at stake and recognize the relevance of other bodies of research and law, such as that pertaining to school violence.

In reference to school violence in particular and contrary to FERPA, courts and researchers addressing school violence emphasize that schools must share information, collect collateral information, and act when a student threatens to harm others—even if such harm is not yet imminent. For example, as the Tenth Circuit noted in the litigation following the Columbine High School shootings, at the time school personnel became aware of the students' violent writings, video enactments including a shooting at the school, and other information, the harm was not "imminent."³⁵² Yet, school personnel could conceivably have been held

347. See *id.* at 173 ("Students with emotional and behavioral problems have the potential to affect many other people on campus, including roommates, classmates, faculty, and staff, in terms of disruptive, disturbing, or even dangerous behavior. At the more extreme end of the continuum, there is the potential that impaired students may physically harm themselves or someone else."); see also Cohen, *supra* note 275, at 3128–29 (noting that "all instances of student suicide also create the potential for deep emotional and psychological harm to surviving witnesses" and that exposure to suicide within one's family or peer group may increase one's own risk of suicidal behavior); Meunier & Wolf, *supra* note 268, at 43 ("Students who share living space will inevitably be affected by the condition of their peers, and may find themselves in the demanding role of monitoring and counseling a peer.").

348. See Kitzrow, *supra* note 187, at 173 (discussing institutional effects such as the transition of on-campus mental health centers from a more preventive and developmental model to a clinical and crisis-management approach in order to meet the needs of growing numbers of students with serious psychological problems, as well as legal challenges related to risk management); see also Meunier & Wolf, *supra* note 268, at 44 (discussing institutional effects such as retention and graduation rates).

349. 19 No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).

350. See Cohen, *supra* note 275, at 3128 (stating that "[v]iolent suicides endanger not only the person trying to inflict self-harm, but also the safety of others" and providing examples of self immolation and carbon monoxide poisoning); see also sources cited *supra* note 347.

351. See Benedict Carey, *Taking a Break Between Shootings is Unusual, but Not Unheard of, Experts Say*, NY TIMES, Apr. 18, 2007, available at <http://www.nytimes.com/2007/04/18/us/18mental.html> (reporting on the Virginia Tech shootings and experts' views regarding mass murders, while warning that checklists of warning signs to detect a school shooter can be dangerous because they are overly broad and label nonviolent students as potentially dangerous).

352. See *Castaldo v. Stone*, 192 F. Supp. 2d 1124, 1172 (D. Colo. 2001) (mentioning that even the plaintiffs conceded that the harm was not "immediate and

liable if the court had been deciding the case under a negligence standard.³⁵³ Similarly, under the FBI threat-assessment model, for example, once a student makes a threat³⁵⁴ to harm others and a student or faculty member reports it to the school's trained threat assessor, the assessor should then collect information about the student's personality, family dynamics, school dynamics, and social dynamics.³⁵⁵ Thus, even when a student makes a low-level threat, the FBI model calls for the assessor to conduct interviews with the student, his parents, and the person threatened³⁵⁶ rather than wait for the risk of harm to become imminent.³⁵⁷

In summary, in addition to expanding the scope of the special relationship to include the IHE-student relationship, both *Schieszler* and *Shin* applied foreseeability concepts from premises liability cases without adapting them to the IHE or mental health context. Although the holdings appear rather limited, operationally, when a student has threatened to harm himself or others, IHEs must collect, share, and act on information long before the risk of harm becomes imminent. Moreover, recognizing that the risk of harm is escalating is more problematic in the mental health context, raising questions such as whether previous acts of self-harm are sufficiently similar to acts involving harm to others. Finally, and as the next section discusses, because threats of self-harm implicate more than individual interests, the common law must identify and balance those interests.

4. Duty to Notify Parents

In addition to the lessons from *Schieszler* and *Shin*, both of which settled and so did not address whether the IHEs breached any duty they owed to the students,³⁵⁸ commentators have also advised against voluntary

proximate" and that the "risk must be of a limited duration, not merely that a person may act violently in the future").

353. *See id.* at 1164 (explaining that the "[p]laintiffs plead facts that suggest[ed] [the video production teacher] was at least negligent and likely reckless" but that "[a]lthough a close question," his "conduct was not willful and wanton").

354. *See O'TOOLE, supra* note 26, at 6–8 (defining a threat as "an expression of intent to do harm or act out violently against someone or something" that "can be spoken, written, or symbolic" and that may be categorized as direct, indirect, veiled, or conditional).

355. *See id.* at 10–11 (explaining that the model is designed to determine if a student "has the motivation, means, and intent to carry out the proclaimed threat" and that "the assessment is based on the totality of the circumstances known about" the student's personality and family, school, and social dynamics).

356. *See id.* at 27.

357. *See id.* at 25–26 ("The school should clearly explain what is expected of students—for example, students who know about a threat are expected to inform school authorities. The school should also make clear to parents that if their child makes a threat of any kind, they will be contacted and will be expected to provide information to help evaluate the threat.").

358. *See Cohen, supra* note 275, at 3097–99 (writing that both suits settled for undisclosed sums of money).

counseling and automatic dismissal policies, instead recommending mandatory assessment and counseling conditioned on forced withdrawal.³⁵⁹ Some IHEs, meanwhile, are also screening and providing students with incentives to disclose mental health information,³⁶⁰ and are using counseling waivers by which students permit counselors to share information with college administrators.³⁶¹ Finally, some commentators have argued that IHEs should have a mandatory duty, rather than the current discretionary choice, to notify parents when students are at risk of self-harm.³⁶²

While it is true that, in cases involving student suicide such as *Shin* and *Schieszler*, “family members will often argue that the institution should have notified them of their child’s mental health issues,”³⁶³ and IHEs respond that FERPA prevents “them from picking up the phone to notify parents,”³⁶⁴ this last suggestion is ill advised. Firstly, the arguments in favor of parental notification are often based on K-12 cases that are easily distinguishable on several grounds. Secondly, the little research that exists regarding the impact of parental notification³⁶⁵ suggests that IHEs should decide whether to contact parents by applying a standard on a case-by-case basis³⁶⁶ rather than using a general bright-line rule.³⁶⁷ Thus, IHEs’

359. See *id.* at 3109–35 (writing that “merely encouraging a suicidal student to seek treatment” is futile and that automatic dismissal policies do not comply with federal law, but that mandatory counseling policies such as the Joffe model limit an IHE’s liability while saving students’ lives); see also Gray, *supra* note 310, at 147–50 (discussing cases involving New York University, George Washington University, and Hunter College and explaining that IHEs should remove a student only if he is a direct threat to the safety of himself or others and only after an opportunity to appeal the decision).

360. See Gray, *supra* note 310, at 137–45; Moore, *supra* note 26, at 443 (explaining how entrance surveys can be used as part of freshman orientation or that the health center could screen students); see also Bernstein, *supra* note 320, at A1 (reporting that Cornell University screens students who use the campus health center, for any reason, for signs of depression and that faculty members are asked to report students who have poor grades or stop attending class).

361. See Gray, *supra* note 310, at 150 (mentioning that states such as Colorado have considered legislation that would authorize campus counselors to notify others about a student who is at risk of self-harm).

362. See Gearan, *supra* note 118, at 1027, 1043–44 (writing that “Congress should amend FERPA to impose affirmative duties during an emergency thereby overriding confusing common-law precedents that leave colleges unsure about parental disclosure” and suggesting that such a duty would encourage colleges and universities to reach out to students rather than relying on privacy to insulate them from litigation).

363. *Id.*

364. *Id.*

365. See Thomas H. Baker, *Notifying Parents After a Suicide Attempt: Let’s Talk About It*, NAT’L ON-CAMPUS REP., Jan. 1, 2006, at 4 (stating “[i]t’s hard for me to be prescriptive, because there’s little research”).

366. See Gray, *supra* note 310, at 145 (discussing the pros and cons of notifying parents about a student’s suicidal ideation).

367. See generally Duncan Kennedy, *Form and Substance in Private Law*

decisions whether to contact parents when students threaten to harm themselves or others should remain discretionary, although IHEs should be clearly permitted to do so.

As scholars have pointed out, “a significant science-and-law debate regarding effective suicide interventions”³⁶⁸ still exists, with little prescriptive guidance regarding parental notification. On one hand, notifying students’ parents might prove an inadequate way to deal with the problem for a number of reasons: it may “only increase the pressure the student feels to complete the act”;³⁶⁹ it may cause a student who fears that an IHE may disclose the student’s counseling or treatment to parents to avoid seeking help;³⁷⁰ and it might result in IHEs merely calling parents rather than providing students with adequate mental health services.³⁷¹ On the other hand, some symptoms of mental illness may impair a person’s ability to make decisions regarding needed care³⁷² and, unless a student chooses to disclose a condition that requires treatment or accommodations, the student is unlikely to receive services.³⁷³ Not only are parents often in the best position to provide medical histories and coordinate care, but parental involvement may also help prevent self-harm in cases where students are motivated to spare their families the pain that a suicide would cause them.³⁷⁴ Furthermore, the current generation of students and their parents have a different relationship than students and parents of previous

Adjudication, 89 HARV. L. REV. 1685, 1687–89 (1976) (explaining that formally realizable definitions of liability offer certainty and restrain official arbitrariness in some ways but sacrifice “precision in the achievement of the objectives lying behind the rules” and that “a general rule will be more over- and under-inclusive than a particular rule”).

368. Lake, *supra* note 27, at B6.

369. Lake & Tribbensee, *supra* note 28, at 149–50; see also *Changing Parent Demands Fuel State FERPA Waiver Plan*, RECRUITMENT & RETENTION IN HIGHER EDUC., July 2005, at 3 [hereinafter *Changing Parent Demands*] (“But in some cases, a parent may be part of why the student is seeking help.” (quoting Claude Pressnell, Jr. President of Tennessee Independent Colleges and Universities Association)).

370. See *Changing Parent Demands*, *supra* note 369, at 3 (discussing how the Tennessee legislature approved a bill for a “pilot parent information program” at Middle Tennessee State University that requires colleges and universities to “provide any information about a student’s well-being, academic progress, or disciplinary status to any person who is responsible, at least in part, for the payment of the student’s tuition and fees, except with respect to information that is required to be kept confidential by federal law” and noting criticisms that such disclosure would prevent students from seeking counseling services).

371. See Cohen, *supra* note 275, at 3107.

372. Mental Health Security for America’s Families in Education Act of 2007, H.R. 2220, 110th Congress, § 2(8) (as referred to H. Comm. on Educ. and Labor, May 8, 2007).

373. See Meunier & Wolf, *supra* note 268, at 43 (explaining that students may not disclose information about a psychiatric disorder to a college, perhaps because they are not sure how the information will be shared).

374. See Gray, *supra* note 310, at 145.

generations. Students and parents now demand more parental involvement³⁷⁵ as parents play a larger role in helping their children adjust and establish safety nets on campus.³⁷⁶

However, when students threaten to harm others³⁷⁷ or when the distinction between harm to self and harm to others is blurred, IHEs should contact parents as a matter of course. As discussed in the preceding section, not only are different interests at stake, but protocols such as the FBI threat assessment model call for parental involvement when a student threatens to harm others. Thus, when the distinction is blurred, IHEs should err on the side of disclosure. In the case of the Virginia Tech shootings, for example, Cho chose not to disclose his mental health history and denied that he had previously received mental health services.³⁷⁸ While his writings contained no actionable threat,³⁷⁹ Cho did threaten to harm himself. The school did not notify Cho's parents about his threat, or about the fact that the school sought to involuntarily hospitalize Cho. However, Cho's parents, who had consistently obtained counseling for Cho when schools recommended it in the past, said that if the school had notified them of the complaints from professors, roommates, and female students, they "would have taken him home and made him miss a semester to get this looked at . . . but [they] just did not know . . . about anything

375. See Meunier & Wolf, *supra* note 268, at 44 (discussing the emerging trend of "helicopter parenting" and attributing it to factors such as smaller families, new modes of communication such as cell phones and e-mail, and the increased cost and competition associated with education); *Changing Parent Demands*, *supra* note 369, at 3 ("Students in the 1970s or 1980s would have sooner swallowed ground glass than have their parents be involved in what was going on on campus. That's not the case now. Students today are quite comfortable with their parents being involved in all of the decisions they make." (quoting Robert Glenn, Vice-President of Student Affairs at Middle Tennessee State University)); Kate Stone Lombardi, *Guidance Counselor; Parents' Rights (and Wrongs)*, N.Y. TIMES, July 30, 2006, at A4, available at <http://query.nytimes.com/gst/fullpage.html?res=9902EED8163FF933A05754C0A9609C8B63> (explaining how a cottage industry provides parents with advice on finding the right balance of parental involvement and suggesting IHEs provide students and parents with information regarding their privacy policies).

376. See Lynette Clemetson, *Troubled Children: Off to College Alone, Shadowed by Mental Illness*, N.Y. TIMES, Dec. 8, 2006, at A1, available at <http://www.nytimes.com/2006/12/08/health/08Kids.html> (reporting on two families whose children, who had depression and bipolar disorder, were transitioning to college and university life and used strategies such as establishing a relationship with a suitable local mental health provider on or near campus before an emergency arose, deciding not to live alone and disclosing their conditions to roommates, scheduling telephone sessions with therapists in their hometowns, and maintaining parental communication).

377. See O'TOOLE, *supra* note 26, at 27 ("Appropriate intervention in a low level case would involve, at minimum, interviews with the student and his or her parents.").

