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LAW

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 FIFTY YEARS  
NACUA: LOOKING BACK. REACHING FORWARD.

SPECIAL COMMEMORATIVE ISSUE

IN CELEBRATION OF NACUA'S 50<sup>th</sup> ANNIVERSARY

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In 1960, few attorneys practiced “higher education law,” and few colleges and universities used attorneys on a regular basis—either as in-house or outside counsel. The expansion of the regulation of higher education, and the application of old laws and precedents in new ways—by all three branches of state and federal government—began at about the same time that the National Association of College and University Attorneys was founded in 1960. This article identifies ten broad areas of change that have affected the practice of higher education law over the past fifty years. For each of these areas, the article looks backward as well as forward, attempting to summarize how we got to where we are now, and where the practice of higher education law seems to be going.

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### **Race and Higher Education: The Tortuous Journey Toward Desegregation**

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There have been many important changes in higher education over the past fifty years, but none is more important than desegregation of our educational institutions. We would not be addressing issues today such as affirmative action, the future of historically black institutions, or race-restrictive scholarships if this nation had not fought the battle to desegregate its schools, colleges, and universities. The long journey toward desegregation of higher education institutions has taken many tortuous turns, winding its way from complete statutory and constitutional state mandates for racial segregation in education to recognition by all states that the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 stand for equal educational opportunity irrespective of race. This essay focuses on race and the desegregation of our educational institutions from the pre-*Brown* graduate school cases to the recent settlements of the massive, long-term desegregation cases in Mississippi, Louisiana, Tennessee, and Alabama.

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# FOREWORD

KATHLEEN CURRY SANTORA\*

I am honored to join NACUA President Derek Langhauser in presenting this special edition of the *Journal of College and University Law* in recognition of NACUA's 50<sup>th</sup> Anniversary. While the practice of higher education law has changed over the past 50 years, the essence of NACUA and the commitment of the attorneys who serve their institutions remain unchanged in many ways. Looking back, NACUA was built on the cornerstones of collegiality and volunteerism; we remain true to those principles and values today and they will continue to guide us as we reach forward to our next 50 years and thereafter.

When the first group of NACUA members gathered at the University of Michigan in 1960, it was to network, share experiences, and discuss issues of common interest. Fifty years later, we still gather to network, share experiences, and discuss issues of common interest and concern. The spirit of volunteerism that made that first meeting successful has been passed on to subsequent generations of NACUA members and today remains the foundation for NACUA's continued success. It is embedded in the culture of the organization and is the common thread that runs through NACUA's very fabric.

Our members' generous spirit of volunteerism has been evident in so many ways over the years, including the scholarly work of those who contribute to this *Journal* and the tireless hours spent by those who referee, review, and edit the myriad articles. These individuals, and the hundreds of others every year who give just as generously of their time and expertise to ensure the viability of all areas of the Association, enable us to pursue our mission "to advance the effective practice of higher education attorneys for the benefit of the colleges and universities they serve."

What have been the most significant changes that we have seen in NACUA and in the practice of higher education law over the past 50 years? Certainly the breadth and complexity of the issues facing colleges and universities. But also the role of college and university counsel. NACUA attorneys have born witness to seminal court cases, legislation, and regulations that have changed the face of higher education and, for many, their role and responsibilities at their institution. What was once a small and relatively unknown area of law has grown into a significant and coveted practice area that requires more and more specialization, knowledge, and expertise, particularly as institutions of higher education

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\* Kathleen Curry Santora has served as Chief Executive Officer of NACUA since February 1, 2001.

continue to face an ever-growing list of new laws, government regulations and compliance requirements. The college or university attorney is now considered an essential member of the campus leadership team and a respected and valued advisor to the president or chancellor. Fifty short years ago, just 50 colleges had an office of legal counsel, most employing a single lawyer; today, NACUA's membership includes more than 3700 attorneys, serving 1600 campuses and more than 700 institutions of higher education.

What also has changed is the way we do business. Technology clearly has been the force behind much of this—literally transforming the way we communicate with the membership, the range and delivery of services we offer, and our ability to respond to member requests for information and assistance in real time so that we can send members what they want when they need it. And, while we now form friendships and professional alliances virtually, often before even meeting in person, there still is no substitute for face-to-face contact and interaction. Our founders realized this during their first meeting, and one of the great by-products of being a NACUA member is the deep and life-long friendships that are forged over many years; there is no doubt that the NACUA community is alive and vibrant well beyond the walls of the Association.

And, finally, the faces of NACUA have changed—to everyone's great advantage and benefit. The Association is more welcoming and inclusive than ever before, and we are well positioned to greet the next 50 years. As the higher education world continually changed around us, NACUA's volunteer leadership over the years had the foresight and acumen to ensure that we changed with it. In addition to our early core values of civility, collegiality, service, quality, and respect, we added diversity and inclusivity, both of which have enabled us to further our mission and strengthen our guiding principles. Our diversity—be it individual or institutional—is one of our greatest assets and has propelled us to become a better, more responsive and inclusive organization, which in turn has enabled our members to better serve their institutions.

While much has changed, much is still the same. Our core values 50 years ago may not have been so pointedly recognized or acknowledged, but the small group of attorneys who laid the foundation for the Association modeled them. They built an organization based on volunteerism that every subsequent generation of NACUA members has embraced. I never cease to be amazed by the generosity of NACUA members to share information and best practices, offer each other advice, and give so selflessly of their time and expertise.

The theme for our 50<sup>th</sup> Anniversary is NACUA's First 50 Years: Looking Back, Reaching Forward. The articles that are included in this special edition of the *Journal of College and University Law* reflect much of the substantive law over this period of time and bear witness yet again to

the dedication and selflessness of our volunteer authors. As we look back, we can see how different the practice of higher education law is today than it was in the *Journal's* early days. And, while NACUA's strategic priorities may vary from year to year to meet members' needs, the culture, values, sense of collegiality, mutual respect, and civility of our members have withstood the tests of time and remain intact.

The future of NACUA and of higher education law most certainly holds new and unforeseen challenges and opportunities. But our foundation is solid, our cornerstones still serve us well, and our membership remains strong and vibrant. I am confident that whatever the future holds, we will continue to model our core values, maintain our historic commitment to volunteer participation in our programming and governance, carry forward our tradition of adapting to changing times and changing member needs, and retain our reputation among institutions and associations as the leading organization on issues related to higher education law.

NACUA will surely embrace the opportunities and rise to the challenges moving forward. The values and sense of camaraderie and common purpose that have sustained us so well during this past half-century will persist, develop, and continue to thrive in the decades to come. It is an honor and a privilege to be part of such a special organization as we celebrate NACUA's many successes and look forward toward its bright future.



# INTRODUCTION

DEREK P. LANGHAUSER\*

Welcome to this special edition of the *Journal of College University Law*. On this 50<sup>th</sup> Anniversary of the National Association of College and University Attorneys, we look at the dominant issues that have defined the past, present and future practice of higher education law. This historic waypoint for NACUA is a time to reflect upon the Association, as Kathleen Santora has done in her thoughtful foreword, and upon our profession, as our distinguished authors do in the pages that follow. It is also a time to reflect upon the unique history of the *Journal* itself.

The origins of the *Journal* trace back to the 1962 monograph, "Proceedings of the Annual Conference of the Association," where NACUA collected the papers presented at its first meetings. In 1966, the Association moved towards a more scholarly format, starting the *College Council* as an annual and semi-annual publication. Seven years later, NACUA started the *Journal* as we know it today. The West Virginia University College of Law published the *Journal* for its first thirteen years and then, in 1986, the *Journal* moved to its current home at the University of Notre Dame Law School. Despite all of these changes over nearly four decades, the purpose of the *Journal* has remained the same. As NACUA's thirteenth president observed in the *Journal's* 1973 inaugural edition, the goal has been to "enhance the service of the Association to the law and to our real principal, American higher education."<sup>1</sup>

The *Journal's* commitment to scholarship has been long and complete, and the numbers demonstrate how steady this commitment has been. For the last 37 years, the *Journal* has published approximately 22,000 pages of nearly 800 scholarly articles in almost 140 numbered volumes. Averaging three volumes per year and 200 pages per volume, the *Journal* has become the source of our profession's highest scholarship for close to 4,000 subscribers.

This edition honors, celebrates, and continues the *Journal's* excellent reputation. Written by the lions of our profession, the articles here address the key issues that continue to define our work: judicial deference, board governance, regulatory compliance, academic freedom, affirmative action, and disability accommodations. The volume begins with an introduction by Barbara Lee who identifies the leading legal, social, and technological changes that have moved the practice of higher education law over the past

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\* President of NACUA and General Counsel of the Maine Community College System. The author acknowledges D. Brock Hornby who has long modeled all of the professional values for which a scholarly publication like our *Journal* stands.

1. Norman L. Epstein, *Preface*, 1 J.C. & U.L. i (1973).

50 years. Judith Areen then traces the evolution of the role of governing boards in higher education, analyzing the primary ways in which such boards are held to account, and offering recommendations on how our boards can best meet their essential responsibilities.

Robert O'Neil turns our readers' attention to the evolution and application of judicial deference to academic decisions, assessing whether the continuing encroachment on such deference can be withstood. Stephen Dunham examines the origins of, and reasons for, government's pervasive regulation of colleges and universities; the net balance of such regulatory costs and benefits; and the myriad of compliance issues challenging counsel across all facets of operation. Tracing the arc of academic freedom over the last half century, Larry White next argues that courts "know academic freedom when they see it," but are either unwilling or unable to provide a unitary, coherent or even useful meaning. Laura Rothstein then tracks the development of disability accommodations in higher education, focusing on student disabilities and identifying the societal benefits of this important area of law.

James Shekleton turns to look back at how academic freedom, civil rights and civil liberties have fallen into conflict and how, looking ahead, restrictive equal protection jurisprudence will not meet potential demographic demands. Mary Ann Connell tightens the focus of civil liberties on race and desegregation, recounting the history of higher education desegregation from the pre-*Brown* days until now, and offering her ever-insightful analyses and reflections. And finally, Jonathan Alger picks up where Ms. Connell leaves off, exploring the evolution of the legal rationales underlying the use of race-conscious measures in higher education, and suggesting both lessons learned and implications for the future.

In publishing this special edition, we have benefitted from the leadership of members Martin Michaelson, William Thro, and Marc Cardinali; faculty editor John Robinson; and NACUA's Director of Legal Resources, Karl Brevitz. Together, these distinguished attorneys have thoughtfully developed and guided this project from start to finish, and we appreciate their work.

We may all take pride in the ongoing commitment of NACUA and the *Journal* to time-honored scholarship. To be sure, we live in a day when the immediacy of communication tests our capacity to reflect thoughtfully, and when an overload of information challenges our capacity to understand deeply. Still we should all hope that, 25 or even 50 years from now, when NACUA celebrates its 75<sup>th</sup> or even 100<sup>th</sup> anniversary, our successors may look back upon what we have done here and see what our *Journal* authors, editors and readers have known for decades: that an ongoing commitment to truly thoughtful scholarship is not just its own reward, it is essential to the provision of thoughtful and effective counsel.



# FIFTY YEARS OF HIGHER EDUCATION LAW: TURNING THE KALEIDOSCOPE

BARBARA A. LEE\*

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## I. INTRODUCTION

Colleges and universities today are probably the most heavily regulated organizations in the United States in terms of the number and types of statutes and judicial precedents with which they must comply. They are subject to common law (contracts, torts, property); state and federal statutory law that governs employers; state and federal regulation of many of their functions, such as the conduct of research and how their funds are spent; and for publicly-funded institutions, state and federal constitutional law as well. Even those with nonprofit status may have tax liability for unrelated business income, be subject to zoning and other local or regional land use requirements, and even face potential liability under state lobbying laws. The number and diversity of sources of legal regulation continues to expand as students, employees, policymakers, and special interest groups find new ways to influence or to hold colleges and universities accountable

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for their actions.

This expansion of the scope of regulation of higher education—by all three branches of state and federal government—began at about the same time that the National Association of College and University Attorneys was founded in 1960.<sup>1</sup> The Higher Education Act of 1965<sup>2</sup> created an expansive set of federal programs to provide financial aid to students and to help low-income students prepare for college or university. The Civil Rights Act of 1964<sup>3</sup> required nondiscrimination on the part of any entity receiving federal funds, but compliance was slow and, in many instances, begrudging.<sup>4</sup> The civil rights movement spawned legal struggles over student access to institutions from which they were previously excluded<sup>5</sup> and the desegregation of public systems of higher education,<sup>6</sup> and saw the recognition of due process rights for students facing discipline at public institutions.<sup>7</sup> The 1970s saw the protections of Title VII of the Civil Rights Act of 1964 extended to employees of higher education institutions,<sup>8</sup> and the passage of Title IX of the Education Amendments of 1972<sup>9</sup> and the

1. Prior to 1960, most of the legal issues faced by colleges and universities involved state control of higher education, loyalty oaths for faculty, intellectual property issues, property law issues, laws applicable to fundraising, and accreditation. See THOMAS E. BLACKWELL, *COLLEGE LAW: A GUIDE FOR ADMINISTRATORS* (American Council on Education, 1961).

2. Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended at 20 U.S.C. § 1070)

3. Pub. L. No. 88-352, 78 Stat. 241 (1964).

4. Jacqueline A. Stefkovich & Terrence Leas, *A Legal History of Desegregation in Higher Education*, 63 J. NEGRO EDUC. 406 (1994).

5. See, e.g., *Meredith v. Fair*, 305 F.2d 343 (5th Cir. 1962).

6. Litigation concerning the desegregation of formerly *de jure* segregated systems of public higher education in Alabama and Tennessee began in 1968. See *Ala. State Teachers Ass'n v. Alabama Pub. Sch. and Coll. Auth.*, 289 F. Supp. 784 (D. Ala. 1968), *aff'd*, 393 U.S. 400 (1969); *Sanders v. Ellington*, 288 F. Supp. 937 (D. Tenn. 1968). Desegregation litigation related to public higher education in Tennessee ended in 2001. See *Geier v. Sundquist*, 128 F. Supp. 2d 519, 521 (M.D. Tenn. 2001). Desegregation litigation concerning Alabama's public system of higher education ended in 1995. See *Knight v. Alabama*, 900 F. Supp. 272 (N.D. Ala. 1995). Similar litigation took place in Mississippi and Louisiana as well. For a history of desegregation litigation in public higher education, see generally JEAN PREER, *LAWYERS V. EDUCATORS: BLACK COLLEGES AND DESEGREGATION IN PUBLIC HIGHER EDUCATION* (Greenwood Press 1982). See also JOHN B. WILLIAMS, *RACE DISCRIMINATION IN PUBLIC HIGHER EDUCATION: INTERPRETING FEDERAL CIVIL RIGHTS ENFORCEMENT, 1964-1996* (Praeger Publishers 1997). For a thorough review of the cases involving the desegregation of public higher education, and a moving personal commentary on the era of desegregation, see Mary Ann Connell, *Race and Higher Education: The Tortuous Journey Towards Desegregation*, 36 J.C. & U.L. 945 (2010).

7. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 151 (5th Cir. 1961).

8. Institutions of higher education were brought under the ambit of Title VII by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

9. 20 U.S.C. § 1681 (2006).

Rehabilitation Act of 1973.<sup>10</sup> Although it would take several decades for either Title IX or Section 504 to be vigorously enforced, their impact was felt on college or university campuses throughout the United States as colleges and universities began to respond to their requirements. The speed and complexity of the new sources of regulation have increased ever since, and have forever changed the role of the attorney who represents colleges and universities.

In 1960, few attorneys practiced “higher education law,” and few colleges and universities used attorneys on a regular basis—either as in-house or outside counsel.<sup>11</sup> Beginning in the early 1970s and throughout that decade, scholars began synthesizing the legal principles developed in litigation involving colleges and universities.<sup>12</sup> These works were intended for use by students studying the “new” area of higher education law, by administrators, and by a developing cadre of “university counsel.” The first treatise on higher education law, written by William A. Kaplin, was published in 1978.<sup>13</sup> The number of university counsel and the length of the books devoted to the explication of higher education law expanded throughout the next three decades.<sup>14</sup>

In 2010, the National Association of College and University Attorneys has 3,677 members, nearly 72 percent of whom work as full-time

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10. 29 U.S.C. § 794 (2006).

11. Early books discussing court cases involving colleges and universities were written primarily for administrators, not for attorneys, and were sponsored by the Carnegie Corporation of New York. See M. M. CHAMBERS, *THE COLLEGES AND THE COURTS*, *Preface* (Illinois State University 1972). A series of volumes called *The Colleges and the Courts*, most of which were written by M. M. Chambers, was published beginning in 1936; six such volumes were published prior to the seventh, cited above. An eighth was published in 1976 by Illinois State University. The Carnegie Foundation for the Advancement of Teaching supported the research and publication of the first six volumes.

12. KERN ALEXANDER & ERWIN S. SOLOMON, *COLLEGE AND UNIVERSITY LAW*, at iii (Michie 1972) (combines analysis of legal principles with selected cases, written for “students and practicing administrators”); JOHN S. BRUBACHER, *THE LAW AND HIGHER EDUCATION: A CASEBOOK* (Fairleigh Dickinson Univ. Press 1971) (two-volume collection of edited cases without accompanying analysis); JOHN S. BRUBACHER, *THE COURTS AND HIGHER EDUCATION* (Jossey-Bass 1971) (descriptive discussion of student, faculty and business issues); HARRY T. EDWARDS & VIRGINIA DAVIS NORDIN, *HIGHER EDUCATION AND THE LAW*, at viii (Institute for Educational Management, Harvard Univ. 1979) (casebook with introductory analysis and notes and questions, written for “students and practitioners.”). Other works focused more narrowly on specific issues related to higher education. See, e.g., WALTER C. HOBBS, ED., *GOVERNMENT REGULATION OF HIGHER EDUCATION* (Ballinger Publishing Co. 1978).

13. WILLIAM A. KAPLIN, *THE LAW OF HIGHER EDUCATION: LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING*, at viii (Jossey-Bass 1978) (intended for “administrators and legal counsel”).

14. For example, the first edition of KAPLIN, *supra* note 13, contains 500 pages of text and indices. The fourth edition of the work, published in 2006, contains 1,726 pages.

employees of their institutions.<sup>15</sup> The last five decades have seen enormous change in higher education itself. Some changes have been caused by new discoveries and new ideas (such as the internet or affirmative action), while other changes have come from developments in the law, both from legislatures and the judiciary. The interplay of these changes has had profound effects on the role of the higher education attorney and the way that we interact with all of higher education's stakeholders.

The overall increase in litigation<sup>16</sup> in the United States is mirrored in higher education, as individuals who disagree with a decision—whether it be admissions, employment, or student discipline—challenge the decision in court under an expanding array of legal theories. For example, courts have found an implied right of individual action under Titles IX<sup>17</sup> and VI,<sup>18</sup> and Section 504,<sup>19</sup> all of which specify enforcement by administrative agencies, but are silent on individual enforcement. In addition, courts have recognized students' rights to challenge disciplinary decisions<sup>20</sup> and academic decisions with behavioral attributes (for example, cheating, misconduct during an internship or other “academic” activities)<sup>21</sup> using Constitutional<sup>22</sup> and contract theories<sup>23</sup>—“rights” that in earlier days were rejected by courts.<sup>24</sup>

This explosion of sources and types of laws affecting higher education makes one wonder if there is a body of “higher education law” anymore. Today, courts in most lawsuits treat a college or university defendant just

15. As of October 2009, the National Association of College and University Attorneys had 729 member institutions comprising 1,653 campuses, and 3,677 individual member attorney representatives. Of those individual member attorney representatives, 2,634, or 71.6 percent, were in-house counsel. Personal communication with Haleema Burton, Manager, Membership and Outreach Services, NACUA.

16. According to one source, litigation in federal courts increased by nine percent in 2008 over the previous year. Law360 Litigation Almanac, available at <http://www.law360.com/litigationalmnac2009>. In the federal appeals courts, appellate filings increased by 27 percent between FY 1997 and FY 2006. According to the same source, filings in federal district courts fluctuated over that ten-year period, but contract claims and products liability claims increased substantially. *A Decade of Change in the Federal Courts Caseload: Fiscal Year 1997–2006*, THE THIRD BRANCH VOL. 39, NO. 11 (Admin. Office, U.S. Courts Office of Pub. Affairs, Washington, D.C.), Nov. 2007, available at <http://www.uscourts.gov/ttb/2007-11/decade/index.html>.

17. Cannon v. Univ. of Chicago, 441 U.S. 677, 679 (1979).

18. Guardians Ass'n v. Civil Serv. Comm'n of New York, 463 U.S. 582 (1983).

19. Consol. Rail Corp. v. Darrone, 465 U.S. 624 (1984).

20. Goss v. Lopez, 419 U.S. 565 (1975).

21. See, e.g., Univ. of Tex. Med. Sch. at Houston v. Than, 901 S.W.2d 926, 928 (Tex. 1995).

22. *Id.* at 930.

23. See, e.g., Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 239 (D. Vt. 1994).

24. Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 261 (1934).

as they would any other business entity.<sup>25</sup> The law has evolved in many respects from treating the institution with deference,<sup>26</sup> to either ignoring the differences<sup>27</sup> or proclaiming that there are none.<sup>28</sup> Colleges and universities are simultaneously being treated like elementary and secondary educational institutions<sup>29</sup> and like businesses,<sup>30</sup> depending on the topic and the type of legal challenge. When courts defer to the “expertise” of academics in certain types of legal claims, is this “academic deference” or merely another name for the “business judgment” rule as applied to an academic organization?<sup>31</sup>

The role of the college or university attorney has changed over the past five decades from primarily transactional (such as real estate, purchasing contracts, occasional premises liability claims) to counseling (development of policy), risk management (reviewing current and proposed policies and decisions for potential litigation risk), and defense against actual or

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25. For a discussion of the apparent decline of academic deference, see AMY GAJDA, *THE TRIALS OF ACADEME* (Harvard Univ. Press 2009).

26. See, e.g., *Bd. of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978); see also Robert M. O’Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept?*, 36 J.C. & U.L. 729 (2010).

27. See, e.g., *Brown v. Trs. of Boston Univ.*, 891 F.2d 337, 346–47 (1st Cir. 1989).

28. See, e.g., *Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 550 (3d Cir. 1980) (“The fact that the discrimination in this case took place in an academic rather than commercial setting does not permit the court to abdicate its responsibility . . . . Congress did not intend that those institutions which employ persons who work primarily with their mental faculties should enjoy a different status under Title VII than those which employ persons who work primarily with their hands.”); see also *Nova Se. Univ. v. Gross*, 758 So. 2d 86, 90 (Fla. 2000) (“There is no reason why a university may act without regard to the consequences of its actions while every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances.”).

29. See, e.g., *Hosty v. Carter*, 412 F.3d 731, 734–35 (7th Cir. 2005) (en banc) (“Only when courts need assess the reasonableness of the asserted pedagogical justification in non-public-forum situations does age come into play . . . . To the extent that the justification for editorial control depends on the audience’s maturity, the difference between high school and university students may be important. (Not that any line could be bright; many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools.) To the extent that the justification depends on other matters—not only the desire to ensure ‘high standards for the student speech that is disseminated under [the school’s] auspices’ . . . but also the goal of dissociating the school from ‘any position other than neutrality on matters of political controversy’ . . . there is no sharp difference between high school and college papers.”) (alterations in original) (citation omitted)).

30. See, e.g., *Hamilton Chapter of Alpha Delta Phi v. Hamilton Coll.*, 128 F.3d 59, 60 (2d Cir. 1997) (private college was subject to antitrust jurisdiction and potential liability for alleged attempt to “monopolize” local market for student room and board. The college later was awarded summary judgment. 106 F. Supp. 2d 406 (N.D.N.Y. 2000)).

31. See Robert M. O’Neil, *supra* note 26.



potential legal claims. Many institutions employ lawyers as administrators for positions outside the counsel's office (for example, the director of the office dealing with accommodation requests from disabled students, or the director of public safety, or the head of human resources). With multiple decision-makers and complicated legal responsibilities, college and university attorneys may find it difficult to remember who the client is. Is it the board of trustees? The president? The institution as a corporate entity? The dean who is accused of discrimination in a tenure denial?

It is beyond the scope of this article to identify all of the social, technological, and cultural changes over the past five decades that have made their mark on higher education and have shaped the practice of higher education law. In an attempt to build a framework to help understand the scope and nature of these changes, this article identifies ten broad areas of change that have affected the practice of higher education law over the past fifty years. Some of these changes were caused by legal developments, while others were stimulated by social or technological change. A few important legal issues are identified for each area; readers will surely think of additional issues of significance. For each of these areas, the article will look backward as well as forward, attempting to summarize how we got to where we are now, and where we seem to be going.

## II. COMMUNICATION AND ACCESS TO INFORMATION

The advent of the internet has changed the way business is done, and higher education is no exception. In addition to using email and web pages for conducting routine business, colleges and universities use the Web for student and staff recruitment, for public relations purposes, for access to institutional library holdings, and a multitude of other important functions. Students submit applications via the web, faculty write letters of recommendation via email, and private information, such as Social Security numbers and student financial data, are maintained on institutional servers (or sometimes on individual laptop computers).

Use of the internet to recruit and admit students, or to send letters of reference, has resulted in litigation in fora far from the state in which an institution is located. Depending on the nature of the claim, courts may exercise personal jurisdiction over an individual or institution located in another state.<sup>32</sup> Faster and more accessible communications with distant

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32. *See, e.g.*, *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257, 1259 (9th Cir. 1989) (ruling that Arizona could exercise personal jurisdiction over the vice president of a Canadian university who allegedly defamed a former professor at that institution who was applying for a position at an Arizona university); *see also* *Wagner v. Miskin*, 660 N.W. 2d 593 (N.D. 2003) (allowing the North Dakota courts to exercise jurisdiction over a defamation claim brought against an out-of-state student by a professor). *But see* *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002) (affirming trial

individuals and campuses has facilitated collaborative research as well as partnerships between institutions of different nations, and has exposed U.S. institutions to more litigation about compliance with both U.S. law and the laws of the nation at the other end of the computer communication.<sup>33</sup> Student use of the internet for social networking may expose them to legal liability<sup>34</sup> or the loss of a degree, job or scholarship,<sup>35</sup> and the college or university to unwelcome publicity, particularly if the institution attempts to regulate or punish students for allegedly inappropriate use of social networking sites.<sup>36</sup> Attempts by public institutions to regulate the content of student speech—either “live” or in web postings—have, for the most part, resulted in liability for the institution under First Amendment theories.<sup>37</sup> The widespread use of computer servers (or laptops) to store

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court’s refusal to assert jurisdiction over faculty members employed by Harvard University, despite the fact that Harvard hosted the website on which the defendants had posted an article that allegedly defamed the plaintiff); *Scherer v. Curators of the Univ. of Mo.*, 152 F. Supp. 2d 1278 (D. Kan. 2001) (holding that a rejected law school applicant could not sue the University of Missouri in federal district court in Kansas, despite the fact that the university recruited Kansas citizens through its website).

33. For example, export control regulations have been used to limit the transfer of research results between U.S. scholars and scholars in nations that the U.S. government believes may support terrorism. *See, e.g.*, U.S. Dep’t of State International Traffic in Arms Regulations (ITAR), 15 C.F.R. §§ 120–130 (2010); U.S. Dep’t of Commerce Export Administration Regulations (EAR), 15 C.F.R. §§ 730–774 (2010). In 2008, a professor at the University of Tennessee was convicted of violating the export control regulations when he shared defense-related articles with two of his graduate students and took sensitive information on his laptop computer to China. Richard Monastersky, *Professor’s Conviction on Export Violations Alerts U.S. Universities*, CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 8, 2008, available at <http://chronicle.com/article/Universities-Heed-Professor/1141>. Some countries require foreign institutions wishing to offer courses or degree programs to first receive the permission of the country’s ministry of education. For the requirements in Singapore, see Ministry of Education: Singapore, List of External Degree Programmes (EDPs), <http://www.moe.gov.sg/education/private-education/edp-list> (last visited April 10, 2010).

34. *See, e.g.*, *J.S. v. Blue Mountain Sch. Dist.*, No. 3:07cv585, 2008 U.S. Dist. LEXIS 72685 (M.D. Pa. Sept. 11, 2008) (high school student had created a false MySpace profile for the school principal that stated that he was a pedophile and bisexual). The court ruled that discipline was appropriate and that the conduct was not protected by the First Amendment. *Id.* at \*26.

35. *See Snyder v. Millersville Univ.*, No. 07-1660, 2008 U.S. Dist. LEXIS 97943 (E.D. Pa. Dec. 3, 2008) (student removed from student teaching and denied a degree in education after using Facebook page to criticize her supervisor and post a picture of her drinking what appeared to be an alcoholic beverage) The court ruled for the university. *Id.* at \*37–41. *See also* Robert Sprague, *Rethinking Information Privacy in an Age of Online Transparency*, 25 HOFSTRA LAB. & EMP. L.J. 395 (2008); Patricia Sanchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J. L. & TECH. 1 (2007).

36. *See, e.g.*, *Yoder v. Univ. of Louisville*, No. 3:09-CV-205-S.2009, WL 2406235, at\* 7 (W.D. Ky. Aug. 3, 2009) (court ordered university to reinstate nursing student who had been academically dismissed for discussing topics on a social networking site that included references critical of her patients).

37. *See, e.g.*, *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989). *See*

sensitive financial or other personal information has attracted hackers, exposed weaknesses in institutions' information systems, and created potential liability for institutions of higher education under state and federal data privacy laws.<sup>38</sup> The internet has made distance learning easier and less expensive to offer, and has allowed "diploma mills" and other questionable organizations selling degrees on the Internet to reach potential purchasers.<sup>39</sup>

Increased access to information via the Internet has also provided students—and faculty—with more opportunities to claim the work of others as their own, leading to charges of academic misconduct.<sup>40</sup> The Internet also provides a platform for scholarly disputes, which occasionally result in defamation claims or accusations of misappropriation of the ideas or work of others, which can embroil the institution in disputes over intellectual property rights.<sup>41</sup>

These advances in the speed and sophistication of communication and information access pose challenges for the higher education legal practitioner. In some respects, oversight needs to be closer—of the security of data, of partnerships with distant organizations to ensure compliance with the laws of many nations, and of student and faculty compliance with the norms of academic research and inquiry. In other respects, these communication advances have led to the need for institutions to step back somewhat from the control of the *content* of student and faculty postings on web pages or in emails. Using a team approach to managing these issues—with the university counsel advising the data security team or the committee reviewing a claim of student or faculty academic misconduct—is an important component of risk management; the speed and penetration of electronic communication is likely to increase, and higher education's dependence on this form of engaging with others, both inside and outside of the institution, is irrevocable.

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generally WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION*, §§ 8.5.2, 9.6.2 (4th ed. 2006).

38. See Jeffery R. Young, *Mistakes, Not Hackers, Are to Blame for Many Data-Security Glitches on Campus, Report Says*, CHRON. HIGHER EDUC. (Wash., D.C.) Feb. 12, 2008, available at <http://chronicle.com/article/Mistakes-Not-Hackers-Are-/494>.

39. Thomas Bartlett, *Government Raids a Diploma Mill*, CHRON. HIGHER EDUC. (Wash., D.C.) Sept. 2, 2005, at A39. The former executive vice chancellor of St. Regis University, Richard J. Novak, agreed to plead guilty to wire and mail fraud and to violations of the Foreign Corrupt Practices Act. Thomas Bartlett, *Fake University Paid Bribes for Credentials*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 31, 2006, at A14.

40. Sara Lipka, *Colleges Sharpen Tactics for Resolving Academic Integrity Cases*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 10, 2009, available at <http://chronicle.com/article/Colleges-Sharpen-Tactics-fo/16451>.

41. See, e.g., Robin Wilson, *U. of Rhode Island Professor Finds Peril in Publishing on the Internet*, CHRON. HIGHER EDUC. (Wash., D.C.), June 18, 2004, available at <http://chronicle.com/article/U-of-Rhode-Island-Professo/16464>.

## III. DIVERSITY OF STUDENTS AND EMPLOYEES

In 2008, the most recent year for which data was available, there were 19,102,800 individuals enrolled in U.S. colleges and universities as undergraduates or graduate and professional students.<sup>42</sup> With respect to domestic students, 63.3 percent were white, 13.5 percent were black, non-Hispanic, 11.9 percent were Hispanic, 6.8 percent were Asian, and one percent were American Indian.<sup>43</sup> Another 3.5 percent were nonresident aliens (international students).<sup>44</sup> Across racial and ethnic categories, 42.9 percent of the students at all levels in 2008 were men, and 57.1 percent were women.<sup>45</sup> These figures demonstrate the great diversity of students at U.S. colleges and universities, and help explain the increased conflict on campus over issues related to access, attrition, and resources available to students.

Born during the civil rights movement of the 1960s,<sup>46</sup> affirmative action in admissions was challenged in the 1970s in cases involving admission to professional schools. Although the U.S. Supreme Court sidestepped the issue in *DeFunis v. Odegaard*,<sup>47</sup> it confronted the issue squarely in *Regents of the University of California v. Bakke*.<sup>48</sup> And although the Court in that case invalidated the practice of reserving a number of places in an incoming class for minority applicants, Justice Powell's finding in *Bakke* that under different circumstances, the use of race as a factor in making admission decisions could be constitutional formed the basis twenty-five years later for the validation of affirmative action in *Grutter v. Bollinger*.<sup>49</sup> *Grutter* did not end the debate over affirmative action; this area of law and political action remains one of the most controversial—and unsettled— aspects of institutional attempts to respond to the educational and social needs of an increasingly diverse society.<sup>50</sup> Counsel must balance the

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42. THOMAS D. SNYDER AND SALLY A. DILLOW, DIGEST OF EDUCATION STATISTICS 2009, tbl. 187, *Enrollment, staff, and degrees conferred in postsecondary institutions participating in Title IV programs, by type and control of institution, sex of student, type of staff, and type of degree: Fall 2007 and 2007-08*, available at [http://nces.ed.gov/programs/digest/d09/tables/dt09\\_226.asp](http://nces.ed.gov/programs/digest/d09/tables/dt09_226.asp).

43. *Id.*

44. *Id.*

45. *Id.*

46. For a thorough and thoughtful overview of the civil rights movement and its impact on colleges and universities, see James F. Shekleton, *Strangers at the Gate: Academic Autonomy, Civil Rights, Civil Liberties and the Well-Judged University*, 36 J.C. & U.L. 875 (2010).

47. 416 U.S. 312, 320–21 (1974).

48. 438 U.S. 265 (1978).

49. 539 U.S. 306 (2003). For an extensive discussion of affirmative action in admissions, see Jonathan Alger, *From Desegregation to Diversity and Beyond: Our Evolving Legal Conversation on Race and Higher Education*, 36 J.C. & U.L. 983 (2010).

50. Indeed, on the same day the Court issued a companion decision to *Grutter*,

institution's zeal to achieve a diverse student body with careful attention to the limits of permissible action under the web of court rulings and, in some states, laws forbidding the use of race in making admissions decisions to public institutions.<sup>51</sup>

Women have become the majority of undergraduates on most college or university campuses, and are becoming an increasing proportion of graduate and professional students as well.<sup>52</sup> Changing attitudes toward the legitimacy of women as students, faculty, and members of historically male-dominated professions<sup>53</sup> have led to increased attention to the prevention of and appropriate response to sexual harassment and sexual assault. Title IX has been interpreted to permit a student to sue a college or university for damages resulting from harassment by an employee<sup>54</sup> and, in some cases, by a fellow student,<sup>55</sup> or to file a claim with the Education Department's Office for Civil Rights.<sup>56</sup> An institution that responds slowly or that appears to underestimate the seriousness of the alleged incident faces both legal and political exposure.<sup>57</sup> College and university counsel

*Gratz v. Bollinger*, 539 U.S. 244 (2003), in which it found unlawful the admissions process for undergraduates at the University of Michigan. The Court spoke again on affirmative action in assignments to public schools in *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). And finally, the Court struck down a city's attempt to disregard test results for firefighters seeking promotions because of the racial gap in test scores. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

51. For a discussion of state law limitations on affirmative action, see KAPLIN & LEE, *supra* note 37, at § 8.2.5.

52. For example, in 2005, approximately 47 percent of all J.D. students were women. American Bar Association, First Year and Total J.D. Enrollment by Gender 1947-2008, <http://www.abanet.org/legaled/statistics/charts/stats%20-%206.pdf>. In 2007, approximately 43 percent of all medical students were women. Association of American Medical Colleges, U.S. Medical School Applicants and Students 1982-83 to 2007-08, <http://www.aamc.org/data/facts/charts/1982to2007.pdf>.

53. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (Virginia Military Institute could not bar women from admission under Equal Protection Clause). For a case involving the attempt of a male to attend a public women's college, see *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

54. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

55. See, e.g., *Simpson v. Univ. of Co., Boulder*, 500 F.3d 1170 (10th Cir. 2007); *Williams v. Bd. of Regents of the Univ. System of Ga.*, 477 F.3d 1282 (11th Cir. 2007).

56. For a discussion of the authority of the Office of Civil Rights over claims filed under Title IX, see KAPLIN & LEE, *supra* note 35, at §13.5.3.

57. For example, at the University of Iowa in 2008, a student and her parents claimed that the university had mishandled her complaint of an alleged assault by a member of the football team. In response, the Board of Regents commissioned a study by an independent firm that was very critical of the university's handling of the case; two vice presidents were dismissed as a result. Libby Sander, *News Analysis: In Athletics-Related Scandals, Damage Control is Elusive*. CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 29, 2008, available at <http://chronicle.com/daily/2008/09/4777n.htm>; see also *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1296-97 (11th Cir. 2007) (court cited university's slow response to student

are increasingly involved in advising and monitoring the institution's response to claims of harassment or assault in order to minimize the risk of litigation and to ensure that the college or university's policies are followed carefully.

Twenty states and the District of Columbia have added sexual orientation and, in fifteen states and the District of Columbia, gender identity or expression, to the list of characteristics which may not be used in making decisions about students or employees.<sup>58</sup> Even in states that have not protected these groups, many institutions have added these categories to their nondiscrimination statements. Protections for individuals in these categories have clashed with the views and practices of some student religious groups, and have resulted in litigation over access to recognition and funding at public institutions for student organizations that violate the institution's nondiscrimination policy by refusing membership or leadership opportunities to individuals on the grounds of sexual orientation or gender identity.<sup>59</sup>

The increasingly diverse student body has also raised the profile of religion on campus. Students who wish to honor their religious beliefs on a secular campus have pushed their institutions to provide accommodations, such as places to wash one's feet before praying and rooms reserved for prayers at particular times of the day.<sup>60</sup> Faculty face challenges from students on religious grounds when they assign certain books to be read or essay topics to be discussed.<sup>61</sup> Public institutions in particular must

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complaint of sexual assault by fellow students as potential evidence of deliberate indifference under Title IX analysis).

58. Discrimination on the basis of sexual orientation is forbidden by law in both public and private sector employment in the following states: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and Washington D.C. Lambda Legal Quick Facts Index Page, <http://www.lambdalegal.org/news/quick-facts/page-34411924.html> (last visited Apr. 10, 2010). Discrimination on the basis of gender identity or expression is prohibited in California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and Washington, D.C. *Id.*

59. *See, e.g.,* Christian Legal Soc'y v. Walker, 453 F.3d 853, 867 (7th Cir. 2006) (law school's refusal to recognize student group that excluded students from membership or leadership positions on the basis of sexual orientation likely violated the group's First Amendment rights of expressive association and free speech). *But see* Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Kane, 319 Fed. App'x 645 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 795 (2009) (university's rule requiring all student organizations to admit any student as a member is viewpoint neutral and does not violate the First Amendment).

60. Tamar Lewin, *Universities Install Footbaths to Benefit Muslims, and Not Everyone Is Pleased*, N.Y. TIMES, Aug. 7, 2007, at A10.

61. Donna Euben, *Curriculum Matters*, ACADEME, Nov.-Dec. 2002, at 86. *See* Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004) (requirement that Mormon student recite allegedly offensive language in drama class was potential free speech and

balance the religious exercise needs of their students against the legitimate pedagogical goals of the faculty, while being careful to avoid Establishment Clause problems.<sup>62</sup> Institutional counsel may find themselves in the middle of debates between religiously conservative students and faculty who believe that academic freedom trumps a student's "sensitivity" to dealing with particular topics or ideas.

The right of a student with a disability to academic and living accommodations is a subject that occupies the time and resources of many college or university staff and institutional counsel.<sup>63</sup> Two federal laws<sup>64</sup> and state law regulate the institution's response to requests for accommodation. Of particular concern in recent years has been the clash between an institution's concerns for the safety of students, including a student with a psychiatric disorder, and the student's right to accommodation unless he or she is a "direct threat" to him- or herself or to others. Institutions that use involuntary withdrawals or other strategies to remove at-risk students from campus face Office for Civil Rights investigations and potential sanctions.<sup>65</sup> Programs that require students to participate in an internship or some other form of off-campus hands-on learning experience also face challenges when a student's disability limits the ways that he or she can participate in that portion of the educational program.<sup>66</sup>

Diversity also affects the institution's relationship with its faculty and staff. In 2005, it was obvious that the diversity of the full-time teaching faculty in U.S. colleges and universities was disproportionate to the diversity of the students they taught. Of the 675,624 full time faculty teaching in U.S. colleges and universities that year, 59 percent were men

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free exercise violation).

62. Barbara A. Lee, *Religion in the Classroom: Legal Issues*, in ENCOUNTERING FAITH IN THE COLLEGE CLASSROOM 105, 105–115 (Miriam R. Diamond, ed., Stylus Publishing 2008).