378. See VT PANEL REPORT, *supra* note 1, at 38–39, 53.

379. See *id.* at 43 (explaining that, in fall 2005, the head of the English Department asked that Cho's writing be "evaluated from a psychological point of view" but was told that while "the content [was] inappropriate and alarming," it did not "contain a threat to anyone's immediate safety").

being wrong.”³⁸⁰ Thus, if Cho’s parents had been notified of his suicidal threat or of others’ complaints about Cho, they may have provided missing pieces of the puzzle, such as Cho’s mental health history, and effectively intervened.

Parental notification when students pose a risk of harm to themselves or others is no panacea, however. As noted above, sometimes contacting parents might exacerbate the situation. Hence, the central question should be whether parental notification in a given case will have a “substantial and material impact on the well being of the student.”³⁸¹ IHEs can help students anticipate this question in advance by providing them with information regarding their privacy policies³⁸² and asking students upon enrollment whom IHEs should contact in case of emergency.³⁸³ While adult students who want to involve their parents should be encouraged to do so, and while IHEs are increasingly eager to facilitate such involvement,³⁸⁴ students should also have the option of designating an alternative emergency contact. Even if an IHE contacts parents, however, parents may deny the problem or, if they are already aware of the student’s diagnosis and difficulties, fail to intervene effectively.³⁸⁵ For example, before the Columbine High School shootings, school personnel contacted one of the shooter’s parents, but to no avail.³⁸⁶ Thus, some tragedies might not be prevented simply by contacting a student’s parents.³⁸⁷ Finally,

380. *Id.* at 49.

381. Lake & Tribbensee, *supra* note 28, at 150 (suggesting that colleges and universities will prevail in many suicide cases in which plaintiffs argue a duty to notify parents because the plaintiff will have the burden of proving breach and causation, and that in reference to causation, “the institution should not be liable for failing to notify parents who are already aware of their child’s circumstances”); *see also* Robert B. Smith & Dana L. Fleming, Point of View, *Student Suicide and Colleges’ Liability*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 20, 2007, at B24 (calling for a change in the courtroom, so that judges do not “mechanically apply tort principles” but recognize that, despite a student’s death, the college or university may not be to blame).

382. *See* Lombardi, *supra* note 375, at A4.

383. *See* Hoover, *supra* note 118, at A39.

384. *See* Eric Hoover & Paula Wasley, *Diversity and Accountability Top the Agenda at a Student-Affairs Summit*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 13, 2007, at A37–39 (interviewing Gary Pavela, who explains that a “seismic shift” in college and university administrators’ attitudes occurred after Congress amended FERPA to allow IHEs to notify parents when students under age twenty-one violated certain alcohol and drug policies and that his standard position is to notify parents).

385. *See* Lake & Tribbensee, *supra* note 28, at 150.

386. *See* Castaldo v. Stone, 192 F. Supp. 2d 1124, 1164–65 (D. Colo. 2001) (explaining that the English teacher contacted one of the shooter’s parents and shared his story with a school counselor who later met with him).

387. *See id.* at 1170 (stating that finding that the failure to suspend the shooters was the proximate cause of the plaintiff’s injuries would require “connecting a series of ‘if . . . then . . .’ propositions which are speculative at best,” including that it was possible to suspend the students “for submitting work with dark themes and violent images” and that they would not return to the school with loaded weapons).

parental notification should be no substitute for ensuring that students are provided with adequate mental health services.³⁸⁸

III. RECOMMENDATIONS

The common law has given rise to three strands of tort doctrine in the context of IHEs' duty to use reasonable care to prevent foreseeable acts of intentional harm to students. A close analysis of this third strand reveals that existing tort doctrines prove inadequate. Rather than merely brandishing the safety sword and adopting foreseeability concepts from state premises liability cases, courts must adapt these concepts and doctrines to the IHE and mental health context. By doing so, courts can avoid inappropriately expanding the scope of the special relationship and thereby creating unrealistic foreseeability demands that are both temporal and conceptual in nature. Furthermore, after recognizing that the first two strands emphasize safety or privacy to the exclusion of the other, courts should identify and balance the interests at stake, creating dialogue between previously discordant discourses.

At the same time, as public health and the common law create new informational demands on IHEs, especially regarding disclosure to third parties such as parents, FERPA must keep pace. In contrast to the 1980s and 1990s when FERPA responded to the new demands the common law was imposing on IHEs to prevent alcohol-related injuries, FERPA contains no clear, tailored exception allowing third-party disclosures when students threaten to harm themselves or others. Instead, because FERPA's emergency exception is too narrow and confusing, IHEs default to nondisclosure when student safety is at risk rather than releasing information to third parties such as parents. Paradoxically, however, FERPA's tax dependent exception is so overly broad and its enforcement mechanism so weak that FERPA not only fails to ensure student safety, but also fails to protect student privacy. Thus, Congress should amend FERPA's emergency and tax dependent exceptions not only to fulfill FERPA's legislative intent and to resolve internal tensions between safety and privacy, but also to bridge the disconnect between the common law and FERPA.

388. See *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 362 (Cal. 1976) (Clark, J., dissenting) (suggesting that the court should "rely[] upon effective treatment rather than on indiscriminate warning"), *superseded by statute*, CAL. CIV. CODE § 43.92 (West 2006); see also Cohen, *supra* note 275, at 3107 (expressing concern that colleges and universities would interpret a duty to notify parents as shifting liability, so that they would not provide mental health resources).

A. Courts Should Adapt Foreseeability to the IHE and Mental Health Context

Foreseeability, although an emerging unifying concept in IHE negligence liability, must be appropriately applied and adapted to the IHE and mental health context. Part II suggested that courts should narrowly apply a totality of the circumstances test to determine foreseeability in premises liability cases involving IHEs. However, the wholesale application of this premises liability model of foreseeability to the mental health context is undesirable for four reasons.

Firstly, the foreseeability of specific risks in the mental health context remains the subject of debate.³⁸⁹ Not only does “a significant science-and-law debate regarding effective suicide interventions”³⁹⁰ still exist, but, as the majority opinion acknowledged in *Tarasoff v. Regents of the University of California*,³⁹¹ there is a “broad range of reasonable practice and treatment in which professional opinion and judgment may differ” regarding whether a person will resort to violence.³⁹² After acknowledging this uncertainty, the court explained that the duty to use reasonable care should turn on the applicable professional standards. That is, only after a plaintiff establishes that the therapist should have determined, per the applicable professional standards, that the patient posed a risk of serious violence to others should the therapist have a duty to use reasonable care to protect foreseeable victims.³⁹³

However, as IHEs adopt recommended practices such as care teams and provide rudimentary training for teachers and even custodians in identifying students under mental health distress,³⁹⁴ to which professional

389. See Ashburn et al., *supra* note 8, at A9 (interviewing the Director of Counseling and Psychological Services at Cornell University and writing that “determining who is and who isn’t an imminent risk is an inexact science”).

390. Lake, *supra* note 27, at B6.

391. 551 P.2d 334.

392. *Id.* at 345.

393. *Id.* (“In our view, however, once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.”).

394. See Lake & Tribbensee, *supra* note 28, at 153–54 (describing the care team approach used by Arizona State University, which holds monthly meetings to “monitor high-risk student concerns”); Meunier & Wolf, *supra* note 268, at 50 (“There must be ongoing efforts to educate the entire campus community to recognize those struggling with psychiatric issues”); see also Ashburn et al., *supra* note 8, at A10 (writing that Colorado State University at Fort Collins holds workshops for faculty and housing staff to help them identify signs of distress and that the University of Wisconsin at Madison uses care teams to spot “issues that are bubbling up around campus”); Bernstein, *supra* note 320, at A1 (explaining that Cornell University, under FERPA’s tax dependent exception, trains personnel across campus, including handymen and custodians, to recognize potentially dangerous behavior and signs of depressions, and that an “alert team” of counselors, administrators, and campus police meet weekly to

standards should they be held? While some scholars have suggested that the risk factors for suicide “can be discerned by nonphysician health-care providers,”³⁹⁵ at least one lawmaker has recognized that “[w]hat happens in schools and universities is [that] the burden of judgment is being placed on people who have no training, and . . . it’s an unfair burden.”³⁹⁶ Although they lack the requisite training, because administrators are less constrained by privacy laws and professional codes of ethics than are mental health professionals, they are more likely to make decisions regarding the disclosure of information to third parties such as parents.³⁹⁷ Thus, the second way in which courts must adapt foreseeability to the mental health context is to distinguish between various college and university personnel on the basis of their training and roles. Specifically, courts should distinguish care team members tasked with merely sharing information from mental health professionals and threat assessors tasked with diagnosing students, assessing threats, and formulating and implementing action or treatment plans.³⁹⁸ For the former, such as the administrators in *Shin* and *Schieszler*, demands of foreseeability should be limited.³⁹⁹ For

discuss students who may be under distress because “each person [knows] pieces of the story but no one [sees] the whole picture”).

395. See Lake & Tribbensee, *supra* note 28, at 148–49 (arguing that “the demands of foreseeability should not be as strict” when the duty imposed requires lesser intervention, such as notifying parents, rather than preventing suicide).

396. J.J. Hermes, *Congress Mulls Change in Student-Records Law to Help Prevent Violence*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 5, 2007, at A23 (quoting Rep. Tim Murphy of Pennsylvania, who sponsored H.R. 2220, the Mental Health Security for America’s Families in Education Act of 2007, which provides a safe harbor for college and university personnel who suspect a student is at risk, consult with a mental health professional, and then contact the student’s parents).

397. See Gray, *supra* note 310, at 151–52 (“If an institution chooses to notify parents, it might be prudent university policy for student affairs personnel to contact parents regarding their student’s health emergency . . . because FERPA often permits a more detailed disclosure than the different confidentiality rules governing campus counseling and health clinics.”); Kitzrow, *supra* note 187, at 174 (recognizing that mental health professional ethical guidelines prohibit the release of confidential information to parents unless students are in “imminent” danger of harming themselves or others); see also Ashburn et al., *supra* note 8, at A8–9 (explaining that a person’s behavior must pose an “imminent risk” before serious measures can be taken, so that concern alone does not support a “logical leap” to suspecting that the person will commit a violent act).

398. See, e.g., *Shin v. MIT*, No. 020403, 2005 WL 1869101, at *38 (Mass. Super. Ct. June 27, 2005) (concluding that a dean and dorm housemaster were part of the student’s “treatment team”); see also Lake & Tribbensee, *supra* note 28, at 156–57 (clarifying that “only professional staff acting in their professional capacity should attempt to diagnose any student” and that action should be based solely on a student’s behavior, not a disability).

399. See *Brooks v. Logan*, 903 P.2d 73, 81–83 (Idaho 1995) (Young, J., concurring in part and dissenting in part) (arguing that absent direct evidence, courts should not hold someone who is not a mental health professional to the same standards regarding the duty to detect mental illness or the potential for suicide); *Bogust v. Iverson*, 102 N.W.2d 228, 230 (Wis. 1960) (“To hold that a teacher who has had no training,

the latter, relevant professional standards exist or are being developed.⁴⁰⁰

Thirdly, applying foreseeability concepts from state premises liability law to the IHE context has its shortcomings, including that landowner-invitee and landlord-tenant relationships do not always encompass the complexity of the IHE-student relationship or recognize the unique characteristics of IHEs.⁴⁰¹ For example, the policy justifications for imposing a duty on IHEs in the premises liability context include that IHEs know more about incidents of third-party harms and so are in a better position to assess the risks and take steps to ensure student safety, while students may not have the incentive, ability, or permission to install proper locks or implement security systems and procedures.⁴⁰² While this rationale holds when the duty imposed is to install locks, it falters when one realizes that students are more than one-time visitors to campus and may sometimes have superior knowledge of risks⁴⁰³ or that colleges and universities are more than landlords in that they require students to live in dormitories and assign them roommates.⁴⁰⁴ Thus, contrary to what the *Bradshaw*⁴⁰⁵ line of cases rejected but what *Shin*⁴⁰⁶ seems to suggest, students under psychological distress may sometimes be like motorists left

education, or experience in medical fields is required to recognize in a student a condition, the diagnosis of which is in a specialized and technical medical field, would require a duty beyond reason.” (quoting the trial court)); *White v. Univ. of Wyo.*, 954 P.2d 983, 987 (Wyo. 1998) (holding that the university was immune from suit under the statute, and concluding that the individuals involved did not subject the institution to potential liability because their jobs did not include “treating and diagnosing physical or mental illness”).

400. See, e.g., Meunier & Wolf, *supra* note 268, at 45 (discussing accreditation standards promulgated by the International Association of Counseling Services); see also sources cited *supra* note 179.

401. See *Hearings*, *supra* note 118 (statement of Irwin Redlener, M.D.) (suggesting that no strategy will always prevent violence on campuses because of the prevalence of psychiatric disorders and the nature of schools, so that imposing strict security is antithetical to the nature, philosophy, and reality of schools).

402. See *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335 (Mass. 1983) (“The threat of criminal acts of third parties to resident students is self-evident, and the college is the party which is in the position to take those steps which are necessary to ensure the safety of its students.”).

403. See *BICKEL & LAKE*, *supra* note 133, at 181–84 (explaining that the pros of applying business law to the college context include that courts are familiar with such law but that the cons include that the “results are sometimes skewed and that certain rationales are not always fully appropriate for unique college environments” because “[s]tudents are not ordinary consumers buying a sandwich or shirt” and are more familiar with campus than are “one-time visitors to a theme park”).

404. See *Lake*, *supra* note 144, at 554–55 (noting that business models fail to capture that IHEs consider residence life part of their educational missions and manage dorms differently than landlords do apartment buildings).

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

406. *Shin v. MIT*, No. 020403, 2005 WL 1869101 (Mass. Super. Ct. June 27, 2005).

stranded by police officers,⁴⁰⁷ in that they are incapable of protecting their own self interests. At the same time, however, IHEs are not police officers or private business owners. Courts must recognize that IHEs are public agencies with limited powers and budgets and must assume roles imposed upon them by laws such as FERPA and state privacy laws,⁴⁰⁸ which restrict the information that IHEs can disclose.

Fourthly, foreseeability concepts rooted in the premises liability strand of tort doctrines emphasize safety to the exclusion of privacy, perhaps because many perpetrators are unidentified. In contrast, when IHEs have a relationship with both the alleged student-perpetrator and student-victim, they must balance one student's privacy and due process rights with the safety of others. Courts, however, have provided little guidance in this area, using either the rhetoric of "safety" for duty or "privacy" for no duty. The *Bradshaw* line of cases, for example, emphasized privacy and ignored safety when insisting that IHEs have no duty to "babysit each student."⁴⁰⁹ In contrast, *Shin* and *Schieszler* emphasized safety and ignored privacy when holding that IHEs, operationally, have a duty to supervise students who threaten self-harm.⁴¹⁰ Rather than using this either-or approach, courts should discuss and distinguish such competing case law from the "safety" and "privacy" strands, thereby illuminating the underlying interests and rationale for why and when IHEs have a duty to closely monitor students.

B. Congress Should Broaden FERPA's Emergency Exception and Create a Safe Harbor

By amending FERPA to include a safe harbor, Congress would be helping to fulfill the legislative intent behind FERPA while addressing contemporary needs and eliminating the bias toward nondisclosure.

Senator Buckley's primary reason for introducing FERPA was to involve parents in education, and he suggested that schools should form partnerships with parents.⁴¹¹ However, neither the common law nor FERPA has adequately resolved perceived conflicts between adult students' privacy, parental involvement in higher education, and the duties

407. See *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 818 (Cal. Ct. App. 1981) (discussing a case in which a special relationship was created via a stranded motorist's dependence on a police officer).

408. See *Peterson v. S.F. Cmty. Coll.*, 685 P.2d 1193, 1196–1202 (Cal. 1984) (considering other factors relevant to the imposition of duty on colleges, including that the college is a public agency and so might have limited power related to the risk, a certain role imposed upon it by law, and budgetary limits).

409. *Beach v. Univ. of Utah*, 726 P.2d 413, 419 (Utah 1986).

410. See *Moore*, *supra* note 26, at 450 (writing that, although duty in these cases of student suicide is not premised on the theory that IHEs act in loco parentis, if colleges have a duty to supervise students, perhaps the common law has come full circle).

411. See discussion *supra* Part I.

IHEs owe to both parents and students.⁴¹² Yet, as illustrated by the amendment allowing parental notification regarding alcohol violations, in light of changes in social norms and state legislation, thoughtful, tailored exceptions to FERPA can encourage IHEs to engage parents in ways that serve the best interests of the student while still respecting the student's privacy.⁴¹³ Given the changing demographics of college and university students, increasing numbers of whom will require mental health services and who desire more parental involvement, coupled with the increasing demands on IHEs to share information to assess and address risks, Congress should create a safe harbor that clearly allows for—but does not require—disclosure to parents, law enforcement officers, medical professionals, or other appropriate parties when a student threatens harm to himself or others.⁴¹⁴

Similar to the increasing alcohol-related injuries in the 1980s and 1990s, mental health needs on college and university campuses are increasing.⁴¹⁵ As the common law responds by increasing the potential liability IHEs face when students harm themselves or others, however, FERPA's emergency exception remains so confusing and restrictive that IHEs do not share information with third parties such as parents even when they could.⁴¹⁶ As it currently stands, the emergency exception is under-interpreted, vague, and too restrictive.⁴¹⁷ Few FPCO guidance letters construe or interpret the emergency exception, with the result that "the FERPA exception allowing for disclosure in emergencies is extremely ambiguous, and [it] discourages notification even in dangerous and appropriate instances."⁴¹⁸ Primarily, the exception and the accompanying regulations and guidance encourage nondisclosure because they are too restrictive in three ways. Not only must harm be imminent⁴¹⁹ before IHEs may share information with third parties

412. See discussion *supra* Parts I, II; see also sources cited *supra* note 108.

413. See Thomas R. Baker, *State Preemption of Federal Law: The Strange Case of College Student Disciplinary Records Under FERPA*, 149 ED. LAW. REP. 283, 318 (2001) (discussing amendments to FERPA and suggesting that federal legislators will likely amend FERPA again when societal interests outweigh students' privacy rights).

414. See discussion *supra* Parts I, II; see also Weeks, *supra* note 89, at 49 (suggesting that "changing understandings of the role of parents in their student's education and in changing behaviors of students should prompt institutions to reexamine their communication policies" and that "[i]t is time for colleges and universities to adopt a less defensive approach to communicating with parents and move toward policies that are family-friendly").

415. See discussion *supra* Part I.G.; see also sources cited *supra* note 118.

416. See discussion *supra* Part I.G.

417. See VT PANEL REPORT, *supra* note 1, at 67 ("[T]he boundaries of the emergency exception have not been defined by privacy laws or cases, and these provisions may discourage disclosure in all but the most obvious cases.").

418. Gearan, *supra* note 118, at 1042.

419. Ashburn et al., *supra* note 8, at A6 ("Federal and state laws often prevent counselors from sharing a patient's records unless the patient is deemed an imminent risk.").

under the exception, but the exception is also temporally limited to the time of emergency⁴²⁰ and is strictly construed.⁴²¹

Firstly, as the cases and issues discussed throughout this Note illustrate, courts and current best practices require IHEs to share information to identify and assess threats before harm becomes imminent.⁴²² For example, teachers and other non-mental health professionals are called upon to recognize signs that students may be under distress and to regularly share that information internally, such as via care teams, to help identify risks.⁴²³ Moreover, campus security officials and college and university administrators must recognize when risks of harm are escalating.⁴²⁴ In the case of students who threaten harm to others, IHEs must then share that information externally, calling on parents to provide collateral information when assessing the threat.⁴²⁵ Thus, the requirement that harm be imminent before IHEs can release PII in education records to third parties is not aligned with what courts or, for example, the FBI's threat assessment model require.⁴²⁶ For this reason, and because mental health professionals cannot release information unless they deem a student to be an imminent risk,⁴²⁷ FERPA should allow administrators to share information with certain third parties whenever a student threatens to harm himself or others, without a determination that such harm is imminent. Hence, IHEs would not doubt that they could share information with parents, mental health professionals, or law enforcement officials when a student such as Cho threatens self-harm or exhibits signs of distress.

Secondly, FPCO guidance explains that the emergency exception is "temporally limited to the period of the emergency."⁴²⁸ However, when does the risk of student self-harm such as that in *Shin* begin and end? In

420. Letter from LeRoy S. Rooker to the University of New Mexico, *supra* note 93.

421. 34 C.F.R. § 99.36(c) (2000).

422. *Cf.* Castaldo v. Stone, 192 F. Supp. 2d 1124, 1172 (D. Colo. 2001) (mentioning that even the plaintiffs in a case regarding the Columbine High School shootings conceded that the harm was not "immediate and proximate").

423. See discussion *supra* Part II.C; see also sources cited *supra* note 394.

424. See, e.g., *Shin v. MIT*, No. 020403, 2005 WL 1869101, at *9 (Mass. Super. Ct. June 27, 2005) (holding that the defendants had a duty to "formulat[e] and enact[] an immediate plan to respond to [the student's] escalating threats to commit suicide"); *Sharkey v. Univ. of Neb.*, 615 N.W.2d 889, 900–02 (Neb. 2000) (finding that the university owed the plaintiff-invitee a duty because it was foreseeable that harassment would escalate into assault).

425. See O'TOOLE, *supra* note 26, at 27 ("Appropriate intervention in a low level case would involve, at minimum, interviews with the student and his or her parents.").

426. See *id.*

427. See, e.g., Ashburn et al., *supra* note 8, at A6 (interviewing the directors of counseling services at Cornell University and Texas A&M University at College Station, and stating that "[f]ederal and state laws often prevent counselors from sharing a patient's records unless the patient is deemed an imminent risk").

428. Letter from LeRoy S. Rooker to the University of New Mexico, *supra* note 93.

that case, the student repeatedly threatened self-harm over a fourteen-month period.⁴²⁹ The defendants faced potential liability precisely because they thought the emergency had ended and failed to realize that the risk of self-harm, perhaps though it had subsided for a time, was escalating.⁴³⁰ Thus, although courts have temporally extended the duty IHEs owe to prevent student self-harm, FERPA's emergency exception has not kept pace.

Thirdly, the current regulations cite Congressional intent and explain that the emergency exception will be strictly construed.⁴³¹ As the VT Panel Report argues, the "strict construction" requirement further narrows the definition of "emergency" without clarifying when an emergency exists, and "feeds the perception that nondisclosure is always a safer choice."⁴³²

For these three reasons, Congress should amend the emergency exception, creating a safe harbor that clearly allows IHEs to disclose information in education records to parents, law enforcement officers, and medical professionals when a student threatens to harm himself or others. "Threat," in turn, should be defined in a way that does not require expert knowledge of another's mental processes. Instead, "threat" should be defined as words or actions that cause "reasonable apprehension of physical harm to a person."⁴³³ Congress should make clear that IHEs may share information to assess threats without first determining that harm is imminent, that the exception applies as long as the threat creates reasonable apprehension of harm, and that the exception will be "reasonably" rather than "strictly" construed. By creating this safe harbor, Congress could effectively "combat any bias toward nondisclosure."⁴³⁴

429. See *Shin*, 2005 WL 1869101, at *1-*6 (indicating that the student attempted to overdose in February 1999, expressed suicidal ideation in October 1999, confessed that she was again cutting herself in November 1999, told a teaching assistant she intended to overdose on sleeping pills in December 1999, notified counselors that she was cutting herself and did not feel safe alone in March 2000, and made several threats preceding her suicide in April 2000).

430. See *id.* at 575-78.

431. See 34 CFR § 99.36(c) (2000); see also letter from LeRoy S. Rooker to the University of New Mexico, *supra* note 93 (stating the concern that "a blanket exception for 'health or safety' could lead to unnecessary dissemination of personal information" and explaining that Congress resolved the issue by directing the Secretary of Education to promulgate regulations, with the expectation that "he will strictly limit the applicability of this exception").

432. VT PANEL REPORT, *supra* note 1, at 69.

433. Ashburn et al., *supra* note 8, at A6 (quoting from policies enacted by the University of Arizona forbidding threatening or disruptive behavior after a nursing student killed three instructors and himself in 2002; however, this publication omits "or property").

434. VT PANEL REPORT, *supra* note 1, at 68 (recommending that privacy laws be revised to include safe harbor provisions insulating persons and organizations from liability "for making a disclosure with a good faith belief that the disclosure was necessary to protect the health, safety, or welfare of the person involved or members of

Although critics of another proposed safe harbor, H.R. 2220, the Mental Health Security for America's Families in Education Act of 2007,⁴³⁵ have argued that it is "inane" because "[i]t legalizes what is already legal"⁴³⁶ by clarifying that FERPA allows such disclosure, Congress could eliminate gray areas that currently confuse and paralyze college and university administrators.⁴³⁷ In addition to the Mental Health Security for America's Families in Education Act of 2007, other recent action includes proposed regulations by the U.S. Dept. of Ed. Under the proposed regulations, IHEs could "take into account the totality of the circumstances" and, if they identify "an articulable and significant threat to the health or safety of a student or other individuals," could disclose information from education records "to any person whose knowledge of the information is necessary to protect the health and safety of the student or other individuals."⁴³⁸ Further, the language regarding strict construction would be removed and, as long as IHEs had a "rational basis for the determination, the Department [of Education] will not substitute its judgment for that of the educational agency or institution"⁴³⁹

The proposed rule is laudable in that it would remove the strict construction language and clarify that IHEs need only identify a rational basis—or identify an articulable and specific threat—before releasing

the general public").

435. See H.R. 2220, 110th Congress (2007) (explaining that the bill would amend FERPA to create a safe harbor for IHEs that disclose, in good faith, confidential information to parents or guardians about dependent students who "may pose a significant risk to their own safety or well-being, or to the safety or well-being of others").

436. Arnone, *supra* note 88, at A22 (quoting Barmak Nassirian, Associate Executive Director of External Relations for the American Association of Collegiate Registrars & Admissions Officers).

437. See Lauren Stiller Rikleen, *Virginia Tech: The Challenge of Assuring Safety*, CHRON. HIGHER EDUC. (Wash., D.C.), May 11, 2007, at B14 ("Ask any campus official about how he or she responds to student complaints of harassment or stalking, and the answer will inevitably be filled with uncertainty and ambivalence. Overreact and fear a lawsuit. But the consequences from underreacting, we now know, can be catastrophic."). Unlike H.R. 2220, however, the safe harbor provision proposed here would not require written certification from a licensed mental health professional that the conduct or expression poses a significant risk of harm and that parental notification would be beneficial. Because FERPA does not currently require such certification, such a provision would "move[] communication with parents a step back." Arnone, *supra* note 88, at A22 (quoting Barmak Nassirian, Associate Executive Director of External Relations for the American Association of Collegiate Registrars & Admissions Officers). Instead, while college and university administrators should be encouraged to consult with mental health professionals and should not be unduly "burdened with defining and determining if a student is at risk," they should not be required to consult with mental health professionals before acting. H.R. 2220.