63. See Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 843 (2010).

64. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 U.S.C.); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended in 29 U.S.C. § 794).

65. Barbara A. Lee & Gail E. Abbey, *College Students with Mental Disabilities: Legal and Policy Issues*, 34 J.C. & U.L. 349 (2008).

66. These issues have been particularly difficult for medical school residents with disabilities, who face academic dismissal if they cannot satisfy their residency requirements. See, e.g., *Wong v. Regents of the Univ. of Cal.*, 379 F.3d 1097, 1100–01, 1110 (9th Cir. 2004) (discussing deterioration in academic performance during clinical clerkships and concluding that "Wong is not substantially limited in a major life activity, so he does not qualify for the special protections the Acts provide for someone who is 'disabled.'").

and 41 percent were women.<sup>67</sup> American Indians constituted 0.5 percent of all full time faculty, Asians were 7 percent, blacks were 5.2 percent, Hispanics were 3.4 percent, and whites were 78 percent of all full time faculty.<sup>68</sup> Despite this disproportion, affirmative action in faculty hiring remains a controversial issue,<sup>69</sup> and one that the Supreme Court has not spoken on since *Johnson v. Transportation Agency, Santa Clara County*<sup>70</sup> was decided in 1987. And discrimination claims are not unusual when a faculty member is denied tenure.<sup>71</sup>

An area of increasing complexity—and litigation—is the accommodation of employees with disabilities.<sup>72</sup> For faculty with impairments that interfere with their ability to teach, accommodations may be difficult to create; these issues are particularly troublesome for probationary faculty on a time-limited tenure track who may need a reduced teaching load or more time to complete their research program.<sup>73</sup> Research that demonstrates that women with children are less likely to receive tenure or to publish as much as their male colleagues has stimulated calls for revising tenure policies to allow for longer probationary periods for faculty—both women and men—who become parents before they achieve tenure.<sup>74</sup> With the advent of the EEOC’s guidelines on “caregiver discrimination,”<sup>75</sup> counsel can expect more claims from employees—both faculty and staff—who believe that a negative employment decision was

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67. U.S. DEPARTMENT OF EDUCATION, EMPLOYEES IN POSTSECONDARY INSTITUTIONS, FALL 2005 AND SALARIES OF FULL-TIME INSTRUCTIONAL FACULTY, 2005–06, NCES 2007-150 7 (2007).

68. *Id.*

69. *See, e.g., Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 722 (7th Cir. 2005) (discussing the effect of affirmative action in discrimination cases and concluding that in the specific case circumstantial evidence of racial discrimination was present).

70. 480 U.S. 616, 642 (1987) (voluntary affirmative action plan with limited goals did not violate Title VII of the Civil Rights Act of 1964).

71. For a discussion of the increase in litigation over denials of tenure, and suggestions for preventing litigation over tenure decisions, see Ann Franke, *Making Defensible Tenure Decisions*, ACADEME, Nov.–Dec. 2001, 32.

72. *See* Laura Rothstein, *supra* note 63.

73. *See generally* Barbara A. Lee & Judith Malone, *Accommodating Faculty with Disabilities: Legal and Policy Issues* (Paper presented for the 28th National Conference on Law and Higher Education, Center for Excellence in Higher Education Law and Policy, Stetson University College of Law, Feb. 19, 2007), available at <http://justice.law.stetson.edu/excellence/HigherEd/archives/2007/AccommodatingFaculty.pdf>.

74. *See, e.g., Mary Ann Mason, Is Tenure a Trap for Women?*, CHRON. OF HIGHER EDUC. (Wash., D.C.) Apr. 22, 2009, available at <http://chronicle.com/article/Is-Tenure-a-Trap-for-Women-/44814/>.

75. EEOC, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES, NO. 115-002 (May 23, 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>.



influenced by their responsibilities as a parent or the individual responsible for elder care.

The impact of diversity—or the institution’s desire to enhance diversity—has particular implications for the college or university attorney. The attorney needs to help guide faculty and administrators through the legal minefield and uncertain legal status of various attempts to increase student and employee diversity. Training of search committees, careful attention to the makeup of candidate pools, and identification of pedagogical justifications for selection decisions will involve the attorney in a rich and complex debate with members of the higher education community.

Since discrimination law has evolved over the decades since Title VII was first applied to higher education in 1972, and additional laws have been enacted that add categories of protection,<sup>76</sup> discrimination law’s focus on individual rights has pitted the individual against the institution and has shifted the discourse from broad definitions of merit to more mechanistic methods of evaluating who “deserves” to be admitted to a college or university or hired as an employee.<sup>77</sup> The law of affirmative action in admissions has been clarified to some extent by *Grutter*<sup>78</sup> and *Gratz*,<sup>79</sup> but the implementation of these precedents has not been smooth and, in fact, has led to additional attempts to outlaw affirmative action through ballot initiatives.<sup>80</sup> Whether the philosophical makeup of the U.S. Supreme Court will change in the next decade, and whether a future court would have the opportunity and the interest in hearing cases challenging affirmative action, cannot be predicted, but it *is* predictable that our colleges and universities will continue to become more diverse and that legal challenges related to this diversity will continue.

#### IV. EXPANSION OF EMPLOYMENT LAW

Over the last fifty years, state legislatures and Congress have created new rights for employees. Although higher education was exempt from Title VII of the Civil Rights Act of 1964 until 1972,<sup>81</sup> claims of employment discrimination are now routine at many institutions.

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76. See, e.g., Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

77. For a discussion of the theory of discrimination and the problems of using monolithic definitions of “merit,” see DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 13–33, 95–96 (Harvard Univ. Press 2008).

78. 539 U.S. 244 (2003).

79. 539 U.S. 306 (2003).

80. For a discussion of these ballot initiatives, see Alger, *supra* note 49.

81. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

Whistleblower laws, both state and federal,<sup>82</sup> have stimulated claims against colleges and universities, particularly in the area of alleged research fraud or other types of research misconduct<sup>83</sup> as well as alleged violations of the Higher Education Act's prohibition on payments for recruiting students.<sup>84</sup> Laws created for employees of business organizations, such as the Family and Medical Leave Act,<sup>85</sup> also apply to colleges and universities, and may complicate staffing of courses. Complex questions about whether employment tax or workers' compensation laws apply to medical residents or residence hall advisors require counsel's assistance and policy clarification (or change).<sup>86</sup> And the termination of a staff member is viewed no differently when it occurs at a college or university from when it occurs at a private sector business establishment.<sup>87</sup>

A trio of federal laws has given employees—particularly women—weapons to challenge perceived discrimination on the basis of sex. Title VII of the Civil Rights Act of 1964,<sup>88</sup> first applied to colleges and universities in 1972,<sup>89</sup> enabled women to challenge not only failures to hire, promote, or tenure, but sexual harassment in the workplace as well. Scholars have concluded that white women have been the primary beneficiaries of Title VII generally,<sup>90</sup> although one study found that women faculty prevailed only twenty percent of the time when they challenged tenure denials using discrimination theories.<sup>91</sup> Title IX of the Education

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82. See, e.g., CONN. GEN. STAT. §§ 31-51m (2009) (Connecticut); N.J. STAT. ANN. § 34:19-3 (2009) (New Jersey); N. Y. LAB. LAW § 740(2) (2009) (New York); see also False Claims Act, 31 U.S.C. § 3729 (2006). For a discussion of the application of the False Claim Act to institutions of higher education, see Rachel Perkins, *Federal Funding and Fraud: The False Claims Act in Higher Education after Main v. Oakland City University*, 35 J.C. & U.L. 747 (2009).

83. See, e.g., *Univ. of Houston v. Elthon*, 9 S.W.3d 351 (Tex. App. 1999) (professor sued under Texas Whistleblower Act, Tex. Gov't Code Ann. §§ 554.001-009, alleging ethical violations by faculty colleagues).

84. See, e.g., *United States ex rel. Bott v. Silicon Valley Colls.*, 262 Fed. App'x 810 (9th Cir. 2008) (dismissing a qui tam claim under the False Claims Act because relators had not provided specific evidence to indicate that staff salary increases were based solely upon success in recruiting students); see also *Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005) (reversing the dismissal of a qui tam claim because relator had sufficiently pleaded facts that could lead the court to conclude that the university had knowingly made a false statement in order to obtain payment of a false claim).

85. 29 U.S.C. § 2601 (2006).

86. For a discussion of these issues, see KAPLIN AND LEE, *supra* note 37, at §§ 13.3.4, 4.6.6.

87. O'Neil, *supra* note 26.

88. 42 U.S.C. § 2000e (2006).

89. Equal Employment Opportunity Act of 1972, P.L. No. 92-261.

90. See John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH L. REV. 2583 (1994).

91. GEORGE R. LANOUE & BARBARA A. LEE, *ACADEMICS IN COURT: THE CONSEQUENCES OF FACULTY DISCRIMINATION LITIGATION* (University of Michigan Press, 1987).

Amendments of 1972<sup>92</sup> provided women faculty and staff with another way to claim employment discrimination, retaliation, or both.<sup>93</sup> Women faculty have had mixed success in challenging alleged pay discrimination under the Equal Pay Act,<sup>94</sup> although some cases have resulted in classwide pay adjustments.<sup>95</sup>

Women faculty and staff have also benefitted from the courts' application of state and federal nondiscrimination law to claims of sexual harassment in the workplace. Beginning with *Meritor Savings Bank v. Vincent*,<sup>96</sup> the U.S. Supreme Court and state courts have expanded the protections against harassment to women (and men) in the workplace. Title IX, which prohibits sex discrimination and harassment against students (among others), has been interpreted far more narrowly by the U.S. Supreme Court, and student claims of harassment, whether by faculty or by peers, are far more difficult to maintain and prove than complaints by employees of workplace harassment.<sup>97</sup> Nevertheless, these laws have made important contributions to gender equity on American college campuses.

Tenure denials frequently lead to breach of contract, denial of due process or discrimination claims (or all three).<sup>98</sup> Litigation surrounding denials of tenure or promotion has resulted in a somewhat more open process, particularly in those states whose open public records acts give candidates for promotion or tenure access to their personnel files.<sup>99</sup> Attempts to discipline or dismiss faculty for misconduct also frequently

92. 20 U.S.C. § 1681 (2006).

93. For a discussion of the limits of Title IX in challenging sex discrimination in employment, see KAPLIN & LEE, *supra* note 37 at 386–389.

94. *See, e.g.,* Donnelley v. Rhode Island Board of Governors for Higher Education, 110 F.3d 2 (1st Cir. 1997) (court ruled that salary differentials between male and female faculty were a result of market factors, not discrimination). *But see* Siler-Khodr v. Univ. of Texas Health Science Center San Antonio, 261 F.3d 542 (5th Cir. 2002) (individual faculty member awarded back pay after jury verdict that institution had discriminated against her in paying her substantially less than equally qualified male faculty).

95. For a review of pay discrimination claims in academe, see Donna R. Euben, *Show Me the Money: Pay Equity in the Academy*, ACADEME, July-Aug. 2001, 30.

96. 477 U.S. 57 (1986).

97. For a discussion of the application of Title IX to student claims of harassment by either faculty or peers, *see* KAPLIN & LEE, *supra* note 37, at §§ 9.3.4 (harassment by faculty) and 8.1.5 (harassment by peers).

98. For a discussion of litigation challenging tenure denials, *see* KAPLIN & LEE, *supra* note 37, at §§ 6.6.3, 6.7.2.2, and 6.7.3. *See generally* STEVEN G. POSKANZER, HIGHER EDUCATION LAW: THE FACULTY (Johns Hopkins University Press 2002).

99. For a case involving the interpretation of a state open records law with respect to a faculty member's tenure file, *see* State *ex rel.* James v. Ohio State Univ., 637 N.E.2d 911 (Ohio 1994). The Supreme Court refused to recognize an "academic freedom privilege" when the EEOC subpoenaed the confidential tenure files of a plaintiff claiming sex discrimination in a tenure denial. *Univ. of Penn. v. Equal Employment Opportunity Comm'n*, 493 U.S. 182 (1990).

lead to internal grievances and appeals and to legal challenges.<sup>100</sup> While courts still defer in many cases to the academic judgment of faculty and administrators making tenure or promotion decisions,<sup>101</sup> public institutions have a stronger defense as a result of the decision of the U.S. Supreme Court in *Garcetti v. Ceballos*,<sup>102</sup> in which the Court ruled that any speech that was related to a public employee's job responsibilities was not protected under the First Amendment and thus could serve as the justification for discipline or discharge.<sup>103</sup> Academic freedom-based cases brought by faculty against public colleges and universities since *Garcetti* have resulted in victories for the institution and have raised concerns among faculty and administrators that academic freedom has been weakened as a result.<sup>104</sup>

Beginning in the late 1960s, faculty unionization arrived on some college or university campuses, both private and public. Although unionization began to spread throughout private four-year colleges or universities during the 1970s, the decision of the U.S. Supreme Court in *NLRB v. Yeshiva University*<sup>105</sup> in 1980 brought private college or university unionization among faculty to a virtual standstill. Between 1980 and 2010, there were twenty-eight published NLRB or court opinions involving challenges to faculty unionization, of which ten resulted in victories for the faculty union.<sup>106</sup> Public university systems in Northeastern, Midwestern,

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100. Donna R. Euben & Barbara A. Lee, *Faculty Discipline: Legal and Policy Issues in Dealing with Faculty Misconduct*, 32 J.C. & U.L. 241 (2006).

101. Robert M. O'Neil, *supra*, note 26; *see also* KAPLIN & LEE, *supra* note 37, at § 6.4.2.

102. 547 U.S. 410 (2006).

103. *Id.*

104. Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 974 (2009); *see also* AAUP, *Protecting an Independent Faculty Voice: Academic Freedom After Garcetti v. Ceballos*, available at <http://www.aaup.org/AAUP/comm/rep/A/postgarcettireport.htm>. For a thorough and thoughtful discussion of the evolution of academic freedom jurisprudence and the unanswered questions that remain, *see* Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791 (2010).

105. 444 U.S. 672 (1980).

106. At private institutions that are not "Yeshiva-like," the NLRB and reviewing appellate courts have refused to apply the managerial exclusion to faculty. *See generally* *NLRB v. Fla. Mem'l Coll.*, 820 F.2d 1182 (11th Cir. 1987); *Kendall Mem'l School v. NLRB*, 866 F.2d 157 (6th Cir. 1989); *NLRB v. Cooper Union for Advancement of Sci.*, 783 F.2d 29 (2d Cir. 1986); *Loretto Heights Coll. v. NLRB*, 742 F.2d 1245 (10th Cir. 1984); *St. Thomas Univ.*, 298 N.L.R.B. 280 (1990); *Marymount Coll. of Va.*, 280 N.L.R.B. 486 (1986); *Montefiore Hosp. & Med. Ctr. & N. Y. State Fed'n of Physicians & Dentists*, 261 N.L.R.B. 569 (1982); *Bradford Coll. & Milk Wagon Drivers & Creamery Workers Union, Local 380*, 261 N.L.R.B. 565 (1982). Faculty have been found to be "managerial," and thus unable to unionize at various colleges and universities. *See generally* *Point Park Univ. v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006); *Boston Univ. Chapter, AAUP v. NLRB*, 835 F.2d 399 (1st Cir. 1987);

and Western states are heavily unionized (both faculty and staff).<sup>107</sup> Graduate students have also unionized at a number of colleges and universities, although the latest ruling from the National Labor Relations Board has slowed the momentum considerably.<sup>108</sup> This area of the law is in flux as the makeup of the NLRB changes depending upon which political party is in power, and the status of graduate students under the National Labor Relations Act could change in the near future.

The presence of unions on campus has resulted in greater use of formal grievance procedures, resistance to “merit pay” for faculty and staff, and less flexibility for administrators with respect to the allocation of institutional resources.<sup>109</sup> Discipline and termination decisions may be slower and more subject to internal challenges. Counsel are more likely to be involved before these decisions are finalized to ensure that policies and contracts have been followed. They are also likely to be involved in negotiations with the union to ensure that mandatory bargaining subjects are addressed but that managerial rights are preserved where possible.<sup>110</sup>

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NLRB v. Lewis Univ., 765 F.2d 616 (7th Cir. 1985); Sacred Heart Univ., Case No. 34-RC-1876 (2001); Sage Colls., Case No. 3-RC-11030 (2001); LeMoyne-Owen Coll. v. NLRB, 345 N.L.R.B. 1123 (2005); Manhattan Coll., 1999 NLRB LEXIS 903 (Nov. 9, 2001); Elmira Coll., 309 N.L.R.B. 842 (1992); Lewis & Clark Coll., 300 N.L.R.B. 155 (1990); Univ. of Dubuque, 289 N.L.R.B. 349 (1988); Livingstone Coll., 286 N.L.R.B. 1308 (1987); Univ. of New Haven, 267 N.L.R.B. 939 (1986); Fairleigh Dickinson Univ. & Fairleigh Dickinson Univ. Council of Am. Ass’n of Univ. Professors Chapters, Case No. 22-RC-7198 (1986); Am. Int’l Coll., 282 N.L.R.B. 189 (1986); Ithaca Coll. & Ithaca Coll. Faculty Ass’n, 261 N.L.R.B. 577 (1982); Thiel College & Thiel Coll. Chapter, Am. Ass’n of Univ. Professors, 261 NLRB 580 (1982); Duquesne Univ. of the Holy Ghost and Duquesne Univ. Law Sch. Faculty Ass’n, 261 N.L.R.B. 587 (1982); Coll. of Osteopathic Med. & Surgery, 265 N.L.R.B. 295 (1982). Additional challenges to faculty unionization have involved the constitutional clash between federal regulation (by the NLRB) and a college’s religious autonomy. *See, e.g.*, Carroll Coll. v. NLRB, 558 F.3d 568 (D.C. Cir. 2009).

107. American Association of University Professors, Collective Bargaining Chapters, <http://www.aaup.org/AAUP/about/cbc/colbargainchap.htm>; National Education Association, [www.nea.org/assets/docs/HE/ORGCOLL.pdf](http://www.nea.org/assets/docs/HE/ORGCOLL.pdf). *see* Joan Moriarty and Michelle Savarese, Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education 3–73 (National Center for the Study of Collective Bargaining in Higher Education and the Professions, Hunter College, January 2006).

108. *See* Brown Univ. & Int’l Union, United Auto., Aerospace & Agricultural Implement Workers of Am., 342 N.L.R.B. 483 (graduate student assistants are students, not employees, and are not protected by the NLRA). *But see* The Research Found. of the City Univ. of N.Y. & Prof’l Staff Congress of N.Y., 350 N.L.R.B. 201 (research foundations do not grant academic degrees and thus student assistants were employees and protected under the NLRA); The Research Found. of the State Univ. of N.Y. Office of Sponsored Programs & Local 1104, Commc’n Workers of Am., AFL-CIO, 350 N.L.R.B. 197.

109. Ray A. Howe, *The Collective Bargaining Process and the Potential for Productive Outcomes*, in *MANAGING THE INDUSTRIAL LABOR RELATIONS PROCESS IN HIGHER EDUCATION* (Daniel J. Julius, ed., Coll. & Univ. Pers. Ass’n 1993).

110. For a discussion of mandatory, permissive, and illegal subjects of collective

Unions on campus increase the need for counsel's advice and participation.

Another issue of great importance to both faculty and institutional leaders is the status of academic freedom. Once thought to be primarily the province of the faculty,<sup>111</sup> jurisprudence beginning in the 1950s,<sup>112</sup> and continuing to recent times,<sup>113</sup> suggests that the college or university may have greater academic freedom protections than do individual faculty, particularly in a dispute between a faculty member and institutional leaders about whose academic freedom holds the trump card.<sup>114</sup> Conflicts over whether an accommodation requested by a student encroaches upon the individual academic freedom of a professor, questions about whether academic freedom protects a faculty member whose course assignment offends a student for political or religious reasons, or concerns that requiring collegiality as a criterion for tenure or promotion somehow abrogates one's academic freedom involve counsel in debates that are central to faculty concerns about individual autonomy. Each of these issues has potential legal consequences and requires counsel to play a nuanced role in protecting both the institution and the doctrine of academic freedom.

Employment law has evolved rapidly since the early 1970s and is likely to continue to do so. The struggle over the proposed "Employee Free Choice Act,"<sup>115</sup> despite the dominance of the Democrats in Congress as this article is written, provides an interesting example of Americans' continued focus on individual rights and lack of interest in collective representation. Current pressures to expand individual rights include attempts to convince Congress to protect individuals from discrimination on the basis of sexual orientation or gender identity<sup>116</sup> and expansion of the Family and Medical Leave Act to require a certain amount of paid leave and time off for parenting responsibilities.<sup>117</sup> The issues on the horizon in

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bargaining, see KAPLIN & LEE, *supra* note 37, at §4.5.4.

111. For a general history of the origins and development of academic freedom, see THE AMERICAN CONCEPT OF ACADEMIC FREEDOM IN FORMATION (Walter P. Metzger, ed., Arno Press, 1977). For an overview of the development of academic freedom jurisprudence in the context of the First Amendment, see J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251 (1989).

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

113. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc).

114. For an analysis of academic freedom jurisprudence and the failure of courts to clarify "what academic freedom protects and who can invoke its protections," see Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 841 841 (2010). For a discussion of "institutional academic freedom," and a criticism of that concept, see KAPLIN & LEE, *supra* note 37, at § 7.1.6.

115. H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009). For a summary of the debate about this bill—in Congress and the media—see <http://www.opencongress.org/bill/111-h1409/show>.

116. H.R. 3017, 111th Cong. (2009); S. 1584, 111th Cong. (2009).

117. Family Leave Insurance Act of 2009, H.R. 1723, 111th Cong. (2009).

employment law have already been addressed on many college or university campuses; in some respects, the law lags behind the reality of employment policies and practices on campus.

#### V. DISPUTE RESOLUTION ON CAMPUS

Mechanisms for resolving disputes on campus have developed and grown more complex in the past fifty years. Prior to *Goss v. Lopez*<sup>118</sup> and its progeny, “dispute resolution” for charges against students may have consisted of a brief meeting with an administrator at which the student was told of a decision to discipline or expel without recourse. *Goss* and similar cases spurred the creation of hearing boards to conduct fact-finding and recommend sanctions against students for violations of a campus code of conduct or for academic dishonesty. Particularly at public colleges and universities, counsel helped shape the design of the process but typically did not participate in the hearings themselves. Even today, many institutions do not permit students to be “represented” by attorneys at student discipline hearings unless they face potential criminal liability.<sup>119</sup>

Student challenges to disciplinary actions typically involve claims of denial of due process (at public institutions) or contract claims (at both public and private institutions). Reviewing courts are usually deferential to institutional decisions involving “purely” academic judgments,<sup>120</sup> such as grading decisions or the determination that a student has not met the academic requirements of a program of study.<sup>121</sup> They are not deferential, however, to decisions involving student conduct, explaining that no special academic expertise is required to determine the factual basis of whether a student’s behavior violated a code of conduct.<sup>122</sup> In cases that have a mixture of “academic” and behavioral issues, such as cheating or

118. 419 U.S. 565 (1975).

119. Edward N. Stoner II and John Wesley Lowery, *Navigating Past the Spirit of Insubordination: A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1 (2004); see also D.R. Richmond, *Students’ Right to Counsel in University Disciplinary Proceedings*, 15 J.C. & U.L. 289 (1989).

120. Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985).

121. See, e.g., Olsson v. Bd. of Higher Educ. of the City of N.Y., 402 N.E.2d 1150, 1152–53 (N.Y. 1980) (explaining why courts should defer to academic judgments in grading disputes); see also *Horowitz*, 435 U.S. 78 and *Ewing*, 474 U.S. 214.

122. See *Horowitz*, 435 U.S. at 87 (“[S]tate and lower federal courts have recognized that there are distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter . . . . Misconduct is a very different matter from failure to attain a standard of excellence in studies. A determination as to the fact involves investigation of a quite different kind. A public hearing may be regarded as helpful to the ascertainment of misconduct and useless or harmful in finding out the truth as to scholarship.” (quoting *Barnard v. Inhabitants of Shelburne*, 102 N.E. 1095, 1097 (1913))).

plagiarism, the courts tend to require greater due process protections and are not as quick to defer to academic judgment.<sup>123</sup> The ever-present threat of a court challenge to the decision to suspend or expel a student encourages counsel's participation in the design of campus hearing systems and the training of hearing boards, most of which include students. Some campuses have engaged attorneys on a part-time basis to chair the hearing board to ensure that due process and policy compliance are respected.

Despite the fact that courts tend to defer to academic judgments, institutions tend to give students the opportunity to challenge negative academic decisions. This is particularly important if the student claims to have a disability, whether the claim is asserted before or after the negative academic decision is made. The ADA's requirement that a college or university consider a reasonable accommodation for a disabled student prior to separating the student from the institution suggests that appeal rights are a good risk management strategy.<sup>124</sup> Given the increasing number of challenges to academic dismissal by students with disabilities, particularly those involving medical or law schools,<sup>125</sup> the involvement of counsel in developing appeal systems and reviewing the process used to make academic dismissal decisions can prevent, or at least reduce, legal liability.

As noted above, unionization has brought formal grievance systems to campus, but even nonunionized campuses frequently use a faculty grievance committee to hear claims from faculty who are denied promotion or tenure or who are disciplined or dismissed. The use of these grievance systems slows down decision making, and may not result in agreement by the faculty panel that the sanction desired by the administration is justified or reasonable. But institutions that have such grievance systems and follow their policies carefully are more likely to see their decisions upheld, even if the administration disagrees with the recommendation of the faculty panel and imposes a sanction over its objections.<sup>126</sup> College and university counsel tend to be involved in the preparation of administrators for participating in these hearings, and in training the members of the hearing board. In addition to their utility in helping the institution deflect legal liability when the procedures are followed, faculty hearing panels are an important component of shared governance on campus.

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123. *See, e.g.*, *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 931 (Tex. 1995) ("Academic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct.").

124. *See, e.g.*, *Singh v. George Washington Univ. School of Med. & Health Scis.*, 508 F.3d 1097 (D.C. Cir. 2007).

125. For a review of student challenges to dismissal on the grounds that they had not been accommodated by institutions (primarily in schools of medicine or law), see Lee and Abbey, *supra* note 65.

126. *See* Euben and Lee, *supra* note 100.



The boom in litigation has convinced many institutions of higher education to turn to alternate dispute resolution mechanisms such as mediation and arbitration. Arbitration may be the final internal step in the grievance system for faculty, particularly at unionized colleges and universities. One advantage of arbitration is that the arbitration agreement (in a collective bargaining agreement or institutional policy) must specify what power the arbitrator has to fashion remedies should the arbitrator find that the institution has violated a contract or policy. Although some collective bargaining agreements permit the arbitrator to award tenure,<sup>127</sup> most restrict the arbitrator to determining whether any procedural violations occurred.<sup>128</sup> Arbitration awards are very difficult to overturn in court,<sup>129</sup> and counsel tend to be heavily involved in preparing administrators for arbitration hearings and representing the institution's interests at the hearing.

A more informal type of alternate dispute resolution—mediation—is gaining popularity on campus as a risk management strategy.<sup>130</sup> Although certain types of disputes, such as allegations of sexual harassment, should not be mediated,<sup>131</sup> disputes between roommates, faculty colleagues, or supervisors and subordinates may be resolved informally, privately, and without the cost and publicity of litigation. Counsel may be asked to train employees to be mediators, or may identify neutral mediators from outside the institution. Another form of dispute resolution involves a campus ombuds, who is an employee trained to resolve disputes informally and confidentially.<sup>132</sup>

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127. *See, e.g.*, *Cal. Faculty Ass'n v. Sup. Ct. of Santa Clara County*, 75 Cal. Rptr. 2d 1 (Cal. Ct. App. 1998).

128. Despite the fact that it is unusual for an arbitrator to be given the authority to award tenure as a remedy for a contractual violation, faculty denied tenure sometimes attempt to attack the substance of a tenure denial by claiming procedural violations. *See, e.g.*, *Am. Ass'n of Univ. Professors, Univ. of Toledo Chapter v. Univ. of Toledo*, 797 N.E.2d 583 (Ohio Ct. Com. Pl. 2003) (court refused to overturn arbitrator's award denying plaintiff's grievance as a result of her tenure denial).

129. The U.S. Supreme Court, in the cases known as the "Steelworkers Trilogy," has ruled that arbitration awards are not reviewable by courts unless the arbitrator has exceeded the authority given to her or him by the contract, has engaged in misconduct, or the outcome of the award violates some important principle of public policy. *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. Warrior and Gulf Navigation*, 363 U.S. 574 (1960).

130. William C. Warters, *MEDIATION IN THE CAMPUS COMMUNITY: DESIGNING AND MANAGING EFFECTIVE PROGRAMS* (Jossey-Bass 1999).

131. U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, *REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES* (2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

132. For information on the use of ombuds in higher education and relevant publications, see The International Ombudsman Association Home Page, <http://www.ombudsassociation.org> (last visited Apr. 12, 2010).

The growth in popularity of dispute resolution mechanisms that serve as substitutes for litigation has highlighted counsel's role as a trainer of hearing panel members and a party to discussions about the creation and revision of policy on campus. Counsel are increasingly being asked to review policies, not only for legal compliance, but for the policy's usefulness and clarity as a guide for decision-makers. Dispute resolution is "private law" in that the parties—or in nonunionized settings, the employer—designs the process and determines what types of disputes will be resolved outside of court. The courts are expanding the role of alternate dispute resolution,<sup>133</sup> and it is likely that more colleges and universities will adopt informal or formal systems as a mechanism for either avoiding litigation or simplifying it when it occurs.

## VI. STUDENT SAFETY

The nature of an institution's duty to its students in the area of safety has undergone multiple transformations over the past fifty years. The doctrine of *in loco parentis*, in which the college or university assumed the role of the parent "concerning the physical and moral welfare and mental training of the pupils"<sup>134</sup> began to wane in the late 1960s as students assumed a more aggressive role in opposing the Vietnam war and joined the civil rights struggle. Shortly after the Twenty-Sixth Amendment, ratified in 1971, lowered the voting age to eighteen, many states lowered the age of majority, making virtually all college and university students legally adults. This new "adult" status gave students the right to enter contracts, consent to (or refuse) medical treatments, declare financial independence, or establish legal residence apart from their parents. It also spurred institutions to treat these students as adults and to abandon certain restrictions such as curfews, limits on access to residence halls after certain hours, or, on some campuses, single-sex residence halls.<sup>135</sup>

The demise of *in loco parentis* led some courts to characterize a college or university as a "bystander" with respect to its duty to students. In an influential case, *Bradshaw v. Rawlings*,<sup>136</sup> a student was seriously injured in an automobile accident when he rode home with an intoxicated fellow

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133. The U.S. Supreme Court has approved the use of arbitration for employment disputes, including those involving claims of discrimination. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). For a discussion of alternate dispute resolution in higher education, see KAPLIN & LEE, *supra* note 37, § 2.3.

134. *Gott v. Berea Coll.*, 161 S.W. 204, 206 (Ky. 1913).

135. For an overview of the demise of *in loco parentis* and the subsequent shift in judicial attitude toward institutional liability for injuries to students, see ROBERT D. BICKEL AND PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISK OF COLLEGE LIFE?* (Carolina Academic Press, 1999).

136. 612 F.2d 135 (3d Cir. 1979), *cert. denied*, 446 U.S. 909 (1979).

student from an off-campus social event sponsored by the college or university. The court refused to find the college or university liable for his injuries.<sup>137</sup> Although a faculty advisor knew that beer would be served and cosigned the check used to purchase it, and the college had a regulation prohibiting the consumption of alcohol on campus or at off-campus events sponsored by the college, the court rejected the student's claim that the college had undertaken to protect him from the type of injury he sustained. The court noted that students had demanded to be treated as adults, and this reduced the college's legal duty to protect them.<sup>138</sup>

*Bradshaw* influenced the decisions of courts throughout the 1980s and 1990s,<sup>139</sup> and the "bystander" theory protected colleges and universities from liability for injuries to students, particularly when the conduct of the student appeared to have contributed to the injury. The courts applied traditional landlord-tenant law to student claims of injury in residence halls or other campus buildings, ruling that colleges and universities had a duty to protect students only from foreseeable risks.<sup>140</sup> Students were considered invitees in these buildings, and thus if they were injured by the negligence of employees, traditional tort law theories applicable to invitees were used.<sup>141</sup>

More recently, however, courts have been applying the "special relationship" doctrine to students injured as a result of the alleged negligence of college or university employees. For example, in *Nova Southeastern University, Inc. v. Gross*,<sup>142</sup> the Florida Supreme Court found that the university had a special relationship with a student who had been sexually assaulted at an off-campus internship site because the university required her to complete an off-campus internship and had recommended the site. University personnel, furthermore, knew that the location of the internship had been the scene of a prior assault. The court ruled that because another assault was foreseeable, the university had a duty to warn

137. *Id.*

138. *Id.* at 139.

139. *See, e.g.*, *Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552 (Ill. App. Ct. 1987) (affording "bystander" status to the institution when conduct by students—either their own or that of another student—was the cause of the injury); *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986). *But see* *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991) (university shared liability with student who injured a fellow student).

140. *Vangeli v. Schneider*, 598 N.Y.S.2d 837 (N.Y. App. Div. 1993) (university provided sufficient security and intruder's access by climbing a two-story exterior metal grate was not foreseeable). *But see* *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331 (Mass. 1983) (risk of intruder gaining access to residence hall was foreseeable when security precautions were minimal); *Miller v. State*, 478 N.Y.S.2d 829 (N.Y. App. Div. 1984) (same).

141. *Pitre v. La. Tech Univ.*, 673 So. 2d 585 (La. 1996) (university not liable for injuries to student paralyzed while sledding on campus because a reasonably prudent invitee would have recognized the danger).

142. 758 So. 2d 86 (Fla. 2000).

Gross of the potential danger of that site.<sup>143</sup> And in *Kleinknecht v. Gettysburg College*,<sup>144</sup> the court held that a special relationship existed between the college or university and a student athlete who died of a heart attack while engaged in lacrosse practice because of the college's sponsorship of the team and the potential for injury. The court ruled that the potential for life-threatening injuries was foreseeable; thus the college's failure to provide facilities for emergency medical treatment was unreasonable.

In recent years, courts have been asked to determine whether a special relationship exists between the institution and a student who engages in self-destructive behavior. Although rulings in these cases have been inconsistent on the issue of special relationship,<sup>145</sup> courts seem more willing to find a special relationship if college or university staff were aware of the student's history of self-destructive behavior and did not, in the court's view, address it sufficiently. On the other hand, an institution that attempted to address a student's apparent suicide threat by barring him from the campus and charging him with a violation of the student code of conduct was sued by the student.<sup>146</sup> The case was settled, and the university promised to change its policies in dealing with at-risk students.<sup>147</sup>

At-risk students who are barred from campus or restricted in other ways tend to file claims with the Office for Civil Rights because they are resolved more quickly in that way than through a lawsuit.<sup>148</sup> Given the fact that one quarter of all adults in the U.S. have a diagnosed or diagnosable mental disorder,<sup>149</sup> and that some forms of mental illness in adults typically

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143. *Id.* at 87–89.

144. 989 F.2d 1360 (3d Cir. 1993).

145. *See e.g.*, *Jain v. State*, 617 N.W.2d 293 (Iowa 2000) (no special relationship existed between university and self-destructive student because university's failure to warn parents did not increase the risk of his committing suicide); *Bash v. Clark Univ.*, No. 06-745A, 2006 Mass. Super. LEXIS 657 (Mass. Super. Ct. November 20, 2006) (student's use of heroin, and subsequent overdose, were not foreseeable and thus no special relationship existed). *But see* *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602 (W.D. Va. 2002) (finding a special relationship to protect student from harming himself because college staff knew of his suicide threats, previous self-inflicted injuries, and history of emotional problems).

146. Brittany Levine, *University, Nott Reach Settlement*, DAILY COLONIAL, Nov. 1, 2006, available at <http://www.dailycolonial.com/go.php?p=3&s=3334>. For background on the Nott situation, see Eric Hoover, *Dismissed for Depression*, CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 24, 2006, at A44.

147. Levine, *supra* note 146.

148. For a review of Office of Civil Rights claims related to mandatory (involuntary) student withdrawals, see Lee & Abbey, *supra* note 65.

149. NATIONAL INSTITUTE OF MENTAL HEALTH. THE NUMBERS COUNT: MENTAL DISORDERS IN AMERICA (2008), <http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america/index.shtml>. Approximately six percent of U.S. adults suffer from a "serious mental illness." *Id.*

first manifest themselves in late adolescence,<sup>150</sup> this area of student affairs requires the active involvement of counsel in dealing with the student's behavior and in determining what course of action to take if the student poses a danger to himself or herself or to others. Insufficient caution may lead to physical harm and consequent legal liability; overcaution may also lead to legal liability. Counsel's participation in these issues is critical to walk the narrow line between the two abysses.

In 1990, Congress passed the Crime Awareness and Campus Security Act,<sup>151</sup> otherwise known as the "Clery Act" after Jeanne Clery, a student murdered on a university campus. The law requires the collection and reporting of data on several categories of crime occurring on campus or on property owned or controlled by the college or on property owned or controlled by student organizations recognized by the institution.<sup>152</sup> The interpretation of this law occupies the time and attention of counsel, not only because of the need to prevent Clery Act violations, but because publicizing these data can create public relations problems for the institution. The Clery Act regulations also require colleges and universities to provide timely warnings to students and others on campus about crimes that could pose a threat to individuals on campus.<sup>153</sup> Helping to determine which incidents qualify for the "timely warning" is another important role for the college or university counsel.

Recent legal disputes have increased the institution's potential legal liability while, in some respects, making students and others on campus potentially less safe. For example, several states have "concealed carry" gun laws. Although some state laws do not affect the ability of colleges and universities to prohibit guns anywhere on campus,<sup>154</sup> the Utah Supreme

150. National Institute of Mental Health, *Mental Illness Exact Heavy Toll, Beginning in Youth* (June 6, 2005), <http://www.nimh.nih.gov/science-news/2005/mental-illness-exacts-heavy-toll-beginning-in-youth.shtml>. Three quarters of all lifetime mental illness begin at or before age twenty-four; half begin by age fourteen. Mood disorders, such as depression, bipolar disorder, or schizophrenia, tend to begin in late adolescence. *Id.*

151. Pub. L. No. 101-542, §§ 201–205, 104 Stat. 2381, 2384–87 (1990).

152. This latter category of "property" could include fraternity or sorority houses as long as the Greek organization is "recognized" by the institution. *Id.* § 204(f)(5)(A)(ii), 104 Stat. at 2386.

153. For a case involving a claim that an institution's "timely warning" about a student who committed an assault was defamatory, see *Havlik v. Johnson & Wales Univ.*, CA 05-510 ML, 2007 U.S. Dist. LEXIS 34690 (D.R.I. May 11, 2007) (defamation claim rejected).

154. See e.g., *DiGiacinto v. The Rector and Visitors of George Mason Univ.*, Dkt. #CL-2008-14054 (Fairfax Co. Cir. Ct. Aug. 14, 2009) (rejecting students' claim that a regulation prohibiting "the possession or carrying of a weapon by any person other than a police officer in academic buildings, administrative office buildings, student/resident buildings, dining facilities or while attending sporting, entertainment or educational events on the University property" violated the Second Amendment and distinguishing *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008)); *Students for Concealed Carry*

Court ruled in 2006 that Utah's gun laws do not permit the University of Utah to prohibit guns on campus.<sup>155</sup> And laws requiring that convicted sex offenders register and that the state provide public access to the list of such individuals<sup>156</sup> mean that colleges and universities have to be vigilant, in order to prevent potential legal liability, in checking the sex offender status of students and employees, particularly those with access to residence halls, day care centers, or other locations where the presence of such an individual could be particularly dangerous.

Student safety issues pose important legal and public relations issues for institutions of higher education and their counsel. The significant number and breadth of laws regulating the relationship between colleges and universities and their students, and the application of common law tort theories to institutions as landlords and places of public access make this area of the law lively and conflict-ridden. Courts are simultaneously holding colleges and universities to the same legal standard as other landlords or controllers of places of public accommodation with respect to premises liability law, while finding a "special relationship" between the college and at-risk students when it comes to other forms of negligence law. While it is unlikely that the *in loco parentis* doctrine will re-emerge, a form of shadow "in loco" law seems to be developing with respect to the college's duty to deal with troubled students.

## VII. INTERNATIONAL & GLOBAL EXPANSION

Rapid communications via the Internet and the globalization of business and culture have spurred greater numbers of faculty and students to participate in academic programs and research abroad. Some institutions require students to have some form of credit-bearing academic experience abroad.<sup>157</sup> Others have created "branch" campuses in other countries,

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on Campus v. Regents of the Univ. of Colo., Case No. 2008CV6492 (Colorado District Ct., Colorado Springs, April 29, 2009) (rejecting the claims of a student group that the University of Colorado's prohibition on the possession of "firearms or other weapons" anywhere on a campus of the university by all individuals except certified law enforcement personnel violated the state constitution as well as the Colorado Concealed Carry Act).

155. Univ. of Utah v. Shurtleff, 144 P.3d 1109 (Utah 2006). In 2007, the Utah legislature amended Utah Code § 53B-3-103 of the Laws of Utah to authorize boards of trustees of public colleges and universities in Utah to "make a rule that allows a resident of a dormitory located at the institution to request only roommates who are not licensed to carry a concealed firearm." 2009 Utah Laws 523-24.

156. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (2006). The law requires registered sex offenders to notify an institution of higher education at which the individual is an employee, student, or "carries on a vocation" that he or she is a registered sex offender. *Id.* § 14071(j).