438. Family Educational Rights and Privacy, 73 Fed. Reg. 15,574, 15,589 (Mar. 24, 2008) (to be codified at 34 C.F.R. pt. 99).

439. *Id.*

information to those who need to know when a student's or other person's health or safety is at risk. However, the notice of proposed rulemaking—which mentions that routine, non-emergency disclosures are still not allowed—does not specifically address the temporal challenges that IHEs face. Thus, it is uncertain to what degree a threat must still be “imminent” and if disclosures must be limited to the duration of the emergency. Courts have temporally extended the duty IHEs owe to prevent student self-harm, for example, up to fourteen months and these temporal determinations are difficult to make in the mental health context.⁴⁴⁰ Although presumably disclosure at any time would be permissible as long as there was an articulable, specific threat, given the textual changes and the fact-driven nature of totality of the circumstances tests, new questions will likely arise. For example, does “specific” require IHEs to identify a likely perpetrator, victim, method of harm, or time and place of harm? The U.S. Dept. of Ed. will need to construe this language as it applies to various fact patterns before IHEs enjoy the clarity and flexibility the new rule is supposed to provide.⁴⁴¹ Although the proposed rule is a good first step, more needs to be done to create a safe harbor that helps fulfill the legislative intent behind FERPA, combat the bias toward nondisclosure, and reconcile the duties imposed by the common law with the permissions granted by FERPA.

C. Congress Should Eliminate the Tax Dependent Exception

Perhaps because FERPA's emergency exception is confusing and too restrictive, some IHEs rely on FERPA's tax dependent exception when implementing recommended best practices such as training personnel and students to recognize signs of student distress and report them, instituting care teams to identify students who are at risk or may pose risks to others, and notifying parents when, for example, students stop attending classes.⁴⁴² The tax dependent exception, which allows IHEs to release information in education records to any parent who claims the student as a tax dependent on federal income tax returns,⁴⁴³ operates as a bright-line rule and thus puts few interpretative demands on IHEs. At the same time, however, this exception has its own weaknesses. Unlike the emergency or alcohol-

440. See discussion *supra* Part II.C.

441. See *id.* (discussing the Virginia Tech shootings, referring to a report documenting the confusion surrounding privacy laws, and stating “the Secretary has determined that greater flexibility and deference should be afforded to administrators so they can bring appropriate resources to bear on a circumstance that threatens the health or safety of individuals”).

442. See Bernstein, *supra* note 320, at A1 (explaining that Cornell University, under FERPA's tax dependent exception, trains personnel across campus, including custodians, to recognize potentially dangerous behavior and signs of depression, and that the “alert team” has notified parents when students have stopped attending classes).

443. See discussion *supra* Part I.F.

violation exceptions, the tax dependent exception is not a narrowly-tailored exception designed to balance privacy and safety. Instead, it is both under- and over-inclusive as it relates to privacy and safety. For these reasons, after Congress amends the emergency exception, it should eliminate the tax dependent exception.

The tax dependent exception is under-inclusive in that it does not always permit IHEs to contact the parents of those who may benefit most from parental involvement. For example, traditional college and university students, those under age twenty-five and so who are most likely to be financially dependent on their parents, comprise only fifty-six percent of the current student population.⁴⁴⁴ At the same time, while at least one study has found that international and graduate students need more mental health services than their peers,⁴⁴⁵ the tax dependent exception is least likely to permit IHEs to contact their parents, even when it may be beneficial to the students.⁴⁴⁶

The tax dependent exception is also over-inclusive. Because IHEs may disclose information in education records to parents of dependent students at any time, for any reason, the exception could eviscerate the rule. As examples, if a misguided IHE were to use an ill-advised checklist of behaviors to identify students who may pose a risk of harm to others and then notify their parents, far too many students would be implicated.⁴⁴⁷ Furthermore, by relying on the tax dependent exception, IHEs could conceivably, as in the *in loco parentis* era, notify parents merely because their daughter was engaging in conduct unbecoming to “a typical Syracuse girl.”⁴⁴⁸ Yet, because FERPA creates no private right of action,⁴⁴⁹ a

444. See Kitzrow, *supra* note 187, at 165 (noting that thirty percent of undergraduates are minorities, twenty percent are foreign-born or first generation, fifty-five percent are female, and forty-four percent are over the age of twenty-five).

445. See DelVecchio, *supra* note 272, at A13 (writing that studies at California campuses revealed too few counselors and counseling sessions, with graduate students and international students particularly vulnerable).

446. ASSOCIATION FOR STUDENT JUDICIAL AFFAIRS, FERPA QUESTIONS FOR LEE ROOKER, DIRECTOR OF THE FAMILY COMPLIANCE OFFICE, U.S. DEPARTMENT OF EDUCATION, [http://asjaonline.org/attachments/wysiwyg/525/FERPAQUESTIONS answered.doc](http://asjaonline.org/attachments/wysiwyg/525/FERPAQUESTIONS%20answered.doc) (explaining that the exception does not apply to international students or students who are not dependents).

447. See O'TOOLE, *supra* note 26, at 1–2 (“This model is not a ‘profile’ of the school shooter or a checklist of danger signs pointing to the next adolescent who will bring lethal violence to a school. Those things do not exist” and “[s]uch lists, publicized by the media, can end up unfairly labeling many nonviolent students as potentially dangerous or even lethal”); see also Ashburn et al., *supra* note 8, at A6 (“‘Odd behavior is not a crime’” and “[n]ot talking to people is not a crime.” (quoting Maggie Olona, Director of Student Counseling Services at Texas A&M University)); Carey, *supra* note 351 (reporting on experts’ views regarding mass murders, while cautioning that checklists of warning signs to detect a school shooter can be dangerous because they are overly broad and label nonviolent students as potentially dangerous).

448. *Anthony v. Syracuse Univ.*, 231 N.Y.S. 435, 437 (N.Y. App. Div. 1928).

student's only remedy, besides those available under state privacy laws, is to file a complaint with the FPCO,⁴⁵⁰ an action that will likely have little effect, given that an IHE does not violate FERPA until it engages in a *pattern* of FERPA violations.⁴⁵¹

D. The U.S. Dept. of Ed. and FPCO Should Provide More Useful Guidance

Because IHEs must balance safety and privacy, often on a case-by-case basis, they need a rich supply of data, meaning examples of how FERPA applies to specific situations, from which they can derive accurate rules and interpretations.⁴⁵² Because individuals have no private right of action under FERPA,⁴⁵³ courts are not interpreting the language or operation of, for example, the emergency exception.⁴⁵⁴ As noted in Part I, while the FPCO provides a wealth of guidance and technical assistance to IHEs regarding FERPA, the Technical Assistance Letters are ineffective because they tend to be conclusory in nature and are neither indexed nor widely disseminated by the FPCO.⁴⁵⁵ Thus, the FPCO should restructure Technical Assistance Letters so that readers can clearly see the Act explained, analyzed, and applied to various situations, and then publish all letters, in redacted form, making them searchable by topic using an on-line database.⁴⁵⁶

The FPCO should also create topic-based publications showing how

449. See Daggett, *supra* note 37, at 640 (“Attempts to create a private cause of action for [FERPA] violations have been singularly unsuccessful.”).

450. See discussion *supra* Part I.E.

451. See *id.*

452. See generally MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 36 (2006) (“This concept [of abstraction ladders] is important to legal analysis because abstract reasoning helps lawyers to identify analogous authorities Very frequently, the tension in a legal argument is about whether . . . the rule applies to a narrower group that excludes a certain person, thing or event.”); Sayer, *supra* note 60, at 174–75 (using the term “situational dependence” to refer to the concept that many questions concerning FERPA do not “fit” into the guidance given and instead require college and university personnel to provide their own interpretation on a case-by-case basis).

453. See discussion *supra* Part I.E.

454. See VT PANEL REPORT, *supra* note 1, at 67 (“[T]he boundaries of the emergency exceptions have not been defined by privacy laws or cases”).

455. See discussion *supra* Part I.G.

456. See O'Donnell, *supra* note 64, at 716–17 (discussing Lawrence Lessig's work, suggesting that when using standard-based rules such as FERPA, lawmakers should identify the values and competing interests at stake and make explicit for college and university policy makers the implicit choices that are being made by action or inaction); see also Sayer, *supra* note 60, at 180 (suggesting that reading technical assistance documents posted on the FPCO website might help IHEs with situational dependence because they can refer to institutions facing similar circumstances).

FERPA applies to common hypothetical situations IHEs encounter.⁴⁵⁷ The FPCO recently took a step in this direction, creating a brochure addressing common misperceptions about FERPA that were brought to light after the Virginia Tech shootings.⁴⁵⁸ However, several questions remain, and others may become more pressing as IHEs institute practices such as care teams. For example, IHEs will need clear criteria to help them determine what is or is not an education record.⁴⁵⁹ Conceivably, because FERPA does not govern college and university personnel's personal observations, and because education records governed by FERPA may be shared within the college or university to employees or officials with a "legitimate educational interest[]"⁴⁶⁰ in inspecting the records, care team members are free to share a good deal of information without violating FERPA. Guidance, however, could eliminate gray areas, so that IHEs neither violate FERPA nor decline to share information about students internally, even when FERPA allows such disclosures.⁴⁶¹

457. See REPORT TO THE PRESIDENT, *supra* note 118, at 7–8 (calling for the U.S. Dept. of Ed. to develop additional guidance clarifying how information may be shared).

458. FAM. POL'Y COMPLIANCE OFF., U.S. DEP'T OF EDUC., BALANCING STUDENT PRIVACY AND SCHOOL SAFETY: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT FOR COLLEGES AND UNIVERSITIES (2007), <http://www.ed.gov/policy/gen/guid/fpco/brochures/postsec.pdf>.

459. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (Breyer, J. & Souter, J., concurring) ("Much of the statute's key language is broad and nonspecific This kind of language leaves schools uncertain as to just when they can, or cannot, reveal various kinds of information."); *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 437 (2002) (Scalia, J., concurring) (writing that the Court's interpretation of "education records" seems to contradict FERPA, and is "incurably confusing").

460. See discussion *supra* Part I.D.

461. See discussion *supra* Part I.G.

CONCLUSION

The common law has typically viewed safety as a sword, resulting in duty for IHEs in the premises liability context, but has viewed privacy as a shield, resulting in no duty for IHEs in the context of students' alcohol-related injuries. Discourses seldom meet and underlying interests are narrowly defined, so that current common law tort doctrines do not adequately capture the uniqueness of IHEs or the IHE-student relationship, address issues of foreseeability specific to the mental health context, or balance privacy and safety concerns.⁴⁶² As courts now expand the scope of the special relationship, so that the IHE-student relationship can give rise to a duty to aid or protect students from self-harm in some circumstances, IHEs face increasing potential liability when students harm themselves or others.⁴⁶³

In light of IHEs' expanding common law duty to share information in order to foresee harm and assist students who are at risk or pose risks to others, Congress should amend FERPA. By creating a safe harbor provision within the emergency exception and eliminating the tax dependent exception, Congress can fulfill the legislative intent behind FERPA by protecting the privacy of students' education records while also allowing IHEs to involve parents and certain other third parties in order to advance a mutual interest in the student's well being. Furthermore, by providing additional guidance, the FPCO can help ensure that IHEs accurately interpret and apply FERPA rather than defaulting to the nondisclosure option. In this way, FERPA would meet the two goals of all information privacy laws by allowing "enough information sharing to support effective intervention" while also protecting "privacy whenever possible."⁴⁶⁴ Perhaps most importantly, these recommendations, by bridging current discrepancies between IHE practices, the common law, and FERPA, would help ensure that, when faced with the complex and difficult decisions implicated by the Virginia Tech shootings, IHEs will not be confused or hampered by privacy laws that are "poorly designed to accomplish their goals."⁴⁶⁵

462. See discussion *supra* Part II.

463. See discussion *supra* Part II.C.

464. VT PANEL REPORT, *supra* note 1, at 68.

465. *Id.* at 63.

ONE STUDENT, ONE VOTE? EQUAL PROTECTION & CAMPUS ELECTIONS

MICHAEL A. ZUCKERMAN*

INTRODUCTION

The right to vote is one of the most basic democratic guarantees of a free society.¹ Indeed, the Supreme Court has long recognized voting as a fundamental right.² Although the U.S. Constitution does not explicitly confer the right to vote onto anyone,³ once a state grants the right to vote, it generally cannot discriminate by denying voters equal access to the ballot box or full and effective participation in the political process.⁴ Accordingly, the Supreme Court closely scrutinizes state action that deprives a citizen of a meaningful opportunity to vote.⁵

One way in which a state may deprive a citizen of a meaningful

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1. *Reynolds v. Sims*, 377 U.S. 533, 562–63 (1964).

2. *See, e.g., Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966).

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Id. (quoting *Reynolds*, 377 U.S. at 561–62).

3. *See United States v. Cruikshank*, 92 U.S. 542, 555 (1875). Indeed, most constitutional provisions dealing with the right to vote are phrased in the negative, rather than granting an affirmative right to vote. *See, e.g., U.S. CONST. amend. XV, § 1* (“The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude.”); *U.S. CONST. amend. XIX* (“The right of citizens of the United States to vote shall not be denied or abridged . . . on account of sex.”).

4. *See U.S. CONST. amend. XIV, § 2; Reynolds*, 377 U.S. 533.

5. *See Reynolds*, 377 U.S. at 565 (“[E]ach and every citizen has an inalienable right to full and effective participation in the political process”); SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS* 112 (3d ed. 2007) (“[S]omething more than simply casting a ballot for a series of state-prescribed candidates is necessary to define democratic legitimacy.”).

opportunity to vote is through vote dilution.⁶ By placing a voter in a legislative district that contains more persons than other legislative districts, a state debases the value of that individual's vote by diminishing his voting power relative to voters in smaller districts.⁷ Accordingly, to address concerns about state districting having the effect of debasing one's vote, the Supreme Court recognizes challenges to election apportionment under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.⁸ The Court has interpreted that Amendment to require state districting to comply with the now-familiar maxim of "one person, one vote."⁹ In short, applicable government units must ensure that their legislative districts contain virtually equal population.¹⁰ Although the Supreme Court initially applied "one person, one vote" to statewide districting, the Court has subsequently extended the rule to certain local government bodies that exercise normal government functions.¹¹

This Note considers the applicability of the "one person, one vote" principle to elected student government bodies at public colleges and universities. It focuses its analysis on the University of Georgia Student Government Association ("UGSGA") and the Michigan Student Assembly of the University of Michigan ("MSA"). UGSGA and MSA serve as effective representative examples of student government for purposes of this analysis because both organizations, like many other student governments, apportion their representatives based on existing, static academic boundaries.

In Part I, this Note discusses the history, scope, and current application of the "one person, one vote" principle. Then, Part II.A considers whether actions of elected student governments at public colleges and universities constitute state action, and whether these student bodies are sufficiently governmental to trigger "one person, one vote." Assuming they are, Part II.B then focuses on the apportionment schemes used by UGSGA and MSA to argue that these and similar schemes violate the Fourteenth Amendment. Finally, notwithstanding constitutional constraints, Part II.C argues that student government compliance with "one person, one vote" overlaps with good practice.

6. *Reynolds*, 377 U.S. at 555 & n.29.

7. *Bd. of Estimate v. Morris*, 489 U.S. 688, 694 (1989).

8. *Reynolds*, 377 U.S. at 558.

9. *See id.* at 577.

10. *See id.* at 565 ("Full and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature.").

11. *See, e.g., Hadley v. Junior Coll. Dist.*, 397 U.S. 50 (1970).

I. “ONE PERSON, ONE VOTE”

A. Justiciability of Apportionment Claims

In the early years of its apportionment jurisprudence, the Supreme Court dismissed for lack of jurisdiction equal protection claims against state apportionment, reasoning that such claims presented non-justiciable political questions.¹² In the 1946 case *Colgrove v. Green*,¹³ for example, registered Illinois voters alleged that Illinois’ failure to reapportion its congressional districts resulted in districts that “lacked compactness of territory and approximate equality of population,” thus denying them equal protection.¹⁴ In dismissing their complaint, the Supreme Court declined to “enter this political thicket” and held that the injured Illinois voters “ask[ed] of this Court what is beyond its competence to grant.”¹⁵ The Court reasoned that “[i]t is hostile to a democratic system to involve the judiciary in the politics of the people.”¹⁶ As such, any remedy for malapportionment, the Court opined, “ultimately lies with the people.”¹⁷

But then, in the landmark case *Baker v. Carr*,¹⁸ the Court departed from *Colgrove* by permitting an equal protection claim against Tennessee’s congressional apportionment scheme.¹⁹ In *Baker*, registered Tennessee voters alleged that Tennessee’s failure to reapportion the state since 1901 denied them equal protection of the laws because subsequent population changes in the state resulted in “debasement of their votes.”²⁰ In analyzing the claim, the Court, speaking through Justice Brennan, distinguished justiciable *political cases* from non-justiciable *political questions*, opining that a case falls into the latter category if it involves:

[1] . . . a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of

12. See, e.g., *Colgrove v. Green*, 328 U.S. 549, 556 (1946).

13. *Id.*

14. *Id.* at 550–55.

15. *Id.* at 552, 556.

16. *Id.* at 553–54.

17. *Id.* at 554.

18. *Baker v. Carr*, 369 U.S. 186 (1962).

19. *Id.* at 237 (“We conclude that the complaint’s allegations of a denial of equal protection present a justiciable constitutional cause of action . . .”).

20. *Id.* at 194.

embarrassment from multifarious pronouncements by various departments²¹

Applying this standard, the Court held that the issues raised by the complaint did not fit into any of the enumerated non-justiciable political question categories and was thus “within the reach of judicial protection under the Fourteenth Amendment.”²² Although the complaint arose in a political context, the Court characterized the claim as one of individual rights under the Equal Protection Clause.²³ Because judicially manageable standards under the Equal Protection Clause are “well developed and familiar,” the Court thought itself competent to determine whether this state action amounted to impermissible discrimination.²⁴

B. Birth of “One Person, One Vote”

Soon after the Supreme Court entered the “political thicket” in *Baker v. Carr*, it considered an equal protection challenge to Alabama’s failure to reapportion its legislative districts since 1900.²⁵ In *Reynolds v. Sims*,²⁶ registered Alabama voters argued that the state’s failure to reapportion resulted in serious discrimination and denied them “equal suffrage in free and equal elections.”²⁷ The Court, speaking through Chief Justice Warren, agreed, holding that the Fourteenth Amendment “requires both houses of a state legislature to be apportioned on a population basis.”²⁸ In so holding, the Court re-affirmed its duty to act to protect voting rights, which it characterized as “individual and personal in nature.”²⁹

Reynolds thus introduced the “one person, one vote” principle to the constitutional law of state legislative apportionment.³⁰ Under this

21. *Id.* at 217.

22. *Id.* at 237.

23. *Id.* at 226.

24. *Id.*

25. *Reynolds v. Sims*, 377 U.S. 533 (1964).

26. *Id.*

27. *Id.* at 540.

28. *Id.* at 576.

29. *Id.* at 561.

30. Another case, *Wesberry v. Sanders*, 376 U.S. 1 (1964), similarly applied the “one person, one vote” principle to congressional districting. *Wesberry* grounded its holding in Article One of the U.S. Constitution. *Id.* at 7–8. Note, however, that the Supreme Court has rejected the so-called federal analogy. In *Wesberry* and *Reynolds*, the states attempted to defend their malapportioned districts by analogizing to the federal system, where U.S. Senate apportionment is not based on population. *Id.* at 27 n.9; *Reynolds*, 377 U.S. at 573–77. But, as the Court noted,

The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, *but implied nothing about the use of an analogous system by a State in a statewide election.* No such specific accommodation of the latter was ever undertaken, and therefore no validation

principle, the state must make an “honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.”³¹ In adopting this principle, the Court reasoned that because legislators “represent people, not trees or acres,” maintaining districts of unequal population necessarily overvalues the vote of voters living in smaller districts.³² Just as it would be “extraordinary” to suggest a state could allow certain citizens to vote more times than other citizens, a state similarly cannot effectively give a citizen more voting power by maintaining unequal districting.³³ Ultimately, the Court opined, “[t]o the extent that a citizen’s right to vote is debased, he is that much less a citizen.”³⁴

Notwithstanding the Court’s commitment to population equality, *Reynolds* noted, “some deviations from the equal-population principle are constitutionally permissible” so long as the state maintains a basic standard of equality.³⁵ Under *Reynolds*, states may deviate from ideal numerical equality to pursue other legitimate interests, including ensuring voice to certain political subdivisions and providing for compact districts of contiguous territory.³⁶ But the Court cautioned that the possibility of such deviations “does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population.”³⁷ Similarly, deviations based solely on history, economic or social interests, and geographic area are not legitimate reasons to depart from strict equality of population.³⁸

Although the constitutional command of *Reynolds* is quite clear—good faith effort to achieve near population equality—its precise boundaries were not immediately so clear.³⁹ Through case law, though, a general principle has developed that states have more leeway when drawing state legislative districts rather than congressional districts.⁴⁰ With regard to congressional districts, the Court has enforced strict mathematical equality,

of its numerical inequality ensued.

Id. at 574–75 (quoting *Gray v. Sanders*, 372 U.S. 368, 378 (1963)) (emphasis added).

31. See *Reynolds*, 377 U.S. at 577. The Court, however, noted that mathematical precision might not be possible. *Id.*

32. *Id.* at 562; see also *Bd. of Estimate v. Morris*, 489 U.S. 688, 698 (1989) (noting that voters in smaller districts are “shortchanged”).

33. *Reynolds*, 377 U.S. at 562.

34. *Id.* at 567.

35. *Id.* at 579; see also *Mahan v. Howell*, 410 U.S. 315, 342 (1973).

36. *Reynolds*, 377 U.S. at 579–80.

37. *Id.* at 581.

38. *Id.* at 579–80.

39. Compare, e.g., *Karcher v. Daggett*, 462 U.S. 725 (1983) (striking down districting plan that had a maximum deviation below the census margin of error), with, e.g., *Brown v. Thomson*, 462 U.S. 835 (1983) (upholding a plan with a maximum deviation of 89%).

40. See *Mahan*, 410 U.S. at 321.

striking down apportionment plans with rather small deviations.⁴¹ Yet with regard to state legislative districting, the Court has permitted states more flexibility.⁴² As a general rule, state legislative redistricting plans with a maximum population deviation of 10% are considered presumptively valid, with 10% acting as a rough constitutional safe harbor.⁴³

C. Extension to Local Government

The U.S. Constitution does not require local governments to be elected,⁴⁴ yet once a local public body holds elections, its electoral apportionment scheme might be subject to the equal population rule of *Reynolds v. Sims*.⁴⁵ Beginning in the late 1960s, the Supreme Court began to apply the “one person, one vote” rule to certain local governments that exercised “general responsibility and power for local affairs.”⁴⁶ In determining which governments exercise this sort of plenary authority, the Court considers the ability of the government to affect a wide array of citizens and the nature of its authority, including its ability to tax.⁴⁷

In *Avery v. Midland County*,⁴⁸ for example, the Court applied “one person, one vote” to the Commissioners Court of Midland County, Texas because that elected entity set tax rates, issued bonds, had discretion to spend its funds, and affected all citizens by maintaining buildings, administering welfare services, and determining school districts.⁴⁹

41. See, e.g., *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (striking down a plan with less than 4% deviation).

42. See, e.g., *Mahan*, 410 U.S. 315 (upholding a plan with 16.4% deviation).

43. See *Brown*, 462 U.S. at 842. It should be emphasized that this constitutional safe harbor raises only a presumption of validity, and the Supreme Court has in fact rejected state legislative apportionment plans that fall within the safe harbor. See *Cox v. Larios*, 542 U.S. 947 (2004) (striking down plan with a 9.9% deviation).

44. See *Sailors v. Bd. of Educ.*, 387 U.S. 105, 108 (1967).

45. See *Avery v. Midland County*, 390 U.S. 474 (1968); see generally Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339 (1993).

46. *Avery*, 390 U.S. at 483. The Supreme Court has used a number of variations to describe the nature of a local government that is subject to “one person, one vote.” See, e.g., *Bd. of Estimate v. Morris*, 489 U.S. 688, 696 (1989) (“powers are general enough and have sufficient impact throughout the district” (quoting *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 54 (1970))); *id.* at 53 (“important government functions”); *Avery*, 390 U.S. at 483 (“power to make a large number of decisions having a broad range of impacts”).

47. Cf. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 729 (1973) (holding that “one person, one vote” did not apply to a water reclamation district that had “no towns, shops, hospitals, or other facilities designed to improve the quality of life within the district boundaries” and no “fire department, police, buses, or trains”). Note, however, that the Court’s jurisprudence in this area of the law is not always clear. See generally Briffault, *supra* note 45.

48. *Avery*, 390 U.S. 474.

49. *Id.* at 482–84.

Similarly, in *Hadley v. Junior College District*,⁵⁰ the Supreme Court extended “one person, one vote” to a junior college board because—even though such an entity was “further removed from the traditional core functions of local government”⁵¹—it nonetheless had the ability to levy certain taxes, issue bonds, and maintain authority over the administration of education, including the collection of fees and discipline of students.⁵² Likewise, in *Board of Estimate of City of New York v. Morris*,⁵³ the Court applied “one person, one vote” to the New York City Board of Estimate, striking down the City’s electoral guarantee of representation to each of the City’s boroughs.⁵⁴ The Court held that the Board’s governmental powers were “general enough and have sufficient impact” to trigger the “one person, one vote” because it had fiscal responsibilities, including calculating utility and tax rates, and management and administrative authority over various city functions such as contracting.⁵⁵

But the Court’s gradual extension of “one person, one vote” to local governments is not without limitation.⁵⁶ Indeed, courts have exempted so-called “proprietary” and “special-purpose” governmental units from “one person, one vote.”⁵⁷ In this regard, the Court will defer to local judgments about apportionment if the local government’s duties are “so far removed from normal governmental activities and so disproportionately affect different groups.”⁵⁸ In *Salyer Land Co. v. Tulare Lake Basic Water Storage District*,⁵⁹ for instance, the Supreme Court dealt with such a government unit in a public water district.⁶⁰ Although the district did exercise some typical governmental powers, it had “relatively limited authority” because its primary purpose was to provide water to farmers in a

50. *Hadley*, 397 U.S. 50.