157. Karin Fischer. *All Abroad! Overseas Study Required*, CHRON. HIGHER EDUC. (Wash., D.C.), June 20, 2008, available at <http://chronicle.com/article/All-Abroad->

either on their own or in partnership with institutions in that country.<sup>158</sup> The number of international students choosing to study in the United States remains substantial,<sup>159</sup> and U.S. regulations restricting the transfer of information across national borders<sup>160</sup> have influenced, but have not stemmed, the amount and nature of cross-border research by collaborators who may have only “met” via the Internet.

Given the increasing numbers of students who choose to study abroad, for a semester, for a summer, or an entire year, college and university counsel have an additional focus for their risk management concerns. In addition to the perennial issue of the quality of the student’s academic experience, counsel are concerned about the safety of their students in residences abroad, in the communities in which partner institutions are located,<sup>161</sup> and in the training and judgment of faculty advisors who direct these programs locally.<sup>162</sup> And although the application of U.S. nondiscrimination laws to students from U.S. colleges and universities while they are studying in another country remains unsettled,<sup>163</sup> ensuring

Overseas-Study-/13923.

158. Beth McMurtrie, *Overseas Programs Increasingly Sharing Risks with Host Countries*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 10, 2006, available at <http://chronicle.com/article/Overseas-Programs-Increasin/19693>.

159. Institute of International Education, *International Students on U.S. Campuses at an All-Time High*, November 17, 2008, available at <http://opendoors.iienetwork.org/?p=131590>.

160. See, e.g., Dep’t of State International Traffic in Arms Regulations (ITAR), 15 C.F.R. §§ 120-130 (2009); Dep’t of Commerce Export Administration Regulations (EAR), 15 C.F.R. §§ 730-774 (2009). Both of these regulations limit the type of research and information that U.S. citizens may share with individuals in certain nations that may be linked to terrorism.

161. See, e.g., *Bloss v. Univ. of Minn.*, 590 N.W.2d 661 (Minn. Ct. App. 1999) (university was not negligent in obtaining housing or providing transportation for student studying in Mexico because its efforts to instruct students on safety issues were reasonable).

162. Karin Fischer, *Trip Cut Short by Medical Evacuations Illustrates Potential Problems for Some Study-Abroad Programs*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 14, 2007, available at <http://chronicle.com/article/Troubles-at-U-of-Washingto/214>.

163. Generally, there is a presumption against the extraterritorial application of U.S. laws unless Congress specifically addresses that issue in the legislation. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991). However, some lower courts have ruled that civil rights laws based on Congress’ spending power may be applied extraterritorially. For example, a federal trial court has ruled that Title IX applies to alleged discrimination against students from U.S. institutions during their study abroad program. *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783 (E.D. Mich. 2002). Another federal trial court ruled that Section 504 of the Rehabilitation Act applied extraterritorially to a student from a U.S. college studying in Australia. *Bird v. Lewis & Clark Coll.*, 104 F. Supp. 2d 1271 (D. Ore. 2000), *aff’d*, 303 F.3d 1015 (9th Cir. 2002). The U.S. Court of Appeals did not address that issue in affirming the lower court’s ruling on the student’s other claim. See also Arlene S. Kanter, *The Presumption Against Extraterritoriality as Applied to Disability Discrimination Laws:*

nondiscrimination for women students in countries in which women do not have equal rights, or attempting to accommodate students with disabilities in communities and buildings designed long before access was required by law, can be a challenge.<sup>164</sup> Considering the potential for legal liability under at least two sets of laws—those of the United States and those of the host country—these programs pose numerous and intricate challenges for college and university attorneys.

An increasing number of U.S. institutions are establishing campuses in international locations.<sup>165</sup> In addition to the risk management issues touched upon above, college and university attorneys face complex issues related to property law, the need to register the academic programs offered at the international site with the host country's ministry of education (and abide by its regulations), tax issues for faculty teaching in the program (both U.S. and local citizens), and immigration issues, to name but a few.<sup>166</sup> Retaining local counsel is considered a "must," particularly in the early stages of establishing a foreign campus.<sup>167</sup> Cultural differences may also complicate the negotiation of agreements or the interpretation of what the U.S. institution believed was the intent of an agreement with a foreign partner institution.

As noted above, the federal government regulates the exchange of data and research results deemed to be of potential interest to terrorist groups and the governments that support them.<sup>168</sup> Institutions whose faculty members participate in such research need specialized legal advice to ensure compliance with these regulations. Institutions employing foreign nationals may need to obtain an export license from the relevant agency.<sup>169</sup>

As a result of the September 11, 2001, terrorist attacks, international students have had more difficulty obtaining visas for study in the United States, and federal requirements for monitoring their status and academic

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*Where Does It Leave Students with Disabilities Studying Abroad?*, 14 STAN. L. & POL'Y REV. 291 (2003).

164. *King v. Bd. Of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783 (E.D. Mich. 2002).

165. Beth McMurtrie, *Rapid Growth in Establishment of International Branch Campuses*, CHRON. HIGHER EDUC. (Wash., D.C.), Sept. 2, 2009, available at <http://chronicle.com/article/Rapid-Growth-Occurs-in-Esta/48275>.

166. CLAIRE H. TOPP, *DOING BUSINESS OVERSEAS: ISSUES AND GUIDANCE ON LEGAL STRUCTURES, TAX IMPLICATIONS AND COMPLIANCE WITH UNITED STATES LAWS*, available at <http://www.nacua.org/nacuanet/NACUAResourcePages/Docs/InternationalPrograms/Topp.doc>; see also Bertrand M. Harding, Jr. *Federal Tax Issues Raised by International Study Abroad Programs*, 27 J.C. & U.L. 207 (2000).

167. Peter May, *Foreign Counsel Identification Guidelines*, available at [http://www.nacua.org/documents/ForeignCounselGuidelines2007\\_PeterMay.doc](http://www.nacua.org/documents/ForeignCounselGuidelines2007_PeterMay.doc).

168. See discussion *supra* note 33.

169. Jamie Lewis Keith, *The War on Terrorism Affects the Academy: Principal Post-September 11, 2001 Federal Anti-Terrorism Statutes, Regulations and Policies*, 30 J.C. & U.L. 239 (2004).



performance have increased. Despite these tighter restrictions, the number of international students attending U.S. colleges and universities in the 2007–08 academic year was 623,805, a record enrollment, and seven percent higher than the previous year.<sup>170</sup> Colleges and universities have been required to increase their staff and ensure that they are well informed about the ever-changing federal regulations dealing with international students. And researchers are noting an increasing number of international students with mental health issues,<sup>171</sup> which has implications not only for an institution's psychiatric services (if they offer them) but potential state law and FERPA issues related to confidentiality of these students' medical records.<sup>172</sup>

The obvious potential for legal liability on a variety of fronts makes the area of international and global programming and research one of great concern for college and university counsel. Counsel have found that aggressive risk management and a well-enforced set of policies and requirements for departments that wish to offer study abroad programs are essential, as well as training for both the faculty advisors and for the students who will participate in these programs. The simultaneous expansion of global activity (and growth of international law in an attempt to deal with this expansion) and the federal government's regulation of data exchange with international partners is likely to continue, at least while threats of global terrorism continue.

#### VIII. FEDERAL REGULATION

It is difficult, and perhaps impossible, to think of an area of higher education that is not touched by federal regulation,<sup>173</sup> and, in fact, each of the sections in this article touches upon various forms of federal regulation. Students may receive federal student financial aid, and all students' privacy is protected by federal law.<sup>174</sup> If they act as research subjects, they are protected by federal regulations,<sup>175</sup> and, at public institutions, their due

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170. Institute of International Education, *International Students on U.S. Campuses at an All-Time High*, November 17, 2008, available at <http://opendoors.iienetwork.org/?p=131590>.

171. Karen Birchard, *Educators Suggest "Mental Health First Aid" for International Students*, CHRON. HIGHER EDUC. (Wash., D.C.), Nov. 27, 2008, available at <http://chronicle.com/article/Educators-Suggest-Mental-H/253>.

172. Nancy E. Tribbensee and Steven J. McDonald. *FERPA and Campus Safety*, 5 NACUA NOTES NO. 4 (Nat'l Ass'n of Coll. & Univ. Attorneys, Washington, D.C.) Aug. 6, 2007, <http://www.nacua.org/documents/ferpa1.pdf>.

173. For a more thorough review of federal regulation of higher education than is possible within the scope of this article, see Steven Dunham, *Government Regulation of Universities: The Elephant in the Middle of the Room*, 36 J.C. & U.L. 749 (2010).

174. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g (2006).

175. For a discussion of the federal laws and regulations requiring review by

process, equal protection, and first amendment rights are protected as well.<sup>176</sup> They are protected against race, sex, disability, and age discrimination in access to and evaluation in academic programs.<sup>177</sup>

Federal laws and regulations affect faculty and staff as well. Federal employment laws protect them from discrimination,<sup>178</sup> provide access to leaves of absence for medical or family needs,<sup>179</sup> protect their rights when returning from military duty,<sup>180</sup> and protect their pensions,<sup>181</sup> among others. Federal copyright<sup>182</sup> and patent<sup>183</sup> laws protect faculty (and in many cases the institution) against misappropriation of intellectual property.

With respect to those areas of federal regulation of potentially the greatest concern for college and university counsel (in addition to employment, which is discussed in Part IV of this article), the federal regulation of research must be highly ranked. Institutional Review Boards (IRBs) must approve all research proposals submitted for possible funding by federal agencies; on many campuses, all proposed research—whether by faculty or students—that uses human subjects must receive IRB approval before the project begins.<sup>184</sup> Counsel are heavily involved in training and working with IRBs in order to ensure compliance with the regulations of those federal agencies that fund research. If animals are used as research subjects, counsel must ensure that institutional animal care and use committees (IACUCs) function properly.<sup>185</sup> Colleges and universities are under increasing pressure to identify and eliminate conflicts of interest by faculty engaging in research,<sup>186</sup> an area of substantial sensitivity on the part of the faculty and concern on the part of the college and university counsel and various members of Congress.<sup>187</sup> Accounting for, and ensuring, the

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Institutional Review Boards of research proposals involving human subjects, see KAPLIN & LEE, *supra*, note 37, at §13.2.3.2.

176. *Id.* at §§ 1.4.2.1, 1.5.

177. *Id.* at § 13.5.

178. *See id.* at Ch. 5, § 6.4.

179. Family and Medical Leave Act, 29 U.S.C. § 2601 (2006).

180. Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4304(A)(I) (2006).

181. Employee Retirement Income Security Act, 29 U.S.C. § 1001(b) (2006).

182. Copyright Act, 17 U.S.C. § 101 (2006).

183. Patent Act, 35 U.S.C. § 101 (2006).

184. For a discussion of the federal laws and regulations requiring review by Institutional Review Boards of research proposals involving human subjects, see KAPLIN & LEE, *supra*, note 37, at §13.2.3.2.

185. Animal Welfare Act, 7 U.S.C. § 2131 (2006); 9 C.F.R. § 2.31 (2008).

186. Peter J. Harrington. *Faculty Conflicts of Interest in an Age of Academic Entrepreneurialism: An Analysis of the Problem, the Law and Selected University Policies*, 27 J.C. & U.L. 775 (2001). For an extensive discussion of the federal regulation of research, see Dunham, *supra* note 173.

187. Jeffrey Brainard, *Senator Grassley Pressures Universities on Conflicts of*

appropriate expenditure of external research grant funds is also an important legal issue to which counsel must be attentive.

The problem of misconduct in research is a perennial one, and the gravity of charges of such misconduct—which can irrevocably alter or end a career even if the charges are disproven—ensures a role for counsel in the investigation of the charges and the disposition of the complaint.<sup>188</sup> Legal issues related to charges of research misconduct run the gamut from those personal to the accused (such as defamation, possible Constitutional claims at a public institution, or discrimination claims) to federal charges against both the faculty member and the institution as the custodian of the funds and the guarantor of their appropriate use.<sup>189</sup> In recent years, the federal government has become more aggressive in investigating and punishing alleged research misconduct,<sup>190</sup> and counsel is involved in every aspect of these claims.

In addition to these areas of federal regulation, colleges and universities, as places of “business,” are subject to the same federal laws that regulate businesses, such as a variety of environmental protection laws<sup>191</sup> and the Occupational Safety and Health Act.<sup>192</sup> Particularly for those institutions with science laboratories or research projects that involve substances regulated by the federal government (including, for example, dangerous chemicals, nuclear materials, possible toxic substances), the alphabet soup of federal regulatory agencies is an ever-present concern, and counsel is attentive to the legal risks posed by the substances that are on campus, their use, storage, and disposal.

Federal student aid is another substantial area of federal regulation, particularly for institutions that participate in the direct lending program.<sup>193</sup> Institutions have been sanctioned for violations of federal student aid regulations,<sup>194</sup> or failure to collect defaulted student loans,<sup>195</sup> among other

*Interest*, CHRON. HIGHER EDUC. (Wash., D.C.), Aug. 8, 2008, at A12.

188. Debra M. Parrish, *Research Misconduct and Plagiarism*, 33 J.C. & U.L. 65 (2006).

189. *Id.*

190. *Id.*

191. *See, e.g.*, Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6901 (2006); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 (2006).

192. Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (2006).

193. Title IV, Higher Education Act of 1965, 20 U.S.C. § 1070 and its subsequent reauthorizations. For a brief review of federal student financial aid programs, *see* KAPLIN & LEE, *supra*, note 37, at §8.3.2.

194. David Moltz, *All Play and No Work*, INSIDE HIGHER ED, Sept. 3, 2009, available at <http://www.insidehighered.com/news/2009/09/03/georgetown> (Georgetown University required to repay federal Work-Study funds as a result of inaccurate recordkeeping for students working for baseball team. The university was also sanctioned by the NCAA, placed on probation for three years, and required to vacate all wins from games in which the players who were improperly paid

claims. The college or university counsel may even need to brush up on—or engage outside counsel for—bankruptcy litigation to deal with borrowers who default on their student loans.<sup>196</sup>

The breadth of federal regulation of higher education, and its persistent expansion into virtually every area of higher education, suggest that these trends will only continue. Short of forgoing all federal student financial aid, as a few colleges have done, it is unlikely that counsel can successfully limit the impact of federal regulation on the institution's operations.<sup>197</sup> This breadth and complexity have greatly complicated the role of counsel and have highlighted the importance of well-informed advice and preventive law.

#### IX. HIGHER EDUCATION AS “BIG BUSINESS”<sup>198</sup>

The image of a college or university as a small island in a bucolic setting—or even as an enclave in the midst of a large city—no longer describes higher education, if it ever did. Colleges and universities—and their counsel—are heavily involved with entrepreneurial activities in collaboration with a variety of organizations, both for-profit and non-profit, both domestic and foreign, and both academic and nonacademic. “Transactional law” is being practiced more frequently on campuses as institutions enter partnerships to develop residence halls,<sup>199</sup> build research parks or “incubators,”<sup>200</sup> develop land that they own into profit-making businesses,<sup>201</sup> or enter agreements to transfer technology developed within

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participated.).

195. See, e.g., *Canterbury Career Sch., Inc. v. Riley*, 833 F. Supp. 1097 (D.N.J. 1993).

196. For a discussion of the application of bankruptcy law to student loan defaults, see KAPLIN & LEE, *supra* note 37, at §8.3.8.1.

197. Dunham suggests that there are strong disincentives for institutions of higher education and their leaders to lobby against greater federal regulation or to protest it when it is imposed. See Dunham, *supra* note 173.

198. In addition to their responsibility to comply with laws and regulations related to their business activities, trustees and institutional officers must comply with their duties as fiduciaries and their accountability for acting in the best interests of the institution. For a thoughtful discussion of these issues, see Judith Areen, *Governing Board Accountability: Competition, Regulation, and Accreditation*, 36 J.C. & U.L. 691 (2010).

199. See, e.g., Larry D. Harris, *The University Edifice Complex: Emerging Trends In Construction: Construction Delivery Systems: A Comparative View*, Presentation at Advanced Workshop sponsored by National Association of College and University Attorneys, March 12, 1999.

200. Purdue University, *Purdue Research Park Receiving National Acclaim*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 7, 2009, available at <http://chronicle.com/campusViewpointArticle/Purdue-Research-Park-Receive/44>.

201. Paul Fain, *Land-Rich Universities Weigh New Options for Real-Estate Development*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 7, 2009, available at <http://chronicle.com/article/Land-Rich-Universities-Weig/944>.

the institution for manufacture or implementation in a commercial context.<sup>202</sup>

Counsel—either in-house or retained for expertise in transactional law—are, or should be, heavily involved in shaping these collaborative partnerships. Risk management and transfer are perennial concerns for all parties involved. Academic freedom for faculty researchers when a private business may wish to limit publication or dissemination of research results can make for difficult negotiations, but protecting academic freedom is critical to the preservation of knowledge transfer. Faculty entrepreneurs may strike out on their own to form partnerships or begin their own businesses with investments from private sector firms whose priorities may not match those of academe. These faculty “start-ups” may distract the faculty member from teaching or other institutional responsibilities, and could lead to a violation of the institution’s conflict of interest or conflict of commitment policies. Disputes over ownership of intellectual property<sup>203</sup> may ensue, even if the partnership agreement has been carefully drafted to anticipate such problems.

Over the past decades, intercollegiate athletics, particularly at those schools that participate in Division One of the National Collegiate Athletic Association, has become “big business” with concomitant big regulation and even bigger legal problems.<sup>204</sup> Litigation involving the NCAA’s power over intercollegiate athletics has included antitrust law,<sup>205</sup> federal constitutional law,<sup>206</sup> state laws protecting due process rights, vis-à-vis the NCAA, of institutions and their student athletes,<sup>207</sup> common law,<sup>208</sup> and

202. Mark L. Gordon, *University Controlled or Owned Technology: The State of Commercialization and Recommendations*, 30 J.C. & U.L. 641 (2004).

203. See, e.g., Bd. of Tr. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 583 F.3d 832 (Fed. Cir. 2009) (dismissing the university’s patent claim against Roche, finding that Stanford did not establish its ownership of the patent in dispute).

204. For a discussion of the evolution of the law governing intercollegiate athletics, including Title IX litigation and NCAA oversight, see KAPLIN & LEE, *supra* note 37, at §§ 10.4 and 14.4.

205. See, e.g., Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984) (NCAA plan for regulating the televising of football games by members institutions violated the Sherman Antitrust Act because it was a restraint of trade). But see Banks v. Nat’l Collegiate Athletic Ass’n, 746 F. Supp. 850 (N.D. Ind. 1990), *aff’d*, 977 F.2d 1081 (7th Cir. 1992); Gaines v. Nat’l Collegiate Athletic Ass’n, 746 F. Supp. 738 (M.D. Tenn. 1990) (NCAA eligibility rules were not a restraint of trade because NCAA gained no commercial advantage from them).

206. See, e.g., Nat’l Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179 (1988) (NCAA requirement that University of Nevada-Las Vegas sever ties to the basketball coach, Tarkanian, was not state action and thus did not violate Tarkanian’s constitutional rights).

207. See, e.g., Nat’l Collegiate Athletic Ass’n v. Miller, 10 F.3d 633 (9th Cir. 1993) (state statute regulating the process to be used in imposing sanctions on players or coaches was an invalid restraint on interstate commerce and interfered with the contractual relationship between the NCAA and its members).

federal discrimination law,<sup>209</sup> among others. Risk management issues abound on campuses when thousands of fans arrive to watch sporting events,<sup>210</sup> as well as resulting from injuries to players during practice or games.<sup>211</sup> Financial aid for student athletes, and its removal if the student violates team rules or the student code of conduct, may lead to litigation.<sup>212</sup> The fact that athletics teams travel to other campuses, other states, and sometimes other countries, can result in legal claims against the home or the visiting institution if a student is injured.<sup>213</sup> Disputes over the hiring and firing of coaches,<sup>214</sup> and the contents of their often lucrative contracts,<sup>215</sup> absorb the time and energy of the college or university attorney. Even the decision to enter or leave a particular athletic conference can lead to litigation.<sup>216</sup> Intercollegiate athletics is a popular pastime for alumni, community members, and in some cases, a national television audience, but its potential for legal problems does not allow the

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208. See, e.g., *Phillip v. Fairfield Univ.*, 118 F.3d 131 (2d Cir. 1997) (NCAA owed no contractual duty to student denied a waiver of NCAA academic eligibility requirements).

209. See, e.g., *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999) (NCAA not a recipient of federal funds and thus not subject to Title IX of the Education Amendments of 1972). *But see* *Tatum v. Nat'l Collegiate Athletic Ass'n*, 992 F. Supp. 1114 (E.D. Mo. 1998) (NCAA is a place of public accommodation and thus is subject to Title III of the Americans with Disabilities Act).

210. See, e.g., *Hayden v. Univ. of Notre Dame*, 716 N.E.2d 603 (Ind. Ct. App. 1999) (injury to football fan when fans lunged for football kicked into the stands was foreseeable; university had duty to protect her from injury).

211. See, e.g., *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3d Cir. 1993) (college had duty to have emergency medical treatment services available in event that student athlete was injured during practice).

212. See, e.g., *Conard v. Univ. of Wash.*, 814 P.2d 1242 (Wash. Ct. App. 1991) (nonrenewal of student athletes' scholarship on grounds of "serious misconduct" was not a breach of contract).

213. See, e.g., *Kavanagh v. Trs. of Boston Univ.*, 795 N.E.2d 1170 (Mass. 2003) (injury to visiting student athlete by basketball player from home team was not foreseeable and thus university was not vicariously liable).

214. Libby Sander and Paul Fain. *Coaches' Contracts are Fertile Ground for Conflict*, CHRON. HIGHER. EDUC. (Wash., D.C.), June 4, 2009, available at <http://chronicle.com/article/Coaches-Contracts-Are-Fert/44424>.

215. See, e.g., *Cremins v. Atlanta Journal*, 405 S.E.2d 675 (Ga. 1991) (state public records law required university and coaches to disclose outside outcome). *But see* *Univ. Sys. of Md. v. The Baltimore Sun Co.*, 847 A.2d 427 (Md. 2004) (coaches' employment contracts with state university must be disclosed, but contracts with third parties for commercial endorsements not subject to the state open public records act).

216. For example, several universities sued the Atlantic Coast Conference (ACC), the University of Miami, and Boston College for conspiracy when those institutions and Virginia Tech decided to leave the Big East football conference for the ACC. The Attorney General of Connecticut filed the lawsuit in Connecticut Superior Court in June of 2003. The case was settled in 2005, with the remaining members of the Big East sharing a settlement reported to be approximately five million dollars. *Big East, ACC Settle Dispute on Realignment*, WASHINGTON POST, May 4, 2005, at D2.

college or university attorney to be a mere spectator.

Many other issues related to the “big business” of higher education may occupy the time of the higher education attorney. Some institutions have the authority to issue bonds to raise the funds to build residence halls or other facilities.<sup>217</sup> Even if the attorney engages a special bond counsel for the purpose of structuring the bond issue and evaluating its financial risks, the long term legal implications of issuing the bonds are the province of the college or university counsel. Some large institutions have their own transportation systems because their campuses are either very large or they need to transport students and faculty between campuses.<sup>218</sup> Some institutions own and manage their own airport,<sup>219</sup> elementary and secondary schools,<sup>220</sup> fire departments, or farms—all of which have their own risk management and regulatory issues that must be addressed.

The diversity of business operations in which a college or university is involved is far broader than that of some large global conglomerate companies, and it is very likely that the legal staff at the college or university is considerably smaller than that of its corporate counterpart. Even if a new activity makes sense from a pedagogical or academic perspective, it may have a serious downside from a risk management or legal compliance perspective. Counsel may have to assist institutional leaders, and possible faculty champions of expensive and risky new ventures, to evaluate the cost and legal complexity of the fruits of their entrepreneurial imaginations.

#### X. ACCOUNTABILITY PRESSURES FROM STATE AND FEDERAL GOVERNMENTS

Whether or not an institution is “public,”<sup>221</sup> state and federal governments demand accountability in a variety of ways from colleges and universities. Private institutions, as well as public, are subject to the federal

217. State law controls the authority of a college or university to issue bonds. *See, e.g.*, 53 PA. CONS. STAT. § 8005 (2009) (classification and authority to issue bonds and notes).

218. For example, both Ohio State University and Rutgers University have an extensive system of bus transportation available to students, staff, and the public because of the large size of their campuses.

219. For example, the University of Illinois owns and operates an airport. *See* University of Illinois Urbana-Champaign, Willard Airport Homepage, <http://www.flycmi.com>.

220. Many institutions own and operate day care centers or schools; one of the best known is the University of Chicago Lab Schools. *See* The University of Chicago, Laboratory Schools Homepage, <http://www.ucls.uchicago.edu/about-lab/index.aspx>.

221. The decline in the proportion of funding provided by state legislators to “public” colleges and universities raises the issue, which is beyond the scope of this article, of how low the proportion of state support can drop before a “public” institution no longer belongs in that category.

regulation of research discussed in Part VIII of this article, as well as in Stephen Dunham's article in this issue.<sup>222</sup> Both types of institutions must meet the requirements of recognized accrediting associations in order for their students to be eligible to receive federal student financial aid.<sup>223</sup> Federal law regulating intellectual property, immigration, the environment, and employment affects both public and private institutions, albeit, in some cases, in different ways. Both private and public institutions may be subject to state regulation if they have hospitals,<sup>224</sup> day care centers, or schools,<sup>225</sup> and to alcoholic beverage control laws if the campus has a restaurant or bar that serves alcohol.<sup>226</sup>

But public institutions have experienced a much greater increase in governmental scrutiny at the state level than have private colleges and universities. The great increase in state regulation of public higher education has occurred just as the amount of public funding for these institutions is declining. Ethics rules first developed to curtail the alleged excesses of state legislators are now applied to faculty and staff at the state's colleges and universities.<sup>227</sup> Legislatures in some states are requiring tuition caps in exchange for state appropriations for higher education.<sup>228</sup> Open public meetings and open public records laws in some states require meetings of presidential search committees to be open to the public,<sup>229</sup> and have generated litigation pitting the privacy rights of

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222. See Dunham, *supra* note 173.

223. For a discussion of the interplay between accreditation and federal student financial aid, see KAPLIN AND LEE, *supra* note 37, at §14.3.

224. For an overview of state regulation of hospitals and health care at colleges and universities, see KAPLIN AND LEE, *supra* note 37, at §12.5.5.

225. State law regulates both public and private schools. See, e.g., N.J. STAT ANN. Title 18A (Education) (2009).

226. States regulate alcohol sales through alcohol control boards. For a list of these boards and their method of control, see The Marin Institute, State Alcohol Control Boards, [http://www.marininstitute.org/alcohol\\_policy/state\\_alcohol\\_control.htm](http://www.marininstitute.org/alcohol_policy/state_alcohol_control.htm).

227. See, e.g., Jennifer Ruark, *Colorado Judge Blocks New Ethics Rules*, CHRON. HIGHER. EDUC. (Wash., D.C.), June 15, 2007, available at <http://chronicle.com/article/Colorado-Judge-Blocks-New-E/6708> (ethics rules for public employees, including college faculty, would prohibit faculty from receiving Nobel Prize monetary award or their children from receiving certain scholarships); see also John Gravois, *2 Professors Sue Over Ethics Test*, CHRON. HIGHER. EDUC. (Wash., D.C.), Feb. 16, 2007, available at <http://chronicle.com/article/2-Professors-Sue-Over-Ethic/34148> (faculty who took state-mandated ethics test "too quickly" were threatened with loss of their jobs).

228. See, e.g., Megan Eckstein, *To Put Brakes on Tuition, Arkansas Caps Public College Spending on Scholarships*, CHRON. HIGHER. EDUC. (Wash., D.C.), Mar. 2, 2009, available at <http://chronicle.com/article/To-Put-Brakes-on-Tuition-A/42500>; see also Josh Keller, *Moody's Warns About State Tuition Caps*, CHRON. HIGHER. EDUC. (Wash., D.C.), Apr. 6, 2007, available at <http://chronicle.com/article/Moodys-Warns-About-State-T/7582> (bond ratings of public institutions could drop if they have less flexibility to use tuition to offset declines in state support).

229. See, e.g., *Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 683 N.W.2d 274 (Minn. 2004) (state's Open Meeting Law and Data Practices Act applied to the



FERPA<sup>230</sup> against the “right” of the press to attend student disciplinary board hearings or at least to learn of the outcomes of these proceedings.<sup>231</sup> Decisions made in the state capital, often by legislators who are unfamiliar with the missions of their higher education institutions and the constraints they face, add to the kaleidoscope of legal, policy, and political issues that the college or university counsel must address. It is unlikely that these issues will either disappear or recede; it is quite likely that additional issues will emerge as political leaders seek to exercise control over public higher education in their state.

#### XI. INFLUENCE OF EXTERNAL GROUPS ON HIGHER EDUCATION

A final area of law—or perhaps more appropriately labeled political action—that counsel are increasingly dealing with is attempts by issue-oriented groups external to the higher education system to influence the decisions of colleges and universities. While these efforts have been most visible regarding affirmative action in college admissions,<sup>232</sup> external interest groups have attempted to influence tenure decisions,<sup>233</sup> the recognition and funding of student organizations,<sup>234</sup> admissions to public

university’s search for a new president).

230. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2006).

231. See, e.g., *Red and Black Publ’g Co. v. Bd. of Regents*, 427 S.E.2d 257 (Ga. 1993) (state open public meetings law requires university to permit members of the public, including media, to attend student disciplinary board hearings).

232. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) in which the Center for Equal Opportunity contributed to the litigation costs for the plaintiffs, and *Gratz v. Bollinger*, 539 U.S. 244 (2003), in which the National Association of Scholars and the Pacific Legal Foundation contributed to the litigation costs for plaintiffs. Advocacy organizations such as the American Civil Rights Institute have supported ballot initiatives in a variety of states to forbid the use of race or gender preferences in college admissions and other public programs. See American Civil Rights Institute Homepage, <http://www.acri.org>.

233. See, e.g., Dan Rabinowitz and Ronen Shamir, *Who Got to Decide on Nadia Abu El-Haj’s Tenure?* ACADEME, Jan.-Feb. 2008, available at <http://www.aaup.org/AAUP/pubsres/academe/2008/JF/Feat/rabi.htm> (discussion of the efforts of an alumna living on the West Bank in Israel to intervene in and prevent the tenuring of an anthropology professor, Nadia Abu El-Haj, who was granted tenure at Barnard College)

234. See *Christian Legal Soc’y v. Walker*, 453 F.3d 853 (7th Cir. 2006) (enjoining Southern Illinois University’s law school dean from refusing to recognize a religiously-affiliated student organization that would not allow gays to be members or hold office; refusal to recognize violated the group’s First Amendment rights of speech and association). *But see* *Christian Legal Soc’y Chapter of Univ. of Cal. v. Kane*, 319 Fed. App’x 645 (9th Cir. 2009), cert. granted, 78 U.S.L.W. 3340 (U.S. 2009) (law school’s refusal to recognize religiously-affiliated student organization did not violate First Amendment because it was content neutral). The national Christian Legal Society and the Alliance Defense Fund Center for Academic Freedom represented the plaintiffs in the Hastings case, which is currently before the U.S. Supreme Court. According to its website, the Alliance Defense Fund is “a legal alliance of Christian attorneys and like-

universities,<sup>235</sup> and, in some cases, reading assignments or the performance of plays on campus.<sup>236</sup> Some of these external entities have bankrolled or initiated litigation, and the results have been mixed for the autonomy of colleges and universities.

One of the most active “watchdog” groups, one that has not hesitated to sue on behalf of students, is the Foundation for Individual Rights in Education (FIRE).<sup>237</sup> It has funded litigation challenging “hate speech” codes<sup>238</sup> and sexual harassment policies.<sup>239</sup> It has also pressured various colleges and universities to modify harassment and hate speech policies by threatening litigation.<sup>240</sup> If one of these external advocacy organizations takes an interest in policies or practices at a particular college or university, the institutional counsel is deeply involved in working with institutional leadership, including its public relations office, to develop a strategy to deal with the media attention that is sure to accompany that “interest.”

A related type of advocacy group that may attempt to influence institutional policy and practice is conservative religious or political organizations. Such organizations have sued public institutions in an attempt to halt the performance of plays that the group believes are sacrilegious,<sup>241</sup> and have attempted to influence curricular content on some

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minded organizations defending the right of people to freely live out their faith. Launched in 1994, ADF employs a unique combination of strategy, training, funding, and litigation to protect and preserve religious liberty, the sanctity of life, marriage, and the family.” Alliance Defense Fund, About ADF, <http://www.adfmedia.org/Home/About>. In the case against Southern Illinois University, Gregory S. Baylor, of Religious Liberty Advocates, located in Springfield, VA, represented the plaintiffs. In both cases, the Foundation for Individual Rights in Education submitted an *amicus* brief.

235. Kathryn Masterson, *U. Illinois President Resigns in Wake of Admissions Scandal*, CHRON. HIGHER. EDUC. (Wash., D.C.), Sept. 23, 2009, available at <http://chronicle.com/article/U-of-Illinois-President-Re/48587> (trustees of University of Illinois at Urbana-Champaign pressured campus administrators, including chancellor, to admit students with political ties).

236. Euben, *supra* note 61; see also *Linnemeir v. Ind. Univ.-Purdue Univ.* Fort Wayne, 155 F. Supp. 2d 1034 (N.D. Ind. 2001) (plaintiff taxpayers objected to the content of a play that was to be performed on the campus of a public university. Court denied plaintiffs’ motion to enjoin presentation of play with religious themes because such presentation was not establishment of religion; theater at public university was a limited public forum, so content restrictions were not permitted).

237. Foundational for Individual Rights Homepage, <http://www.thefire.org>.

238. According to FIRE’s website, it has sponsored successful litigation related to “hate speech codes” against Shippensburg State University (PA), Texas Tech University, SUNY Brockport, and Citrus College (CA). FIRE, Case Archive, <http://www.thefire.org/cases/all>

239. *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

240. For a list of the “cases” that FIRE has focused on, using tactics that include litigation and political advocacy, see FIRE, Case Archive, <http://www.thefire.org/cases/all>.

241. *Linnemeir*, 155 F. Supp. 2d 1034.

campuses.<sup>242</sup> Several institutions have been sued by student organizations affiliated with the Christian Legal Society when institutions refuse to recognize religious student organizations whose exclusionary membership requirements run afoul of the institutions' nondiscrimination policies.<sup>243</sup> The decision of the U.S. Supreme Court in *Rosenberger v. Rector and Visitors of the University of Virginia*<sup>244</sup> has expanded the types of student organizations that expect recognition and allocations from student activity fees, and has necessitated the involvement of the college or university attorney in resource allocation decisions when the use of student fees is at issue.<sup>245</sup>

A perennial source of external attention is the scrutiny of the individuals or entities that provide funding for the college or university—whether it is donors to private institutions or state legislators who vote on funding for public institutions. Although these individuals and organizations are often more of a political concern than a source of potential legal liability, the institution's counsel may become involved in strategizing on how to respond to, or potentially avoid, requests that either violate institutional policies or, in some cases, suggest potential violations of state or federal ethics laws and regulations. Pressure from state legislators to make favorable admissions decisions for certain applicants received substantial press attention in one state and led to the resignation of the president of the state's flagship university.<sup>246</sup> Donors who are dissatisfied with the way the institution is, or is not, spending the proceeds of the donation may demand the return of the funds.<sup>247</sup> Some of these "political" pressures and conflicts may have legal consequences, and the college attorney is deeply involved in problem-solving and litigation avoidance strategizing.

The increase in pressure and scrutiny from external organizations seeking to impose their agenda on colleges and universities highlights the significance of the counsel's role as an advisor on institutional strategy as well as being the institution's chief legal advisor. This may not be a role

242. See, e.g., David Glenn, *Private Effort to Create Courses Draws Praise—and Charges of 'Buying' Curricula*, CHRON. HIGHER. EDUC. (Wash., D.C.), July 13, 2009, available at <http://chronicle.com/article/Private-Effort-to-Create-Co/47052>.

243. *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006); *Christian Legal Soc'y Chapter of Univ. of Cal.; Hastings Coll. of the Law v. Kane*, 319 Fed. App'x 645 (9th Cir. 2009).

244. 515 U.S. 819 (1995).

245. See *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217 (2000) (public university must allocate mandatory student activity fees in a neutral manner).

246. Kathryn Masterson, *supra* note 235.

247. *Robertson v. Princeton Univ.*, Dkt. #C-99-02, N.J. Super. Ch. Div. (Dec. 12, 2008). A son of a donor to Princeton University sued the university, alleging that the funds had not been used for their intended purpose and that the funds had not been managed appropriately. The case was settled in December of 2008. Princeton University, *Robertson Lawsuit Overview*, <http://www.princeton.edu/robertson/about>.

that the college attorney anticipated or desired, yet it is a critical one.

## XII. WHERE IS HIGHER EDUCATION LAW GOING?

This analysis of the growth and development of the law that affects colleges and universities suggests that, in many respects, there is no “body” of higher education law. Although courts tend to defer to “academic” judgments, they still review some of them on the merits and occasionally reverse those they find unsupported.<sup>248</sup> Many college or university functions have counterparts in business or government, and challenges to decisions related to those functions often do not recognize the missions or special circumstances of these institutions. The scope and breadth of federal and state regulation, with new laws being created seemingly without regard to their effect on college or university operations, suggests that the college or university counsel may frequently need specialized assistance in order to address the plethora of legal issues that even relatively small institutions face.

The explosion of litigation and regulation has occurred in an environment in which stakeholders of colleges and universities seem unwilling to accept negative decisions or outcomes, and feel compelled to challenge them, either through regulatory agencies or in court. Even in areas in which academe has traditionally been viewed as authoritative, such as the evaluation of student academic performance or employee merit, legal challenges abound. And the fact that colleges and universities tend to prevail in most of these disputes is of small comfort to the attorneys and staff that must divert institutional resources to respond to these legal challenges.

The last five decades have seen even more change than could have been anticipated by the small group of college and university attorneys who formed NACUA in 1960. One wonders whether higher education law will continue to expand at the rate of the last fifty years; if so, an increasing proportion of institutional resources will be required to respond to or prevent legal challenges. Although the outcome of legal developments over the next five decades is uncertain, there is one certainty—that college and university attorneys will continue to need the type of mutual assistance and collaboration that is the hallmark of the National Association of College and University Attorneys, and that has characterized the organization since its inception.

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248. *See, e.g.*, *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996) (court rejected college’s attempt to sanction faculty member for alleged verbal sexual harassment of students in class); *see also* *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994) (same). In both of these cases, a faculty grievance committee had determined that the content of the professors’ classroom speech and assignments was inappropriate and violated the institution’s policy against sexual harassment—an academic judgment.

# GOVERNING BOARD ACCOUNTABILITY: COMPETITION, REGULATION, AND ACCREDITATION

JUDITH AREEN\*

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## I. INTRODUCTION

On September 17, 2009, the attorney general of New Jersey filed a sixteen-count civil complaint against the president and board of trustees of

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Stevens Institute of Technology.<sup>1</sup> The complaint set forth a lengthy list of alleged misdeeds including providing excessive compensation and low-interest loans to the president without proper authorization, and concealing negative financial reports from the full board.<sup>2</sup> The national press did not report the filing for more than three months but, recognizing that the case was both important and rare, the *New York Times* eventually put the story on page one<sup>3</sup> and followed it with an editorial urging the legislature “to strengthen New Jersey’s weak laws governing the financial behavior of colleges and other nonprofit institutions.”<sup>4</sup>

The filing raised a number of questions about the responsibilities of college and university governing boards: By what authority does a state attorney general bring a complaint against a private university? What are the legal obligations of trustees of private colleges and universities?<sup>5</sup> Are they different from the obligations of trustees of public institutions of higher education? How are boards of trustees held to account? Are existing accountability mechanisms effective?

To answer these questions and to understand more generally the responsibilities of trustees, Part II of this article traces the evolution of the role of governing boards in the United States, from guiding the first colonial colleges to overseeing more than 4,300 institutions of higher education, which range in size and mission from small, sectarian, private colleges and two-year community colleges to multi-campus public universities with tens of thousands of students and multiple doctoral and professional programs.<sup>6</sup> This history reveals how their distinctive governance structure helped to promote academic excellence by providing American colleges and universities with significant autonomy from

1. Complaint, *Milgram v. Trs. of the Stevens Inst. of Tech.*, No. HUD-C-115-09 (N.J. Super. Ct. Law Div. Sept. 17, 2009), available at <http://www.nj.gov/oag/newsreleases09/pr20090917a-complaint.pdf> (last visited May 11, 2010).

2. Complaint, *supra* note 1, at ¶¶ 38, 40, 41, 332.

3. See Sam Dillon, *College Is Beset by Accusations in New Jersey*, N.Y. TIMES, Dec. 22, 2009, at A1.

4. Editorial, *The Stevens Scandal*, N.Y. TIMES, Dec. 28, 2009, at A24. The parties reached a settlement on January 15, 2010. See *infra* text accompanying notes 127–128.

5. Colleges and universities use a variety of names for the members of their respective governing boards, including “curator,” “director,” “manager” and “regent.” The term “trustee” is used here to encompass all of the many names employed. Although the for-profit sector in higher education has grown significantly in size and importance in the last few decades, this article will focus on nonprofit and public institutions.

6. See *2005 Carnegie Classification of Institutions of Higher Education Efforts to Combat Illegal File Sharing and Plagiarism*, CHRON. HIGHER EDUC., Aug. 28, 2009, at 36. Although only 1,700 of the 4,300 institutions are public, the majority of post-secondary degrees awarded are from public institutions. *Growth in Bachelor’s Degrees Awarded by Field of Study*, CHRON. HIGHER EDUC., Aug. 28, 2009, at 16.

government control. In the twentieth century, governing boards further refined their role by embracing shared governance, a system in which governing boards delegate primary responsibility for academic matters to faculties.<sup>7</sup> The combination of autonomy from state control on the one hand and shared governance on the other has produced what is widely considered the leading system of higher education in the world.<sup>8</sup>

Part III of the article analyzes the three primary ways in which governing boards are held to account: (1) competition, (2) regulation, and (3) accreditation. Together, they have created a market in higher education that is both lightly regulated, and quite competitive. Part IV sets forth recommendations on how governing boards best can meet key legal and structural responsibilities.

## II. EVOLUTION OF THE AMERICAN SYSTEM OF GOVERNANCE.

### A. Lay Governing Boards

In order to understand the responsibilities of governing boards, it helps to have some knowledge of how the American system of governance evolved and how it compares to the systems common in other countries. There are three primary models of academic governance in use: (1) control by the faculty; (2) control by the state; and (3) control by governing boards. Although the faculty-control model arose in the Middle Ages, a few institutions, including Oxford and Cambridge, are still run by their faculties. At Oxford, a twenty-six member Council sets policy for the university on most matters, but final responsibility rests with Congregation, a body that includes some 4,000 members of the academic, senior research, library, museum, and administrative staffs.<sup>9</sup> At Cambridge, although a twenty-one member Council is the principal policy-making organ of the university, the ultimate governing body is Regent House, which consists of some 3,800 officers, fellows, faculty, and others.<sup>10</sup> Efforts to streamline the governance structure of each university were defeated in recent years.

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7. *See infra* Part II.B.

8. *See* JONATHAN R. COLE, *THE GREAT AMERICAN UNIVERSITY* 1–5 (2009) (America has “the greatest system of higher learning that the world has ever known” whether measured by the quality of faculty and students, rankings of universities, or number of Nobel Prizes received). The most recent Annual Ranking of the World Universities by Jiao Tong University of Shanghai placed 55 American universities in the top 100 positions. The only non-American institutions in the top twenty were the Universities of Cambridge (4), Oxford (10), and Tokyo (20). ARWU–2009, *Academic Ranking of World Universities 2009*, available at <http://www.arwu.org/ARWU2009.jsp> (last visited May 11, 2010).

9. News: Next Steps for Oxford Governance, Oxford University, <http://www.admin.ox.ac.uk/po/051212.shtml> (last visited Oct. 4, 2009).

10. How the University Works, University of Cambridge, <http://www.cam.ac.uk/univ/works/regenthouse.html> (last visited May 11, 2010).

In 2006, the then-Vice-Chancellor of Oxford proposed the adoption of an American-style governing board. After heated debate, Congregation, by a vote of 720 to 456, turned down the proposed change.<sup>11</sup> In 2009, the Higher Education Funding Council for England, which provides public funds to Oxford, Cambridge, and other institutions of higher education, proposed that the governing council of Cambridge University should have a majority of outside trustees, but then agreed to defer the proposal for three years.<sup>12</sup>

The second governance model—control of colleges and universities by the government—is most prevalent in continental Europe, Asia, and Latin America. Although there are signs that European countries are moving towards greater university independence,<sup>13</sup> it remains the case that many countries limit the autonomy of their institutions of higher education and thereby hinder their ability to function well.<sup>14</sup> In six European countries, for example, appointments of some staff (usually faculty) must be approved by a national Ministry of Education or the President of the country.<sup>15</sup> In most of Europe, the government sets individual faculty salaries,<sup>16</sup> and in nine countries, it determines tuition or fees.<sup>17</sup>

The third model of governance, which is widely followed by both private and public institutions of higher education in the United States, puts

11. *Report of the Proceedings in Congregation*, 28 Nov. 2006, OXFORD UNIV. GAZETTE, Dec. 7, 2006, available at [www.ox.ac.uk/gazette/2006-7/supps/1\\_4791.htm](http://www.ox.ac.uk/gazette/2006-7/supps/1_4791.htm). The Vice-Chancellor elected to take the matter in December to all of Congregation by postal ballot. This time, more than 2,500 members of Congregation voted, and again the proposal was rejected when more than sixty percent of those who voted opposed the change. *Rejection on a Division of Amended Legislative Proposal Confirmed by Postal Vote*, OXFORD U. GAZETTE, Jan. 11, 2007, available at [www.ox.ac.uk/gazette/2006-7/weekly/110107/acts.htm](http://www.ox.ac.uk/gazette/2006-7/weekly/110107/acts.htm).

12. Donald MacLeod, *Cambridge Dons Retain Control of University*, *Guardian*, March 20, 2009, available at <http://www.guardian.co.uk/education/2009/mar/20/cambridge-dons-control>.

13. THOMAS ESTERMANN & TERHI NOKKALA, *UNIVERSITY AUTONOMY IN EUROPE I: EXPLORATORY STUDY 42* (European University Association (EUA) 2009), available at [http://www.upr.si/fileadmin/user\\_upload/RK\\_RS/EUA\\_Autonomy\\_Report\\_Final.pdf](http://www.upr.si/fileadmin/user_upload/RK_RS/EUA_Autonomy_Report_Final.pdf).

14. *Id.* See also Simon Marginson, *Going Global: Governance Implications of Cross-Border Traffic in Higher Education*, in *COMPETING CONCEPTIONS OF ACADEMIC GOVERNANCE* 1, 7 (William G. Tierney ed., 2004) (In Western European countries “the nation remains a central actor in governance.”); COLE, *supra* note 8, at 459 (French system of higher education “is very closely linked to state control . . . with national policies controlling the operation of individual units in the system to an excessive degree.”); *Id.* at 461 (In Germany “[t]here is a high level of bureaucratic state control of the system. . . . [T]he absence of competition within Germany itself creates stagnation in the system and hurts the quality of higher education within the country.”).

15. The six are Bulgaria, France, Poland, Romania, the Slovak Republic, and some German states. *Id.* at 28.

16. *Id.* at 41.

17. *Id.* at 22. The nine include France, Spain, and Turkey.



control in the hands of a lay governing board (“lay” meaning nonfaculty).<sup>18</sup> Louis Menand recently described the modern American university as a product of the nineteenth century.<sup>19</sup> In fact, its governance structure is older. The use of lay boards dates back to the seventeenth century, although shared governance did not develop until the early twentieth.

Harvard, the oldest American college, was modeled on Emmanuel College of Cambridge University, at least with respect to curriculum and facilities.<sup>20</sup> When Harvard was founded in 1636, however, there were not enough scholars in Massachusetts Bay Colony to copy the English system of faculty governance. The colonists instead put a lay governing board in charge of the college.<sup>21</sup> This improvised governance structure was adopted in turn by the other colonial colleges, and remains the most common form of governance in American higher education.<sup>22</sup>

At first, the use of lay governing boards did not influence American higher education. As in Europe, faculty were hired only to teach, and the curriculum contained the same mix of scripture and classics that had been used in European higher education institutions for centuries.<sup>23</sup> By the end of the Civil War, however, the mission of American colleges and

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18. See Ass’n of Governing Bds. of Univs. & Colls. (AGB), *AGB Statement on Institutional Governance*, in *AGB STATEMENT ON INSTITUTIONAL GOVERNANCE AND GOVERNING IN THE PUBLIC TRUST: EXTERNAL INFLUENCES ON COLLEGES AND UNIVERSITIES* 1, 2 (2003) (“[T]he presence of lay governing boards is what distinguishes American higher education from most of the rest of the world . . .”).

19. LOUIS MENAND, *THE MARKETPLACE OF IDEAS: REFORM AND RESISTANCE IN THE AMERICAN UNIVERSITY* 17 (2010).

20. Of the 100 graduates of Cambridge University who crossed the North Atlantic before 1646, thirty five were connected to Emmanuel College, including John Harvard. NORMAN SCARFE, *CAMBRIDGESHIRE* 94–95 (1983).

21. Harvard’s oldest governing board, the Board of Overseers, which was established in 1642, was initially made up of public officials and ministers from neighboring towns. CONSTITUTIONAL ARTICLES AND LEGISLATIVE ENACTMENTS RELATIVE TO THE BOARD OF OVERSEERS AND THE CORPORATION OF HARVARD UNIVERSITY 3–4 (1835), <http://pds.lib.harvard.edu/pds/view/2582402?op=n&n=1&treeaction=expand> (last visited May 11, 2010). In 1650, the colonists established the Harvard Corporation to oversee the college because the Board of Overseers was both too large and too difficult to assemble to govern effectively the ordinary business of the college. SAMUEL ELIOT MORISON, *HARVARD COLLEGE IN THE SEVENTEENTH CENTURY* 3–4 (1936). The Corporation consisted of five fellows, the president, and the treasurer of Harvard—as it does today. Harvard University, *Governance of the University*, <http://www.news.harvard.edu/guide/underst/index.html> (last visited Mar. 4, 2010). Harvard is unusual in having two governing boards: the Corporation, which oversees most matters; and the Board of Overseers, which is consulted on major issues. *Id.*

22. Improvisation was not the only driving force. The lay governing-board structure adopted at William and Mary was modeled in part on Scottish institutions, particularly the College of Edinburgh. JURGEN HERBST, *FROM CRISIS TO CRISIS: AMERICAN COLLEGE GOVERNMENT, 1636–1819*, at 32.

23. CAROLINE WINTERER, *THE CULTURE OF CLASSICISM: ANCIENT GREECE AND ROME IN AMERICAN INTELLECTUAL LIFE, 1780–1910*, at 11–29 (2002).

universities began to change. Leading college and university presidents and faculty increasingly sought to emulate German universities, particularly in their embrace of research as well as teaching.<sup>24</sup> At the same time, the first Morrill Act, signed into law by President Lincoln in 1862, authorized the establishment of land-grant colleges and universities, which also were committed to scientific research—at least if the science was relevant to agriculture or to the mechanical arts.<sup>25</sup> Clark Kerr best captured the nature of these two influences:

The one was Prussian, the other American; one elitist, the other democratic; one academically pure, the other sullied by contact with the soil and the machine. The one looked to Kant and Hegel, the other to Franklin, Jefferson, and Lincoln. But they both served an industrializing nation.<sup>26</sup>

Together, the confluence of these two developments also produced the modern American university. The change in mission was accompanied by change in the membership of governing boards. Historians still debate whether the earliest American colleges were public, private, or something else entirely.<sup>27</sup> The thirty members of the Board of Overseers at Harvard, for example, were appointed by the state until 1865 when Massachusetts conferred the power to elect the overseers on the university's alumni.<sup>28</sup> The change of control at Harvard took place without much controversy. At Yale, by contrast, the debate over whether alumni should control the governing board became a national issue that was discussed in many newspaper editorials and letters in national periodicals.<sup>29</sup> Ultimately, the

24. The University of Berlin, founded in 1810 by Wilhelm von Humboldt, was the first university dedicated to research as well as teaching. WILLIAM CLARK, *ACADEMIC CHARISMA AND THE ORIGINS OF THE RESEARCH UNIVERSITY* 442–46 (2006); 3 *A HISTORY OF THE UNIVERSITY IN EUROPE* 4–5 (Walter Rugg ed., 2004).

25. GEORGE RAINSFORD, *CONGRESS AND HIGHER EDUCATION IN THE NINETEENTH CENTURY* 91–91, 101 (1972).

26. CLARK KERR, *THE USES OF THE UNIVERSITY* 11–12 (1963).

27. Compare JOHN S. WHITEHEAD, *THE SEPARATION OF COLLEGE AND STATE: COLUMBIA, DARTMOUTH, HARVARD AND YALE, 1776-1876*, at 45 (1973) (“a distinction between private and public or state institutions was not commonly recognized before the Civil War”) with HERBST, *supra* note 22, at xi (the modern American configuration in which public and private institutions exist side by side “emerged in the four decades before 1820”).

28. An Act in Relation to the Board of Overseers of Harvard College, 1865 Mass. Acts 565–67. That same year, Cornell established a place for an alumnus on its governing board, although the first alumni trustee was not seated until 1874. MORRIS BISHOP, *A HISTORY OF CORNELL* 77, 195 (1962).

29. Peter Dobkin Hall, *Noah Porter Writ Large?: Reflections on the Modernization of American Education and Its Critics, 1866-1916*, in *THE AMERICAN COLLEGE IN THE NINETEENTH CENTURY* 196, 211 (Roger L. Geiger, ed., 2000). Hall concluded that the fight was a much about religion as it was about the role of the state:

The stakes involved nothing less than the question of who should control American culture—the ministers who had reigned basically unchallenged

six state senators on the Yale governing board were replaced by trustees elected by the alumni. The ten positions for “successor trustees,” the self-perpetuating part of the board, were opened to lay members at least in principle, although alumni did not become a majority of the board until 1910.<sup>30</sup> By early in the twentieth century, all major private colleges and universities were under lay control.<sup>31</sup>

By constitutional authority in some states,<sup>32</sup> and by statute in others,<sup>33</sup> most public institutions of higher education in the United States also are governed by lay boards.<sup>34</sup> In *Regents of the University of Michigan v. State of Michigan*,<sup>35</sup> for example, the state supreme court rejected as a violation of the state constitution the attempt of the state legislature to require the university’s governing board to divest from companies doing business in South Africa. The court also recounted the experience of the state when the legislature had entire control and management of the university, and noted that the result had been a university that “was not a success.”<sup>36</sup> When the Michigan Constitution of 1850 gave control of the university to a lay governing board, by contrast, the university grew “to be one of the most successful, the most complete, and the best-known institutions of learning in the world.”<sup>37</sup> Governing boards thus have served as a buffer for public as well as private institutions of higher education in the United States from excessive government control.

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ever since the establishment of the first colleges, or the emergent class of businessmen and professionals who, as alumni, felt closely tied to the colleges and, as the people being asked to support them, felt that they were owed a voice in them.

*Id.*

30. *Id.* at 212. The alumni took their revenge. When Yale attempted to raise funds from the alumni in 1871, the effort was an abysmal failure. *Id.* at 213.

31. *Id.* at 213.

32. *See, e.g.*, CAL. CONST. art. IX, § 9; GA. CONST. art. 8, § 4; MICH. CONST. 1963 art. 8 §§ 5 and 6. *See generally* WILLIAM A. KAPLIN & BARBARA A. LEE, 2 THE LAW OF HIGHER EDUCATION 1255-58 (4th ed. 2006).

33. *See, e.g.*, 110 ILCS 205/10; K.S.A. CONST. art. 6, § 2 (“The legislature shall provide for a state board of regents and for its control and supervision of public institutions of higher education”); WYO. CONST. art. 7, § 17 (“The legislature shall provide by law for the management of the university, its lands and other property by a board of trustees.”).

34. Board members are selected in a variety of ways. In Michigan the regents are elected state-wide. MICH. CONST. art. 8, § 15. In California, they are appointed by the governor and confirmed by the Senate. CAL. CONST. art. 9, § 9.

35. 419 N.W. 2d 773 (Mich. Ct. App. 1988).

36. *Id.* at 776.

37. *Id.* State constitutions do not always protect state colleges and universities from state legislation. *See, e.g.*, Univ. of Utah v. Shurtleff, 144 P.3d 1109 (Utah 2006) (upholding right of state to prohibit university from barring possession of firearms on campus, and distinguishing the decision in *University of Michigan v. State of Michigan* on the ground that wording of Utah constitution differed from that of the Michigan constitution).

Of course, governing boards were not the only factor that led to a considerable degree of autonomy for American institutions of higher education. As Alan Macfarlane has observed:

A society or civilization to a certain extent gets the university it deserves. If a society is open, balanced, and liberal, it will be reflected in that kind of university. If it is closed, inquisitorial, centralized, it will get another kind.<sup>38</sup>

The United States was founded on the principle of limited government. That belief is not only embedded in the Constitution, it is reflected in the major, federal programs that provide financial support to higher education. Thus the G.I. Bill, which provided funding for more than three million veterans to attend institutions of higher education, empowered individual students to decide which institution to attend. This meant that federal funds went to the institutions chosen by students rather than by the government. The same approach was used in the National Defense Education Act of 1958, the first of the post-war acts that provided significant financial aid to students at institutions of higher education.<sup>39</sup>

#### B. Shared Governance

The United States not only developed a new form of governance for colleges and universities, both public and private, when it embraced lay governing boards—it also devised a new relationship between governing boards and their faculties. The changing relationship with faculty began in the late nineteenth century. As faculty members conducted more original research and developed expertise in a variety of disciplines, a number of clashes erupted between faculty members and trustees. Those clashes, in turn, led to a new form of internal governance.

One of the most publicized disputes involved Edward A. Ross, a prominent economist on the Stanford faculty. His advocacy of free silver and opposition to the exploitation of foreign labor offended Mrs. Leland Stanford, the sole trustee of the university that she and her late husband had founded in memory of their son. In 1897, she demanded that David Starr

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38. ALAN MACFARLANE, REFLECTIONS ON CAMBRIDGE 12–13 (2009).

39. The Serviceman's Readjustment Act, 58 Stat. 284, codified as amended at 10 U.S.C. § 16131, better known as the GI Bill, was signed into law on June 22, 1944, by President Roosevelt. By 1947, there were 1,164,000 veterans registered for college using the G.I. Bill, nearly half of all enrolled students. MILTON GREENBERG, THE GI BILL: THE LAW THAT CHANGED AMERICA 36 (1997). In 1972, Congress amended the 1964 Higher Education Act to provide Basic Educational Opportunities Grants, soon renamed Pell Grants in honor of their Senate sponsor, to low-income students. By 1990, the program was providing 3 million students nearly \$4 billion in aid. JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 325 (2004). *See generally* ALICE M. RIVLIN, THE ROLE OF THE FEDERAL GOVERNMENT IN FINANCING HIGHER EDUCATION 61 (1961).

Jordan, then president of Stanford, fire Professor Ross. President Jordan delayed as long as he could, but, in 1900, he capitulated.<sup>40</sup>

In response to the Ross affair and a growing number of disputes between faculty members and governing boards at other institutions, both public and private, a group of leading scholars in 1915 organized the American Association of University Professors (AAUP).<sup>41</sup> That same year, the AAUP issued a *Declaration of Principles on Academic Freedom and Academic Tenure*,<sup>42</sup> which has come to be recognized as the seminal statement of academic freedom in the United States.<sup>43</sup>

What is not as widely recognized is that the *Declaration* also endorsed a new approach to governance. The *Declaration* credited the German concept of academic freedom as its inspiration, but in Germany no lay boards were interposed between the government and the faculty. The state posed the most immediate threat to academic freedom. In the United States, by contrast, the lay governing board at once offered faculty some insulation from governmental meddling and created a new source of interference with faculty control of academic matters. To protect American faculties from overreaching by governing boards, the *Declaration* adopted a broader form of academic freedom, one that rested on a new allocation of governance responsibilities within colleges and universities. This allocation has come to be known as “shared governance”:

A university is a great and indispensable organ of the higher life of a civilized community, in the work of which the trustees hold an essential and highly honorable place, but in which the faculties hold an independent place, with quite equal responsibilities—and in relation to purely scientific and educational questions, the primary responsibility.<sup>44</sup>

The *Declaration* justified this new approach to governance on the pragmatic ground that shared governance is the best way for an institution

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40. ORRIN LESLIE ELLIOTT, *STANFORD UNIVERSITY: THE FIRST TWENTY-FIVE YEARS* 11 (1937); MARY O. FURNER, *ADVOCACY & OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE, 1865-1905*, at 233–39 (1975).

41. CHRISTOPHER JENCKS & DAVID RIESMAN, *THE ACADEMIC REVOLUTION* 15–20 (1968); LAWRENCE R. VESEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* 384–418 (1965).

42. AM. ASS'N OF UNIV. PROFESSORS, *GENERAL DECLARATION OF PRINCIPLES*, reprinted in 2 *AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY* 860, 860 (Richard Hofstadter & Wilson Smith eds., 1961) [hereinafter 1915 DECLARATION].

43. See, e.g., Robert Post, *The Structure of Academic Freedom*, in *ACADEMIC FREEDOM AFTER SEPTEMBER 11*, at 61, 64 (Beshara Doumani ed., 2006) (the Declaration is “arguably the greatest articulation of the logic and structure of academic freedom in America.”).

44. 1915 DECLARATION, *supra* note 42 at 866.

to promote “[g]enuine boldness and thoroughness of inquiry.”<sup>45</sup> It warned of the danger of “a tyranny of public opinion” in any democracy, and explained that a college or university must be a refuge from such tyranny, “an intellectual experiment station, where new ideas can germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen.”<sup>46</sup> If trustees were to hold the power to decide what is taught and written, the *Declaration* warned, the institution would be more an instrument of propaganda than a true university.<sup>47</sup>

The contours of shared governance were further refined by leading higher-education associations. In 1966, the AAUP issued a *Statement on Government of Colleges and Universities*, which had been formulated jointly with the American Council of Education, the professional association of college and university presidents.<sup>48</sup> The *Statement* explored the benefits of shared governance and explained the need for joint efforts by the key constituencies:

45. *Id.* at 862. Some colleges and universities involved faculty in governance of academic matters decades earlier. Jeremiah Day, for example, who was president of Yale from 1817 to 1846, discussed and decided all questions connected with college policy in meetings of the faculty. RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 235 (1955).

46. 1915 DECLARATION, *supra* note 43, at 870. A recent example of the pressure public opinion can bring to bear on an institution’s governing board took place at the University of Nebraska. On November 20, 2009, the Board of Regents by a 4-to-4 vote defeated an effort to limit human embryonic stem cell research at the university. Monica Davey, *U. of Nebraska Defeats Tighter Limits on Stem Cell Research*, N.Y. TIMES, Nov. 21, 2009, at A12. The measure was defeated only because of a change-of-heart by a regent who had been backed by anti-abortion groups in his campaign to be elected to the board. Nebraska is one of the few states where regents are elected in state-wide elections. Scott Jaschik, *Narrow Win for Stem Cell Research*, INSIDE HIGHER EDUC., Nov. 23, 2009, <http://www.insidehighered.com/layout/set/print/news/2009/11/23/nebraska> (last visited Mar. 1, 2010).

47. 1915 DECLARATION, *supra* note 43, at 870.

48. AM. ASS’N OF UNIV. PROFESSORS, 1966 STATEMENT OF GOVERNMENT OF COLLEGES AND UNIVERSITIES, *reprinted in* AAUP POLICY DOCUMENTS & REPORTS 135–40 (10th ed. 2006) [hereinafter 1966 STATEMENT]. In addition, the board of directors of the Association of Governing Boards (AGB) encouraged institutions and their boards to consider the 1966 *Statement*. ASS’N OF GOVERNING BODS. OF UNIVS. & COLLS., STATEMENT ON BOARD ACCOUNTABILITY 2 (2007), *available at* <http://agb.org/sites/agb.org/files/u16/AGB%20Statement%20on%20Board%20Accountability.pdf> (last visited May 11, 2010) (Noting that “[a]mong th[e] abiding values [of higher education] are self-regulation and autonomy, academic freedom and due process, shared governance, educational quality, transparency and fiscal integrity.”). The 2007 Statement added that “[t]he faculty and academic administrators—not the board—shape the manner in which subjects are taught and learning experiences framed, identify who shall teach these programs, and develop approaches to assess the outcomes of student learning.” *Id.* at 7. *See also* ASS’N OF GOVERNING BODS. OF UNIVS. & COLLS., EFFECTIVE GOVERNING BOARDS: A GUIDE FOR MEMBERS OF GOVERNING BOARDS OF INDEPENDENT COLLEGES AND UNIVERSITIES 4 (2009) (“[T]he tradition of shared governance [is] integral to the academic community”).

The variety and complexity of the tasks performed by institutions of higher education produce an inescapable interdependence among governing board, administration, faculty, students, and others. The relationship calls for adequate communication among these components, and full opportunity for appropriate joint planning and effort.<sup>49</sup>

The *Statement* identified major activities that would benefit from joint effort, including framing and executing long-range plans, decisions regarding existing or prospective physical resources, budgeting, and selection of a new president.<sup>50</sup> It also outlined the distinctive roles of governing boards, faculties, and administrators. Governing boards, in addition to being responsible for the matters that need joint work, should husband the endowment, obtain needed capital and operating funds, and pay attention to personnel policy.<sup>51</sup> Faculty should have primary responsibility for academic matters, including “curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life that relate to the educational process.”<sup>52</sup> Giving the faculty primary responsibility for academic matters, the *Statement* explained, means that presidents and boards should overrule faculty decisions about academic matters “only in exceptional circumstances, and for reasons communicated to the faculty.”<sup>53</sup>

Although governing boards were acknowledged to be the “final institutional authority,” the *Statement* urged them to undertake appropriate self-limitation. An effective board, “while maintaining a general overview, entrusts the conduct of administration to the administrative officers—the president and deans—and the conduct of teaching and research to the faculty.”<sup>54</sup>

In 1980, the Supreme Court acknowledged the value of shared governance in *NLRB v. Yeshiva University*.<sup>55</sup> In the course of deciding that the faculty at Yeshiva could not organize as a union because their managerial responsibilities meant that they were not ordinary employees, the Court explained:

The “business” of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions. . . . The university requires faculty participation in

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49. 1966 STATEMENT, *supra* note 48, at 136.

50. *Id.* at 136–37.

51. *Id.* at 138.

52. *Id.* at 139.

53. *Id.*

54. *Id.* at 138.

55. 444 U.S. 672 (1980).

governance because professional expertise is indispensable to the formulation and implementation of academic policy.<sup>56</sup>

Academic leaders also have addressed the strengths and weaknesses of shared governance. In 1934, A. Lawrence Lowell, then president of Harvard University, explained that because colleges and universities are established not to earn profits, but to preserve, transmit and increase knowledge, the relationship of board to faculty should not be one of employer to employee, but one of mutual cooperation for “the promotion of the scholar’s work.”<sup>57</sup> Although some presidents have advocated a more corporate style of management,<sup>58</sup> most have concluded that assigning faculty primary responsibility for academic matters is the best way to strengthen their commitment to the production and dissemination of knowledge. In the words of Derek Bok:

No one ever raised the level of scholarship by ordering professors to write better books, nor has the quality of teaching ever improved by telling instructors to give more interesting classes. In these domains, good work depends on the talent and enthusiasm of professors.<sup>59</sup>

Shared governance is not without its faults. Faculty senates can be slow to respond even to time-sensitive matters or dominated by petty debate. But its merits have led to its adoption by a majority of American institutions of higher education. A 2001 survey found that faculty participation in the governance of academic matters has increased significantly in recent decades. In 1970, faculties determined the content of the curriculum at 45.6% of the 1,321 surveyed institutions, and they shared authority over the curriculum with the administration at another 36.4%. By 2001, faculties determined curriculum content at 62.8% of the institutions, and shared authority at an additional 30.4%.<sup>60</sup> Similarly, by 2001, faculties

56. *Id.* at 688–89 (footnote omitted).

57. A. Lawrence Lowell, *The Relation Between Faculties and Governing Boards*, in *AT WAR WITH ACADEMIC TRADITIONS IN AMERICA* 288–90 (photo. reprint 1970) (1934).

58. See, e.g., James J. Duderstadt, *Fire, Ready, Aim! University Decision-Making During an Era of Rapid Change*, in *GOVERNANCE IN HIGHER EDUCATION: THE UNIVERSITY IN A STATE OF FLUX* 26 (Werner Z. Hirsch & Luc E. Weber eds., 2001).

59. DEREK BOK, 2006-07 ANNUAL REPORT TO THE HARVARD CORPORATION, available at <http://harvardmagazine.com/breaking-news/president-boks-annual-report> (last visited Oct. 4, 2009). Bok added:

It is certainly true that professors can resist change and that, like most human beings, they are often loath to give up their prerogatives. For all that, however, American universities have fared quite well over the past 50 years, the very period when faculty power reached its zenith.

*Id.*

60. Gabriel E. Kaplan, *How Academic Ships Actually Navigate*, in *GOVERNING ACADEMIA* 165, 172, 202 (Ronald G. Ehrenberg ed., 2004). Faculty participation varies significantly by type of institution. “In for-profits the faculty are quite clearly



determined the appointment of full-time faculty in 14.5% and shared authority in 58.2% of the surveyed institutions.<sup>61</sup> Shared governance, as a refinement of the governing board structure used by both public and private institutions of higher education, has become the norm at the very time that American higher education has been recognized as including the lion's share of the best colleges and universities in the world.<sup>62</sup>

*Shared* governance should not be confused with *divided* governance. It gives faculties *primary*—not *exclusive*—responsibility for academic matters. As the 1966 *Statement on Government* recognized, there are times when a governing board should override a faculty decision.<sup>63</sup> Similarly, although governing boards have primary responsibility for financial matters, it is normally best to consult with the faculty about, or include representatives of the faculty in, the decision-making process for financial and other matters that will directly affect the ability of faculty to research or to teach, such as the budget, strategic planning, and the construction of new academic facilities.<sup>64</sup>

Shared governance applies only to academic matters, moreover. As a result most colleges and universities have a dual-management structure. There is a fairly horizontal relationship among governing board, administration, and faculty when academic matters are at issue. The traditional “pyramidal hierarchy” characteristic of for-profit corporations, by contrast, applies to board oversight of administrators and staff.<sup>65</sup> It also applies to oversight of faculty when nonacademic matters are at issue. A faculty member, for example, cannot invoke academic freedom as a justification for not teaching his or her classes, or for demanding better health benefits.<sup>66</sup>

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employees, few faculty are involved in creating curriculum, and decision making of all sorts is firmly in the hands of managers.” Brian Pusser & Sarah E. Turner, *Nonprofit and For-Profit Governance in Higher Education*, in *GOVERNING ACADEMIA* 235, 251.

61. Kaplan, *supra* note 60 at 202.

62. See *supra*, note 8 and accompanying text.

63. 1966 STATEMENT, *supra* note 48, at 139.

64. *Id.* at 137. Specifically, the statement reasoned that:

The allocation of resources among competing demands is central in the formal responsibility of the governing board, in the administrative authority of the president, and in the educational function of the faculty. Each component should therefore have a voice in the determination of short- and long-range priorities, and each should receive appropriate analyses of past budget experience, reports on current budgets and expenditures, and short- and long-range budgetary projections.

*Id.*

65. Cf. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680 (1980) (“The [National Labor Relations] Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry.”).

66. See, e.g., *Smith v. Kent State Univ.*, 696 F.2d 476 (6th Cir. 1983) (upholding termination of a tenured professor who repeatedly refused to teach assigned classes).

The American use of lay governing boards protects the independence of the nation's colleges and universities from state control and, refined by the adoption of shared governance, has been a major force in producing the best higher education sector in the world. It takes more than a particular governance structure, however, to produce academic excellence. The next section will analyze how American governing boards are held to account

### III. FORMS OF ACCOUNTABILITY: COMPETITION, REGULATION, AND ACCREDITATION

There are three forms of accountability that have shaped American higher education: competition, licensing, and accreditation.

#### A. Competition

Market competition has held American colleges and universities to account from the earliest decades of the nation,<sup>67</sup> and it remains the most important form of accountability. The institutional diversity that came to characterize American higher education led to robust competition for students, faculty, and funds by the twentieth century. As explained by Ruth Simmons, president of Brown University:

Another factor in the strength of U.S. higher education is the competition that its institutions enjoy with each other, and I don't mean on the athletic field. We all compete for students, faculty, government grants, awards and prizes, philanthropic support, and rankings. Those institutions that compete most successfully attract better students and more resources and, in so doing, they continue to improve, extending their success in more and more powerful ways. Those institutions that are weaker may fall back and even go out of business. Economists tell us that competition is good and that, under most circumstances, it leads to improvement. Our competition relies on our differences, the advantages that we can establish, the niches that are uniquely ours.<sup>68</sup>

Institutional diversity has further contributed to the quality of American higher education by providing multiple settings in which to determine how best to educate different students and to stimulate research and innovation. A major source of the institutional diversity that characterizes American

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67. During the colonial period, there was little competition because each college was established in a separate colony until Queens College (Rutgers) was founded in 1766. Religious differences still limited most competition between Queens and Princeton. HERBST, *supra* note 22, at 112.

68. Ruth J. Simmons, President, Brown University, Address at the Economics Club of Washington, D.C., April 2, 2008, *transcript available at* <http://brown.edu/Administration/President/letters/2007-2008/economic-club.pdf>.

higher education is the existence of a strong private as well as a strong public sector.<sup>69</sup> In the early years of the nation, however, it was not at all clear that the private sector would survive.

In 1779, the Pennsylvania legislature suspended the powers of the trustees of the (private) College of Philadelphia, changed its name to the University of the State of Pennsylvania, and appointed twenty-four new trustees, including six state officials.<sup>70</sup> The legislature was responding in part to action taken by trustees of the college during the revolution. Some trustees withdrew to the British lines, or to Great Britain itself.<sup>71</sup> Of the three trustees who were members of the Continental Congress, one voted for the Declaration of Independence, one against, and one refrained from voting.<sup>72</sup> Other trustees and their families remained on pleasant terms with the British army of occupation in Philadelphia in 1777 and 1778, and the Provost chose not to participate in any way in the movement for independence.<sup>73</sup>

For nearly a decade, the original trustees of the college resisted the actions of the state until, in 1789, the legislature, whose membership had changed in intervening elections, acknowledged that its earlier actions violated state-law protections of private property, and restored the property of the college.<sup>74</sup> For a brief time, the college and the university attempted to operate separately, but they merged in 1791 to form the (private) University of Pennsylvania.<sup>75</sup>

A better-known challenge to private higher education took place in New Hampshire, although it grew out of an internal governance dispute rather than a state-initiated effort to seize control. Clergyman Eleazor Wheelock established Dartmouth College at his own expense for the purpose of Christianizing Native Americans.<sup>76</sup> Rev. Wheelock obtained a charter from the King of England in 1769 and raised money for the college from

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69. Although only 1700 of the 4300 institutions of higher education in the United States are public, the majority of post-secondary degrees are awarded by public institutions. CHRON. HIGHER EDUC., Aug. 28, 2009, at 16. Most students outside the United States attend public universities. In Europe, only Portugal and Turkey have large private sectors in higher education. Estermann & Nokkala, *supra* note 13, at 9.

70. EDWARD POTTS CHEYNEY, HISTORY OF THE UNIVERSITY OF PENNSYLVANIA, 1740-1940, at 123-24 (1940).

71. *Id.* at 119.

72. *Id.*

73. *Id.*

74. *Id.* at 146-50. A more dramatic confrontation involving higher education occurred in New York City in 1775 when hundreds of protestors armed with clubs threatened Myles Cooper, the president of Kings College (the precursor of Columbia University) for being a Tory. Alexander Hamilton, a student at the college, detained the mob long enough for the president to escape. RON CHERNOW, ALEXANDER HAMILTON 63-64 (2004).

75. *Id.* CHENEY, *supra* note 70, at 162-69.

76. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 631 (1819).

the English aristocracy. The royal charter gave him the right to select his successor, and he named his son, John.<sup>77</sup> By the early nineteenth century, the original trustees had been replaced with new ones who were both less deferential to and more conservative religiously than the president.<sup>78</sup> In 1814, this board refused to permit President John Wheelock to teach his traditional course to seniors in the college.<sup>79</sup> This was the last straw for the embattled college president. When President Wheelock complained to the legislature about his treatment, the trustees fired him.<sup>80</sup>

Wheelock then reached out for support to the Jeffersonian Republicans, who for the first time in 1816 had captured New Hampshire's governorship and a majority in the state legislature. The reconstituted legislature passed a statute to turn (private) Dartmouth College into (public) Dartmouth University.<sup>81</sup> A companion statute authorized a fine of \$500 if any trustee interfered with the new university's operations.<sup>82</sup> The trustees concluded that they had no choice but to sue. They lost in the state courts and appealed to the Supreme Court of the United States.

With Chief Justice John Marshall writing, the Court in *Trustees of Dartmouth College v. Woodward*<sup>83</sup> held that the college's charter was a contract protected under the Constitution's Contracts Clause from breach by the state.<sup>84</sup> The trustees' victory kept Dartmouth private. More importantly, *The Dartmouth College Case* has stood since as a bulwark protecting private colleges and universities from state expropriation and thus helped to preserve a private sector in American higher education.

The intense competition in higher education today for students, faculty, and funds means that governing boards need to be particularly careful of the reputation of their institution. If a board fails to oversee the president adequately, an institution's reputation may be as damaged by adverse publicity as by a civil complaint brought by the state attorney general. Similarly, a board's failure to uphold academic standards in admissions or in the granting of degrees may lead to as much reputational harm as overpaying the president.<sup>85</sup> A look at several of the most

77. *Id.* at 632.

78. HERBST, *supra* note 22, at 235.

79. WHITEHEAD, *supra* note 27, at 54.

80. *Id.* at 58–59.

81. *Id.* at 63. The statute is set forth in the official report of the case, 17 U.S. (4 Wheat.) 518, 539–44 (1819).

82. WHITEHEAD, *supra* note 27, at 65.

83. 17 U.S. (4 Wheat.) 518 (1819).

84. *Id.* at 654.

85. The costs of scandal to a nonprofit college or university can be seen in the experience of several respected charities. In the 1990s, the president of the United Way was convicted of embezzling \$600,000. *See* Karen W. Arenson, *April 2–8: He Took at the Office*, N.Y. TIMES, Apr. 9, 1995, Sec. 4, at 2. A few years later the head of the United Way of the National Capital Area pleaded guilty to criminal fraud. *See*

publicized recent controversies reveals the kinds of misjudgments that may lead to reputational harm.

### 1. Board Failure to Oversee the President

One of most-publicized recent failures of a governing board to oversee a president took place at American University. The matter came to the attention of the media in July 2005, when *The Washington Post* received an anonymous letter. It was a copy of a letter that had been sent a few months earlier to the board of trustees of American alleging “severe expense account violations” by the university president and his wife.<sup>86</sup> The letter claimed that they had charged the university for presents for their family, a personal French chef, long weekends in Europe that were not for university business, and daily wine for lunch and dinner at \$50 to \$100 per bottle. When outside auditors investigated the allegations, the chair of the board’s audit committee learned that they were “all basically true.”<sup>87</sup> After continuing, negative publicity, the Board voted to dismiss the president.<sup>88</sup>

### 2. Board Failure to Resist Improper Intervention by State Officials or Major Donors

Colleges and universities understandably seek to be responsive to requests from major donors or state officials who have power over their funding. Being responsive, however, does not justify granting academic favors to public officials, their relatives, or their friends. Two recent and widely-publicized incidents demonstrate the high reputational price that institutions and their governing boards may pay if they fail to resist inappropriate requests from public officials or donors.

#### *a. The University of West Virginia and the Governor’s Daughter*

The controversy began on October 11, 2007, when a reporter from the Pittsburgh Post-Gazette contacted West Virginia University (WVU) to confirm the credentials of the daughter of the governor of West Virginia,

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generally Nicole Gilkeson, Note, *For-profit Scandal in the Nonprofit World: Should States Force Sarbanes-Oxley Provisions onto Nonprofit Corporations?*, 95 GEO. L.J. 831 (2007). After the fraud, private contributions to the United Way of the National Capital Area dropped by more than \$30 million, resulting in a thirty percent reduction in total revenue. The charity was forced to lay off forty percent of its workforce. Jacqueline L. Salmon, *United Way’s Donations Plummet; Charity Will Cut 40% of Workforce*, WASH. POST, Jan. 31, 2003, at A1.

86. Harry Jaffe, *Let Them Eat Truffles*, WASHINGTONIAN, April 2006, at 76.

87. *Id.* at 120.

88. Michael Janofsky, *College Chief at American Agrees to Quit for Millions*, N.Y. TIMES, Oct. 26, 2005, at A20. The president was later permitted to resign and provided with a generous settlement. *Id.*

who had just been appointed chief operating officer of one of the world's largest generic drug companies.<sup>89</sup> The company's chairman was a major contributor to the governor's campaign, as well as the University's largest donor, having given \$20 million to the University in 2003.<sup>90</sup> The University told the newspaper that the governor's daughter had earned an undergraduate degree at West Virginia University, but had not finished her executive MBA degree as she claimed on the company's website. Days later, a University spokeswoman reported that the daughter had completed all of the requirements for the MBA degree, but simply had failed to pay a \$50 graduation fee. When pressed to explain its conflicting statements, the University said that the business school had failed to transfer some of her credits and grades to the records office.

After a three-month investigation, a five-member Special Investigative Panel appointed by the University's provost and the Faculty Senate found that there had been no academic justification for granting the MBA degree to the daughter.<sup>91</sup> They also found that University administrators had added courses and unearned grades to her record.<sup>92</sup> When the report was released, the provost of the university and the dean of the business school resigned,<sup>93</sup> and the chairman of the University's Board of Governors gave up his chairmanship.<sup>94</sup> One month later the president of the University announced that he, too, would resign.<sup>95</sup>

*b. Shadow Admissions at the University of Illinois*

On May 29, 2009, the *Chicago Tribune* reported that a "shadow" admissions system existed at the University of Illinois, under which some well-connected applicants were admitted over the protests of admissions officers because the applicants were sponsored by state lawmakers or University trustees.<sup>96</sup> The following month, the governor of Illinois,

89. Ian Urbina, *University Investigates Whether Governor's Daughter Earned Degree*, N.Y. TIMES, Jan. 22, 2008, at A15.

90. *Id.*

91. JOHN M. BURKOFF ET. AL, REPORT OF THE SPECIAL INVESTIGATIVE PANEL FOR REVIEW OF EXECUTIVE MBA PROGRAM RECORDS, Apr. 21, 2008, at 3, available at <http://facultysenate.wvu.edu/r/download/15764> (last visited Nov. 27, 2009).

92. *Id.* at 6–8.