51. *See, e.g.*, Briffault, *supra* note 45, at 356.

52. *Id.* at 353–54.

53. *Bd. of Estimate v. Morris*, 489 U.S. 688 (1989).

54. *Id.*

55. *Id.* at 696 (quoting *Hadley*, 397 U.S. at 54).

56. *See Avery*, 390 U.S. at 483–84 (suggesting an exception for a “special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents”); *Hadley*, 397 U.S. at 56 (noting “that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* . . . might not be required . . .”).

57. *See, e.g.*, *Benner v. Oswald*, 444 F. Supp. 545 (M.D. Pa. 1978), *aff’d* 592 F.2d 174 (3d Cir. 1979) (board of trustees); *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972) (judicial elections); *The Fla. Bar re Amendments to the Rules Regulating the Fla. Bar* (reapportionment), 518 So.2d 251 (Fla. 1987) (bar association); *Humane Society, Inc. v. N.J. State Fish & Game Council*, 362 A.2d 20 (N.J. 1976) (state fish and game council).

58. *See Hadley*, 397 U.S. at 56.

59. 410 U.S. 719 (1973).

60. *Id.* at 728–29.

limited area.⁶¹ Similarly, in *Ball v. James*, the Court held that a water reclamation district election did not fall within the ambit of *Reynolds v. Sims* because the district was the “narrow, special sort” of local government body that does not have general governmental powers.⁶² The Court reasoned that the district’s authority was limited to water-related matters and, even in that sphere, its authority was fairly narrow.⁶³

II. APPLICATION TO CAMPUS ELECTIONS

A. Applicability of “One Person, One Vote”

1. State Action Requirement

Against this backdrop, the analysis now turns to student government at public colleges and universities. First, it is well established that the Fourteenth Amendment only applies to state action.⁶⁴ That means that private actors are generally not subject to the equal protection constraints of the Constitution. Thus, since the “one person, one vote” rule of *Reynolds v. Sims* is grounded in the Fourteenth Amendment, the *Reynolds* rule only applies to student governments at public institutions if state action is present. To begin, then, the analysis must determine whether the Fourteenth Amendment applies at all before it can determine whether *Reynolds* and its progeny cover student governments at public colleges and universities.

In most cases, the state is sufficiently involved in student government at public colleges and universities to satisfy the state action requirement of the Fourteenth Amendment.⁶⁵ Student governments, unlike individual student officers,⁶⁶ or derivative student organizations funded by the student

61. *Id.* at 723.

62. *Ball v. James*, 451 U.S. 355, 370 (1981).

63. *Id.* at 366 (reasoning that the district does not provide for “maintenance of streets, the operation of schools, or sanitation, health, or welfare services”).

64. *E.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (“[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.”).

65. *See, e.g.*, *Gay & Lesbian Stud. Ass’n v. Gohn*, 850 F.2d 361, 365–66 (8th Cir. 1988) (holding that student government was a state actor because, inter alia, the University retained final authority over student funding decisions); *Uzzell v. Friday*, 625 F.2d 1117 (4th Cir. 1980) (holding implicitly that student government is subject to equal protection challenge); *Sellman v. Baruch Coll.*, 482 F. Supp. 475, 478–79 (S.D.N.Y. 1979); *Arrington v. Taylor*, 380 F. Supp. 1348, 1359 (M.D.N.C. 1974).

66. *Cf. Husain v. Springer*, 494 F.3d 108 (2d Cir. 2007) (affirming dismissal of First Amendment claims against student government officers because those officers were not state actors to the extent state law did not compel them to act in a specific manner); *Mentavlos v. Anderson*, 249 F.3d 301 (4th Cir. 2001) (holding that individual cadets at public military college did not act under color of state law for purposes of

government,⁶⁷ are “creature[s] of governmental agencies,” expressly chartered and overseen by a public body.⁶⁸ In *Sellman v. Baruch College of City University of New York*,⁶⁹ for instance, a federal district court found that the Baruch College student government was a state actor, reasoning that it receives state funds, holds meetings on public property, benefits students and the college, and is supervised by public officials.⁷⁰ Similarly, in *Uzzell v. Friday*,⁷¹ the Fourth Circuit implicitly held that the state action requirement was satisfied and allowed an equal protection claim to proceed against regulations governing the composition of the University of North Carolina’s student government.⁷² Likewise, in *Arrington v. Taylor*,⁷³ a federal district court held that the student government at the University of North Carolina at Chapel Hill is a state actor, reasoning as follows:

The Student Government occupies and operates on premises owned by the University, and thus by the State; the Student Government is organized as and performs the functions of a governmental body; the Student Government derives its authority from the University; the Student Government receives direct and indirect financial assistance from the University.⁷⁴

2. Nature of Student Government

Assuming most student governments at public colleges and universities satisfy the state action requirement of the Fourteenth Amendment, the analysis must now determine whether these bodies exercise “important government functions” so as to subject them to a “one person, one vote” challenge.⁷⁵ Admittedly, equating student government with political government seems curious because student governments, at first blush, do not appear analogous to the political units treated by *Avery* and its progeny. Upon closer examination of the nature of student government and the relevant factors identified by the Supreme Court, however, the idea of applying “one person, one vote” to student government gains strength.

Student governments exercise broad and important governmental

§ 1983 claim).

67. *Cf. Leeds v. Meltz*, 85 F.3d 51, 53–56 (2d Cir. 1996) (holding that student publication’s rejection of advertisement did not constitute state action where school provided only limited funding and disclaimed any right to control).

68. *Sellman*, 482 F. Supp. at 478; *see also, e.g.*, WISC. STAT. § 39.09(5) (West 2007).

69. *Sellman*, 482 F. Supp. 475.

70. *Id.* at 478–79.

71. 625 F.2d 1117 (4th Cir. 1980).

72. *See id.*

73. 380 F. Supp. 1348 (M.D.N.C. 1974).

74. *Id.* at 1359.

75. *See Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 54 (1970).

functions, including promoting public safety,⁷⁶ building community relations,⁷⁷ and protecting the environment.⁷⁸ Although student governments do not often have authority over some traditional governmental functions identified in *Ball* such as maintenance of streets and sewage systems,⁷⁹ they do often address quality of life issues for students—including health, safety, and housing quality—in addition to collecting student fees.⁸⁰ Moreover, many student governments at public institutions act under the auspices of the state and serve important public functions.⁸¹ Some student bodies, for example, make important campus judicial appointments,⁸² while others have exclusive control over chartering student organizations.⁸³ In fact, Wisconsin state statute guarantees students in its public universities the right to self-organization.⁸⁴ Additionally, as in *Hadley*, many student governments have significant control over the administration of education in the form of advising college and university officials, serving on college and university policy boards, and handling student discipline.⁸⁵

76. See, e.g., Illinois Student Senate, About the Illinois Student Senate, http://www.iss.uiuc.edu/main/index.php?option=com_content&task=view&id=21&Itemid=88 (last visited Oct. 27, 2008) (“The Student Senate also focuses on bettering the campus environment for all students, by promoting health, safety, and participation on campus.”).

77. See, e.g., Community Relations, University of Notre Dame, Student Senate Committee Overviews, <http://studentgovernment.nd.edu/SenateCommitteeApplication/committees.htm> (last visited Oct. 27, 2008).

78. See, e.g., Press Release, University of Colorado at Boulder, CU Students Transition to Local Energy and Local Climate Protection Programs (Jan. 31, 2008) (on file with the author), available at <http://www.colorado.edu/news/releases/2008/33.html>.

79. Cf. *Ball v. James*, 451 U.S. 355, 366 (1981).

80. See, e.g., Jeremiah G. Coder, Note, *The Vote Is In: Student Officer Campaigns Deserve First Amendment Protections*, 31 J.C. & U.L. 677, 699 (2005) (“Students elected to campus office make substantive decisions that have a genuine consequence for certain aspects of student life”); Roseann Moring, *Condom Plan Still in Works*, THE MANEATER (Columbia, Mo.), July 11, 2007, available at <http://www.themaneater.com/stories/2007/7/11/condom-plan-still-works/>; Associated Students of Madison, Campus Safety, <http://www.asm.wisc.edu/cms/content/view/265/208> (describing student efforts to improve campus safety) (last visited Oct. 27, 2008); Sahil Chaundry, University of Southern California Student Body President, State of the Undergraduate Student Government (Feb. 5, 2008), <http://usg.usc.edu/USG-President.html> (describing student governments efforts to improve the off-campus housing situation).

81. *Arrington v. Taylor*, 380 F. Supp. 1348, 1359 (M.D.N.C. 1974) (noting that the student government “is organized as and performs the functions of a government body”).

82. See, e.g., MICHIGAN STUDENT ASSEMBLY CONST., art. II, E & J, available at <http://www.msa.umich.edu/downloads/Constitution.pdf>.

83. UNIV. OF CINCINNATI STUDENT GOVERNMENT CONST. art. II, § 3, pt. a.

84. See, e.g., WIS. STAT. § 39.09(5) (2007) (guaranteeing Wisconsin students the right to participate in campus governance through student organization).

85. See *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 53–54 (1970).

Additionally, student governments, like many non-student local political governments, represent their student constituents' interests in a broad array of local, national, and international matters.⁸⁶ Not too long ago, students, often acting through student governments, took a leading role in protesting the Vietnam War and South African apartheid.⁸⁷ Today, mirroring the activities of other local political governments, student elected bodies continue to provide an important means for students to achieve policy ends on issues ranging from the Iraq War, to sustainability, to the cost of higher education.⁸⁸ In fact, the Arizona Students' Association recently was instrumental in drafting a state legislative bill to curb the cost of textbooks.⁸⁹

The most significant power of student governments, though, is often the power to assess and collect a mandatory student activity fee as part of enrolled student tuition. The ability to assess this fee is tantamount to the official power to tax.⁹⁰ Indeed, student government is compelling students to pay a fee into a public account under color of state authority.⁹¹ The fee is authorized by an arm of the state and will be used for public purposes by members of the academic community. Although one might argue that the power to assess an activity fee is not an actual tax because one is not required to enroll at the institution, this argument is flawed because, for instance, property taxes are official taxes even though one is not required to own real estate.⁹²

It is this power to tax for general governmental purposes—recognized in *Avery*, *Hadley*, *Ball*, and other cases—that often defines a public body.⁹³ When combined with the broad and important functions of student

86. See, e.g., Ed Kompenda, *SGA Prepares for Lobby Day*, WESTERN COURIER (Moline, Ill.), Feb. 27, 2008; Scott Miller, *Students Want to Break Code*, THE PANTAGRAPH (Bloomington, Ill.), Aug. 30, 2007, at C1.

87. See Philip G. Altbach & Robert Cohen, *American Student Activism: The Post-Sixties Transformation*, 61 J. HIGHER EDUC. 32 (1990).

88. See, e.g., Menaka Fernando, *USAC Passes Resolution Condemning War with Iraq*, DAILY BRUIN (L.A., Cal.), Nov. 27, 2002; Anita Little, *USC Greeks Go Green, Install Recycling Bins at Houses on The Row*, DAILY TROJAN (L.A., Cal.), Apr. 23, 2008 (describing Greek efforts to join sustainability movement aided by student government).

89. Nicole Santa Cruz, *Student Based Textbook Legislation Heads to Ariz. Governor*, ARIZ. DAILY WILDCAT, Apr. 29, 2008.

90. *Bd. of Regents v. Southworth*, 529 U.S. 217, 241 (2000) (Souter, J., dissenting); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 873–74 & n.3 (1995) (Souter, J., dissenting). *But see id.* at 873 (opining that student activity fee collection at the University of Virginia is not a tax for purposes of the First Amendment). *Cf.* *George v. Uninsured Employers Fund (In re George)*, 361 F.3d 1157, 1160–61 (9th Cir. 2004) (defining taxation).

91. See, e.g., *Southworth*, 529 U.S. at 241 (Souter, J., dissenting).

92. *Id.* at 241 & n.7.

93. See, e.g., *Ball v. James*, 451 U.S. 355, 366 (1981); *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 53 (1970); *Avery v. Midland County*, 390 U.S. 474, 483 (1968).

governments described above, student governments' power to tax and spend for the general student welfare through the student activity fee separates student government from the "narrow, special sort" of governments discussed in *Ball*.⁹⁴ Unlike the water districts in *Salyer* and *Ball* that primarily benefit landowners and farmers, the activities of student government do not primarily benefit any subset of the student population; rather, they benefit all students. Indeed, through their activities, student governments act on behalf of students in a broad array of matters and often collect a mandatory fee in pursuit of this mission. To that end, the student governing authority ordinarily uses this fee to fund campus organizations,⁹⁵ many of which serve important social and public functions, including ensuring student safety through the provision of emergency medicine.⁹⁶

3. Deference to the College or University?

Although using the U.S. Constitution to limit student government action is not unprecedented,⁹⁷ one must be mindful of the traditional latitude that courts afford educational institutions to manage their affairs, including student government.⁹⁸ In the First Amendment context, for instance, courts are especially reluctant to interfere with student government, subject to a viewpoint neutral qualifier.⁹⁹ To that end, in *Flint v. Denison*,¹⁰⁰ the Ninth Circuit rejected an attack on student campaign finance regulation, holding *Buckley v. Valeo*¹⁰¹ inapplicable.¹⁰² Reversing an earlier case,¹⁰³ *Flint*

94. *Ball*, 451 U.S. at 370.