93. Patricia Sabatini and Len Boselovic, *The Story of a Cover-up*, PITTS. POST-GAZETTE, May 4, 2008 at A1.

94. Paul Fain, *Chairman of West Virginia U. Board Quits Post but Will Not Leave the Board*, CHRON. HIGHER EDUC., May 9, 2008, <http://chronicle.com/article/Chairman-of-West-Virginia-U/40949/> (last visited Nov. 23, 2009).

95. Paul Fain, *Questions Follow a Political President's Fall*, CHRON. HIGHER EDUC., June 20, 2008, at A11.

96. Jodi S. Cohen, Stacy St. Clair, & Tara Malone, *Clout Goes to College: Rezko Relative is Among Those Admitted to U. of I. in Shadow System Influenced by Trustees*

appointed an investigative commission chaired by Abner Mikva, a respected former federal judge and congressman, to investigate the matter.<sup>97</sup> The *Tribune* later reported there were nearly one hundred instances where trustees had backed applicants in the past three years, “including their relatives and the children of colleagues and ‘key employees.’”<sup>98</sup> According to the *Tribune*, every member of the board took part except for the newest trustee, who had been on the board for only one month.<sup>99</sup> The chairman of the board resigned on August 3, 2009, and the investigative commission called on all politically-appointed trustees to do the same.<sup>100</sup>

The Mikva Commission Report, released on August 6, 2009, concluded:

For years, a shadow admissions process existed at the University of Illinois. Unknown to the public and even to most University employees, this shadow process—referred to as “Category I”—catered to applicants who were supported by public officials, University Trustees, donors, and other prominent individuals. While applicants who lacked such clout sought admission through the University’s official admissions process, Category I applicants were given separate and often preferential treatment by University leadership. . . . In scores of instances, the influence of prominent individuals—and the University’s refusal or inability to resist that influence—operated to override the decisions of admission professionals and resulted in the enrollment of students who did not meet the University’s admissions standards—some by a considerable margin. . . .<sup>101</sup>

The report found that, due to the advocacy of influential “sponsors,” the University admitted in 2009 at least thirty-three Category I undergraduate applicants who had been designated for denial by the admissions officers.<sup>102</sup> In addition, the College of Law admitted twenty-four substandard applicants between 2003 and 2007.<sup>103</sup>

The report recommended that all members of the Board of Trustees

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*and Other Insiders*, CHI. TRIB., May 29, 2009, at 1.

97. Karen Ann Cullotta, *Panel to Investigate Admissions at U. of Illinois*, N.Y. TIMES, June 11, 2009, at A18.

98. Robert Becker, Tara Malone, & Jodi S. Cohen, *Trustees No Strangers to Clout*, CHI. TRIB., June 21, 2009, at 1.

99. *Id.*

100. Ashley C. Killough, *Report Calls on All U. of Illinois Trustees to Resign*, CHRON. HIGHER EDUC., Aug. 6, 2009, <http://chronicle.com/article/Report-Calls-on-All-U-of-I/47969> (last visited Nov. 23, 2009).

101. STATE OF ILLINOIS ADMISSIONS REVIEW COMMISSION, REPORT & RECOMMENDATIONS, Aug. 6, 2009, at 3, available at <http://admissionsreview.illinois.gov/documents/FinalReport.pdf>.

102. *Id.* at 4.

103. *Id.*

submit their resignations in order to permit the governor to decide who should be reappointed.<sup>104</sup> It also recommended establishing a firewall around the admissions process, which would prohibit consideration of sponsorship by prominent individuals or other undue influence in the admissions process.<sup>105</sup> In September, the University president announced his resignation.<sup>106</sup>

Competition has served as a powerful source of accountability for colleges and universities and for their governing boards even in the best of times. As recent controversies demonstrate, trustees must be careful to act in ways that will not harm the reputation of their institution because applicants, faculty, and grantors may avoid an institution that develops a reputation for either academic or financial irregularities.

## B.Regulation

### 1.Of Nonprofit Organizations Generally

From the earliest days of the nation, regulation of American higher education has been viewed as a state rather than a federal responsibility.<sup>107</sup> The first regulations of the structure or governance of private institutions of higher education and of other nonprofit organizations were not promulgated, however, until after World War II. Like most nonprofit organizations, if colleges or universities chose to incorporate in earlier years, they used the “nonstock” provisions found in the general corporation law of many states.<sup>108</sup> In 1952, a Model Non-Profit Corporation Act was developed by a committee of the American Bar Association.<sup>109</sup> By 2003, the Model Act had prompted the adoption of nonprofit corporation acts in all but two states.<sup>110</sup>

The nonprofit corporation acts divide the fiduciary obligations of nonprofit trustees into a duty of care and a duty of loyalty.<sup>111</sup> The duty of

104. *Id.* at 6.

105. *Id.* at 7.

106. Jodi S. Cohen, Stacy St. Clair, & Tara Malone, *University of Illinois President B. Joseph White Resigns*, CHI. TRIB., Sept. 24, 2009, available at <http://www.chicagotribune.com/news/chi-u-of-i-white-resign-24-sep24,0,161068.story> (last visited Nov. 27, 2009).

107. LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783-1876*, at 400–09 (1980).

108. Elizabeth A. Moody, Foreword, *MODEL NONPROFIT CORPORATION ACT* xix (3d ed. 2009).

109. *Id.*

110. MARION R. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS* 152 (2004). In Delaware and Kansas, charitable corporations are governed by the business corporation act, but their articles of organization must both provide that the corporation is not created for profit and prohibit the distribution of dividends to shareholders. *Id.*

111. *Id.* at 199–226.



care is essentially the same as the duty owed by directors of business corporations to their shareholders: a director must exercise “that degree of skill or diligence, and care that a reasonably prudent person would exercise in similar circumstances.”<sup>112</sup> There are, however, significant differences between the duty of loyalty owed by for-profit directors and that owed by nonprofit trustees. These differences reflect the different organizational purposes of for-profit and nonprofit corporations:

The officers and directors of a for profit corporation are to be guided by their duty to maximize long term profit for the benefit of the corporation and the shareholders. A nonprofit public benefit corporation’s reason for existence, however, is not to generate a profit. Thus a director’s duty of loyalty lies in pursuing or ensuring pursuit of the charitable purpose or public benefit which is the mission of the corporation.<sup>113</sup>

Nonprofit corporations by definition are precluded from distributing their surplus profits to those in charge of the organization, a prohibition that Henry Hansmann termed “the nondistribution constraint.”<sup>114</sup> This definition of what it means to be a nonprofit has the virtue of being used in the nonprofit corporation statutes of all fifty states.<sup>115</sup> State laws embody the constraint by providing that “insiders,” including trustees, officers and donors, may not take advantage of their positions either by engaging in self-dealing transactions that benefit themselves at the expense of the mission of the nonprofit organization, or by approving or accepting excessive compensation.<sup>116</sup> Most states also restrict their officeholders

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112. ROBERT CLARK, *CORPORATE LAW* § 3.4 (1986). Liability for violating the duty of care is limited by the business judgment rule: a director’s business judgment cannot be attacked unless it “was arrived at in a negligent manner, or was tainted by fraud, conflict of interest, or illegality.” *Id.*

113. *Summers v. Cherokee Children & Family Servs.*, 112 S.W.3d 486, 504 (Tenn. Ct. App. 2002).

114. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980):

A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees. By “net earnings” I mean here pure profits—that is, earnings in excess of the amount needed to pay for services rendered to the organization; in general, a nonprofit is free to pay reasonable compensation to any person for labor or capital he provides, whether or not that person exercises some control over the organization. . . . I shall call [this prohibition on the distribution of profits] the “nondistribution constraint.”

115. Richard Steinberg & Walter W. Powell, *Introduction to THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 1* (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006).

116. American Law Institute, *Principles of the Law of Nonprofit Organizations* § 310 Duty of Loyalty (Tentative Draft No. 1, March 19, 2007, tentatively approved at 2007 and 2008 Annual Meetings):

from receiving distributions of budgetary surpluses, which means that *public* colleges and universities also are subject to the nondistribution constraint.<sup>117</sup>

Significantly, the means of enforcing the duties of for-profit boards and nonprofit trustees are quite different. In the for-profit sector, the possibility of a stockholder derivative action helps to ensure the board's accountability. In the nonprofit sector, however, charitable corporations have no stockholders to bring such an action. Most states, therefore, have enacted statutes authorizing the state attorney general to intervene when the board of a charitable organization fails to fulfill its duty of care or loyalty.<sup>118</sup> It was this type of statute that authorized the action filed in New Jersey against Stevens Institute of Technology.<sup>119</sup>

The duty of loyalty requires each board member, the governing board, and each committee of the board and committee member--

(a) to act in a manner that such person or body reasonably believes to be in the best interests of the charity, in light of its stated purposes. . . .

The Official Comment answers the question to whom fiduciary duties are owed:

In a private (noncharitable) trust, trustees owe fiduciary duties to the beneficiaries; in a business corporation, the directors owe their duties to the corporation. In the case of a charitable trust, which lacks ascertainable beneficiaries who can enforce their rights, the fiduciary duties are instead said to run to the charitable purpose. . . .

. . . By using the phrase "best interests of the charity, in light of its stated purposes," this Section combines the trust and corporate language to declare an affirmative obligation of the fiduciaries to govern for charitable purposes, and not for the benefit of board members, executives, donors, or other private parties. Of course, private individuals—such as students . . . will incidentally benefit from the charities activities.

117. THE NONPROFIT SECTOR, *supra* note 115, at 2.

118. The tradition of relying on government action to stop fraud in charitable organizations originated in seventeenth-century England. See Kevin C. Robbins, *The Nonprofit Sector in Historical Perspective: Traditions of Philanthropy in the West*, in THE NONPROFIT SECTOR, *supra* note 115, at 13 (discussing Statute of Charitable Uses of 1601 and the inquisitorial powers and procedures conveyed to local commissioners to combat fraud in charitable organizations).

119. See *supra* text accompanying notes 1–2. A decade ago, a similar action was brought against the trustees and officers of private Adelphi University. It was brought by the New York Board of Regents rather than the Attorney General, however, because New York grants the Regents broad powers to oversee all academic institutions. In 1997, the trustees and officers of Adelphi filed a civil suit to prohibit the New York Board of Regents from conducting a hearing into the fitness of the board. *In re Adelphi University v. Board of Regents of the State of New York*, 229 A.D.2d 36, 652 N.Y.S. 2d 837 (1997). The court held that the Regents had the necessary statutory authority to proceed. After a full inquiry, the Regents removed eighteen of the nineteen Adelphi trustees. The reconstituted Board of Trustees fired the president, whose compensation had triggered the Regents' initial inquiry. His compensation had reached \$837,113 in 1995 and included an option to purchase his \$1.3 million apartment in Manhattan and an \$82,000 Mercedes. Courtney Leatherman, *Adelphi's Former Trustees Reach Multimillion-Dollar Settlement with University*, CHRON. HIGHER EDUC.,

The action was filed on September 17, 2009.<sup>120</sup> Several counts of the complaint focused on actions that had been approved by only a minority of the board. Specifically, the complaint alleged that the president and chairman of the board joined with the two vice-chairs of the board to “dictate the composition of most committees of the Board,” and otherwise to control the full board.<sup>121</sup> Among the kinds of information that allegedly were not disclosed to the full board were the reasons PriceWaterhouseCoopers withdrew as outside auditor in 2005, the internal-control letters of the independent auditors, the compensation of the president, and unauthorized loans to the president.<sup>122</sup>

To support the claim of excessive presidential compensation, the complaint alleged that, in fiscal year 2007, the president was paid \$770,000 to oversee operating expenses of \$158 million.<sup>123</sup> That same fiscal year, the president of MIT was paid \$635,000 to oversee operating expenses of more than \$2.3 billion.<sup>124</sup> The complaint also alleged that when a compensation comparability analysis was first procured from an executive-compensation firm in 2005, the president and other officers attempted to influence the consultant by arguing that universities with larger budgets and student bodies should be included in the list of peer schools used. The compensation committee never provided the report of this consultant to the full board.<sup>125</sup> A second consultant looked only at salary and bonus, and ignored the loans, loan forgiveness, housing, and tuition benefits that also were provided to the president. When the president told the second consultant to alter the peer group used for comparison, moreover, the firm complied, and only the revised report of the second firm was given to the full board.<sup>126</sup> Referencing the *Chronicle of Higher Education*, the complaint noted that the president’s cash compensation alone made him the tenth highest paid university president in the United States, and that eight of the nine presidents with higher cash compensation were at schools with

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Nov. 27, 1998, at A34. A 1998 settlement brought Adelphi University \$1.23 million from the former trustees, and another \$1.45 million from the insurance company that had indemnified them. David M. Halbfinger, *Lawsuits Over Ouster of Adelphi Chief Are Settled*, N.Y. TIMES, Nov. 18, 1998, at B14; William H. Honan, *Campus in Turmoil: A Special Report; Adelphi, A Little University with Big Ideas*, N.Y. TIMES, Feb. 5, 1997, at B1.

120. Complaint, *supra* note 1; John Hechinger, *New Jersey Sues Stevens Institute of Technology*, WALL ST. J., Sept. 17, 2009, <http://online.wsj.com/article/SB125322955414021243.html> (last visited May 11, 2010).

121. Complaint, *supra* note 1, ¶¶ 9, 32, 35.

122. *Id.* at ¶¶ 38, 40, 41, 332.

123. *Id.* at ¶ 54.

124. *Id.* at ¶ 53.

125. *Id.* at ¶¶ 375, 384.

126. *Id.* at ¶¶ 390, 397, 408.

operating budgets that exceeded \$1 billion.<sup>127</sup>

On January 15, 2010, a settlement was reached between Stevens Institute of Technology and the New Jersey Attorney General.<sup>128</sup> In it, the Board agreed to a number of governance changes including a requirement that the entire board approve key compensation and investment decisions, improvements in the operations of Board committees, particularly Audit, Compensation, and Investment, and the appointment of a non-trustee financial expert to the Audit Committee.<sup>129</sup> The president earlier had announced that he would leave his position on June 30, 2010.<sup>130</sup>

In the last decades of the twentieth century, after Congress approved large increases in the amount of federal loans and grants available for post-secondary students,<sup>131</sup> the federal government began to regulate some operations of colleges and universities. It did so by placing conditions on their students' eligibility for federal financial aid.<sup>132</sup> Another significant source of federal regulation of colleges and universities is the tax code. Colleges and universities are not commonly thought of as charities, but the federal tax code includes them in its definition of "charitable organizations" eligible for tax relief.<sup>133</sup>

127. *Id.* at ¶¶ 435, 438.

128. Settlement in *Milgram v. Trustees of the Stevens Institute of Technology*, available at <http://stevens.edu/sit/board-of-trustees-statement.cfm> (last visited May 11, 2010).

129. *Id.*

130. Letter from Lawrence T Babbio, Chairman of the Board of Trustees and Harold J Raveche, President, Stevens Institute of Technology, Jan. 15, 2010, available at [http://www.stevens.edu/pdf/LB\\_HR\\_Statement.pdf](http://www.stevens.edu/pdf/LB_HR_Statement.pdf) (last visited May 11, 2010); *Stevens Institute's President Will Resign as Part of Settlement with New Jersey*, CHRON. HIGHER EDUC., Jan. 15, 2010, <http://chronicle.com/blogPost/Stevens-Institutes-Preside/20548/> (last visited May 11, 2010).

131. *See supra* note 39.

132. *See, e.g.*, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (prohibiting federal funding of students in educational institutions that discriminate on the basis of sex in education programs or activities); the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g (prohibiting federal funding of students in educational institutions that have a policy or practice of releasing education records to unauthorized persons); and the Clery Act, 20 U.S.C. § 1092(f) (prohibiting federal funding of students in education institutions that do not notify their constituent communities of certain crimes).

133. The confusion produced by the difference between the legal and the common meaning of the word "charitable" was first noted by Lord MacNaghten in *Commissioners v. Pemsel*, A.C. 531, 583 (1891). The legal meaning of "charitable organizations" is rooted in the Statute of Charitable Uses of 1601, Stat. 43 Eliz., c.4, which included in its definition of charitable purposes, relief for the aged and poor, schools of learning, free schools, scholars in universities, and churches. Thus, educational organizations are not required to aid the poor in order to qualify as charitable organizations under the tax code. In 1983, the Supreme Court held that the exemption may be denied, however, if a charitable organization is violating public policy. *Bob Jones Univ. v. United States*, 461 U.S. 574 (upholding denial of tax-

There are two primary forms of federal tax relief provided to qualified charities. Since the enactment of the federal income tax in 1913, the United States has exempted the income of all qualified charitable organizations from federal taxation.<sup>134</sup> In addition, since 1917, the United States has provided an income tax deduction to individual and corporate donors to qualified charities.<sup>135</sup> Together, these two provisions provided more than \$40 billion in tax relief to the nonprofit sector in 2001.<sup>136</sup> Approximately 10% of this amount, or \$4 billion, went to higher education.<sup>137</sup>

The federal tax code also reinforces the nondistribution constraint by (1) a proscription against “inurement,”<sup>138</sup> (2) a proscription against more than incidental private benefit, and (3) rules imposing taxes on excess-benefit transactions.<sup>139</sup> The proscription against inurement applies to benefits received by “insiders.”<sup>140</sup> The private-benefit proscription, by contrast,

exempt status to university because of its racially discriminatory policy).

134. I.R.C. § 501 (c)(3); *see generally* DARRYLL JONES ET AL., *THE TAX LAW OF CHARITIES AND OTHER TAX EXEMPT ORGANIZATIONS* (2003). States provide comparable tax benefits to qualified organizations and donors. *See, e.g.*, *Yale Univ. v. Town of New Haven*, 42 A. 87 (Conn. 1899) (holding section 3820 of the Connecticut General Statutes makes colleges, academies, churches, and public school houses or infirmaries tax exempt). *See generally* John D. Colombo, *Why is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions.)*, 35 ARIZ. L. REV. 841, 855–56 (1993) (“state tax exemption tends to follow the federal pattern”). In addition, states exempt educational institutions from property taxes. *See City of Washington v. Board of Assessment Appeals*, 704 A.2d 120 (Penn. 1997) (upholding property tax exemption of Washington & Jefferson College). *See generally* William R. Ginsberg, *The Real Property Tax Exemption of Nonprofit Organizations: A Perspective*, 53 TEMP. L.Q. 291 (1980).

135. I.R.C. § 170 (a). Some nonprofit corporations, such as private clubs and unions, are exempt from taxes on the income that they generate, but are not eligible to receive tax-deductible charitable contributions. I.R.C. §§ 501(c)(7) and (c)(5).

136. John Simon, Harvey Dale & Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK*, *supra* note 115, at 267, 271.

137. From July 2007 through June 2008, \$31.6 billion was given to higher education in the United States. GIVING USA FOUNDATION, *GIVING USA 2009: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2008*, at 97 (2009). This was slightly more than 10% of the total charitable giving that year. *Id.* at 4.

138. The term was first used in 1909 to preclude exempting from an excise tax any “part of the net income [of charitable organizations,] which inures to the benefit of any private stockholder or individual.” *THE NONPROFIT SECTOR*, *supra* note 115, at 282.

139. *Id.* at 281 (“The proscriptions against private inurement and more-than-incidental private benefits and the . . . rules imposing sanctions on “excess benefit” transactions parallel the state-based *duty of loyalty* rules that regulate and punish fiduciaries’ self-dealing and diversion of a charity’s financial assets to themselves.”).

140. *See* I.R.C. §501(c)(3). “Insider” was defined in 1996 to mean “any person who was . . . in a position to exercise substantial influence over the affairs of the organization.” Treas. Reg. § 53.4958-6(a)). Authorities agree that the inurement proscription does not prevent the payment of reasonable compensation for goods or services. Simon et al., *supra* note 136, at 282.

applies to benefits received by anyone unless the benefits are incidental.<sup>141</sup> Finally, since 1996, the tax code has provided for penalty excise taxes to be imposed on any insider who receives an “excess benefit” from a qualified charity, and on any “organization manager” who knowingly participates in the transaction.<sup>142</sup>

## 2. Higher Education Licensing Laws

In addition to the state corporate law requirements and federal tax benefits available to nonprofit corporations generally, most states also have laws that apply specifically to higher education. Because most applicants and their families are not in a good position to evaluate the academic quality of colleges and universities, many states decided that some form of consumer protection was needed. Most turned to licensing, the same approach used to protect the public from unqualified doctors, lawyers, and other professionals.

The move toward licensing began toward the end of the nineteenth century when concern escalated about diploma mills that were preying on the unwary.<sup>143</sup> In 1897, the National Education Association asked states to exercise some supervision over degree-conferring institutions in order to bar diploma mills.<sup>144</sup> One of the first fruits of this call for regulation was a licensing law adopted in New Jersey in 1912 and signed into law by Woodrow Wilson during his brief tenure as governor between his years as president of Princeton and as president of the United States. In *Shelton College v. State Board of Education*,<sup>145</sup> the New Jersey Supreme Court upheld the New Jersey licensing law, and explained that, as useful as private accreditation is, “it cannot deal directly with the nonaccredited school. It cannot stop the substandard school or close the out-and-out degree mill.”<sup>146</sup> For those problems, licensing is needed. Shelton College asserted that the licensing statute violated its First Amendment rights. The court disagreed; it described the privilege of granting a degree as “intimately related” to the public welfare and thus unquestionably subject to state regulation.<sup>147</sup> The law did not violate the First Amendment, the court explained, because licensing did not turn on the content of what the college taught but on the granting of degrees. The college’s assertion that the Constitution guaranteed an absolute right to bestow the degree of

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141. IRS Gen. Couns. Mem. 39862 (Nov. 21, 1991).

142. I.R.C. § 4958; *see also* Simon et al., *supra* note 136, at 283.

143. ROBERT H. REID, AMERICAN DEGREE MILLS 12 (1959).

144. *Id.* at 13.

145. 226 A.2d 612 (N.J. 1967).

146. *Id.* at 619.

147. *Id.* at 618 (quoting ELLIOTT, THE COLLEGES AND THE COURTS 200 (1930)).

Bachelor of Arts was dismissed as simply “untenable.”<sup>148</sup>

A similar conclusion was reached in *Nova University v. Educational Institution Licensure*.<sup>149</sup> The court there explained that, by 1929, the District of Columbia had become the “capital” for practically all diploma mills in the United States and the world.<sup>150</sup> “Hundreds of fraudulent institutions of ‘learning’ incorporated in the District and sold degrees from baccalaureate to doctoral in every conceivable field of study with little or no academic work.”<sup>151</sup> They also sold their charters to individuals who ran diploma mills in other states and other countries.<sup>152</sup> In response, Congress enacted a statute requiring degree-granting institutions incorporated or operating in the District to be licensed.<sup>153</sup> Like Shelton College, Nova University claimed applying that the licensing statute to its program violated its First Amendment right to free speech. Citing *Shelton*, the D.C. Court of Appeals rejected Nova’s challenge.<sup>154</sup>

Despite the licensing requirements imposed by most states, diploma mills remain a serious problem. In 2008, for example, a couple pleaded guilty to mail and wire fraud after a federal investigation into their diploma mill, most often called St. Regis University, which had churned out more than 10,000 diplomas for customers in 131 countries.<sup>155</sup> Among their customers were more than 350 federal employees, including the deputy undersecretary for personnel and readiness at the Defense Department, who was charged with overseeing two million Pentagon employees.<sup>156</sup>

It is evident that more needs to be done to stop diploma mills.<sup>157</sup> As a

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148. 226 A.2d at 620.

149. 483 A.2d 1172 (D.C. Ct. App. 1984).

150. *Id.* at 1176.

151. *Id.*

152. *Id.*

153. Pub. L. No. 70-949, § 586a, 45 Stat. 1504 (1929).

154. 483 A.2d at 1181.

155. Diana Jean Schemo, *Diploma Mill Concerns Extend Beyond Fraud*, N.Y. TIMES, June 29, 2008, Sec. 1 at 4.

156. *Id.* In 2004, the Government Accountability Office (GAO), at the request of Congress, investigated whether federal funds had been used to pay for degrees from diploma mills, and whether federal employees holding senior-level positions had obtained degrees from them. *Diploma Mills: Federal Employees Have Obtained Degrees from Diploma Mills and Other Unaccredited Schools, Some at Government Expense: Hearing Before the S. Comm. on Governmental Affairs, 108th Cong. (2004)* (statement of Robert J. Cramer, Managing Director, Office of Special Investigations, GAO), available at <http://www.gao.gov/new.items/d04771t.pdf> (last visited May 11, 2010). The GAO searched the Internet for unaccredited schools that offered degrees for a relatively-low fee, awarded credits on the basis of life experience, and did not require any classroom instruction. *Id.* at 1. Three of the four unaccredited schools they investigated provided records that identified 463 purchasers of their degrees who were employed by the federal government. *Id.* at 2. One was employed in a senior position at the Department of Homeland Security. *Id.*

157. See generally ALLEN EZELL & JOHN BEAR, *DEGREE MILLS: THE BILLION-*

step in the right direction, the Higher Education Opportunity Act (HEOA) of 2008, in order to “prevent, identify, and prosecute diploma mills,” mandated better collaboration among the Secretary of Education and the United States Postal Service, the Federal Trade Commission, the Department of Justice (including the Federal Bureau of Investigation), the Internal Revenue Service, and the Office of Personnel Management.<sup>158</sup> It will take more than collaboration, however, to police diploma mills effectively. Both states and the federal government need to devote resources to the problem.<sup>159</sup>

Regulating the minimum quality of higher education, moreover, as licensing does, does nothing to improve academic quality at institutions that meet state minimum standards. Fortunately, a new mechanism was developed in the United States to raise academic quality without increasing the role of government: accreditation.

### C. Accreditation

Most nations have a ministry of education that sets national standards for their institutions of higher education. The United States, by contrast, developed its own system for ensuring and improving academic quality, one that was designed to protect the autonomy of colleges and universities from government control. Accreditation, the American approach, relies on private, voluntary associations that use peer review to accredit institutions of higher education.<sup>160</sup> At the heart of the system are six regional associations that accredit institutions in their geographic areas.<sup>161</sup> There are also a number of specialized accreditors, such as the Section of Legal Education and Admission to the Bar of the American Bar Association,

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DOLLAR INDUSTRY THAT HAS SOLD OVER A MILLION FAKE DIPLOMAS (2005).

158. Pub. L. No. 110-315, 122 Stat. 3098 (2008).

159. On January 28, 2010, Representative Timothy Bishop, a Democrat from New York, introduced the Diploma and Accreditation Integrity Protection Act, HR 4535. It is co-sponsored by Michael N. Castle, a Republican from Delaware. The bill would direct the Federal Trade Commission to take action against diploma mills and accreditation mills, and report its findings to the Department of Education. Thomas Bartlett, *New Bill in Congress Would Make Diploma Mills a Federal Concern*, CHRON. HIGHER EDUC., Jan. 29, 2010, <http://chronicle.com/article/New-Bill-in-Congress-Would-/63776/> (last visited Feb. 7, 2010).

160. The New York Board of Regents, which is a public body, is an exception to this pattern. It was established in 1787. Its members at first were required to visit every college in the state and to report on them annually to the legislature. WILLIAM K. SELDEN, *ACCREDITATION: A STRUGGLE OVER STANDARDS IN HIGHER EDUCATION* 30 (1960).

161. The six are the New England Association of Schools and Colleges, the Middle States Association of Colleges and Schools, the Southern Association of Colleges and Schools Commission on Colleges, the Higher Learning Commission of the North Central Association of Colleges and Schools, the Northwest Commission on Colleges and Universities, and the Western Association of Colleges and Schools.



which accredits law schools.

The New England Association, established in 1885, is the oldest of the regional accreditors, although it did not begin formally accrediting institutions until 1952.<sup>162</sup> By contrast, the North Central Association, which was established in 1895, issued its first list of accredited institutions in 1913.<sup>163</sup>

The need for a comprehensive approach to accreditation became apparent in 1912, when the University of Berlin announced that, for purposes of admission to its graduate programs, it would recognize American undergraduate degrees only if they were from members of the Association of American Universities (AAU). Other universities in Germany and Holland soon adopted the same policy.<sup>164</sup> Charles Eliot, then president of Harvard, a member of the AAU, took the position that the Association should either justify the confidence being placed in it by foreign universities, or notify them that there were American institutions outside the Association whose work and standing were not inferior to those who were members.<sup>165</sup> As in a game of hot potato, responsibility for accreditation was passed around for a number of years. The AAU concluded that it did not want the responsibility of accrediting colleges and universities. An earlier effort by the United States Bureau of Education (a precursor of the present Department of Education) to take on the task was stopped by President Taft after widespread public criticism of the Bureau's proposal.<sup>166</sup> The American Council on Education (ACE) took up the responsibility for accreditation in 1921, but abandoned it in 1935.<sup>167</sup> Ultimately, accreditation was left to the regional accreditors. Since 1996, the private Council for Higher Education Accreditation (CHEA) has coordinated the work of the six regional accreditors as well as many of the specialized accreditation bodies.<sup>168</sup> CHEA today is the largest institutional membership organization of higher education in the United States, with some 3,000 degree-granting colleges and universities as members.<sup>169</sup>

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162. SELDEN, *supra* note 160, at 30, 37.

163. *Id.* at 31, 37.

164. GEORGE F. ZOOK & M. E. HAGGERTY, *THE EVALUATION OF HIGHER INSTITUTIONS* 34 (1936).

165. *Id.*

166. *Id.* at 21.

167. *Id.* at 41, 43.

168. Harland Bloland has chronicled the rather tumultuous history that led to the establishment of CHEA. HARLAND G. BLOLAND, *CREATING THE COUNCIL FOR HIGHER EDUCATION ACCREDITATION* (2001). The higher-education community was extremely hesitant at first to organize a national body to coordinate the work of the various accreditors, but came to realize that the alternative was likely to be more regulation by either the states or the federal government.

169. Letter from Judith S. Eaton, President, Council For Higher Education Accreditation, to Colleagues (October 2006), *available at* <http://www.chea.org/pdf/>

Accreditation, in contrast to licensing, was designed to provide quality improvement as well as quality assurance.<sup>170</sup> To achieve both goals, accreditors rely on self-studies and peer evaluation. The accrediting organization recruits a team of faculty and administrative peers to visit an institution being accredited (or reaccredited). Team members are all volunteers and, typically, uncompensated. The institution being visited prepares a self-study that summarizes how well it thinks it is meeting the standards of the accrediting organization. The self-study is followed by a multi-day visit by the accreditation team to the college or university, which includes meetings with faculty, administrators, and students, attending classes, and inspection of facilities. After the visit, the team prepares a detailed report on the institution based on what was learned during the visit and other information provided by the school. The site team report is then used by the accrediting body to decide whether to accredit (or reaccredit) the school.<sup>171</sup> In contrast to licensing under which an institution is simply either granted or denied a license, accreditation provides more guidance to institutions. Even institutions that are accredited (or reaccredited) receive a

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PrezLtr\_DegMills\_1006.pdf (last visited Nov. 23, 2009).

170. JUDITH S. EATON, AN OVERVIEW OF U.S. ACCREDITATION (2009), *available at* [http://www.chea.org/pdf/2009.06\\_Overview\\_of\\_US\\_Accreditation.pdf](http://www.chea.org/pdf/2009.06_Overview_of_US_Accreditation.pdf). *See, e.g.*, Middle State Commission on Higher Education: Mission, Vision, & Core Values, <http://www.msche.org/?Nav1=ABOUT&Nav2=MISSION> (last visited May 11, 2010) (“The Middle States Commission on Higher Education is a voluntary, non-governmental, membership association that is dedicated to quality assurance and improvement through accreditation via peer evaluation.”). *See also* Western Association of Schools and Colleges: Purposes of WASC Accreditation, <http://www.wascsenior.org/node/247> (last visited May 11, 2010):

The accreditation process is aimed at: Assuring the educational community, the general public, and other organizations and agencies that an accredited institution has demonstrated it meets the Commission’s Core Commitments to Institutional Capacity and Educational Effectiveness, and has been successfully reviewed under Commission Standards; Promoting deep institutional engagement with issues of educational effectiveness and student learning, and developing and sharing good practices in assessing and improving the teaching and learning process; Developing and applying Standards to review and improve educational quality and institutional performance, and validating these Standards and revising them through ongoing research and feedback; Promoting within institutions a culture of evidence where indicators of performance are regularly developed and data collected to inform institutional decision making, planning, and improvement; Developing systems of institutional review and evaluation that are adaptive to institutional context and purposes, that build on institutional evidence and support rigorous reviews, and reduce the burden and cost of accreditation; and Promoting the active interchange of ideas among public and independent institutions that furthers the principles of improved institutional performance, educational effectiveness, and the process of peer review.

*Id.*

171. Eaton, *supra* note 170, at 6–7. The time periods for reaccreditation vary. For example, it is seven years for law schools, and ten for the regional accreditors.

confidential report from the accrediting agency, which identifies ways to improve the institution.

There have been a number of challenges to, and court rulings about, the authority of regional accreditors. One of the most important was the decision by the Seventh Circuit in *North Dakota v. North Central Association of Colleges*,<sup>172</sup> which established the authority of regional accreditors to act even when the conditions that led them to withdraw accreditation from a college were the result of actions by a state government. The court held that, as private associations, accreditors are free to establish their own standards.<sup>173</sup>

### III. IMPROVING BOARD OVERSIGHT

As the previous section has shown, trustees of colleges and universities, in addition to meeting the legal standards imposed on the boards of all nonprofit corporations, must ensure that their institutions also meet the demands of a highly competitive marketplace in higher education, comply with state licensing requirements, and satisfy accreditation standards. Recent controversies highlight three areas that need particular board attention: (1) avoiding the reputational harm that can result from excessive compensation or conflicts of interest; (2) understanding that in the eyes of the public, the nondistribution constraint applies to academic goods as well as to financial assets; and (3) strengthening the quality and autonomy of accrediting bodies.

#### A. Reputational Harm Caused by Excessive Compensation or Conflicts of Interest

The *Stevens* complaint suggests that in addition to their oversight of the endowment and other assets, governing boards should compare the compensation of presidents of similar colleges and universities when setting the compensation for the president of their institution.<sup>174</sup>

The events at American University underscore that a governing board should have procedures in place not only for reviewing the president's compensation, but for overseeing the president's institutional expenditures as well.<sup>175</sup> No board member should look over a president's shoulder, but a wise president will welcome a well-crafted review procedure. For

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172. 99 F.2d 697 (7th Cir. 1938).

173. 99 F.2d at 700.

174. A 2007 survey of trustees found that a stunning 23% of trustees *did not know* whether their boards used comparative data to determine the president's compensation, and 5% reported that the board had no role in determining the president's compensation. Paul Fain, *For Trustees, Faith in College Presidents Lies at the Heart of Good Relationships*, CHRON. HIGHER EDUC., May 11, 2007, at A14.

175. See *supra* text accompanying notes 86–88.

example, the compensation committee of the board might establish appropriate policies on such matters as presidential travel, meals, and gifts. The president's expenses then can be reviewed annually by the outside auditors to see that they conform to the established policies.

To ensure that trustees themselves are complying with state law, a growing number of college and university boards have adopted conflict-of-interest policies that require annual disclosures by all board members and senior officers of actual conflicts of interest, and of affiliations that might create the appearance of such a conflict.<sup>176</sup>

Given the importance of faculty to the reputation and revenue of institutions of higher education, governing boards also should adopt procedures for identifying, and eliminating financial conflicts of interest that might compromise the scholarly objectivity of faculty members.<sup>177</sup> Public Health Service regulations require all institutions that receive funds from the National Institutes of Health to have policies that require researchers to disclose "significant financial interests" in entities whose financial interests may be affected by their research.<sup>178</sup> Governing boards should consider extending those disclosure standards to all researchers, whether or not they are funded by NIH.

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176. A 2009 survey found that 89% of boards have a conflict-of-interest policy, compared with only 46.5% in 1986. *Survey of Higher Education Governance*, ASS'N OF GOVERNING BDS. 3 (2009). More boards of private colleges and universities had such policies than boards of public institutions because of the use of statewide conflict policies for state agencies. *Id.*

177. In FY 2008, 80% of the budget of the National Institutes of Health (NIH)—\$29.5 billion—was distributed through almost 50,000 competitive grants to researchers at over 3,000 universities, medical schools, and other research institutions. DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF THE INSPECTOR GENERAL, HOW GRANTEEES MANAGE FINANCIAL CONFLICTS OF INTEREST IN RESEARCH FUNDED BY THE NATIONAL INSTITUTES OF HEALTH 1 (Nov. 2009), *available at* <http://oig.hhs.gov/oei/reports/oei-03-07-00700.pdf> (last visited May 11, 2010).

178. 42 C.F.R. § 50.604(a) (2009). The term "significant financial interest" is defined as income to an investigator, or the investigator's spouse or dependent child that exceeds \$10,000 in a year, or an equity interest whose value exceeds that amount or 5% ownership in a company. In 2008, the National Institutes of Health took the unprecedented step of suspending a five-year, \$9.3 million grant to Emory University because the principal investigator on the grant, a tenured faculty member, had failed to disclose some \$800,000 in payments from pharmaceutical companies. Joe Pereira, *Emory Professor Steps Down*, WALL ST. J., Dec. 28, 2008, *available at* <http://online.wsj.com/article/SB123000405102929417.html>. A report by the Inspector General of the Department of Health and Human Services found that 50% of universities do not ask their faculty members to disclose financial conflicts of interest. DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF THE INSPECTOR GENERAL, *supra* note 177, at 13. In addition, university administrators rarely require researchers to eliminate or reduce such conflicts. *Id.* at ii.

### B. The Nondistribution Constraint and Academic Goods

In addition to their duty to oversee the financial assets of their college or university, governing boards have a fiduciary duty to protect and enhance the academic mission of their institution. As Peter Ewell has explained:

It is up to the faculty and administration to uphold and improve academic quality. But it is up to the board to understand it and to see that it gets done. Ensuring academic quality is a fiduciary responsibility; it is as much part of our role as board members as is ensuring that the institution has sufficient resources and is spending them wisely.<sup>179</sup>

Because faculty are central to the academic success of a college or university, conscientious trustees should be as knowledgeable about their quality as about the health of the financial assets.<sup>180</sup> A good place to begin is with faculty hiring and retention patterns. Unfortunately, it typically is easier for a board member to know the win-loss records of an institution's athletic teams than it is to know how many of the recent offers to hire faculty were accepted or rejected, or how many experienced faculty were persuaded to leave other institutions to join the school, or how many departed for other institutions. Hiring patterns should not be assessed for only one year, of course, but over a period of years. Moreover, hiring trends may vary considerably from department to department or school to school. It is important, therefore, for a governing board to work closely with academic leaders when reviewing faculty data.

A major challenge for any governing board is how to promote academic quality without undermining the faculty's responsibility for academic matters. The importance of respecting the role of the faculty is demonstrated by the controversies discussed above. Several would not have occurred if the governing board and administrators had upheld the academic standards established by faculty for admitting applicants<sup>181</sup> or granting degrees to students.<sup>182</sup> A conscientious governing board therefore, will ensure that faculty members in the institution understand their role in overseeing such academic matters as the curriculum, faculty hiring, and student academic standards.<sup>183</sup> The board also should encourage the faculty to establish standards for monitoring the quality of teaching and research.<sup>184</sup>

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179. PETER T. EWELL, *MAKING THE GRADE: HOW BOARDS CAN ENSURE ACADEMIC QUALITY* vii (2006), quoted in *EFFECTIVE GOVERNING BOARDS*, *supra* note 48, at 16.

180. EWELL, *supra* note 179, at xiii.

181. *See supra* text accompanying notes 96–106.

182. *See supra* text accompanying notes 89–95.

183. New faculty members might benefit as much as new trustees from some orientation about their governance responsibilities.

184. *See EFFECTIVE GOVERNING BOARDS*, *supra* note 48, at 15.

Admissions are a particularly challenging area for many colleges and universities. Because of the additional life-time compensation and social prestige that a post-secondary degree brings, the public understandably expects that the entrance requirements and graduation standards of an institution of higher education will be applied fairly. If a college or university grants public officials or their relatives an advantage in the awarding of admission spots or degrees, the public is likely to feel that its trust has been betrayed as much as it does when a charitable assets are mismanaged.

Although faculty have primary responsibility for establishing the standards for admission,<sup>185</sup> in most colleges and universities individual admission decisions are made by administrators with little or no faculty participation. Because they do not have tenure, administrators are likely to be particularly vulnerable to pressure from senior administrators or trustees to admit applicants who would not be admitted on their merits. As the Mikva report found, it is important to have an admissions process that treats all applicants fairly.<sup>186</sup> Striking the right balance between resisting improper pressure to admit a particular applicant, and being fair to all applicants is not easy. The report, for example, did not recommend prohibiting all letters of support from prominent officials or donors. It did recommend limiting them to standard letters of recommendation. A complete ban on such letters presumably would not be fair to an applicant who had worked for a public figure, and who would thereby be unable to submit a letter of recommendation from his or her employer. To ensure that even letters of recommendation from prominent individuals are not given undue weight, the report recommended that the university adopt a written admissions policy that clearly sets forth the factors that may be considered in admissions decisions.<sup>187</sup> It also recommended that admissions decisions be made by a committee, rather than by a single person, on the ground that a committee is less likely to cave to improper

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The faculty and academic administrators—not the board—determine the manner in which subjects are selected and taught, faculty members are recruited . . . curricula are reviewed and revised, student progress and performance are assessed, and degrees are awarded. Yet it is appropriate for the board to convey its expectations that faculty will establish and monitor standards for teaching and learning, as well as for curricular review and revision.