95. See, e.g., *Rosenberger*, 515 U.S. at 824 ("The Student Council [at the University of Virginia], has the initial authority to disburse [student activity] funds . . .").

96. One survey found that 15% of college- and university-based emergency medical services were supervised by student government, and 20% received funding from student government. See Jonathan Fisher et al., *Collegiate-Based Emergency Medical Services (EMS): A Survey of EMS Systems on College Campuses*, PREHOSPITAL AND DISASTER MED., Mar.–Apr. 2006, at 95.

97. See, e.g., *Uzzell v. Friday*, 625 F.2d 1117 (4th Cir. 1980) (equal protection); *Welker v. Cicerone*, 174 F. Supp. 2d 1055 (C.D. Cal. 2001) (free speech), *abrogated by* *Flint v. Dennison*, 488 F.3d 816 (9th Cir. 2007).

98. See, e.g., *Ala. Student Party v. Student Gov't Ass'n. of Univ. of Ala.*, 867 F.2d 1344, 1345 (11th Cir. 1989).

99. *Bd. of Regents. v. Southworth*, 529 U.S. 217, 220 (2000).

100. 488 F.3d 816.

101. 424 U.S. 1 (1976) (considering the constitutionality of Federal Election Campaign Act of 1971).

102. *Flint*, 488 F.3d at 827.

103. The earlier case is *Welker v. Cicerone*, 174 F. Supp. 2d 1055 (C.D. Cal. 2001), *abrogated by* *Flint*, 488 F.3d 816. In *Welker*, a federal district court ordered the reinstatement of a student to the legislative council of the Associated Students of the University of California, Irvine, after he was disqualified for violating its campaign finance rules. *Welker*, 174 F. Supp. 2d at 1067. The court grounded its legal analysis in *Buckley v. Valeo*, 424 U.S. 1, finding "no reason to distinguish between applying

reasoned that even though student government has an impact on student lives, “it simply does not follow that [it] is akin to a political government.”¹⁰⁴ The court characterized student government as an educational tool to introduce students to the “principles of representative government.”¹⁰⁵ Since the institution’s “primary purpose is *education*, not electioneering,” the Court continued, “[c]onstitutional protections must be analyzed with due regard to that educational purpose.”¹⁰⁶ The Eleventh Circuit applied a similar analysis in *Alabama Student Party v. Student Government Association of the University of Alabama*,¹⁰⁷ when it upheld restrictions on distributing campaign literature over a First Amendment challenge.¹⁰⁸

As the forgoing describes, many of the cases considering the intersection of campus elections and the Constitution have arisen in the First Amendment context. In this regard, courts have often deferred to and relied on the educational nature of student government to decline to intervene in student elections.¹⁰⁹ Although the consequences of cases like *Flint* and *Alabama Student Party* may extend beyond the First Amendment, these cases do not necessarily preclude an equal protection challenge to student legislative apportionment that debases—intentionally or otherwise—a student’s right to vote in a student election at a public college or university. Indeed, not only might the level of deference afforded to colleges or universities differ from that afforded to K-12 institutions,¹¹⁰ but an over reliance on cases like *Flint* and *Alabama Student Party* overlooks the significant public function that student governments fulfill *in addition* to their educational role.¹¹¹

To the extent that the educational nature of student government is a

Buckley to state political elections and political elections at state universities.” *Welker*, 174 F. Supp. 2d at 1065.

104. *Flint*, 488 F.3d at 827 (“The ubiquity with which political government is present to control facets of our lives is not—thank Heavens!—replaced by student government in student lives.”).

105. *Id.*

106. *Id.* (quoting *Ala. Student Party v. Student Gov’t Ass’n of the Univ. of Ala.*, 867 F.2d 1344, 1346 (11th Cir. 1989)) (emphasis in original). The court seemed to be deferring to the long-standing idea of academic freedom. *See generally* *Regents v. Ewing*, 474 U.S. 214, 226 (1985) (“Academic freedom thrives not only 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.”).

107. 867 F.2d 1344.

108. *Id.*

109. *See, e.g., Flint*, 488 F.3d at 827; *Ala. Student Party*, 867 F.2d at 1346.

110. *See generally* Coder, *supra* note 80.

111. This public function includes representing students’ interests in local, national, and international matters, assessing and collecting mandatory fees, and in some cases, funding emergency services on campus. *See generally supra* text accompanying notes 64–96.

reason for judicial restraint in the First Amendment area, this rationale falls apart in the equal protection context. Accepting that student governments are formed for the purpose of educating leaders and learning about democracy,¹¹² equal protection nonetheless stands as a guarantee of equal access to this type of education. Apportioning legislative districts in an unequal manner discriminates against students in larger districts by debasing and diluting their voting power.¹¹³ Unequal apportionment is not analogous to limits on campaign speech, which affect all participants in the process because the inequality here is targeted at student voters in certain districts. Consequently, malapportioned districts deprive certain voters of meaningful and equal access to the political (or educational) opportunity that is student government.

Although little case law exists in the area of equal protection and campus elections, at least one federal appellate court has permitted an equal protection claim against a student government election scheme. In *Uzzell v. Friday*, two white students at the University of North Carolina at Chapel Hill brought an equal protection claim against the University based on a provision of the student government constitution that required “up to two minority race students be appointed to the student legislature . . . if a like number of such students is not elected”¹¹⁴ The court first determined that the students had standing, reasoning that the student constitution denies them, based on their race, an equal opportunity to compete in the election.¹¹⁵ The court went on to hold that the challenged student constitution provision, both on its face and in its application, violated the Equal Protection Clause because it amounted to purposeful discrimination by the state without sufficient justification.¹¹⁶

B. Assessing Compliance with “One Person, One Vote”¹¹⁷

To the extent student government apportionment must comply with “one person, one vote,” present methods of apportionment raise serious

112. *Flint*, 488 F.3d at 827.

113. *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

114. *Uzzell v. Friday*, 592 F. Supp. 1502, 1505 (M.D.N.C. 1984) (citing the STUDENT CONST. OF THE UNIV. OF N.C. AT CHAPEL HILL, art. I, § 1.D), *on remand from* 625 F.2d 1117 (4th Cir. 1980).

115. *Uzzell*, 592 F. Supp. at 1514. The court’s mention of a denial of equal opportunity to compete evenly with other candidates for student government is similar to that of one of the appellate panels to review this case during a complicated procedural history. *See Uzzell v. Friday*, 591 F.2d 997, 999 (4th Cir. 1979) (“[T]he presence of one or more unelected members on the [student government] dilutes the representative character of the legislative body.”), *aff’d in part, vacated in part, and remanded*, 625 F.2d 1117 (4th Cir. 1980).

116. *Uzzell*, 592 F. Supp. at 1516–23.

117. The author collected all data for this Note from publicly available sources. To prevent confusion and distraction, the Author omits footnote citations to this data, instead making all data compilations available in the appendices to this Note.

constitutional concerns. Many student-governing bodies use existing, static academic boundaries to allocate representation and refuse to create districts that contain students from more than one such unit. By focusing more on boundaries than equality, student governments ignore the Supreme Court's admonition that "legislators represent people, not trees or acres."¹¹⁸ Indeed, as explained below, egregious inequity in voting power has resulted from this practice.¹¹⁹ Student voters in one University of Michigan student government district, for example, have over 15,000% more voting power than similarly situated students in other districts.¹²⁰

The apportionment schemes that many student governments employ are similar to the scheme that the Supreme Court struck down in *Board of Estimate of City of New York v. Morris*.¹²¹ In *Morris*, the Court rejected New York City's guarantee of representation to each of the City's five boroughs.¹²² Finding that the maximum population deviation resulting from the plan to be 78%, the Court rejected any interest the City had in respecting natural and political boundaries and adopting its apportionment to the needs of a regional government.¹²³ Similarly, here, student governments would ostensibly argue an interest in having static academic unit representation to ensure that student interests in each unit are represented. But, the Supreme Court has made clear that even pursuing legitimate interests "does not mean that each local government unit or political subdivision can be given separate representation regardless of population."¹²⁴ Because many student governments have made districting so inflexible, one might infer that they have not made an "honest and good faith effort to construct districts . . . as nearly of equal population as is practicable."¹²⁵

This is not to say that students do not think about "one person, one vote,"—they do¹²⁶—but, rather, history, short-sightedness of student representatives who will soon graduate, and lack of any judicial intervention might have entrenched a system at many institutions that violates "one person, one vote." Although the rhetoric of *guaranteed* representation to each academic unit is powerful, it is plainly not permitted by the Constitution. True, political problems might arise if certain smaller

118. *Reynolds*, 377 U.S. at 562.

119. See generally Part II.A.2(a)–(b), II.B.2.

120. See Part II.A.2.b.

121. 489 U.S. 688 (1989).

122. *Id.* at 702.

123. *Id.* at 702–03.

124. *Reynolds v. Sims*, 377 U.S. 533, 581 (1964).

125. *Id.* at 577.

126. See, e.g., E. Martin De Luca, Commentary, *Constitution Controversy*, DAILY TARGUM (New Brunswick, N.J.), Feb. 7, 2007; Kristin Shrewsbury, *SGA Begins to Wrap Things Up*, THE DAILY COLLEGIAN (University Park, Penn.), May 7, 2001.

groups are denied guaranteed representation,¹²⁷ but solutions to this problem exist.¹²⁸ Now, with that foundation, the analysis turns to apportionment schemes at the University of Georgia and the University of Michigan as representative examples of how current student government apportionment quite often leads to unequal voting power.

1. University of Georgia

The University of Georgia Student Government Association (“UGSGA”) is the official student government of the University of Georgia.¹²⁹ UGSGA consists of both an executive and legislative branch, the latter being comprised of an elected Student Senate.¹³⁰ The Student Senate performs myriad important functions, one of which is to participate in the assessment and disbursement of the mandatory student activity fee. To that end, the UGSGA appoints students to a committee that advises the University on all student fees, and then another committee, comprised in part by students, distributes the funds.¹³¹ In pursuit of its general mission, the Student Senate holds annual elections for its legislature, which consists of students representing “each of the individual schools and colleges . . . in proportion to the student enrollment within the school or college.”¹³² This apportionment scheme, though, has led to egregious departures from “one person, one vote” because it refuses to create districts that span multiple academic boundaries and it allows graduate students to vote twice. Because graduate and non-graduate students are treated separately under the UGSGA apportionment scheme, the analysis takes them in turn.

With regard to non-graduate students, students who are enrolled in any of five specific UGA academic units have voting strength below mathematically ideal levels. Those students include the voters enrolled in Arts and Sciences (-26.14%), Business (-20.56%), Education (-17.83%), Agriculture and Environmental Sciences (-12.90%), and Family and Consumer Sciences (-2.02%). At the expense of non-graduate students in those schools, non-graduate students in other schools are mathematically overrepresented on the UGSGA in terms of voting strength. For example, UGSGA’s guarantee of representation to each school has resulted in the 49 non-graduates enrolled in Ecology having a 474.85% increase in their voting strength relative to what their voting strength would be under a “one person, one vote” model. Other non-graduate winners in this system

127. See, e.g., Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775 (1992).

128. See Part II.C (discussing, inter alia, possibilities to create influence districts).

129. UNIV. OF GA. STUDENT GOV’T ASS’N CONST. [hereinafter UGSGA CONST.].

130. UGSGA CONST. art. I.

131. Univ. of Ga. Bd. of Regents Policy § 704.021.

132. UGSGA CONST. art. IV, § 3, para. B.

include non-graduate voters in Public Health (128.33%), Forestry and Natural Resources (82.58%), Veterinary Medicine (76.97%), Environment and Design (69.75%), Journalism and Mass Communication (35.37%), Pharmacy (76.97%), Law (12.91%), and Public and International Affairs (2.48%).

As mentioned earlier, graduate students not only may vote for their academic unit representatives, but also may vote for four separately designated graduate school representatives. This double-representation has resulted in graduate students—across *every* academic unit—having more voting power than they would under a system committed to “one person, one vote.” Graduate students benefiting the most from this dual representation are those in smaller and otherwise overrepresented academic units. For instance, the voting power of a graduate student enrolled in Ecology is 522.66% higher than it would be under a system comporting with ideal mathematical equality. Other upward departures in voting strength for graduate students—relative to a baseline “one person, one vote” model—are as follows: Public Health (175.05%), Forestry and Natural Resources (129.41%), Family and Consumer Sciences (116.57%), Social Work (123.80%), Veterinary Medicine (91.34%), Journalism and Mass Communication (82.19%), Pharmacy (74.79%), Law (59.73%), Public and International Affairs (49.30%), Family and Consumer Sciences (44.81%), Agriculture and Environmental Sciences (33.92%), Education (29%), Business (26.26%), and Arts and Sciences (20.69%).

2. University of Michigan

The Michigan Student Assembly (“MSA”) is the central student government at the University of Michigan and was formed so that students could participate in University governance and address quality of life issues for students.¹³³ To that end, MSA has wide-reaching power. Not only does it make appointments to the campus judiciary system and other important bodies,¹³⁴ but it also has the power “[t]o levy dues and provide for their collection equally among all the students of the Ann Arbor Campus.”¹³⁵ As of Fall 2007, MSA assessed each Michigan student a mandatory fee of \$7.19 per term, resulting in nearly \$280,000 in receipts for the MSA.¹³⁶ To carry out its activities, MSA guarantees at least one elected representative to all colleges and schools that have at least one

133. MICH. STUDENTS ASSEMBLY CONST. pmbl.

134. *Id.* at art. II, §§ E & J. *Cf.* *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 53–54 (1970).