*Id.*

185. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 363 (2003) (holding that the First Amendment protects four academic freedoms first identified by Justice Frankfurter: to determine “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”).

186. See *supra* text accompanying note 105.

187. STATE OF ILLINOIS ADMISSIONS REVIEW COMMISSION, *supra* note 101, at 43.

pressure to admit a particular applicant.<sup>188</sup> Finally, the report recommended that no answer should be given to inquiries about the status of an applicant from prominent individuals who are not members of an applicant's family (or the equivalent). Any admissions-related inquiries from unrelated, prominent individuals should be documented, the report advised, and the inquirers notified that such documentation is subject to disclosure under the Illinois Freedom of Information Act.<sup>189</sup> In short, as Justice Brandeis recommended, sunshine should be used as a disinfectant.<sup>190</sup>

### C. Strengthening Accreditation

One of the most effective ways of measuring academic quality is the accreditation process. In some respects, accreditation is to academic programs what audits are to financial affairs. A careful board will take advantage of the opportunity accreditation presents, therefore, by reviewing with the institution's academic leadership the reports of the various accreditation visiting teams.<sup>191</sup>

Unfortunately, in recent years the federal government has increasingly threatened the independence of the American system of accreditation. Although President Taft blocked the earliest effort to have the federal government assume responsibility for accreditation, once substantial federal funds began to flow to higher education, predictably more federal oversight followed. When the GI Bill was reauthorized in 1952 and extended to cover Korean War veterans, Congress also authorized the Commissioner of Education to publish "a list of nationally recognized accrediting agencies and associations which he determines to be reliable authority as to the quality of training offered by an educational institution."<sup>192</sup>

A more serious challenge arose in 1992 when Congress required every state to establish a State Postsecondary Review Entity (SPRE) that would review institutions identified by the Secretary of Education as having

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188. *Id.* at 36.

189. *Id.* at 43–44.

190. LOUIS BRANDEIS, OTHER PEOPLE'S MONEY—AND HOW BANKERS USE IT 67 (1914), available at <http://www.law.louisville.edu/library/collections/brandeis/node/191> (last visited May 11, 2010).

191. The Association for Governing Boards concurs:

An especially valuable source of [information about academic quality] is board participation in the external review of academic units and the institution as a whole by regional and specialized accrediting associations. The board should commit substantial time to read and discuss the reports of accreditation visiting teams, under the guidance of the president and academic administrators who bear direct responsibility for the units under review.

EFFECTIVE GOVERNING BOARDS, *supra* note 48, at 16.

192. Pub. L. No. 78-346, 58 Stat. 284.

specified problems, such as a high default rate on student loans.<sup>193</sup> Most accreditors saw this as a direct attempt either to eliminate accreditation or to federalize accrediting organizations.<sup>194</sup> In 1995, however, the challenge was defanged when President Clinton signed into law a bill that rescinded funding for the SPREs.<sup>195</sup> In 1998, the Reauthorization of the Higher Education Act entirely eliminated the SPRE requirement, along with a companion requirement that accrediting agencies carry out unannounced visits to campuses.<sup>196</sup>

The most recent federal challenge to the independence of accreditation bodies came from the Executive Branch rather than Congress. Federal law provides that colleges and universities must be accredited by an accrediting agency recognized by the Secretary of Education if they want to be eligible to receive federal student financial assistance.<sup>197</sup> Under the leadership of Secretary Margaret Spellings, the Department of Education in 2006 began to press accrediting associations to require the institutions they accredit to assess student achievement or risk being denied official recognition by the Department.<sup>198</sup> In response, Congress in the Higher Education Opportunity Act of 2008 (HEOC) prohibited the Department of Education from regulating the manner in which accrediting agencies assess student achievement.<sup>199</sup>

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193. 1992 Amendments to the Higher Education Act of 1965, Pub. L. 102-325, 106 Stat. 448, discussed in BLOLAND, *supra* note 168, at 39–40.

194. BLOLAND, *supra* note 168, at 40.

195. *Id.* at 117.

196. *Id.* at 189.

197. Higher Education Act of 1965, Pub. L. 89-329, 79 Stat. 1219 (November 8, 1965), codified as amended in 20 U.S.C. §1001 et seq. Colleges and universities must meet three requirements to be eligible for Title IV student financial-assistance-program funds: they must be (1) certified by the Department of Education as eligible; (2) accredited by an accrediting agency recognized by the Secretary of Education and (3) licensed or authorized by the state education agency in which they operate. The review process is set forth in 20 U.S.C. § 1099b; 34 C.F.R. Part 602.

198. See A. Lee Fritschler, *Government Should Stay Out of Accreditation*, CHRON. HIGHER EDUC., May 18, 2007, at B20:

Last September a report by the Spellings Commission on the Future of Higher Education expressed grave concern about the quality and purpose of colleges and universities. . . . One remedy that the Education Department has proposed would give accrediting agencies responsibility not only to evaluate institutions for access to federal student-aid money but also to set and enforce minimum standards for “student achievement.” Under draft rules, if the department decides that the learning standards than an accreditor applies to institutions are not sufficiently high, it can withdraw the accrediting agency’s power to accredit. . . .

199. Pub. L. 110-315, 122 Stat. 3078. HEOC also reconfigured the National Advisory Committee on Institutional Quality and Integrity, which recommends whether particular accreditors should be approved by the Secretary. Formerly, all members of the Committee were appointed by the Secretary of Education. In the future, one-third of the eighteen members will be appointed by the Secretary, one third



Although Congress rebuffed the most recent federal challenge to the autonomy and flexibility of private accreditors, the pressure on the federal government to increase its regulation of accreditors may prove irresistible in the future, given the large amount of federal funding that goes to higher education.<sup>200</sup> Certainly the requirement that colleges and universities must be accredited by an agency recognized by the Secretary of Education for their students to receive federal financial assistance gives the federal government enormous potential leverage over accreditors. If accreditation is to endure, institutions of higher education and their governing boards need to understand and to support the capacity of the American system of accreditation to provide accountability without losing its independence from government control.

#### IV. CONCLUSION

College and universities in the United States differ from most institutions of higher education in their use of lay governing boards, which shield them from excessive government control, and in their adoption of shared governance, which gives faculties rather than boards primary responsibility for academic matters. Shared governance also protects from public and trustee pressure the free inquiry that is central to the effectiveness and productivity of modern academic institutions. The combination of lay governing boards and shared governance has been a major force in developing the best higher education sector in the world.

Private colleges and universities and their governing boards are subject to the same laws that apply to all nonprofit corporations. State nonprofit corporation laws impose on governing boards duties of care and of loyalty to the mission of preserving, transmitting, and increasing knowledge. They also prohibit the distribution of surplus resources to those in charge of the institution—apart from the payment of reasonable compensation for goods and services. Federal tax laws reinforce this nondistribution constraint and are the source of more than \$4 billion annually in tax exemptions and deductions for higher education.

State nonprofit corporation laws, however, have been enforced against colleges and universities only in the most extreme circumstances. Competition, therefore, remains the most important form of board accountability. State licensing laws establish minimum standards that

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by the Senate, and one-third by the House of Representatives. Pub. L. 110–315, 122 Stat. 3091.

200. By 2005, the federal government for the first time provided more financial support for higher education than the states. Federal funding included \$61 billion in loans, \$18 billion in direct student-aid grants, and an estimated \$8 billion in tax support for a total of more than \$90 billion. All the states combined provided about \$74 billion that year of which \$7 billion was for financial aid. F. King Alexander, *The States' Failure to Support Higher Education*, CHRON. HIGHER EDUC., June 30, 2006, at B16.

academic institutions must meet in order to offer degrees, but they generally do not focus on increasing academic quality above the minimum. Accreditation, by contrast, is as concerned with quality improvement as with quality assurance. This distinctly American form of accountability is carried out by private, voluntary associations that use self-studies and peer assessment to evaluate colleges and universities and to advise them on how to improve their programs and functions. Accreditation also has helped to protect the autonomy of the higher education sector from government control, although the federal government in recent years has taken an increasingly active role in regulating the accreditors. In fulfilling their fiduciary duty to preserve the fiscal integrity of their institutions, governing boards should pay particular attention to the compensation and expenditures of their presidents. They also should adopt conflict-of-interest policies that apply to governing board members as well as policies that ensure that the scholarly objectivity of faculty is not compromised by financial conflicts of interest.

Governing boards also have a fiduciary duty to protect and enhance the academic quality of the college or university they oversee. Because the public expects the nondistribution constraint to apply to academic goods as well as to financial resources, governing boards should be particularly careful to uphold the standards established by faculties for such academic matters as admitting applicants and granting degrees. Finally, governing boards need to understand and to support the system of accreditation that has developed in the United States to improve academic quality without increasing the role of the government in higher education.

# JUDICIAL DEFERENCE TO ACADEMIC DECISIONS: AN OUTMODED CONCEPT?

ROBERT M. O'NEIL\*

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## I. INTRODUCTION

Judicial deference to academic decisions and actions emerges in many and varied settings and for myriad reasons. The notion that courts should not only respect the judgments of academic councils but should decline to overrule or second-guess such judgments has deep roots. Judicial deference has had its share of champions and critics; some scholars laud the doctrine as a blessing,<sup>1</sup> while others decry it as a curse.<sup>2</sup> Some observers argue that judicial deference represents an idea whose time has come and gone, and now deserves a decent burial,<sup>3</sup> while others view this

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1. See Neil Kumar Katyal, *The Promise and Precondition of Educational Autonomy*, 31 HASTINGS CONST. L.Q. 557, 563–64 (2003). The author, who is now Deputy Solicitor General of the United States, wrote from the perspective of writing and filing an amicus brief in the Supreme Court on behalf of deans of private law schools in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

2. See Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 9–10 (2006).

3. This thesis is the focus of a very recent book by Amy Gajda, *The Trials of Academe: The New Era of Campus Litigation*, marshaling both relevant data and

legal doctrine as alive, well, and useful.<sup>4</sup> An assessment of the current status of so vital a judicial practice is thus timely, if not overdue. This article seeks to identify the historic rationale for judicial deference to academic decisions and the conditions under which it has been invoked, as well as changing circumstances and forces that have raised doubts about the continuing stature of this doctrine.

A quite recent and highly publicized case offers illustrative insight. When former University of Colorado Professor Ward Churchill sought reinstatement following dismissal (on charges of flagrant research misconduct) from his tenured position on the Boulder campus faculty, the state trial judge was troubled by sharply conflicting factors. On one hand, a jury in his courtroom had concluded several months earlier that Churchill's firing had been motivated by official animus against constitutionally protected speech.<sup>5</sup> Although the University had declined to impose any sanction against Churchill on the basis of highly controversial messages he had posted soon after the terrorist attacks of September 11, 2001, the jury concluded that a subsequent (and ultimately adverse) review of Churchill's published research had been triggered by the contentious postings.<sup>6</sup> That finding, in the jury's view, entitled the embattled scholar to reinstatement. While the accompanying award of but one dollar in damages undeniably reflected ambivalence or division on the jury's part, there was no doubt they had ruled in Churchill's favor on the merits of his reinstatement claim.

On the other hand, the judge was keenly aware that the dismissal had followed a lengthy, painstaking review by two faculty committees, as well as the ultimate judgment of the Board of Regents.<sup>7</sup> A special committee charged with addressing research misconduct reached an adverse conclusion, which was later affirmed, after separate review, by the faculty-elected Committee on Privilege and Tenure.<sup>8</sup> Such review reflected a strong commitment by the University to shared faculty governance and due process in faculty personnel matters. Thus, the judge was torn between the finding in Churchill's favor by a jury he had charged and guided, and his understanding of the process the University had followed in terminating a

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analysis. AMY GAJDA, *THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION* (Harvard University Press 2009). For an extensive interview with the author, highlighting issues of judicial deference to academic judgments, see Amy Gajda and Scott Jaschik, *The Trials of Academe*, *INSIDE HIGHER ED.*, Sept. 22, 2009, <http://www.insidehighered.com/news/2009/09/22/gajda>.

4. Katyal, *supra* note 1.

5. *Churchill v. Univ. of Colo.*, No. 06CV11473, slip op. at 26 (D. Colo. July 7, 2009), available at <http://www.aaup.org/NR/rdonlyres/98F88939-7C2A-4D61-BE8E-0260F62ABFFE/0/ChurchillNavesdecision.pdf>

6. For an analysis of the earlier phases of the Churchill case, see Robert M. O'Neil, *Limits of Freedom: The Churchill Case*, *CHANGE*, Sept.-Oct. 2006, at 34.

7. *Churchill*, No. 06CV11473 at 22.

8. *Id.* at 15.

tenured faculty appointment.

In the end, the court resolved such doubts in the University's favor, though not easily or comfortably. Even if the jury had awarded substantial damages to Professor Churchill, the judge made quite clear that the Regents' dismissal action should remain free from judicial intervention or reversal. Basically, ordering reinstatement in such a case "would entangle the judiciary excessively in matters that are more appropriate for academic professionals."<sup>9</sup> That conclusion drew support from an earlier Colorado ruling on strikingly similar facts, whereby a federal judge deferred to the challenged academic judgment of a different university, despite a plausible professorial claim of injustice that courts might otherwise redress.<sup>10</sup> The *Churchill* judge went on to note that were he to compel a terminated professor's reinstatement, serious remedial problems would likely follow—not only in regard to the enforcement of such a decree, but, even more seriously, also posing the risk of seriously impairing the University's sensitive and complex academic mission. Recognition of such "potential to harm students and faculty who played no role in the [dismissal] decision," thus, strongly reinforced a judgment based on the "inappropriateness" of judicial intervention.<sup>11</sup>

The *Churchill* ruling reflects several qualities of judicial deference, and its recency suggests a continuing vitality for this doctrine.<sup>12</sup> Such cases are seldom easy, since the basis for intervention may be appealing, even compelling, and the problem might warrant a more aggressive judicial course should a similar dispute arise in a non-academic setting. Yet the factors that ultimately counseled abstention in cases such as that of Professor Churchill merit special recognition in the academic setting—the complexity of most challenged academic decisions, the relative unfamiliarity of judges with college and university procedures and deliberations, the record of typically elaborate internal review preceding the challenged action, and the daunting task of framing a decree that would avoid seriously disrupting the process of teaching and learning within the college and university setting. Despite such considerations, the doctrine of judicial deference has recently become an increasingly visible target of

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9. *Id.* at 36.

10. *Thornton v. Kaplan*, 961 F. Supp. 1433 (D. Colo. 1996).

11. *Churchill*, No. 06CV11473 at 40.

12. An even later decision reinforces this impression. In early December of 2009, the New York Supreme Court's Appellate Division rejected a former professor's claim that New York University had breached its obligation under a settlement agreement, specifically regarding it dispositive that "[c]ourts exercise restraint in applying traditional legal rules to determinations concerning academic qualifications because such determinations generally rest upon the subjective professional judgment of trained educators." *Flomenbaum v. New York Univ.*, 890 N.Y.S.2d 493, 493 (1st Dept Dec. 3, 2009). The Appellate Division specifically relied on *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), to support their deferential view of this case. *Id.*

concern, even open hostility, in some sectors of the academic community. A brief review of its evolution and application may be helpful in setting the stage for the current controversy.

## II. ANTECEDENTS AND APPLICATIONS

Quite clearly judicial deference has a long and distinctive history. Arguably the origins of this doctrine could be traced as far back as the early nineteenth century, conceivably to the *Dartmouth College* case,<sup>13</sup> despite the very different legal context and terminology. Whether or not the doctrinal roots run that deep, courts unhesitatingly showed respect for academic judgments long before the Supreme Court in 1985 gave a strong endorsement to such deference in *Regents of the University of Michigan v. Ewing*.<sup>14</sup> That case involved a student's challenge to his ouster from a graduate medical program on the basis of a failing grade in an examination integral to the academic program. The justices were unanimous in their declaration that courts had no business second-guessing, much less overturning, such judgments, however appealing the ousted student's plea. In their ruling, moreover, they left not the slightest doubt about the strength of that conviction—or about their view of the distinctive nature of the academic setting to which such deference properly applied:

When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.<sup>15</sup>

Such a rousing endorsement of judicial deference could hardly have been more welcome to the college and university community at a time of rapidly rising court challenges to a host of actions and decisions. Yet the concept was hardly novel. Indeed, the Supreme Court's *Dartmouth College* decision<sup>16</sup> had arguably established a zone of immunity for academic decisions and actions—albeit for reasons (the sanctity of contract) rather different from those that would later evoke the Justices' solicitude. Although the *Ewing* Court cited remarkably little precedent, Justice Stevens' opinion did recall one relatively recent case in which the

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13. *Tr. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819). In this historic case, Dartmouth's trustees sought judicial relief after the New Hampshire legislature increased the size of the board, gave appointive powers to the governor, and created a superior board with powers of oversight. The Supreme Court ruled in the trustees' favor, declaring that the college's charter created contractual rights and obligations that the legislature could not impair under the U.S. Constitution.

14. 474 U.S. 214 (1985).

15. *Id.* at 225.

16. *Woodward*, 17 U.S. at 518.

University of Missouri had prevailed against the court challenge of another dismissed student.<sup>17</sup> There too the basis for the adverse action had been a faculty judgment regarding a student's inadequate academic performance. With equal conviction about the appropriateness of abstention, the Court ruled against judicial intervention, albeit for a reason slightly different from that in *Ewing*—specifically, recognition that such decisions by faculty require “an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision-making.”<sup>18</sup> The Court in *Bishop* cited the general reluctance of judges to second-guess “the multitude of personnel decisions that are made daily by public agencies,”<sup>19</sup> but then noted nine years later in *Ewing* (with specific reference to the campus setting of the case before them) that “far less is [a federal court] suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions.”<sup>20</sup>

The *Ewing* Court also offered a strong hint of an additional and rather separate basis for deference, citing the Court's long recognized “responsibility to safeguard [colleges and universities'] academic freedom,”<sup>21</sup> most clearly evidenced by the Justices in the 1967 *Keyishian* ruling, which invalidated New York's loyalty oath on First Amendment grounds, with a special emphasis on the constitutional stature of academic freedom.<sup>22</sup> Although academic freedom would, even in the 1960s, have been deemed mainly a personal or individual interest, the *Ewing* Court added in a puzzling footnote that “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.”<sup>23</sup> Professor Judith Areen concludes from this cryptic addendum: “In other words, constitutional academic freedom protects both individual faculty members and institutions.”<sup>24</sup> Obviously when the institution seeks immunity for a decision made or an action taken by its faculty—the prototypical judicial deference case—there is no need to arbitrate between contending or conflicting claims advanced by the college or university on one hand and by its professors on the other. Yet such unity of interest is not always present, and in a now far more complex litigation scene, such conflict cannot be avoided; we shall address it in due course.

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17. *Bd. of Curators v. Horowitz*, 435 U.S. 78 (1978).

18. *Id.* at 90.

19. *Bishop v. Wood*, 426 U.S. 341, 349 (1976).

20. *Regents of the Univ. of Mich. V. Ewing*, 474 U.S. 214, 226 (1985).

21. *Id.* at 226.

22. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

23. *Ewing*, 474 U.S. at 226 n. 12.

24. Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 *GEO. L.J.* 945, 979 (2009).

For the moment, the *Ewing* footnote suffices.

The *Ewing* case may in a different way aid understanding of the Court's unambiguous embrace of judicial deference. Almost in passing, and prefatory to a quite different point, Justice Stevens cited "our concern for lack of standards."<sup>25</sup> That concern apparently reflected doubts not so much about the competence of courts in unraveling complex matters as it revealed uncertainty about (or even the absence of) meaningful criteria by which to frame remedies that would adequately address the unique circumstances of academic decisions. Such remedial concerns do, as we noted in regard to the recent *Churchill* ruling, occasionally enter the equation—usually more as a makeweight than as a driving force, though often useful to reinforce other grounds for abstention.

### III. RATIONALES AND CONDITIONS

Before appraising the current status of judicial deference, a review of its underlying rationale and of conditions under which it is invoked seems appropriate. At the threshold, this doctrine is hardly unique to the campus context. As the *Ewing* Court noted, reluctance to overturn or even to modify academic judgments is really a special application of a much broader concept of abstention—reflected, for example, in the administrative law doctrine of "primary jurisdiction" under which courts regularly defer to agencies with greater and more specialized expertise in a subject area.<sup>26</sup> Yet, as Kaplin and Lee observe, abstention here has special force; "issues regarding academic deference can play a vital, sometimes dispositive role in litigation involving higher educational institutions"<sup>27</sup>. An abiding concern for academic freedom clearly explains many such rulings, as the brief reference in *Ewing* suggested. Indeed, occasionally a court will decline to intervene on academic freedom grounds even on behalf of an aggrieved professor who presses a plausible personal academic freedom claim; as one federal court noted:

[F]or a university to function well, it must be able to decide which members of its faculty are productive scholars and which are not . . . [T]he only way to preserve academic freedom is to keep claims of academic error out of the legal maw.<sup>28</sup>

Thus, through a curious twist, judicial deference based upon regard for

25. *Ewing*, 474 U.S. at 226.

26. *See, e.g.*, *Barnhart v. Walton*, 535 U.S. 212 (2002), *Chevron U.S.A., Inc v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); Catherine T. Struve, *Greater or Lesser Powers of Tort Reform: The Primary Jurisdiction Doctrine and State-Law Claims Concerning FDA-Approved Products*, 93 CORNELL L. REV. 1039 (2008).

27. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 127 (4th ed. Jossey-Bass 2006).

28. *Feldman v. Ho*, 171 F.3d 494, 497 (7th Cir. 1999).



academic freedom may incline courts to avoid adjudicating personnel claims of a type that would almost certainly not be spurned in less sensitive contexts.

Deference may also reflect a judicial appreciation for the college or university's uniquely important and sensitive research mission. Finding in favor of Stanford University's challenge to funding agency restrictions on publication of results of sponsored research, a federal district judge recognized a compelling set of interests that would clearly warrant abstention should the question arise in reverse:

Stanford University, a premier academic institution, engaged in significant scientific and medical research for the benefits of the American people, is not ipso facto compelled under the law to surrender its free speech rights and those of its scientific researchers to a "contracting officer" merely because a regulation . . . so directs.<sup>29</sup>

Although such strongly protective language may work better in a defensive mode than in litigation such as this (where Stanford prevailed against conditions on federal funding), courts have occasionally rebuffed corporate demands for disclosure by college and university scholars of research data in process on quite similar grounds.<sup>30</sup> Thus academic-freedom based judicial deference may be reinforced by parallel pleas for abstention derived from the college or university's sensitive research mission and the risks of potentially disruptive or intrusive intervention.

A second and closely related rationale for deference is judicial respect for academic governance. As the *Churchill* court suggested, where critical decisions have been committed to faculty bodies, courts should be unusually reluctant to gainsay or overturn the results of that process. Such reluctance seems to reflect two quite distinct considerations. On one hand, such deference may recognize the unusual degree to which resolution of such disputes has been entrusted to a different but cognate legal system; suggestive here is the analogy to judicial refusal to intervene in internal disputes within religious bodies based on other factors, but reflective in part of the "elsewhere committed" notion.<sup>31</sup> Also arguably relevant is the deference that the American Association of University Professors has long paid to church-affiliated colleges and universities.<sup>32</sup> Thus, it may not be unfair or illogical in effect to tell an aggrieved professor that he or she

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29. Tr. of *Leland Stanford Junior Univ. v. Sullivan*, 773 F. Supp. 472, 478 (D.D.C. 1991).

30. See, e.g., *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998); In re *American Tobacco Co.*, 880 F.2d 1520 (2d Cir. 1989).

31. See, e.g., *Jones v. Wolf*, 443 U.S. 595 (1979); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969).

32. See JUDITH C. AREEN, *HIGHER EDUCATION AND THE LAW: CASES AND MATERIALS* 369–88 (Thomson/West 2009).

implicitly accepted peer review and judgment by faculty committees upon joining the college or university. Though well short of recognizing binding arbitration as an exclusive remedy, that analogy does invoke the pervasive power of faculty governance.

Judicial deference also invokes a quite different set of practical values. An obvious lack of expertise in the ways of academe surely represents one such barrier to intervention. Even those few judges who have actually been law professors are usually uncomfortable when faced with complex campus disputes. Thus, as Kaplin and Lee observe, “courts are more likely to defer when the judgment or decision being reviewed . . . involves considerations regarding which the postsecondary institution’s competence is superior to that of the courts”<sup>33</sup>—an imperative frequently recognized by judges inclined toward abstention.<sup>34</sup> Indeed, it is the rare case in which a court could fairly claim comparable competence or familiarity with the ways in which academic decisions develop. For the very reasons that many observers of the academy express frustration, even outrage, at the slow pace of hiring or other key intra-college and university decisions, an outsider who happens to be a judge is seldom better equipped to understand or adjudicate arcane academic disputes or conflicts.

Closely related to the matter of competence or familiarity is that of remedy. Even in a case where ultimate deference did not seem warranted, for example, the Supreme Court recognized that intervention should be resisted or avoided if it would prove “so costly or voluminous that . . . the academic community . . . [would be] unduly burdened.”<sup>35</sup> A lower federal court cited as a reason for deference the risk of a ruling or decree that would “necessarily intrude upon the nature of the educational process itself.”<sup>36</sup> Similar concerns reinforced that inclination of the Colorado judge in the *Churchill* case to abstain from ordering reinstatement, noting as he did widely expressed concerns of Boulder faculty and academic administrators about the potentially harmful effects of the requested relief.<sup>37</sup> Of course, if a state or federal judge orders the reversal of a challenged personnel or other institutional action, the college or university may be forced to comply under threat of a contempt citation. That ultimate reality does not, however, warrant intervention in an academic dispute without careful consideration of possibly harmful effects and consequences. Cases at several levels underscore the importance of careful judicial assessment of the sometimes subtle or hidden risks of unfettered

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33. KAPLIN & LEE, *supra* note 27, at 131.

34. *E.g.*, *Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 548 (3d Cir. 1980); *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1153 (2d Cir. 1978).

35. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979).

36. *Kunda*, 621 F.2d at 547.

37. *Churchill*, No. 06CV11473 at 38–42.

intervention.<sup>38</sup>

Consideration of the “why” of the equation leads naturally to the “when”—conditions and circumstances under which academic matters most clearly merit judicial deference. Perhaps the most crucial such condition was implicit in the *Ewing* case and has been made explicit elsewhere—that the action for which insulation is claimed should be a “genuinely academic decision.”<sup>39</sup> Deputy Solicitor General Neal Katyal, recalling his success in pressing that claim in the race-based admissions case, insists that such decisions must be “educational judgments”<sup>40</sup> and that they should clearly reflect “faculty involvement.”<sup>41</sup> Thus deference would be less readily available to a purely administrative action that involved no faculty judgment or expertise—partly because a non-academic judgment would almost surely be more amenable to the expertise that most judges would bring to the process. (Indeed, one could posit as a separate desideratum the accessibility of the challenged decision, and its relative familiarity or unfamiliarity to judges; although this factor would likely parallel so closely the “academic-ness” of the issue that a separate criterion seems unhelpful).

One further caution may be obvious but deserves emphasis: There is no bright or sharp line that cleanly differentiates between “genuinely academic” and other judgments or decisions within the campus community; Some adverse actions against students might, for example, reflect regulations crafted by faculty groups, though applied and enforced by non-faculty administrators. Yet, undoubtedly the most compelling cases for according deference to academic judgments encompass matters where there has been central faculty judgment in shaping the challenged action or policy.

Such an inquiry should not, however, be limited to *whether* faculty were involved, but should also consider *how and what* they contributed; process may be at least as crucial as substance. The adequacy and fairness of internal procedures also represent a familiar desideratum that judges are well equipped to appraise. The *Ewing* Court took specific note that the challenged student dismissal was not only made by the relevant faculty, but that “the faculty’s decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing’s academic career.”<sup>42</sup> Thus the depth and intensity of faculty judgment may be at least as crucial in occasioning deference as its presence. So too, the judge in the *Churchill* case did not simply mention the two faculty committees that had negatively reviewed the impugned scholarship, but detailed the process by

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38. See e.g., *Churchill v. Univ. of Colo.*, No. 06CV11473 (D. Colo. July 7, 2009); *Cannon*, 441 U.S. at 710.

39. *Ewing*, 474 U.S. at 225 (1985).

40. Katyal, *supra* note 1, at 569

41. *Id.* at 566.

42. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

which that review had progressed in support of his conclusion that deference to the adverse outcome was warranted as much by the process that preceded it as by the content of the charges.<sup>43</sup> Thus, process may be almost as important as substance—conceivably even more so in certain situations—in defining the appropriate conditions for judicial deference.

A third condition or qualification is potentially far more difficult, yet sufficiently recurrent that it should be addressed. In most of the judicial deference cases we have considered here, the positions of the institution and of its faculty are concurrent or concordant, if not identical. Thus, the institution seeks judicial deference, as in *Ewing*, *Horowitz*, *Churchill* and other cases we have examined, to protect or insulate faculty judgment from court intervention and possible reversal. But what if the institution, by contrast, claims deference to shield from court probe or rebuke a position its faculty opposes? The cases posing such dissonance are relatively few, though likely to become more common and clearly deserving separate analysis.

The Fourth Circuit's ruling in *Urofsky v. Gilmore*,<sup>44</sup> is illustrative, where en banc review sustained against constitutional challenge a state law barring state employees (including public college and university faculty) from using state-owned or state-leased computers to access sexually explicit material (at least without a supervisor's approval). Six professors at Virginia state colleges and universities filed a First Amendment challenge in federal court. The district judge ruled in the scholars' favor on several grounds.<sup>45</sup> A three-judge panel of the Court of Appeals, however, proved far more sympathetic to the challenged statute. At the ultimate stage, an en banc ruling soundly rejected the scholars' constitutional challenge, and effectively obliterated any possible individual academic freedom claim in such a situation.<sup>46</sup> Although no institutional decisions or actions were in dispute—and in that sense the case did not invoke familiar arguments for and against judicial deference—the full court's dismissal of the professorial challengers' academic freedom claims clearly signaled to which set of interests the Fourth Circuit would defer if called upon to do so. In the event of a dispute between a college or university and its professors with regard to matters of teaching or scholarship, the institution's academic freedom claim would prevail since in the majority's view, the Supreme Court had never given primacy to individual faculty in such a dispute.<sup>47</sup> Of course, because the institutions where the plaintiffs taught were not parties to a suit against the Commonwealth, any comments about relative academic freedom claims were necessarily dicta.

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43. *Churchill*, No. 06CV11473 at 4–8.

44. 216 F.3d 401 (4th Cir. 2000).

45. *Urofsky v. Allen*, 995 F. Supp. 634 (E.D. Va. 1998).

46. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).

47. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).

There have, however, been a few cases that directly juxtaposed institutional and individual claims and yielded results that bear significantly (if perhaps obliquely) on the proper role of judges when asked to review institutional actions that affect academic life. Two federal appeals courts reached diametrically opposed results with regard to a professor's right to grade students as part of the teaching process. In a Tennessee case, the reviewing court sided with the instructor, ruling that "the freedom of the university professor to assign grades according to his own professional judgment is . . . central to the professor's teaching method" and thus protected by academic freedom.<sup>48</sup>

Yet in the other case, filed against a Pennsylvania public university, the court insisted that grading was not an integral part of instruction and thus not within the scope of an individual professor's academic freedom.<sup>49</sup> Specifically, "because grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught."<sup>50</sup> The contrasting lessons for judicial deference seem unavoidable: In the Sixth Circuit the institution's plea for autonomy must yield to an instructor's claim of primacy in grading his or her own students, while in the Third Circuit, the college or university's quest for deference on precisely that issue prevails. Thus by clear implication, should an issue of judicial deference arise in a dispute between teacher and institution over such an issue of academic policy, the result may vary dramatically from one venue to another, and for reasons that relate to broader desiderata shaping judicial deference.

One might consider a quite different case in another federal appeals court, this one pitting an Illinois community college against the chairman of its art department in a bitter dispute over the location of a racially sensitive exhibit that the chairman himself had created.<sup>51</sup> When the case reached Judge Richard Posner in the appellate court, his many years as a law professor undoubtedly sharpened his appreciation of a lurking tension between individual and institutional academic freedom claims—a latent tension that he and his Seventh Circuit colleagues insisted must now be addressed. Academic freedom, observed Judge Posner, was used in an "equivocal" sense both to "denote the freedom of the academy to pursue its ends without interference from government" and "the freedom of the individual teacher . . . to pursue his ends without interference from the academy."<sup>52</sup> Noting that "these two freedoms are in conflict . . . in this case," Judge Posner wisely warned of the need to recognize such tension

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48. *Parate v. Isibor*, 868 F.2d 821, 828 (6th Cir. 1989).

49. *Brown v. Armenti*, 247 F.3d 69 (3d Cir. 2001).

50. *Id.* at 75.

51. *Piarowski v. Ill. Cmty. Coll.*, 759 F.2d 625 (7th Cir. 1985).

52. *Id.* at 629.

and chart a course for potential accommodation.<sup>53</sup> Here again, although the facts did not present the court with a conventional plea for institutional autonomy, Judge Posner's characterization of the case and its central issues invited analysis strikingly comparable to what courts do when asked to defer to a challenged academic action or policy. The court of appeals affirmed the dismissal of the artist-professor's suit partly because an alternative exhibit site had been offered and rejected, but also because of a valid concern on the college's part that the targeted images might impair its minority recruitment and community-relations efforts.<sup>54</sup> The Seventh Circuit's benign resolution of the *Piarowski* case also offered valuable, if analogous, guidance for the disposition of more familiar deference claims.

If both institution and faculty appear in court as adversaries, each invoking academic freedom and urging judicial deference, a couple of simplistic solutions initially suggest themselves. A judge could simply note that whichever party seeks relief—and it could be either in an era when colleges and universities occasionally sue their professors—may not logically seek deference since it has called for judicial interference; or a court could dismiss the case on the ground that considerations, which counsel deference in the more typical case, would likewise justify abstention when the very source of deference is itself in dispute between the parties. But neither option seems at all satisfying, and their inadequacy compels further analysis.

The most difficult case, of course, would be one in which a challenged institutional policy or action directly conflicts with the results of faculty governance—for example, a faculty senate's insistence on autonomy in grading, overridden by a dean's intervention in favor of a student who complains of a failing grade. Superficial analysis might presumably invite deference to the institution, especially since an intrusive administrator could claim that drastic action was vital to preserve a student's learning opportunity. But in such a case, the primary pillar of judicial deference—faculty judgment on a “genuinely academic issue”—would now be found on the other side. A court should not defer to the institution's grading policy if that would mean (as it typically would) disregarding a faculty's judgment to the contrary. Perhaps the wisest course would be simply to treat such a situation as one to which judicial deference does not apply since the rule and its rationale have been separated or divorced. Clearly a decision could be reached in such a case, since neither side would be properly entitled to judicial deference.

#### IV. JUDICIAL DEFERENCE TODAY: OBSOLETE OR ALIVE AND WELL?

The time has come to assess the current status of judicial deference.

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53. *Id.* at 629–30.

54. *Id.* at 630–31.

Observers and commentators fall into three distinct groups. Most familiarly, there are those who still acclaim the doctrine and regularly invoke it in litigation of cases like Professor Churchill's reinstatement suit.<sup>55</sup> At the other end of the spectrum are skeptics or critics who insist that judicial deference, if ever tenable, has recently served to shield or immunize colleges and universities from legal accountability for decades of discrimination.<sup>56</sup> Then there are those who, like Professor Amy Gajda, are not partisans in the debate for or against judicial deference, but who nonetheless argue that the doctrine has recently been undermined and made far less relevant by a host of changing conditions.<sup>57</sup> It is the views of this third group that most clearly merit our attention here, since their objectivity on the merits of judicial deference affords a special credibility.

Observers such as Professor Gajda, who claim that judicial deference has lost favor and force, cite several factors, the existence of most of which is beyond dispute. For example, a half century or less ago, litigation against institutions of higher learning was minimal, involving for the most part claims and disputes common to all non-profit organizations and government agencies. The rapid proliferation of such litigation in the past several decades is an indisputable phenomenon; almost without regard to changes in the subject matter of such litigation, the rapidly rising case load would in any event have made academic decisions more often amenable to court intervention.<sup>58</sup> But there have been dramatic changes in the sources of such legal claims against institutions of higher learning, and to those changes Professor Gajda and others<sup>59</sup> quite logically attribute the declining deference of any courts. Aided in part by such dramatic changes in the legal landscape as federal and state civil rights laws, a host of new plaintiffs have gone to court seeking relief from colleges and universities over issues and claimed injustices that simply did not exist a generation earlier. Indeed, the realm of discrimination (mainly on grounds of race and gender) seems to have opened legal gates that historically had appeared to have been closed and locked for higher education plaintiffs.<sup>60</sup> Bias claims seem also to have emboldened skeptical judges to express more freely their

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55. *E.g.*, Katyal, *supra* note 1.

56. *See, e.g.*, Mark Bartholomew, *Judicial Deference and Sexual Discrimination in the University*, 8 *BUFF. WOMEN'S L.J.* 55 (2000).

57. *See* GAJDA, *supra* note 3, at 15–16.

58. Even this factor may, however, merit reconsideration in light of current trends. A very recent study published in the *Education Law Reporter* in late summer 2009, noted that the earlier growth in litigation against institutions of higher learning has slowed significantly, and that faculty members constitute a diminishing share of current legal challenges. *Growth in Litigation Involving Colleges Has Slowed, Study Finds*, *CHRON. HIGHER EDUC.*, Sept. 11, 2009, <http://chronicle.com/blogPost/Growth-in-Litigation-Involving/8008/?s>.

59. *See, e.g.*, Moss, *supra* note 2, at 9–10.

60. *See, e.g.*, *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979).

doubts about the propriety (much less the necessity) of abstention from campus disputes.<sup>61</sup>

A similar broadening of legal recourse seems to have resulted from the dramatic rise in student activism starting in the late 1960s, which brought to the courts a host of novel free speech and due process issues seldom seen on college and university campuses in earlier times.<sup>62</sup> If only because the claims of student plaintiffs in such cases were familiarly constitutional, based on readily available First and Fifth Amendment precepts, judges were less inclined to defer to academic judgments. As early as the Supreme Court's 1972 ruling in favor of a student political group's claim not to be barred from a public campus because of the controversiality of its views,<sup>63</sup> it was clear that deference would not foreclose review of such clearly constitutional interests—that would have been the Court's view even if the institution claimed an “academic” rationale for excluding the student group. And where the challenged sanction involved disciplining a student (or occasionally an outspoken professor) for campus protest or disruption, the historical basis for judicial deference was far less apparent.<sup>64</sup> Thus, intervention became far more difficult for colleges and universities to resist in cases of this type.

Beyond such newfound statutory remedies as those that protect civil rights, attorneys who represent aggrieved students or professors have fashioned a host of new claims and causes of action such as “educational malpractice” that invite courts to tread paths toward relief that simply never existed in earlier times.<sup>65</sup> Even traditional causes of action, such as breach of contract, seem to have become more popular as a means by which aggrieved members of the academic community might pierce the veil of institutional autonomy.<sup>66</sup> Taking all such factors and forces together over the past quarter century or so, Professor Gajda concludes that the legal landscape has changed dramatically:

The important development is that, as far as litigation and the courts are concerned, academia is beginning to resemble other walks of life. Significantly, members of the academic community are increasingly inclined to think about their interactions in legal terms. And, of at least equal significance, judges are increasingly receptive to mediating these campus

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61. See GAJDA, *supra* note 3, at 51–81.

62. *E.g.*, Healy v. James, 408 U.S. 169 (1972).

63. *Id.* at 192.

64. *See, e.g.*, Shamloo v. Miss. State Bd. of Tr., 620 F.2d 516 (5th Cir. 1980); Roberts v. Haragan, 346 F. Supp. 2d 853 (N.D. Tex. 2004).

65. *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992); AREEN, *supra* note 32, at 709–10 (noting that “educational malpractice claims have continued to fare badly in the courts”).

66. *E.g.*, Atria v. Vanderbilt Univ., 142 Fed. Appx. 246 (6th Cir. 2005).



conflicts.<sup>67</sup>

Such analysis seems beyond dispute in one respect, yet it invites consideration of a broader question. The growth of litigation against institutions of higher learning, and the erosion of certain historical barriers to legal liability, can hardly be doubted. On the other hand, it is far from clear that judicial deference has ceased to insulate from court intervention the types of actions to which it applies—those “genuinely academic judgments” that a unanimous Supreme Court said should be disturbed only if the decision-maker “did not actually exercise professional judgment.”<sup>68</sup> Here the situation is far more mixed, as the recent ruling in the *Churchill* case reminds us.<sup>69</sup> Indeed, one might well conclude that judicial deference still applies where it belongs, while non-academic campus decisions and actions have not surprisingly become increasingly amenable to court intervention.

Several factors may guide us to this somewhat paradoxical conclusion. For one, the legal landscape has always been more confusing on close scrutiny than it may appear to casual observers. Courts have occasionally seemed more deferential to decisions of those public governing boards like the Regents of the Universities of California and Michigan, which enjoy special status under their state constitutions, than to the general run of non-constitutional public boards—and for reasons that are unrelated to the central premise of “judicial deference.”<sup>70</sup> Although it may be wholly coincidental that the two resounding victories for race-based admissions policies,<sup>71</sup> offering what are probably the strongest declarations of deference, happened to involve those very constitutional governing boards, the parallel is nonetheless striking. Constitutional status is properly a source of deference, both judicial and legislative, though unrelated to the doctrine on which we focus here.

Then there is the contrast between public and private college and university campuses, which also turns out to be more complex than it may appear to the untrained eye. How private colleges and universities actually fare in court varies so widely as to preclude easy generalization. New York courts, for example, have always been more receptive to students and

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67. GAJDA, *supra* note 3, at 4.

68. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)

69. *Churchill v. Univ. of Colo.*, No. 06CV11473 (D. Colo. July 7, 2009). [http://extras.mnginteractive.com/live/media/site36/2009/0707/20090707\\_122722\\_churchill.pdf](http://extras.mnginteractive.com/live/media/site36/2009/0707/20090707_122722_churchill.pdf)

70. *E.g.*, *Regents of Univ. of Mich. v. State*, 419 N.W. 2d 773 (Mich. Ct. App. 1988) (invalidating various forms of legislative regulation that would have been virtually unassailable in most non-constitutional states.) *See generally* Karen Petroski, *Lessons for Academic Freedom: The California Approach to University Autonomy and Accountability*, 32 J.C. & U.L. 149 (2005).

71. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

faculty on private campuses than the state courts of nearly any other state.<sup>72</sup> Then there is the curious case of New Jersey, further illustrating the elusive nature of the usually distinct contrast between “public” and “independent” institutions.<sup>73</sup> When the state supreme court ruled on “state action” grounds in favor of a political activist who had been removed from Princeton’s clearly private campus, the U.S. Supreme Court granted review of a novel free speech ruling.<sup>74</sup> The case was eventually dismissed when Princeton’s regulations governing trespass were modified before the high Court rendered judgment, making the core issue moot.<sup>75</sup>

Meanwhile, federal courts seem to have become markedly less willing to find adequate evidence of “state action” as a basis for Section 1983 claims against private institutions than was the case in the 1960s, when as traditionally and functionally private an institution as Washington University in St. Louis was held legally accountable in federal court for a claimed deprivation of constitutional rights.<sup>76</sup> More recently though, federal judges seem to have insisted on substantially greater evidence of governmental impact or nexus before finding a private college or university to be engaged in “state action;”<sup>77</sup> such reluctance to intervene could not, however, logically be attributed to anything like “judicial deference,” even though the readiness of federal courts to tackle such cases in earlier times may partly have reflected a lesser measure of just such deference.

A third factor that surely enters the equation is the dramatic change in the subject matter of higher education lawsuits. The rapid rise of student free speech and due process claims, followed by sharp growth in statutorily based claims of race and gender discrimination, are indisputable facts of life for college and university administrators and their attorneys.<sup>78</sup> The greater readiness (indeed sometimes eagerness) of federal judges to adjudicate such disputes could appear to reflect a lower level of deference toward academic decisions. On the other hand, such trends may equally reflect changes in the focus of litigation. Growing reliance on new statutory remedies and regulatory principles may have allowed even the most sympathetic judges substantially less latitude for deference or abstention than existed in earlier times, when most claims against higher

72. See, e.g., *Carr v. St. John’s Univ.*, 231 N.Y.S.2d 410 (N.Y. App. Div. 1962).

73. *State v. Schmid*, 423 A.2d 615 (N.J. 1980), *appeal dismissed*, 455 U.S. 100 (1982).

74. *Princeton Univ. v. Schmid*, 451 U.S. 982 (1981).

75. *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982).

76. See *Belk v. Chancellor of Wash. Univ.*, 336 F. Supp. 45 (E.D. Mo. 1970) for a characteristically sympathetic federal court view of claims against private educational institutions.

77. See, in contrast, for a later and less receptive view, *Hack v. President of Yale Coll.*, 237 F.3d 81 (2d Cir. 2000), *cert. denied*, 534 U.S. 888 (2001); *Coleman v. Gettysburg Coll.*, 335 F. Supp. 2d 586 (M.D. Pa. 2004).

78. See GAJDA, *supra* note 3, at 5-6.

education institutions reflected more amorphous constitutional and common-law roots.

A fourth and related factor that merits closer attention is several highly relevant changes in legal principles that have opened courts to previously non-justiciable claims. The case of public employee speech offers a striking illustration. Until the late 1960s, government could punish or dismiss its workers almost as readily as could private employers. Justice Oliver Wendell Holmes wrote in the 1890s that a politically active patrolman had no legal recourse against his dismissal because “a man may have a constitutional right to talk politics, but . . . [not] to be a policeman.”<sup>79</sup> That remained the template until 1968, when the Supreme Court conferred substantial First Amendment protection on public employees.<sup>80</sup>

Although only statements on “matters of public concern” could claim protection, and although a state agency could still invoke such interests as harmony within and confidence without as grounds for disciplining outspoken staffers, government workers would (at least for several decades) enjoy markedly greater freedom of speech than had ever been the case in the past. For state college and university faculty, that standard provided far greater protection. The University of Colorado’s initial decision to spare Professor Ward Churchill from any sanction on the basis of his shocking comments about the 9/11 tragedy reflected precisely that precedent.

Ironically, however, the scope of such protection for outspoken professors has now lessened in a way that might seem to—but in the end does not—imply heightened judicial deference to public colleges and universities. As the result of a 2006 Supreme Court ruling,<sup>81</sup> several lower federal courts have denied First Amendment protection to outspoken professors because their offending speech fell “within their official duties” and, thus, beyond the protective ambit of the Supreme Court’s public employee speech doctrine.<sup>82</sup> Inferring that courts have become more respectful of state college and university control over professors’ extramural speech would, however, be as misleading as it is superficially plausible. The change in question has undoubtedly resulted in fewer successful suits by outspoken faculty—but not because courts are readier to respect the process by which such sanctions are imposed against offensive professorial speech. And to return briefly to the latest round of the *Churchill* litigation, where the critical issue is research misconduct and not extramural speech, the deference paid to Colorado university officials is

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79. *McAuliffe v. Mayor of Aldermen*, 29 N.E. 517, 517 (Mass. 1893).

80. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

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

82. *Id.* at 574. See *Hong v. Grant*, 516 F. Supp. 2d 1158, 1165 (C.D. Cal. 2007); *Gorum v. Sessoms*, 561 F.3d 179, 186 (3d Cir. 2009).

neither more nor less than would have occurred in earlier times.

In this regard, as with other changes in the legal landscape of higher education, what might superficially appear to be changing levels of deference to campus judgment are in fact prompted by wholly different forces and factors. A critical distinction should now be noted between a trend that, on one hand, some observers see as a gradual erosion of judicial deference, and the same phenomenon that others, in sharp contrast, view simply as expansion of the types of legal claims against colleges and universities that should not counsel abstention out of respect for the academic decision-making process. We might cast this issue in a slightly different mode: What proof exists that courts have become less ready to defer to campus processes and judgments in “genuinely academic” matters of the sort that the *Ewing* Court exempted from routine judicial review?

The evidence on that point is elusive at best. Several recent cases that Professor Gajda cites to support her claim of diminished deference<sup>83</sup> might well in earlier times have been deemed candidates for abstention, though most of these examples would (or should) never have triggered the *Ewing* standard.<sup>84</sup> Meanwhile, most of the cases on which Gajda and others rely as evidence of reduced respect for academic processes reflect quite different forces, such as greater resort to new types of legal claims to which deference was never logically applicable.

However sanguine one may be about the current status of judicial deference, complacency would be as unwise here as in other areas of higher education law. Even if this legal doctrine is in perfect health—a premise that remains in dispute—there is little doubt that it could be made stronger and more defensible. One commentator who faults traditional deference has recently urged that academic autonomy with regard to truly educational matters could be better reconciled with anti-discrimination claims through a balancing process she describes as “limited deference.”<sup>85</sup> Relying primarily on several recent Seventh Circuit decisions<sup>86</sup> that reflect such accommodation, she describes the balancing approach thus:

Unlike the traditional approach, whereby courts defer to universities and avoid evaluating the individual merits of the case, the Seventh Circuit approaches university-employment disputes much like it addresses disputes in other industries, but it continues to defer to the university in matters of academic

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83. *E.g.*, *Atria v. Vanderbilt Univ.*, 142 Fed. Appx. 246 (6th Cir. 2005); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).

84. See, for example, Amy Gajda & Scott Jaschik, *supra* note 3.

85. Michelle Chase, *Gender Discrimination, Higher Education and the Seventh Circuit: Balancing Academic Freedom with Protections under Title VII Case Note: Farrell vs. Butler University*, 22 WIS. WOMEN’S L.J. 153, 165 (2007).

86. See *Farrell v. Butler Univ.*, 421 F.3d 609 (7th Cir. 2005).

evaluation.<sup>87</sup>

On the basis of his experience representing private law school deans in the *Grutter* litigation, Deputy Solicitor General Katyal has offered a rather different, but equally intriguing formula for balancing institutional autonomy with individual interests. With an eye to the degree of deference courts should pay to such controversial policies as those that include race among the admission factors to highly selective graduate programs, Katyal offers this prospectus:

A peer-review proposal for academic autonomy would look something like this: Universities that would like to take race into consideration must have their processes reviewed by a national committee of academics devoted to the task. . . . The principle of academic autonomy recognizes that universities often have superior competence at making tough admissions policy choices when compared to federal courts. But university decision-making can also be bureaucratic, too rough, not tailored to the educational interests at stake, and possibly even tinged by animus. Without strong procedural limits to the use of academic autonomy, the doctrine can morph into a monster with pernicious consequences.<sup>88</sup>

While others may disagree with this formulation from either side—finding it either unduly deferential to the academic community in a sensitive and contentious area, or unduly restrictive of the autonomy of a single college or university that wishes and has the resources to craft its own admissions policies—Katyal’s caution seems well worth heeding.

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87. Chase, *supra* note 85, at 171–72.

88. Katyal, *supra* note 1, at 571.

# GOVERNMENT REGULATION OF HIGHER EDUCATION:

## THE ELEPHANT IN THE MIDDLE OF THE ROOM

STEPHEN S. DUNHAM\*

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### I. INTRODUCTION

Higher education is a regulated industry. Colleges and universities are regulated entities.<sup>1</sup> The law and governments touch virtually

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1. See Derek P. Langhauser, *Executive Regulations and Agency Interpretations: Binding Law or Mere Guidance? Developments in Federal Judicial Review*, 29 J.C. & U.L. 1, 1 (2002) (“Colleges and universities are among the most extensively regulated

everything colleges and universities do, frequently with a heavy hand. While other parts of our economy have been affected by sweeping deregulation, the experience of higher education is just the opposite. Colleges and universities may not yet be public utilities, but the trends are unmistakable.

These statements would have shocked college and university boards, presidents and faculty who governed our higher education institutions over the 300 plus years from the founding of Harvard College in 1636 until the late 1940s, when this story begins. For three centuries, higher education institutions thrived largely independent of federal regulation and control. Between 1945 and today, all of this changed. Institutional autonomy has been limited by requirements of institutional compliance. Deference has been diluted by oversight. Academic freedom has been constrained by a maze of federal regulations.

What is the history of governmental regulation of colleges and universities? How and why has it developed? What are the costs and benefits of regulation? How has government regulation changed the still new field of higher education law? What does it mean for lawyers who represent colleges and universities? What does it mean for the institutions themselves, including their missions and their varied and multiple constituencies?

This article attempts to address these questions. Part I is historical—what are the origins of and reasons for government regulation? Part II is analytical—what are the costs and benefits of government regulation of higher education; how are these interests balanced and evaluated? Part III is descriptive—it recounts certain college and university functions that are regulated, the applicable laws, and how they work. Finally, Part IV provides a very brief introduction to the relatively new field of “compliance.” Part IV addresses the question: How does a college or university comply with both the myriad of changing regulatory requirements that it faces and the changing role of college or university counsel who may be asked not just to advise and defend the institution but also to act as a kind of government agent—an in-house regulator—to ensure that the “entity client” follows the law?

## II. HISTORY AND PURPOSE OF GOVERNMENT REGULATION OF COLLEGES AND UNIVERSITIES

With a few notable exceptions,<sup>2</sup> colleges and universities are created and organized under state law. As legal entities they have always been subject to applicable “law,” including state and federal constitutional, statutory or

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enterprises in the nation.”).

2. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* § 1.3.3 (4th ed. 2006).

common law and the provisions of their founding documents. As such, they have always been regulated, or at least theoretically subject to regulation, by the laws of the jurisdictions where they are located and by whatever governmental entities, including courts, have had the authority to enforce the laws. To this limited extent, governments and laws have always affected, or had the potential to affect, colleges and universities. But the history described here relates not to the generic and largely theoretical application of general statutory and common law to colleges and universities. The subject of this paper is rather the laws, regulations and judicial decisions that uniquely apply to colleges and universities precisely because of what they are, and the special functions and missions they carry out—research, teaching of students, and governance of not-for-profit academic institutions—that set them apart from most other legal entities.

Government regulation of higher education in 2010 covers a wide range of activities at virtually all colleges and universities.<sup>3</sup> Most regulatory activity can be divided into four categories: laws applied as a condition of funding that specifically promote and protect the government's interests and objectives in the research or other activities that it funds; laws and regulations that apply as a condition of funding but that promote a specific federal or public policy agenda separate from the direct purpose of the funding; laws of general application that apply to higher education institutions along with other entities, though the application of the laws to colleges and universities may be unique; and laws that regulate academic institutions based on their not-for-profit status. The history of regulation in each of these four areas varies one from another and helps to explain both the public benefits sought to be created by the regulations and the costs the regulations impose on colleges and universities.

#### A. Federal Funding of Colleges and Universities to Advance a Specific Public Purpose

##### 1. Funding of Research to Promote New Discoveries and Products

The history of the American research university is usually traced to the late 1800s, when several American colleges and universities, beginning in 1876 with The Johns Hopkins University, began to adopt the German model in which universities sought to encourage research and to advance knowledge well beyond the education (or training) of undergraduates and professional students.<sup>4</sup> Federal funding of research universities and the

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3. See Campus Legal Information Clearinghouse (CLIC), Summary of Federal Laws Governing Independent Colleges and Universities, <http://counsel.cua.edu/fedlaw> (last visited Apr. 8, 2010) (providing access to a compilation of federal laws that apply to higher education).

4. See generally JONATHAN R. COLE, *THE GREAT AMERICAN UNIVERSITY: ITS*



resulting regulation of scientific research, however, did not begin until the immediate aftermath of World War II, when the government supported scientific research first in the area of national defense and then in medical research and health.<sup>5</sup>

Before World War II, the federal government had supported scientific research but for the most part it had done so directly through federal employees in federal laboratories.<sup>6</sup> As a result of collaborations begun during the war, the government expanded its support of science by awarding grants to university scientists to carry out government projects at the universities themselves.<sup>7</sup> This defense-related work continued and expanded in the late 1940s and 1950s and was expanded further in the early 1950s to include funding for medical research from the National Institutes of Health.<sup>8</sup>

The amount of federal funding of research at colleges and universities has exploded since it began in the late 1940s. Starting from virtually zero, federal funding for research at higher education institutions, in constant year 2000 dollars, increased to approximately \$6 billion in 1972, \$7.7 billion in 1980, \$11.87 billion in 1990, \$17.5 billion in 2000, and \$26 billion in 2005.<sup>9</sup>

Similarly, the scope of funding has expanded from defense to include medicine, basic science, agriculture,<sup>10</sup> energy, environment, education,

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RISE TO PREMINENCE, ITS INDISPENSIBLE NATIONAL ROLE, WHY IT MUST BE PROTECTED 16–22 (2010) (“The combination of teaching and research became distinguishing feature of the [German] system. . . . Throughout much of the nineteenth century Americans interested in higher learning and the university were simply envious of what they saw in Germany. . . . The first American university to emphasize research rather than undergraduate teaching was Johns Hopkins, which opened its gates in 1876.”); JOHN THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 103–07 (2004) (discussing “the German ideal of advanced scholarship, professors as experts, doctoral programs with graduate students, and a hierarchy of study,” its influence on Johns Hopkins and the development of the “‘university’ model of federated units” in the United States in the nineteenth century).

5. See COLE, *supra* note 4, at 98–99; THELIN, *supra* note 4, at 271–74; WILSON SMITH & THOMAS BENDER, AMERICAN HIGHER EDUCATION TRANSFORMED 1940–2005 at 402–405 (2008). See also DAVID DICKSON, THE NEW POLITICS OF SCIENCE 7 (The University of Chicago Press 1988) (1984); ROGER L. GEIGER, KNOWLEDGE AND MONEY: RESEARCH UNIVERSITIES AND THE PARADOX OF THE MARKETPLACE 132–43 (2004); ROBERT M. ROSENZWEIG, THE POLITICAL UNIVERSITY: POLICY, POLITICS, AND PRESIDENTIAL LEADERSHIP IN THE AMERICAN RESEARCH UNIVERSITY 3–5 (1998).

6. COLE, *supra* note 4, at 88. THELIN, *supra* note 4, at 201, 271–72.

7. COLE, *supra* note 4, at 95–98; ROSENZWEIG, *supra* note 5, at 4–5.

8. COLE, *supra* note 4, at 98–99.

9. National Science Foundation, Division of Science Resources Statistics, Survey of Research and Development Expenditures at Universities and Colleges, <http://www.nsf.gov/statistics/srvyrdexpenditures> (last visited Apr. 8, 2010).

10. The federal government has supported state universities, including their agricultural activities, since the Morrill Act of 1862. Morrill Act of 1862, 7 U.S.C. § 301 (2006).

public health, aid to developing countries, and other areas.

Federal funding of research at colleges and universities is based on a contract model. The “Government promises to fund the basic science . . . and scientists [at colleges and universities] promise that the research will be performed well and honestly and will provide a steady stream of discoveries that can be translated into new products, medicines, or weapons.”<sup>11</sup> In order to ensure that the colleges and universities perform the work “well and honestly,” the government has adopted an increasing array of regulations. The “contract” has moved from one based in large part on trust to one based in greater part on regulation and oversight intended to insure that the government’s objectives are properly served. To determine “honesty,” for example, the government has adopted a framework to evaluate allegations of research and scientific misconduct and rules for determining conflict of interests. To determine that government money was in fact spent on the purposes for which it was provided, the government requires an effort-reporting system to determine that time is actually spent and properly allocated to each contract and an audit system to judge that expenses are properly incurred and attributed. The contract model thus uses compliance with regulations as a means to ensure that the purposes of the funding are met.

## 2. Funding of Financial Aid to Promote Access to Higher Education

In the waning days of World War II, the government began planning for the transition of military personnel to civilian jobs. One part of this program was the GI bill, originally passed in 1944.<sup>12</sup> “Over two million veterans went to college or university using the GI Bill,” and the federal government spent \$14.5 billion dollars on the education portion of the bill.<sup>13</sup>

The next big wave of federal support for access to higher education came in 1972 with the Pell Grant program, followed over the years with other federal loan and grant programs for financial aid.<sup>14</sup> By 2009, the federal government budget supporting financial aid for students exceeded \$95 billion dollars.<sup>15</sup>

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11. David H. Guston & Kenneth Keniston, *Introduction: The Social Contract for Science*, in *THE FRAGILE CONTRACT: UNIVERSITY SCIENCE AND THE FEDERAL GOVERNMENT* 1, 11 (David H. Guston & Kenneth Keniston, eds., 1994).

12. U.S. Dep’t of Veterans Affairs, GI Bill History, [www.gibill.va.gov/GI\\_Bill\\_Info/history.htm](http://www.gibill.va.gov/GI_Bill_Info/history.htm) (last visited Apr. 8, 2010).

13. KATHLEEN J. FRYDL, *THE G.I. BILL* 186, 310 (2009).

14. Federal Pell Grant Program, <http://www2.ed.gov/programs/fpg/index.html> (last visited Apr. 8, 2010).

15. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *BUDGET OF THE UNITED STATES GOVERNMENT, DEP’T OF EDUC., FISCAL YEAR 2009* (2008), available at <http://www.gpoaccess.gov/usbudget/fy09/pdf/budget/education.pdf>.

Federal money to support student access to education brought with it a slew of regulatory requirements which, as with research dollars, were intended both to ensure that the government's money was well spent and also that it was spent to further the government's purposes.<sup>16</sup>

## B. Laws and Regulations Imposed as Conditions on Funding But Designed to Promote Public Purposes Separate from the Purpose of the Funding Itself

### 1. Research

As noted, the original “contract” between the federal government and college and university recipients of federal research monies was a simple one: the government provided the money in return for the institution's promise to undertake the research. Over time the government has added conditions to the contract under which the recipient promises to comply with various other laws and regulations. Some of these conditions and regulations (such as protection of human subjects and animals) relate to the funded research but are principally intended to promote secondary purposes. Many others—employment laws, student rights and protections—are simply expressions of unrelated federal policy to which the college or university must attest or certify as a condition of receipt of the federal money.

The National Council of University Research Administrators publishes a book entitled *Regulation and Compliance: A Compendium of Regulations and Certifications Applicable to Sponsored Programs* (“NCURA Compendium”).<sup>17</sup> The 2007 edition lists over 90 different legal requirements applicable to recipients of federal grants and contracts,<sup>18</sup> ranging from the relatively specific—the Byrd Amendment<sup>19</sup> requiring recipients to hold an educational program on the United States Constitution on September 17 of each year – to general omnibus requirements which contain literally hundreds of other specific requirements.<sup>20</sup>

16. See *infra* Part II.B.2.

17. JANE A. YOUNGERS, REGULATION AND COMPLIANCE: 2007, A COMPENDIUM OF REGULATIONS AND CERTIFICATIONS APPLICABLE TO SPONSORED PROGRAMS (NCURA 2007).

18. *Id.* at 193–96.

19. Consolidated Appropriations Act, Pub. L. No. 108-447, 118 Stat. 2809 (2005); Notice of Implementation of Constitution Day and Citizenship Day, 70 Fed. Reg. 29,727-01 (May 24, 2005).

20. For example, the Federal Acquisition Regulations include relatively new provisions relating to sex trafficking and codes of conduct. Federal Acquisition Regulations System, 48 C.F.R. § 1.101 ch. 1 (October 1, 1984), available at <https://www.acquisition.gov/far/current/pdf/FAR.pdf>. See also COUNCIL ON GOVERNMENTAL RELATIONS (COGR), MANAGING EXTERNALLY FUNDED RESEARCH PROGRAMS: A GUIDE TO EFFECTIVE MANAGEMENT PRACTICES (2009).

Not all of these requirements apply to every federal program. Some apply to grants and not contracts, or vice versa. Some apply only to grants or contracts with certain agencies. Figuring out which regulatory requirements apply to which grants or contracts is part of the regulatory maze through which colleges and universities must navigate.

As noted, some of these requirements are related to the actual work to be performed under the grant or contract, even though they may not serve the purpose or objective of the contract. For example, requirements related to the protection of human subjects and to the use of animals in research are inextricably intertwined with the research and are intended to ensure that the research is performed according to certain professional, ethical or scientific standards. Nevertheless, these purposes—which are highly laudatory and appropriate—are secondary to the reason the government has chosen to fund the research. These regulations are thus designed to promote secondary purposes (i.e. protection of human subjects or animals) that are above and beyond the objectives of the underlying research (i.e. medical advances or improved public health).

Many other laws and regulations that are the subject of certifications and assurances that are conditions to federal research grants and contracts have essentially nothing to do with the purpose of the contract or grant itself. Making these secondary laws a condition of the contract is simply a vehicle by which the government seeks to promote a particular public policy. Laws in this category include statutes and regulations related to anti-discrimination, privacy, safety and security, data dissemination, and a host of miscellaneous provisions such as “Buy American” acts and laws about smoke-free environments.<sup>21</sup>

## 2. Financial Aid

As with research monies, over time the government has added even more regulatory conditions to the receipt of federal financial aid monies beyond the primary requirement that the money be used as financial aid to support access to education. The best recent example is the Higher Education Opportunity Act of 2008 (“HEOA”),<sup>22</sup> amending the Higher Education Act of 1965 (“HEA”).<sup>23</sup> Annually, colleges and universities who participate in federal financial aid programs must certify compliance with the HEOA, as amended, and the myriad of requirements that it imposes.

As with the conditions applied to research monies, some of these

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21. See YOUNGERS, *supra* note 17, at 25–43 (anti-discrimination), 45–56 (privacy), 89–99 (safety and security), 101–11 (data dissemination), 159–60 (Buy American Act), 165 (smoke-free workplace).

22. Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008).

23. 20 U.S.C. §§ 1001–1161aa (2006).

conditions can be said specifically to promote the purpose of the financial aid programs to which they are appended—financial assistance and access to higher education. But many requirements of the HEOA are truly unrelated to these purposes of the federal funding and were apparently added to serve separate public purposes or to respond to separate special interests. The National Postsecondary Education Cooperative recently published a list of the “disclosure” requirements of the HEA and the HEOA that it considers “non-loan related.”<sup>24</sup> They list 31 such requirements, many of which have numerous sub-requirements.<sup>25</sup> These disclosure requirements cover a wide range of topics, including: privacy, diversity, the price of textbooks, copyright infringement, fire safety, and graduation rates.<sup>26</sup>

### C. Laws, Regulations and Court Decisions of General Scope with Unique Application to Colleges and Universities

The scope of laws and court decisions of general application that apply to colleges and universities is as broad as our entire legal system and is well beyond the scope of this paper. But the regulatory nature of these laws arises most significantly and problematically where general purpose laws have a particularly intrusive effect when applied to higher education institutions. Two broad examples illustrate this point.

#### 1. Equal Opportunity and Non-discrimination

Beginning in the 1970s, federal laws prohibiting discrimination and promoting equal opportunity began to be applied to college and university admissions decisions, academic programs and faculty hiring.<sup>27</sup> While some of these laws did not apply uniquely to colleges and universities, they had the effect, for the first time, of bringing the federal government into academic decision-making at colleges and universities. Some of these laws apply to colleges and universities whether or not they are recipients of federal funding. Many have a unique impact on colleges and universities because of their educational missions and governance structures. Application of these laws to higher education in the 1970’s generated the first wave of concern on the part of colleges and universities that government regulation might threaten their missions, institutional autonomy and fundamental values.<sup>28</sup>

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24. NATIONAL POSTSECONDARY EDUCATION COOPERATIVE, INFORMATION REQUIRED TO BE DISCLOSED UNDER THE HIGHER EDUCATION ACT OF 1965: SUGGESTIONS FOR DISSEMINATION at A-1 (Nov. 2009), available at <http://nces.ed.gov/pubs2010/2010831rev.pdf>.

25. *Id.* at A-5 to A-29.

26. *Id.* at A-7, A-8, A-9, A-12, A-20 to A-22, A-23 to A-25.

27. *See infra* Part III.I.1.

28. *See* Ernest Gellhorn & Barry B. Boyer, *The Academy as a Regulated Industry*,

## 2. Court Decisions and the Rights Revolution

Court decisions in the 1960s and 1970s gave to students, particularly at public universities, rights against the colleges and universities they attended; they also gave to faculty rights at the schools where they teach.<sup>29</sup> These court decisions thus “regulated” academic decision-making at colleges and universities. They also caused an explosion of internal “preventive law” regulations as higher education institutions tried to avoid lawsuits by aggrieved students and faculty members. The result was a double whammy of regulation—court decisions imposed standards and created rights, and colleges and universities regulated themselves by adopting internal procedures that they were required to follow to avoid violating the new judicially created duties and obligations.

### D. Laws Relating to Governance

Most colleges and universities are either public entities or private non-profit corporations organized under state laws. In either case, they are regulated at the state level. In addition, private non-profits are subject to regulation by the federal government incident to their 501(c)(3) status under the Internal Revenue Code.<sup>30</sup> In the last decade, there has been a sea-change in the increase of federal regulation of private colleges and universities based on their not-for-profit status.

Just as the federal government conditions the granting of federal monies on the acceptance by colleges and universities of the imposition of regulations, so also the government conditions 501(c)(3) status on acceptance of the imposition of a different set of requirements. Certain of these “rules” have been in existence for decades, though there has been a recent increase in federal oversight. This category includes unrelated business tax issues, rules of private inurement and rules relating to issuance of tax free bonds. With the recent changes in 2008 to the Form 990, the IRS has now established a kind of regulatory oversight over a new and wide ranging set of issues, many of which relate to governance.<sup>31</sup> At present this Form 990 “regulation” is mostly informational—i.e., private non-profits must provide information to the federal government on a long

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*in* GOVERNMENT REGULATION OF HIGHER EDUCATION 25, 48 (Water Hobbs ed., Ballinger Pub. Co. 1978). *See also* NATHAN GLAZER ET AL., BUREAUCRATS AND BRAINPOWER: GOVERNMENT REGULATION OF UNIVERSITIES 25 (Paul Seabury ed., Institute for Contemporary Studies 1979).

29. WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION §§ 5.1, 8.1 (4th ed. 2006).

30. 26 U.S.C. § 501(c)(3) (2006).

31. Internal Revenue Service, Form 990 Redesign for Tax Year 2008 Background Paper (Dec. 20, 2007), *available at* [http://www.irs.gov/pub/irs-tege/background\\_paper\\_form\\_990\\_redesign.pdf](http://www.irs.gov/pub/irs-tege/background_paper_form_990_redesign.pdf).

list of policies and practices. But the direction is clear—depending on the information submitted, the federal government may argue that an institution's governance policies are not consistent with 501(c)(3) status. Or, based on the information the IRS receives, it may choose to issue regulations or recommend legislation that would cover new areas that it perceives to be problematic or to further a specific policy. The topics on which colleges and universities must now report in the Form 990 (not all are new) include conflict of interest, overseas activities, gifts, non-discrimination, joint ventures, intermediate sanctions, relationships among trustees and officers, endowment, document retention, whistleblower policies, political contributions, lobbying and others.

### III. COSTS AND BENEFITS OF GOVERNMENT REGULATION OF HIGHER EDUCATION

At a macro level, government regulation of higher education institutions creates a classic tension between understandable and laudable public purposes, on the one hand, and the resulting costs and loss of independent decision-making, on the other. Regulation of any business involves balancing such costs and benefits, but, for a variety of reasons, regulation of higher education institutions, particularly research universities and teaching colleges, poses unique issues. The effort in identifying, analyzing and weighing these costs and benefits necessarily varies by the activity being regulated. Why the government cares that its money is not wasted is different from why it cares that animals are not mistreated. Costs imposed by periodic audits of government contracts are different from costs imposed by second guessing academic judgments.

Cost-benefit analysis as a means to examine a prospective decision or a proposed law or regulation is not new. There is a body of literature discussing cost-benefit analysis of regulations as a methodology.<sup>32</sup> Indeed, in 1993 President Clinton issued Executive Order No. 12866, amending a previous Executive Order issued by President Reagan, which requires a review and cost-benefit analysis of proposed regulations.<sup>33</sup> The Executive Branch has also created a high-level government office to undertake this analysis.<sup>34</sup>

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32. Tyler Cowen, *Using Cost-Benefit Analysis to Review Regulation* (draft book chapter of Jan. 15, 1998 on file with author and George Mason University) *available at* <http://www.gmu.edu/centers/publicchoice/faculty%20pages/Tyler/Cowen%20on%20cost%20benefit.pdf>.

33. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993), *available at* <http://www.whitehouse.gov/OMB/inforeg/eo12866.pdf>.

34. For an example of cost-benefit analysis see a report on the Department of Education by the U.S. Government Accountability Office. Letter and Enclosure from Robert J. Cramer, Managing Associate General Counsel, U.S. Government Accountability Office, to the Hon. Tom Harkin, Chairman, U.S. Senate Committee on Health, Educ., Labor and Pensions and the Hon. George Miller, Chairman, House of

The analysis undertaken here does not attempt to apply cost-benefit analysis as a formal discipline to government regulations of colleges and universities. It does not attempt to count the same costs that the government may have counted in its analyses. Rather, the analysis that follows attempts to take a look at the costs and benefits of government regulation that does not necessarily track the methodology followed by the government. Although the article does not attempt to critique analyses that the government has undertaken, one of the premises of this article is that the government approach undercounts “costs” imposed on colleges and universities because it does not adequately consider the harm to educational mission, values and autonomy and does not properly consider whether the benefits to be achieved are truly in the public interest or could be obtained by less intrusive means, or both.

The purpose of Part II is to identify the recurring themes and the generic costs and benefits that arise uniquely from the regulation of higher education institutions. Part III will apply this analysis to specific subject matter areas.

#### A. Why Regulate? What are the Benefits to the Government and Public?

The government has a self-evident interest in assuring that “its” (taxpayer) money is well spent and not wasted as a result of fraud or mismanagement. The government also has an interest (some would say an obligation) to ensure that the specific public objectives—and, as noted, there are many—for the many different federal programs that fund activities at colleges and universities are in fact met: that good science is carried out, that students are helped, that health is promoted and that the national security is served. Finally, the government has an interest more broadly, quite apart from funding a particular activity, in ensuring that other, more generic public policies are served and promoted—e.g., non-discrimination, protection of the environment, safety, and privacy. Fundamentally, the reasons for government regulation fall into one of two buckets: accountability and furtherance of a specific public policy.

In analyzing the reasons for the increasing growth of regulation, certainly part of the explanation lies at the doorsteps of the colleges and universities themselves. One of the fundamental arguments colleges and universities have put forth against the need for regulation is that the institutions will self-regulate and take care of the problem, so there is no need for the government to step in. When this does not happen, and a school or group of schools fails to address an identified problem or is found



to have violated the law, it is natural for the public, and the government, to conclude that self-regulation does not work and regulatory oversight is necessary to achieve the perceived purpose (benefit) of the regulation.

Put another way, one of the most important strategies for colleges and universities in arguing against increased regulation is to adopt vigorous compliance and training programs and take other internal steps that decrease the need for “outside intervention.” In this way colleges and universities can take ownership of the “benefit” side of the equation to avoid the external costs of regulation. In an ideal world, college and university internal controls would in fact reduce incidents and crises that lead to a public outcry which in turn lead to regulation. And even when the inevitable problem occurs at a single school, if the college or university community can show that it has collectively taken aggressive actions to address the issue, the chances are better that government policymakers will conclude that new regulations are not justified. The point here is that the perceived benefits from regulation should include an analysis as to whether the same benefits can be achieved by self-regulation.

#### B. Why Not Regulate? What are the Costs to the Colleges and Universities?

To over-generalize, government regulation of higher education: (1) increases the administrative costs of operation, thus decreasing monies available to colleges and universities and their faculties to serve their missions of teaching and research; (2) interferes with institutional autonomy; (3) standardizes operations and thus decreases diversity of institutions; and (4) interferes with academic and scientific decision-making.

These “costs” are uniquely troubling to colleges and universities for several reasons. First, non-profit institutions are limited more than their for-profit counterparts in their ability to recoup regulatory costs by raising prices and, in part because of faculty tenure and traditions of academic freedom, in cutting costs. Second, many would argue that colleges, universities and individual faculty are in a better, more informed position than the government to make decisions about academic priorities and strategies, so the loss of autonomy and interference with academic decision-making hurts the quality of the decisions affected. Third, the loss of diversity in operations decreases the “marketplace” of approaches and styles and thus hurts the overall quality of the nation’s higher education institutions. Fourth, colleges and universities are marketplaces of ideas, and bureaucratic oversight through government regulation affects speech and implicates First Amendment issues.<sup>35</sup>

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35. Estelle A. Fishbein, *The Academic Industry—A Dangerous Premise*, in GOVERNMENT REGULATION OF HIGHER EDUCATION 57, 57–64 (Water Hobbs ed.,

### C. Towards a Unifying Theory: An Approach to Balancing Costs and Benefits in Federal Regulation of Higher Education

No one method of analysis will answer the question, in any individual case, whether the benefits of regulation outweigh the costs. Is the regulation worth it? Is it wise? How does one balance measurable costs or benefits against subjective values and interests? The facts matter, and the specifics will always control the outcome. But it may be useful to suggest a framework for analysis so that policy makers and college and university officials have a common language or understanding as to how to think about and approach balancing the costs and benefits of existing and prospective regulation.<sup>36</sup>

Any analysis must begin with an identification of the respective benefits sought to be achieved and the resulting costs that the regulations create. Next, we need to consider whether it is possible to quantify or measure these purposes and effects in ways that allow us to calculate whether the perceived benefits of regulation exceed the costs. Identification of the costs and benefits and quantifying or evaluating these interests merge together, so these first two steps frequently conflate into one. The final step in the process is to balance and weigh benefits, costs and interests. Because there will almost always be non-numerical interests—both costs and benefits—this final step usually requires a subjective evaluation of factors.

#### 1. Identifying and Evaluating Costs and Benefits

Some interests can be measured in dollars. This is not to say that the numbers assigned are accurate, but that, setting aside the inevitable uncertainty of hypothetical and future-looking calculations, one can nevertheless agree that certain of the costs and benefits can be stated in terms of actual dollars. So, for example, an oversight system of reports, monitoring and auditing, such as exists for effort-reporting on federal grants, can be expected to prevent or “find” and correct a certain amount of misspending, stated as a percentage of the grant monies involved. This is a benefit of the effort-reporting regulations. The countervailing cost is what it costs the college or university and its faculty to do the reporting, monitoring and auditing: how much in out-of-pocket expenses, what

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Ballinger Pub. Co. 1978). For a recent analysis of the scope of academic freedom, see Judith C. Areen, *Government as Educator*, 97 GEO. L.J. 945, 1000 (2009).

36. A 2006 Issue Paper released by Chairman Charles Miller of the Secretary of Education’s Commission on the Future of Higher Education provides “a few observations . . . regarding the current state of federal regulation of higher education,” from the perspective of a university official and shows the necessity of common understanding. Secretary of Education’s Commission on the Future of Higher Education, Issue Paper No. 15 (April 21, 2006), available at <http://www2.ed.gov/about/bdscomm/list/hiedfuture/reports/parker.pdf>.

percentage of a faculty member's time, how many support staff, etc. These two "numbers" can be compared to decide if the regulation is "worth it."

Other interests, however, cannot be expressed in dollar terms. In our effort-reporting example, the governmental regulation that requires a faculty member to allocate all of her time to sponsored and unsponsored work has the effect of forcing a faculty member to make a substantive decision as to whether reading certain research is or is not related to a particular sponsored research project. This is an intrusive process that is academically artificial; the faculty member makes an academic decision to read certain articles as part of her academic research interests, but she is then forced to allocate effort between one project and another, sponsored or unsponsored, federal or private, and this not only costs the faculty member time—i.e., a percentage of salary that can be expressed as a number—but it also creates a risk that the government (or an internal university auditor) will disagree with what is in part an artificial, non-scientific decision. This "cost" is an infringement on individual faculty autonomy that is not easily expressed in dollar terms. This is not to say that this is an unreasonable requirement, but simply to note that it imposes a non-quantifiable cost.

Similarly, the government has an interest (i.e., the "benefit" to be achieved) in assuring the research that it funds is carried out in a way that serves the government's purpose in funding the research. The dollar value of this interest is presumably the dollar value of the grant, though one could add in secondary benefits such as bringing new products to market. When, however, the government imposes a regulatory requirement on the research to serve other public policy purposes—such as compliance with standards of human subject research, or animal protection, or protecting national security—these public policy purposes cannot be expressed in dollar terms. They are political choices made through the democratic processes of legislation and administrative regulation. They are certainly legitimate. But they are not quantifiable. By contrast, certain of the costs imposed on the colleges and universities from these regulations are to a significant extent quantifiable—how many employees staff the institutional review boards; what percentage of the scientists' time is spent complying with human subject requirements or national security interests or protection of animals?

The interests served by these "other" public policies—i.e., beyond the objectives of the specific federal funding—are completely valid interests that certainly can "justify" regulation. They are, however, non-quantifiable benefits that must be balanced against the quantifiable burdens imposed on the colleges and universities.

Regulatory action, whether legislative or administrative, is essentially the outcome of a political process. Elected representatives or executive branch officials who are, ultimately, responsible to an elected official, are charged with balancing the costs and benefits, including doing so where the

costs or the benefits are not necessarily quantifiable but are really just “judgment” calls reflecting the political balancing of interests. In the private sector, where businesses are regulated, one expects the affected businesses to hire lobbyists and to communicate with their representatives and the executive branch about those costs and benefits. Further, even after the legislation is passed or the regulation is adopted the private sector firm can challenge the regulation in court, and thus obtain a further review of the action.

Colleges and universities, however, are, in significant part, dependent on receiving the federal money which carries with it the regulatory burdens as a condition of receiving it. Although higher education certainly does “lobby” the government both directly and through associations, nevertheless, doing so is closer to “biting the hand that feeds you” than it is in the for-profit sector. Certainly this is true in the case of litigation. It may be a standard and accepted part of the regulatory process for utilities and chemical companies to sue to block environmental regulations. For colleges and universities to do so, however, carries with it a higher risk, real or perceived, that the government will react by withholding money. In other words, where the regulation is a condition of funding, the system is stickier and does not as easily allow for colleges and universities to express their concerns.

If these suppositions are true, the regulatory process as applied to higher education is an unfair fight. Or, more accurately, the system is imbalanced to credit the public policy purpose of the regulation (or the interest group served by the regulation) more than the costs (financial and otherwise) imposed on the recipients of funds.

An example may illustrate this point: Let us assume Congress is considering legislation that would require all colleges and universities that receive federal funds, whether research funds or financial aid assistance for students, to file quarterly reports with the federal government with the following information: (1) A description of all private consulting (under the school’s “day a week” consulting policy) performed by the institutions’ faculty, including time spent and dollars received; (2) for each faculty member who took a sabbatical, a description of what he or she did, including time spent and outcomes, and an evaluation of why the research justified the sabbatical; (3) a report on what all students who received degrees in the last five years are currently doing, including an assessment of how the school’s education achieved designated outcomes and helped the students in the workplace; and (4) a report on all efforts made by the school to further national security, including monitoring international students, tracking what the school’s professors and students do when they travel and study/research abroad, and all activities to cooperate with intelligence agencies who ask for help from the school and its faculty.