135. MICH. STUDENTS ASSEMBLY CONST. art. II, § B.

136. Office of the Registrar, University of Michigan, Full Term Tuition and Fees for Fall 2007, <http://www.umich.edu/~regoff/tuition/full.html> (last visited Oct. 27, 2008).

student in their “degree granting unit.”¹³⁷ The largest consequence of this scheme is that graduate students are not counted for apportionment purposes in the specific school in which they are enrolled.¹³⁸ Rather, graduate students are only apportioned into the Rackham Graduate School because that school confers degrees upon all graduate students.¹³⁹

Similar to the UGSGA,¹⁴⁰ MSA’s insistence on representation based on static graduating unit boundaries, without the possibility of mixed-graduating unit districting, has led to a system of unequal voting power. The most egregious example comes from the School of Natural Resources and the Environment (“SNRE”). Because most of SNRE’s enrollment is comprised of graduate students who do not count for apportionment purposes in that school,¹⁴¹ only five students are eligible to vote for the SNRE representative. This small voting pool results in those five eligible voters having 15,123% more voting power than they would under a system comporting to “one person, one vote.” Similarly, in the Public Policy School, because of the presence of graduate students who do not count for apportionment purposes, the remaining 48 eligible voters in that school have 1,485.78% the amount of voting power they would otherwise have under a system of ideal mathematical equality. Other winners under MSA’s apportionment scheme are voters in Education (247.57%), Pharmacy (158.90%), Social Work (78.89%), Art & Design (72.99%), Architecture and Urban Design (76.61%), Public Health (40.44%), Dentistry (35.92%), and Nursing (25.40%). The losers under this scheme are voters in Law (-32.34%), Business (-21.37%), Medicine (-13.5%), Engineering (-12.84%), Music (-10.24%), LS&A (-8.42%), Kinesiology (-2.41%), and the Rackham Graduate School (-1.55%).

137. *See generally* MICH. STUDENTS ASSEMBLY CONST. art. V, § A.

138. Graduate students all receive their degrees from the Rackham Graduate School. This means that although graduate students are enrolled in academic units other than Rackham, they are only counted for apportionment purposes in the Rackham Graduate School. As a consequence, to determine total population for apportionment purposes in the Rackham School, we add the number of students exclusively enrolled in Rackham (614) to the other Rackham students enrolled elsewhere (6,185) to arrive at the total of 6,799. To determine the total voters in the other academic units, we take their total enrollment minus the enrolled Rackham students, who are not counted for apportionment purposes outside of Rackham. For example, the School of Information does not have a representative on the MSA because its entire enrollment is comprised of graduate students who are only counted for apportionment purposes in the Rackham Graduate School. *See generally* Table 2 in the Appendix.

139. E-mail from Michael L. Benson, Student General Counsel, Michigan Student Assembly, to Michael A. Zuckerman, J.D. Candidate, Cornell Law School (May 2, 2008, 2:28:59 EDT) (on file with author).

140. *See supra* Part II.B.1.

141. *See supra* note 138.

C. Benefits of Compliance with “One Person, One Vote”

Notwithstanding the constitutional command of “one person, one vote,” student governments should adhere to equal-population districting as a matter of good policy. Not only may compliance increase voter-turnout and the effectiveness of student government initiatives by bolstering the appearance of democracy and legitimacy, but it also will guarantee all students equal access to their representatives. Because each elected student representative would serve an equal number of constituent voters, voters across every academic unit would have an equal opportunity to both influence their representatives and access their representative’s resources. Adherence may also increase the number of student candidates for office because students who were formerly in large districts would no longer have to target their campaign to a larger pool of voters than similarly situated candidates. Furthermore, adherence to “one person, one vote” prevents student governments from intentionally diluting the voting strength of a target group.¹⁴² It also prevents student governments from inflicting an intangible, civic injury onto all student voters.¹⁴³ Moreover, unequal voting power seems un-American and undermines institutional commitments to equal treatment of students. To paraphrase the Supreme Court, to the extent that a student’s right to vote in campus elections is debased, the student is that much less an equal member of the campus community.¹⁴⁴

For the student districter, the costs of complying with “one person, one vote” are not unduly burdensome. In fact, some student governments have voluntarily decided to adhere to it.¹⁴⁵ All that compliance requires is for student government to divide the total number of eligible voters by the total number of elected representatives and create only districts of that size. Under such a scheme, student governments can ensure equal voting power across districts, while respecting—to the extent practicable—existing academic unit boundaries.¹⁴⁶ When it is possible to create districts

142. Cf. *Uzzell v. Friday*, 625 F.2d 1117 (4th Cir. 1980).

143. See Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 105 (2000) (“A districting scheme so malapportioned that a minority faction is in complete control, without regard to democratic sentiment, violates the basic norms of republican government.”).

144. See *Reynolds v. Sims*, 377 U.S. 533, 567 (1964).

145. See, e.g., ASSOCIATED STUDENT GOV’T CONST. OF TEX. STATE UNIV. art. II, § 2.

146. Note that “one person, one vote,” especially in the case of local government, does not require mathematical exactness. Student districters would have some flexibility to deviate from ideal mathematical equality to accommodate academic affiliations to some extent. For example, if the student government could only fit 98 of the 100 students in Academic Unit X into an equal population district, the government would likely be able to deviate from ideal equality to place the remaining two students into that district. See generally *supra* Part I.B.

composed of voters only from one academic unit, the student government would be permitted to do so.

Even when all voters from a certain academic unit would not fit into an equal-population district, the student government can group those ‘excess’ voters together in another district where they can exercise significant influence over the electoral outcome. Similarly, in the case of a small school without sufficient voters to constitute an entire district,¹⁴⁷ student government should not hesitate to group these students in districts with voters from other academic units because voters from the small school will either constitute a voting majority or constitute a sizable minority and be able to influence the outcome of the election. For this reason, deconstructing academic unit districts, even though many of the students have developed unique group characteristics, is not troublesome—those students, as described immediately above, would remain clustered together and positioned to influence electoral outcomes.

CONCLUSION

Daniel Webster once remarked, “[T]he right to choose a representative is every man’s portion of sovereign power.”¹⁴⁸ Echoing this sentiment, the Supreme Court closely scrutinizes state action that deprives a voter of a *meaningful* opportunity to vote.¹⁴⁹ One way that a state may deprive a voter of such an opportunity is through the creation of legislative districts of unequal population. Accordingly, to prevent the state from debasing one’s voting power, the Supreme Court has interpreted the Fourteenth Amendment to require states to comply with the now familiar maxim of “one person, one vote.” Even though the Court initially applied this rule to congressional districting, it extended it to state legislative districting, and then to certain local governmental units that exercise normal government functions.¹⁵⁰

Within this constitutional framework, this Note contends that “one person, one vote” might apply to student government apportionment at public colleges and universities. Although the idea that student governments exercise important governmental powers might seem flimsy at first, upon closer analysis the idea gains strength. Student governments serve important public functions by advocating for students’ interests in local, national, and international affairs. They often play important roles on campus in recommending policies and appointing students to important committees. Perhaps the most important public function that many student governments serve, though, is assessing and collecting a student activity

147. *Cf. Bd. of Estimate v. Morris*, 489 U.S. 688 (1989).

148. *Id.* at 693 (quoting *Luther v. Borden*, 48 U.S. 1 (1849) (statement of counsel)).

149. *See Reynolds*, 377 U.S. 533.

150. *See, e.g., Hadley v. Junior Coll. Dist.*, 397 U.S. 50 (1970).

fee as a mandatory condition of enrollment. This fee, which is tantamount to an official tax, often supports student organizations and campus services like emergency medicine. Then, assuming the “one person, one vote” applies to student government elections, this Note uses the UGSGA and the MSA as illustrations of how current methods of student government apportionment—namely by using inflexible academic boundaries—often lead to egregious departures from ideal mathematical equality.

In the end, whether or not “one person, one vote” limits student governments, good policy dictates that equal population districting guide student governments. Creating districts of equal population may encourage participation, guarantee equal representation, discourage discrimination, and prevent civic injury. Any negative consequence of breaking up single-academic unit representation, or the guarantee of representation to small units, can be mitigated by placing those displaced voters in districts where they might, as a group, exercise meaningful political influence. Student governments should not be afraid to create districts that span multiple academic units; it promotes full and effective democratic participation and complies with an important constitutional principle that has yet to be applied to public college and university campuses.

Table 1: University of Georgia

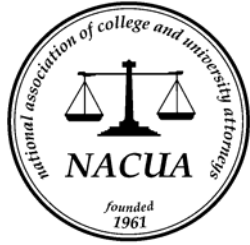
STRUCTURE		POPULATION			VOTING POWER COEFFICIENT		DEVIATION FROM IDEAL	
District	Reps	Non-Grad	Grad	Total	Grad	Non-Grad	% Non-Grad	% Grad
Agriculture & Environmental Sciences	2	1357	362	1719	0.0018	0.0012	-12.90%	33.92%
Arts & Sciences	16	14549	1668	16217	0.0016	0.0010	-26.14%	20.68%
Business	3	2210	617	2827	0.0017	0.0011	-20.56%	26.26%
Ecology	1	49	81	130	0.0083	0.0077	475.84%	522.66%
Education	5	2250	2305	4555	0.0017	0.0011	-17.83%	29.00%
Environment & Design	1	341	100	441	0.0029	0.0023	69.75%	116.57%
Family & Consumer Sciences	2	1404	124	1528	0.0019	0.0013	-2.02%	44.81%
Forestry & Natural Resources	1	248	162	410	0.0031	0.0024	82.58%	129.41%
Journalism & Mass Communication	2	1014	92	1106	0.0024	0.0018	35.37%	82.19%
Law	1	646	17	663	0.0021	0.0015	12.91%	59.73%
Pharmacy	1	520	65	585	0.0023	0.0017	27.96%	74.79%
Public Health	1	187	141	328	0.0037	0.0030	128.23%	175.05%
Public & International Affairs	2	1238	223	1461	0.0020	0.0014	2.48%	49.30%
Social Work	1	146	277	423	0.0030	0.0024	76.97%	123.80%
Veterinary Medicine	1	383	135	518	0.0026	0.0019	44.52%	91.34%
Biomedical & Health Sciences Institute	0	0	10	10	0.0006	0.0000		
Institute of the Faculty of Engineering	0	1	1	2	0.0006	0.0000		
Institute of Bioinformatics	0	0	15	15	0.0006	0.0000		
Graduate School	4	0	6395	6395	0.0006			
Total Reps	44	26543	6395					
Total Students	32938							
Ideal Coefficient	0.0013							

Enrollment Data <http://irhst40.irp.uga.edu/html/eFactbook/2007/ugafb07.pdf>
 * **Note:** For apportionment purposes, UGA counts graduate students both in the Graduate School and the other various units in which they are enrolled.

Table 2: University of Michigan

STRUCTURE		POPULATION			VOTING POWER COEFFICIENT		DEVIATION FROM IDEAL	
District	Reps	Voters*	Total	Rackham				
Arch. & Urban Design	1	431	553	122	0.0023		76.61%	
Business	3	2,904	2,990	86	0.0010		-21.37%	
Education	1	219	546	327	0.0046		247.57%	
Law	1	1,125	1,125	0	0.0009		-32.34%	
Medicine	2	1,760	2,103	343	0.0011		-13.50%	
Nursing	1	607	842	235	0.0016		25.40%	
Rackham	8	6,799	6,799	614	0.0012		-10.44%	
Public Health	1	542	833	291	0.0018		40.44%	
Social Work	1	426	426	0	0.0023		78.68%	
Art & Design	1	440	466	26	0.0023		72.99%	
Dentistry	1	560	647	87	0.0018		35.92%	
Engineering	6	5,240	7,103	1,863	0.0011		-12.84%	
Kinesiology	1	780	822	42	0.0013		-2.41%	
LS&A	19	15,792	17,604	1,812	0.0012		-8.42%	
Music	1	848	978	130	0.0012		-10.24%	
Pharmacy	1	294	366	72	0.0034		158.90%	
Information	0	0	353	353				
Public Policy	1	48	199	151	0.0208		1485.78%	
Nat. Resour. &	1	5	250	245	0.2000		15123.53%	
Totals	51	38820						
Ideal Coefficient	0.0013							

Enrollment Data <http://www.umich.edu/~regoff/report/08wn101.pdf>
 * **Note:** Graduate students, even though enrolled in academic units other than Rackham, are only counted for apportionment purposes in the Rackham Graduate School. So, to determine total voters for apportionment purposes in the Rackham Graduate School, we add the number of students exclusively enrolled in Rackham (614) to the other Rackham Graduate School students enrolled elsewhere (6,185) to arrive at the total of 6,799. To determine the total voters in the other academic units, we take the total population minus the enrolled Rackham graduate students, who are not



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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.

The Association's purpose is to improve the quality of legal assistance to colleges and universities by educating attorneys and administrators on legal issues in higher education. NACUA accomplishes this goal through its publications, conferences, and workshops. NACUA also operates a clearinghouse for references through which attorneys share knowledge and work products on current legal problems. With its headquarters in Washington, D.C., NACUA monitors governmental developments having significant legal implications for its member institutions, coordinates the exchange of information concerning all aspects of law affecting higher education, and cooperates with other higher education associations to provide general legal information and assistance.

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