Most higher education institutions would react with varying degrees of

horror to these proposals, and they would argue against them in various ways. But would they testify strongly in opposition? Would they turn down the federal money to avoid being subject to any of the proposals that might pass in modified and limited form? Would they sue the federal government arguing that the legislation/regulations were unconstitutional? Would they be as aggressive as the insurance industry has been in the health care reform debate? Would higher education leaders make individual political donations that reflect opposition to these initiatives? Would the schools worry about their 501(c)(3) status if they were too far out in front in opposing these proposals?

At certain points in the history of the regulation of colleges and universities by the federal government, higher education leaders and their institutions have spoken out against certain laws, have expressed concerns about the effects of regulation, have lobbied against specific measures, and have even gone to court to fight particularly intrusive laws and regulations.<sup>37</sup> But for the most part, these examples have been at the extremes. In the day-to-day reality of regulatory flow, the current has been almost entirely in one direction. The public policy that supports regulation is usually sound; the out-of-pocket costs incurred in compliance are relatively minor compared to the funds received; the harm to non-monetary values of academic freedom and institutional autonomy are difficult to explain and impossible to measure; it is just prudent to go along. The result is regulatory creep, and before you know it, higher education institutions are no more than public utilities serving important public purposes that are dictated by others. Institutions with a proud tradition of independence and autonomy have become, in part, government laboratories operating under government supervision.

## 2. Balancing Costs and Benefits

Considering the need to balance objective costs and benefits against subjective ones, is a unifying theory for analyzing and weighing the costs and benefits of specific regulations possible? Put another way, faced with the uncertain, ambiguous, and ultimately subjective costs and benefits involved, and considering also the inherent and structural limitations on how colleges and universities can effectively participate in the process of developing and adopting (or opposing) new regulations, is it possible to construct an overall approach to analyzing new regulatory initiatives and deciding which are “good” and which should be resisted?

To a large extent, the answer is probably no. The individual situations differ too much, the facts matter too much, the interests vary too

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37. See *Rumsfeld v. Forum for Academic and Inst. Rights*, 547 U.S. 47 (2006) (upholding the Solomon Amendment, 10 U.S.C. § 983).

much, and the costs and benefits are too difficult to categorize to adopt a unifying theory across multiple areas. However, in Part III this article looks at a set of subject matter areas in which colleges and universities are already subject to substantial regulation. Based on this review, it is possible at least to identify and describe some of the kinds of costs and benefits that must be considered and evaluated. This analysis is neither comprehensive nor complete, but it does start to identify factors and themes that may be useful in evaluating proposed legislation or regulations.

Even accepting all of the limitations of trying to force a single system of analysis on disparate areas, it may be possible to come up with a list of considerations that might, depending on the situation, be useful, at least as a starting point, in thinking about any specific proposed regulation and weighing the costs and benefits involved. Drawing from the area by area analysis that follows in Part IV, such a list might include the following:

(1) If the regulation is imposed as a condition of funding, is it intended to further the specific purpose of the funding (including the appropriate expenditure of the money), or is it intended in whole or in part to further a different public policy and the funding is just the vehicle for the regulation? As a general matter, the public benefits are more likely to be stronger in the former case, than in the latter, because the regulation and the funding serve the same purpose.

(2) Do the costs of a proposed regulation impose unique costs on colleges and universities that are different from, and greater than, costs imposed by the same regulation on for-profit entities? Regulations that arguably infringe upon institutional autonomy and touch on academic freedom (admittedly very subjective factors) are in this category and should be evaluated with greater scrutiny.

(3) Are the transaction costs of implementing regulations—committees, processes, lawyers, staff, reports, plans, compliance requirements, disclosures, etc.—disproportionately high as compared to the costs that are directly attributable to serving a specific public purpose? If so, the costs may more likely outweigh the benefits.

(4) Are the benefits served by proposed regulation promoted by a specific interest group or politician as opposed to a general public purpose? For example, regulations addressing discrimination in employment address a broad public purpose and may more likely outweigh costs of compliance; regulations that are promoted by a specific interest group (such as the peer-to-peer file sharing requirements in the HEOA),<sup>38</sup> while arguably

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38. See Higher Education Opportunity Act, Pub. L. No. 110-315, § 493, 122 Stat.

beneficial, may impose costs that exceed the more limited public purpose.

(5) Does the proposed regulation create subjective costs that are difficult to measure but which affect the core mission of higher education? If out-of-pocket costs are minor, but important subjective interests of higher education are restricted (academic freedom, institutional autonomy, the faculty-student relationship, creativity in research), then policy makers should be cautious about putting too much weight on a numerical cost-benefit analysis.

(6) Are regulations in an area being amended and added to on a regular basis? The cumulative costs of compliance with changing requirements are significant and may exceed the benefit as initially defined.

(7) Are the regulations complex? The costs of compliance with complex regulations may exceed benefits, because they include transactions costs—such as training, clarifying, interpreting—that do not directly serve the public purpose.

(8) Do the regulations have unintended consequences? Costs of regulations include not just out-of-pocket costs of compliance, but secondary effects that need to be considered. For example, the costs of new reporting burdens on faculty include less time by the faculty member to perform research that serves the public interest.

(9) Do the regulations invite or allow government investigations and audits or private party litigation? Certainly audits and litigation can help achieve public purposes, but the greater the risk of litigation, the more time and money are spent by higher education institutions trying to build a record that can be used for defensive purposes, or just to settle a case without merit. Frequently these defensive efforts drain time and money from the very benefits sought to be achieved by the federal funding.

(10) Do the regulations directly serve a public purpose, or are they intended to collect information for study? The more a particular regulation fits in the latter category, the more likely the costs outweigh the benefits, since the benefits of data gathering are less direct and speculative and do not themselves further a public purpose.

#### IV. SUBJECT MATTER AREAS OF REGULATION

This Part identifies and briefly describes nine “subject” areas of college and university functions that are regulated by the federal government. This list is of course far from complete and discusses only certain areas of regulation from a much longer list. For each, the paper provides a cursory summary of the law, what it requires, and a brief analysis of certain of the costs and benefits of the regulations.

##### A. Research Misconduct

###### 1. Laws and Regulations

The history of federal oversight of research misconduct at colleges and universities began in 1985. Following a series of high profile cases, Congress passed the Health Research Extension Act of 1985 which established the basic regulatory framework that is in place today.<sup>39</sup> The law requires higher educational institutions that receive federal funding to have an internal process for investigating scientific misconduct and it requires annual reporting to the federal government. The Public Health Service (“PHS”) adopted final regulations in 1989 that set out requirements governing how the colleges and universities’ procedures and policies should work.<sup>40</sup> The PHS also established the office that in 1993 became the Office of Research Integrity (“ORI”).<sup>41</sup> These regulations were revised in 2005.<sup>42</sup>

###### 2. What is Required?

Colleges and universities that receive PHS funding must have research misconduct policies and procedures that meet federal requirements. Research misconduct is described as fabrication, falsification or plagiarism in research. If an allegation is made, the institution must first “assess” the allegation to decide whether the allegation fits within the definition. If it does, the institution conducts an “inquiry” to decide if sufficient evidence exists to undertake a full investigation. If the answer is yes, the institution must notify ORI and proceed with a formal “investigation.” Following the investigation the institution reports its findings to ORI.<sup>43</sup>

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39. Health Research Extension Act of 1985, 42 U.S.C. § 289a (2006).

40. Public Health, 42 C.F.R. § 50, subpt. A (subpart A was removed in 2005).

41. See Michelle M. Mello & Troyen A. Brennan, *Due process in Investigations of Research Misconduct*, 349 NEW ENG. J. MED. 1280, 1280–86 (2003).

42. Public Health Service Policies on Research Misconduct, 42 C.F.R. § 93.100 (2005).

43. 42 C.F.R. §§ 93.300–93.319 (2009).



### 3. Costs and Benefits

Research misconduct regulations are in the first category of government regulations, described above in Part II.A, because they go to the core of the government's purpose in funding. At the highest level, the contract between the government and the college or university is a payment for services, and if the researcher makes up data or copies it from others, the government's purpose is not met. The benefit to the government of the regulations, therefore, is directly tied to the purpose of the funding and can be measured by the amount of the funding that would be wasted by fraudulent research that can be prevented and detected by the regulations.

The cost to the university or college of regulations directed at research misconduct consists of staff and faculty time devoted to following the procedures dictated by the government. In essence, government regulation in this area consists primarily in outsourcing to the recipient of federal funds a process for deciding if the funds are spent on fraudulent research. The required procedures are fairly minimal, with a high degree of flexibility given to the institutions. Therefore, while research misconduct proceedings can be extremely time consuming and expensive in staff and faculty time, the "costs" are the direct result of a process necessary to respond to allegations of fraud. There is very little if any wasted or extra paperwork. Unless the government was to accept the full risk and cost of fraud in a federal program, the regulations in place seem to be a minimally invasive way to achieve a direct and reasonable government purpose.

Evaluating costs and benefits of the regulations in this area is relatively straightforward. The regulations directly serve the federal purpose in ensuring that its money is not wasted on fraudulent research, and the regulatory structure does not impose extra or unrelated costs or attempt to serve unrelated purposes. There has not been regulatory creep in this area, which remains essentially the same as when first implemented in the mid-1980s.

## B. Conflict of Interest

### 1. Laws and Regulations

Concerns about conflicts of interest in government funded research at colleges and universities have existed for decades, but government regulation in this area is much more recent. College and university associations first issued a statement about such conflicts in 1964. The National Academy of Sciences sent a letter to study committee members asking for disclosure of financial interests in 1971 and college and university presidents and industry leaders met to discuss conflicts of interest and industry relationships at the Pajaro Dunes Conference in 1982. By the 1960s and continuing into the 1980s, many universities had adopted conflict of interest policies and the United States Public Health Services

(“PHS”) issued a policy statement suggesting that grant recipients should have a conflict of interest policy in 1987. But it was not until 1995 that PHS and the National Science Foundation first issued regulations requiring grantee institutions to identify interests of investigators, determine if a conflict of interest exists, manage or eliminate the conflict, and report to the granting agency. In 1998 the Food and Drug Administration (“FDA”) adopted regulations covering clinical trials that are used in seeking FDA approval of new drugs. The National Institutes of Health (“NIH”) is currently reviewing its conflict of interest regulations and is expected to issue new regulations soon.<sup>44</sup>

Beyond regulation of conflicts of interest in college and university research, the government has regulated relationships between doctors and pharmaceutical companies, medical device companies and hospitals since the early 1970s. These regulations were expanded with the passage of the Stark Laws beginning in 1989.<sup>45</sup>

As of early 2010, the formal regulation of conflicts of interest at colleges and universities remains limited to federally funded research and laws applicable more generally to hospitals and faculty physicians. However, a whole slew of possible new regulations of conflicts of interest are under review and consideration (whether by the government, accrediting bodies, or the institutions themselves), including expanding the regulation of conflicts of interest in research, regulating so-called institutional conflicts, restrictions on gifts and entertainment from the medical industry, prohibitions on ghostwriting, regulations on continuing medical education, and limitations on consulting.<sup>46</sup>

In addition, following state and federal investigations into possible conflicts of interest in connection with federal financial aid, new federal regulatory requirements related to financial aid have been adopted.<sup>47</sup>

## 2. What is required?

The current PHS regulations essentially outsource the management of conflict of interest issues in federally sponsored research to the institutions themselves. The institutions typically require applicants for federal research to disclose their financial interests to an internal office or

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44. For a general discussion of conflicts of interest, including the historical background, see Institute of Medicine (IOM), *Conflict of Interest in Medical Research, Education, and Practice* 1, 23–43 (2009), available at [http://books.nap.edu/openbook.php?record\\_id=12598](http://books.nap.edu/openbook.php?record_id=12598) [hereinafter IOM Report].

45. *Id.* at 36–38.

46. For a discussion of some of the new developments see *id.* at 62–96.

47. For a guide that shows the regulatory impact of the new requirements in action, see INFORMATION FOR FINANCIAL AID PROFESSIONALS (IFAP), 2009-2010 FEDERAL STUDENT AID HANDBOOK, available at <http://ifap.ed.gov/fsahandbook/attachments/0910FSAHandbookIndex.pdf>.

committee; the institution reviews the interests and determines if there is in fact a conflict to be prohibited or managed; prohibits the conflicting arrangements or puts in place a management plan, as appropriate; and reports to the NIH that there is a conflict of interest and whether that conflict has been reduced, managed, or eliminated. The grantee institution does not report the details of the financial interest and the NIH has not historically second guessed or re-reviewed these management plans.

### 3. Costs and Benefits

Conflict of interest regulations fall into the middle category of the kinds of regulation described above in Part II.B. Unlike certain financial regulations and auditing and reporting requirements, they are not directly focused on helping the government ensure that the purposes of the funding are met, but they are intended to ensure that government money is spent in ways that do not undermine the federal purpose. Conflict of interest regulations do not focus on the end result—is the research biased, are the results faulty—but, rather, focus on process and appearances—are there financial interests involved that might affect the outcome and which therefore could create an appearance of the lack of objectivity. The benefits to the government are therefore hard to quantify. Clearly the purpose of conflict of interest regulations is more than legitimate, and no one would argue otherwise. On the other hand, the regulations only deal with risks, not a provable loss of objectivity. They do not directly save the government money or ensure that government purposes are met.

The costs, however, are real and measureable. Colleges and universities create standing committees to review possible conflicts of interest; they hire staff to handle the paperwork; they require researchers to fill out forms; they have enforcement mechanisms to ensure that the rules are followed; they respond to government inquiries; they maintain data bases; they undertake self-audits; they change their policies and procedures to meet new requirements; and, they require training, which costs time and money, etc. Although the details of these processes and procedures are not at present established by federal regulation, in order to comply with the reporting obligations, an institution and its faculty must in fact spend considerable time collecting, considering and managing the information about financial interests that is collected.

The difficulty is how to balance the benefits to the government of reducing the risk of the loss of objectivity—not the actual loss, since that is not prohibited or measured—against the actual out-of-pocket costs of time and money incurred by the higher educational institutions. Ultimately, this is a political judgment for public policy decision-makers to balance. But, the decision-makers do not bear the costs, institutions and researchers do, so the inherent imbalance between a laudatory purpose supported by political interests and a cost borne by others favors regulation every time.

Put another way, the pressure on public policy decision makers is to impose ever more stringent regulations; in that way, the “public” is protected, and no one can second-guess the decision-makers for lack of oversight. Colleges and universities could theoretically argue against this and demonstrate that the regulations impose excessive costs, but all too often this appears to be self-interested whining, so colleges and universities accept the regulations and spend even more money on compliance.

### C. Human Subjects

#### 1. Laws and Regulations

The ethical and scientific issues raised by human subject research have existed for centuries. Legal control and regulation of these issues in modern times has been debated since the Nuremberg Code of 1946.<sup>48</sup>

Federal regulation of human subject research appears to date from 1962 with the passage of the Kefauver-Harris Drug Efficacy Amendment to the Federal Food, Drug and Cosmetic Act.<sup>49</sup> The amendment required informed consent from participants in clinical trials used to obtain approval of new drugs. In 1966, the NIH issued policies relating to human subjects research. On May 30, 1974, the Department of Health, Education and Welfare adopted regulations that for the first time put these policies into law.<sup>50</sup> Among other things, the regulations led to the establishment of Institutional Review Boards (“IRBs”). In July 1974, Congress passed the National Research Act, which established the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. The Commission issued the Belmont Report in 1979, which set out principles and guidelines that led to an informed regulation in 1981 on Department of Health and Human Services (“DHHS”).<sup>51</sup> The regulations were revised in 1991 and became known as the Common Rule.<sup>52</sup> There are also various more specific regulations applicable to special populations and circumstances.<sup>53</sup>

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48. Nuremberg Code, Office of Human Subjects Research, National Institutes of Health, <http://ohsr.od.nih.gov/guidelines/nuremberg.html> (last visited Apr. 21, 2010). *See also* WORLD MEDICAL ASSOCIATION DECLARATION OF HELSINKI, ETHICAL PRINCIPLES FOR MEDICAL RESEARCH INVOLVING HUMAN SUBJECTS (2008), *available at* <http://www.wma.net/en/30publications/10policies/b3/17c.pdf>.

49. 21 U.S.C. §§ 301 et seq. (2006). *See also* U.S. Department of Human & Health Services, Food and Drug Administration, This Week In FDA History – June 20, 1963, <http://www.fda.gov/AboutFDA/WhatWeDo/History/ThisWeek/ucm117831.htm> (last visited Apr. 21, 2010).

50. Protection of Human Subjects, 45 C.F.R. § 46 (2005), *available at* <http://www.hhs.gov/ohrp/documents/19740530.pdf>.

51. 45 C.F.R. §§ 45–46 (2005); 21 C.F.R. § 50 (2010).

52. *See* 45 C.F.R. § 46 (2005).

53. *See generally* ROBERT J. LEVINE, ETHICS AND REGULATION OF CLINICAL

## 2. What is Required?

The application of federal regulations to human subject research is extremely fact-intensive and complex. There are special considerations for different populations of subjects, complex issues of informed consent, evaluation of degrees of risk, requirements for disclosure of possible conflicts of interest, and many other issues. At the most general level, however, the regulations require institutions to establish IRBs to review and approve all proposed human subject research involving federal money.<sup>54</sup> The institutions must report any infractions to the Office of Human Subjects Research in the DHHS.<sup>55</sup> The government has the authority to shut down a research project, or indeed all of an institution's human subject research, if it finds violations.<sup>56</sup>

## 3. Costs and Benefits

The benefits of government regulation are the protection of individuals, including their lives, health and safety. Although the benefits are as fundamental as any could be, they are not the purpose of the federal funding itself. In that sense they are secondary to regulations intended to support the very purpose of the funding, though no one would doubt their importance.

The costs of federal regulation are the time and expense that institutions incur to review and make appropriate decisions with respect to federally funded research involving human subjects. Because of the complexity of the requirements, and because of the stakes involved—risks not only to life and safety but also to continued federal funding—the costs are considerable. Many institutions spend millions of dollars annually to support the IRB processes and to ensure compliance with the regulations. There are also subjective costs caused by constraining institutional autonomy and academic and scientific judgments.

The balancing of costs and benefits in this area poses the classic challenge of how to judge the worth of fundamental human values such as life and safety as measured against the costs required, including both out-of-pocket costs and interference with academic and scientific judgments. It is unseemly to even suggest that financial costs might outweigh the

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RESEARCH (2D ED., YALE UNIVERSITY PRESS 1988) (1986). *See also* ROBIN LEVIN PENSLAR, OFFICE FOR HUMAN RESEARCH PROTECTIONS, INSTITUTIONAL REVIEW BOARD GUIDEBOOK (1993), *available at* [http://www.hhs.gov/ohrp/irb/irb\\_guidebook.htm](http://www.hhs.gov/ohrp/irb/irb_guidebook.htm).

54. Institutional Review Boards, 21 C.F.R. § 56.103 (2009); Protection of Human Subjects, 45 C.F.R. § 46.103 (2009).

55. Institutional Review Boards, 21 C.F.R. § 56.108 (2009); Protection of Human Subjects, 45 C.F.R. § 46.103(5) (2009).

56. Institutional Review Boards, 21 C.F.R. § 56.113 (2009); Protection of Human Subjects, 45 C.F.R. § 46.113 (2009).

protection of fundamental human values, and no college or university representative would do so. However, it is interesting to note the contrast between federal regulation of day-to-day clinical patient care—which is essentially non-existent and left almost entirely up to state malpractice laws—and its heavily regulated counterpart, human subject research. While no one would dispute the necessity for a high degree of effort to ensure compliance with fundamental ethical principles of human subject research, it is nevertheless true that government regulation drives up the cost of research, and this may have the effect of reducing resources available to improve the health, safety and welfare of all individuals. Government regulations may also discourage meritorious research projects—for example, in the social sciences—that have minimal effect on human safety.

#### D. Animals

##### 1. Laws and Regulations

Animals have been used in medical research for centuries, but such use was not regulated in the United States until the passage of the U.S. Laboratory Animal Welfare Act in 1966.<sup>57</sup> The Act has been amended several times since then.<sup>58</sup> The US Department of Agriculture has issued regulations pursuant to the Act.<sup>59</sup> The Act applies to the humane treatment of animals in general, including in research. In addition, in 1985 Congress passed the Health Research Extension Act which required the DHHS to issue regulations governing the use of animals in research.<sup>60</sup> Under the 1985 Act, the Public Health Service issued its Policy on Humane Care and Use of Laboratory Animals.<sup>61</sup>

##### 2. What is Required?

Institutions that receive PHS monies for research that involves the use of animals must provide an assurance to the Office for Protection from Research Risks that the institution complies with the Animal Welfare Act and the PHS Policy, and that it has appointed an appropriate oversight committee (an Institutional Animal Care and Use Committee, known as an

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57. See 7 U.S.C. §§ 2131–56 (2006).

58. See *id.* § 2131.

59. Animal Welfare, 9 C.F.R. §§ 1–4 (2009).

60. Health Research Extension Act of 1985, Pub. L. No. 99-158, § 495, 99 Stat. 820, 875–77 (1985).

61. See OFFICE OF LABORATORY ANIMAL WELFARE, PUBLIC HEALTH SERVICE POLICY ON HUMANE CARE AND USE OF LABORATORY ANIMALS (2002), available at <http://grants.nih.gov/grants/olaw/references/PHSPolicyLabAnimals.pdf> [hereinafter PUBLIC HEALTH SERVICE POLICY].

“IACUC”). The IACUC must review and approve prior to submission all applications from the institution for new and continuing federal grants involving animals.

### 3. Costs and Benefits

The benefits that flow from regulating the use of animals in research by colleges and universities are the proper care and treatment of the animals. The regulations are intended to respect the lives of animals, ensure that the research provides a societal benefit, require consideration of alternatives, protect against needless pain and protect against malicious or other improper conduct. The regulations cover care and feeding, housing, transporting, monitoring, use and health checks.<sup>62</sup>

The costs of animal welfare regulation include staffing costs, which are considerable since they require consultation and review by a veterinarian, and also significant facility costs to ensure that the cages and other physical facilities meet federal standards. In addition, the IACUC itself is regulated as the regulations require that the IACUC meet certain standards and work in certain ways.<sup>63</sup> Many major research universities have annual budgets for animal welfare and related compliance that amount to hundreds of thousands of dollars or more.

The purpose of the federal funding, to which the animal welfare requirements attach as a condition, is not to promote animal welfare. In that sense, these laws and regulations are intended to serve a secondary purpose beyond the purpose of the funding itself. As with human subject research requirements, this area of regulation requires balancing the non-monetary values of protecting animal welfare against the hard dollar costs of the regulation and the subjective effects of restricting academic and scientific judgments. A full analysis of the need or justification for the regulations would also require an analysis of what the conditions would be like in the absence of the federal requirements—in other words, how much of the regulatory burden is simply documenting and proving to the federal government that appropriate safeguards are in place? Finally, this area of regulation raises the issue of the tension between the academic or professional judgment by a faculty member or laboratory, on the one hand, and the sometimes conflicting view of the regulators, on the other. The regulations in this area thus infringe to some extent on the academic and institutional autonomy of the college or university and its faculty. Assessing whether this loss of autonomy and academic decision-making is justified by the benefits of regulation should be part of the decision-making process used by the regulators when they consider new regulations or

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62. See 7 U.S.C. §§ 2131–56 (2006); Health Research Extension Act of 1985, Pub. L. No. 99-158, 99 Stat. 820 (1985).

63. PUBLIC HEALTH SERVICE POLICY, *supra* note 61, at 12–15.

changes to existing regulations.

## E.Export Controls

### 1.Laws and Regulations

The federal government has regulated exports to protect national security since the earliest days of the nation. In modern times, the three most important laws with potential application to colleges and universities are the Export Administration Regulations (“EAR”) of the Department of Commerce,<sup>64</sup> the regulations of the Office of Foreign Assets Control (“OFAC”) of the Department of the Treasury<sup>65</sup> and the International Traffic in Arms Regulations (“ITAR”) of the Department of State.<sup>66</sup>

The application of export control laws to colleges and universities did not become a significant concern until the mid-1980s, when the government began to be concerned that the results and products of research performed at colleges and universities might become available to enemies of the United States. Faculty and administrators at research universities, in turn, became concerned that these laws could infringe academic freedom and impair important basic research. The higher education community raised their concerns with the government and the discussions led to the issuance of National Security Decision Directive 189, the so-called “fundamental research exemption.”<sup>67</sup> The exemption applies to research activities in the United States. It does not apply to the actual export of banned or covered products or data overseas.

### 2.What is Required?

The EAR regulations require a license from the Department of Commerce to export products that are determined by the Bureau of Industry and Security to have possible military use or that may be used in terrorist activities.<sup>68</sup> There are more than 2,000 products on the list,

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64. Export Administration Regulations, 15 C.F.R. §§ 730–74 (2009).

65. Foreign Assets Control Regulations, 31 C.F.R. § 500 (2009).

66. International Traffic in Arms Regulation, 22 C.F.R. §§ 120–30 (2009). *See* CAROL T. CARR, *NEGOTIATING THE MINE FIELD: THE CONDUCT OF ACADEMIC RESEARCH IN COMPLIANCE WITH EXPORT CONTROLS* (2006); JAMIE LEWIS KEITH, *MAY 2006 UPDATE ON DEVELOPMENTS IN “DEEMED” EXPORT CONTROLS IN THE UNIVERSITY CONTEXT* (2004-2006), *available at* [http://web.mit.edu/osp/www/Export\\_Controls/index\\_files/JLK%20ExportUpdateMay06.pdf](http://web.mit.edu/osp/www/Export_Controls/index_files/JLK%20ExportUpdateMay06.pdf).

67. NSDD-189: National Policy on the Transfer of Scientific, Technical and Engineering Information (Sept. 21, 1985), <http://www.fas.org/irp/offdocs/nsdd/nsdd-189.htm> (last visited Apr. 8, 2010).

68. *See* Export Administration Regulations, 15 C.F.R. §§ 730–74 (2009).



including software, commodities, drugs, bacteria and technology.<sup>69</sup> The ITAR regulations require a license from the Department of State to export articles and services related to military use and defense.<sup>70</sup> The OFAC regulations require a license related to financial, travel and other transactions with certain embargoed countries, such as travelling or sending money to Cuba.<sup>71</sup> For all three laws, it is illegal to engage in a covered transaction without a license from the administering authority.<sup>72</sup> Overlaying the laws is the concept of “deemed exports,” which holds that making covered products or data available to a foreign national, even if exclusively done within the United States, is “deemed” to be an export (subject, however, in many, but not all, situations, to the fundamental research exemption).<sup>73</sup>

In order to comply with these laws, which are extremely complex and technical and change on a regular basis, most research universities and other higher education institutions with overseas activities have established procedures to try to identify activity that may be covered, processes to review and evaluate such activities, and individuals in the institutions with the expertise to seek the necessary export licenses for any activity that is in fact covered. Because the laws apply to the activities of literally hundreds and sometimes thousands of individuals at a single institution, export control programs also include a heavy dose of training and monitoring.

### 3. Costs and Benefits

The purposes (i.e., “benefits”) of export control laws can be considered within categories 1 and 3 discussed in Parts II.A. and II.C. When applied to research conducted under federal grants, these laws are directly related to the purposes of the funding—the funding is to promote a particular national interest, and providing covered products and data to certain foreign countries and nationals may not be consistent with that purpose. However, the export control laws also apply to research and activities not funded with federal dollars. In these instances, export regulations are laws of general application that apply to colleges and universities in the same manner and for the same reason that they apply to industry.

The costs imposed on colleges and universities by these laws include the out-of-pocket expenses of operating a compliance program. These costs can be considerable for several reasons. First, the laws are complicated and difficult to understand and apply. Second, the application of the laws to

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69. *See id.*

70. *See* International Traffic in Arms Regulation, 22 C.F.R. §§ 120–30 (2009).

71. *See* Foreign Assets Control Regulations, 31 C.F.R. § 500 (2009).

72. Export Administration Regulations, 15 C.F.R. §§ 730.7 (2009); Foreign Assets Control Regulations, 31 C.F.R. § 500.201 (2009); International Traffic in Arms Regulation, 22 C.F.R. §§ 120.2 (2009).

73. Export Administration Regulations, 15 C.F.R. §§ 734.2(b)(2)(ii) (2009).

hundreds and thousands of faculty, staff and students is essentially “decentralized” throughout a college or university, and so consistency and accuracy in application is difficult to achieve. Third, the risks of non-compliance are so high—there have been several recent high profile cases where researchers have been found guilty of criminal conduct and served jail-time<sup>74</sup>—that the costs to prevent violations are necessarily high to be commensurate with the risk.

Beyond the out-of-pocket costs of compliance, which parallel the costs faced by private industry, the costs of the regulations in this area also include limitations on educational programs and on the values of academic freedom and autonomy. OFAC regulations may prevent study tours to Cuba and exchange programs with Syria. EAR regulations may chill fundamental research and limit study protocols. To identify these costs is not to conclude that they necessarily outweigh the benefits to the government, but simply to note that public policy decision-makers, when they adopt and revise regulations intended to protect and preserve the national security—certainly a public policy of the highest importance—must also try to evaluate and weigh the real non-dollar harm caused to the academic enterprise. National security is also served by allowing researchers the freedom to explore new frontiers that sometimes lead to new means of fighting terrorism—perhaps large scale computing with massive amounts of data is a good example as well as understanding and establishing relations with the cultures and peoples of certain embargoed countries may be another. Regulations that impede this work must therefore be carefully analyzed to be sure they do not do more harm than good to the national interest.

## F. Effort Reporting

### 1. Laws and Regulations

Effort-reporting is just one piece of a larger body of regulations relating to administration and expenditure of federal grants. Effort-reporting is the process by which institutions and the federal government determine that the salaries charged to a particular grant are reasonable and proportional in relation to the work the employee actually performed. Beyond effort-reporting, the federal government also regulates how equipment is purchased, sub-contracts are managed, overhead is calculated and many other facets of the general topic of grants administration.

Effort-reporting regulations are principally set out in the OMB’s

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74. See, e.g., Sharon Weinberger, *From Ivory Tower to Iron Bars: Scientists Risked Jail Time for Violating Export Laws*, WIRED (Sept. 17, 2009), available at <http://www.wired.com/dangerroom/2009/09/from-ivory-tower-to-iron-bars-academics-risk-jail-time-for-violating-export-laws>.

Circular A-21, though there are other federal and agency-specific policy statements and circulars (e.g., A-110) that are relevant as well.<sup>75</sup> The Bureau of the Budget first issued A-21 in 1958.<sup>76</sup> In 1967, A-21 was amended to require detailed documentation of faculty efforts.<sup>77</sup> There have been many other changes over the years, including both changes in specific regulatory requirements and the perception of substantial increases in government audits, oversight, investigations and enforcement actions.<sup>78</sup>

## 2. What is Required?

In 2007, the Council on Governmental Relations (“COGR”) issued a Policies and Practices summary that provides a very helpful overview of the regulatory requirements.<sup>79</sup> The regulations allow for some flexibility and different institutions have adopted different practices and procedures to comply with A-21. Under one common approach, individual researchers are required every six months to report (“after the fact”) to the institution the percentage of their overall effort (and therefore of their base salary) that they expended on each federal grant on which they were working during the reporting period.<sup>80</sup> The institution then charges the correct percentage of the individual’s salary to each grant. There are many variables, but among the difficulties is the need to determine which activities properly are or are not fairly and reasonably attributable to a grant and, if the researcher is working on several different sponsored projects, to determine the proper allocation between and among funding sources—public and private. In addition, the system creates an inherent internal conflict, because it relies on overall effort, not a standard work week. Therefore, if a faculty member works a fixed number of hours on a grant, the harder he or she works on other projects, the lower the percentage attributable and therefore chargeable to the grant.

## 3. Costs and Benefits

Effort-reporting is perhaps the clearest example of a federal regulation that falls squarely within category 1 identified in Part II.A—i.e., the purpose (namely, the benefit) of the regulation is to ensure that the money

75. Office of Management and Budget, Circular A-21, [http://www.whitehouse.gov/omb/circulars\\_a021\\_2004/](http://www.whitehouse.gov/omb/circulars_a021_2004/) (last visited Apr. 8, 2010); Office of Management and Budget, Circular A-110, [http://www.whitehouse.gov/omb/circulars\\_a110/](http://www.whitehouse.gov/omb/circulars_a110/) (last visited Apr. 8, 2010).

76. Council on Governmental Relations, Policies and Practices: Compensation, Effort Commitments, and Certification 10 (Mar. 1, 2007), *available at* [http://www.rsp.wisc.edu/effort/COGR\\_EffortPaper.pdf](http://www.rsp.wisc.edu/effort/COGR_EffortPaper.pdf) [hereinafter COGR Report].

77. *Id.*

78. *See id.*

79. *Id.*

80. *Id.* at 49.

the government provides is used directly and only for the purpose for which it was provided.

The direct out-of-pocket costs of compliance are two-fold. First, each researcher must fill out a form on a periodic basis to account for his or her time on each federal grant, and, second, the institution at different levels (departmental, central) must have procedures in place to review, monitor and maintain the records, and to make any changes to grant charges that may be necessary. In addition to the time researchers must spend in training, keeping records and filling out forms, the effort-reporting process is distracting from a researcher's core mission—to perform the research with integrity and efficiency and according to professional standards.

Beyond the direct costs of compliance, this is an area that has generated *qui tam* False Claims Act cases,<sup>81</sup> with several reported settlements under which institutions have paid many millions of dollars to the federal government and *qui tam* plaintiffs. To the extent settlements exceed the amounts that were wrongly charged to the federal government, and include penalties, attorney's fees, or just payments to avoid the costs and risks of litigation, they represent additional out-of-pocket costs attributable to the regulations and the enforcement mechanisms. These litigation costs are an important component of the "transaction costs" of regulation in this area, both because settlements and attorneys fees may frequently exceed the value of any true harm, and because institutions necessarily engage in costly preventive measures that may cost the institutions more dollars than they save. If institutions are spending needless amounts to prevent or resolve claims (beyond any harm to the government), the public suffers because the institutions have fewer resources to devote to important research.

In balancing and weighing the costs and benefits in this area, decision-makers need to make judgments about the degree of oversight necessary to ensure that the public's interest is protected. As stated by the 2007 COGR Report, "The underlying theme of this paper is to remind decision-makers, leaders, and officials from the research community of the need to restore the balance between accounting oversight requirements and the necessary regulatory flexibility to produce good science."<sup>82</sup>

## G. Form 990

### 1. Laws and Regulations

The IRS has long had the authority to regulate 501(c)(3) corporations to determine whether they engage in activity inconsistent with their not-for-

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81. See 31 U.S.C. §§ 3729–33 (2006).

82. COGR Report, *supra* note 76, at 5.

profit status.<sup>83</sup> In the first decade of the twenty-first century, however, the federal and state governments have increasingly exercised supervisory authority over the governance of colleges and universities.

First, reacting to corporate scandals in the for-profit world, in 2002 Congress passed the Sarbanes-Oxley Act with numerous requirements related to how for-profit corporations manage their affairs.<sup>84</sup> Certain of the Act's requirements apply to non-profit colleges and universities, including provisions related to whistleblowers and document retention or destruction.<sup>85</sup> Some states have also passed laws regulating the governance of non-profits, and state attorneys general also exercise authority over non-profits within their jurisdiction.<sup>86</sup>

Second, in 2008, the IRS, perhaps reacting in part to congressional inquiries, amended IRS Form 990, an "informational" tax return that 501(c)(3) organizations are required to file on an annual basis, to include numerous provisions that relate to governance.<sup>87</sup> The new form was preceded by an IRS White Paper entitled "Governance and Related Topics – 501(c)(3) Organizations."<sup>88</sup> The White Paper set out governance standards that the IRS "recommended" that non-profit organizations follow. The revised Form 990 itself<sup>89</sup> has numerous new provisions requiring extensive information on a variety of topics. While the return is informational in form, it has a regulatory effect because of the IRS's supervisory authority over non-profit institutions.

Beyond the Form 990, the IRS also "regulates" not-for-profit colleges and universities through its rules on unrelated business income tax, tax exempt bonds, private inurement and intermediate sanctions.

## 2. What is Required?

The IRS Form 990 requires institutions to disclose information related to numerous discrete categories, including fundraising, political campaigning and lobbying, compensation, conflicts of interest and transactions with interested persons, document retention and destruction, whistleblower policies, a joint venture policy, the process for Board review and approval

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83. See 26 U.S.C. § 501(c) (2006).

84. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

85. See, e.g., *id.* § 806, § 1102(c).

86. See, e.g., MASS. ANN. LAWS ch. 180 (LexisNexis 2005 & Supp. 2009); TEX. BUS. ORGS. CODE ANN. ch. 22 (Vernon 2008).

87. See Form 990 Redesign for Tax Year 2008 (Filed in 2009) (Forms and Highlights), <http://www.irs.gov/charities/article/0,,id=176637,00.html> (last visited Apr. 8, 2010).

88. Governance and Related Topics – 501(c)(3) Organizations (Feb. 4, 2008), [http://www.irs.ustreas.gov/pub/irs-tege/governance\\_practices.pdf](http://www.irs.ustreas.gov/pub/irs-tege/governance_practices.pdf) (last visited Apr. 8, 2010).

89. Effective beginning in 2008 (for organizations that use a July 1–June 30 fiscal year, it is applicable to FY 2009, ending June 30, 2009).

of the Form 990, tax exempt bonds, expenses of certain employees, foreign activities and other matters.<sup>90</sup> To collect this information, colleges and universities have instituted processes and procedures to ensure that they capture and collect the information, have the requisite policies and otherwise are in a position to provide the requested information to the IRS.

### 3. Costs and Benefits

The benefits the government hopes to achieve from the new Form 990 are presumably: (1) to collect information useful to the IRS in its enforcement activities to ensure compliance with tax-exempt status, and (2) to cause higher education institutions to improve their governance activities in ways that further the not-for-profit missions of the schools. Non-profits do not pay taxes based on the activities of their core missions, which are deemed to be sufficiently “public” to justify that status, so it is not unreasonable to consider non-profits as quasi-public entities serving a public purpose, thereby justifying some amount of public oversight.

The costs incurred by colleges and universities include the considerable staffing and administrative costs in collecting, analyzing and storing all of the information required by the IRS and the development of new policies that the IRS Form 990 suggests the institutions should have. Many institutions undoubtedly have been required to add staff to deal with the new requirements, or they have reassigned staff who could otherwise have worked on other projects to further the mission of the school. To the extent the new disclosure requirements force institutions to change their governance practices, there is a clear loss of institutional autonomy. One of the difficult public policy choices in this area is how to value the loss of autonomy and diversity that comes with increased oversight and federal standards.

## H. Higher Education Opportunity Act of 2008<sup>91</sup>

### 1. Laws and Regulations

The Higher Education Act of 1965 (“HEOA”) was amended in 2008 to impose substantial additional regulatory requirements on institutions that participate in federal financial aid programs. Participating institutions must sign a Program Participation Agreement.<sup>92</sup> This provision requires certifications of compliance with respect to use of Title IV funds.<sup>93</sup> It also

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90. See Form 990: Return of Organization Exempt from Income Tax (2009), available at <http://www.irs.gov/pub/irs-pdf/f990.pdf>.

91. Higher Education Opportunity Act, Pub. L. No. 110–315, 122 Stat. 3078 (2008).

92. 20 U.S.C. § 1094(a) (2006).

93. *Id.*

requires certification of compliance with expanded disclosure requirements of 20 U.S.C. 1092.<sup>94</sup> Many of the new regulatory requirements went into effect in August 2008.<sup>95</sup> The Department of Education has issued regulations further implementing many of the provisions of the Act.<sup>96</sup>

## 2. What is Required?

The Act currently requires<sup>97</sup> colleges and universities to make disclosures or otherwise take action regarding a laundry-list of areas, including campus crime reporting, college costs, graduation data, peer-to-peer file sharing, teacher preparation, textbooks, veterans, emergency procedures, missing students, disciplinary proceedings, and other matters.<sup>98</sup>

## 3. Costs and benefits

Many of the requirements in the Higher Education Act of 1965, as amended, and the regulations promulgated under the Act, do in fact relate to the purpose of the law—to provide financial aid to students. Many of the new provisions, however, fall clearly within the second category of laws identified in Part II.B, in that they are conditions to participate in the financial aid programs but have as their purpose wholly unrelated public policies. To analyze the benefits of these miscellaneous provisions requires, therefore, an examination of each of the scores of specific unrelated provisions serving unrelated public purposes.

The costs imposed by the new requirements likewise can be analyzed only by going through each of the separate new requirements to determine the costs of compliance. Indeed, the scattershot nature of the regulations creates unique costs because compliance requires consultation with, and responses by, many different institutional officials. Perhaps recognizing the burdens the new law would impose on colleges and universities, Congress did add language to the HEOA that requires a review of regulations for their effect on colleges and universities, but the initial review appears to be limited to Title IV regulations, not the broader list described here.<sup>99</sup>

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94. *Id.* §§ 1092, 1094(a)(7).

95. *See* Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008).

96. *See, e.g.*, 74 Fed. Reg. 46,399, 46,399–401 (Sept. 9, 2009) (to be codified at 34 C.F.R. chap. IV).

97. Some requirements pre-date 2008. Some were added in 2008 and some were modified in 2008.

98. *See* Higher Education Opportunity Act, Pub. L. No. 110-315, § 493, 122 Stat. 3078, 3308–18 (2008).

99. 20 U.S.C. § 1098 (2006). *See also* ADVISORY COMMITTEE ON STUDENT FINANCIAL ASSISTANCE, HIGHER EDUCATION REGULATIONS STUDY, BACKGROUND PAPER, TITLE IV REVIEW PANEL, available at <http://www2.ed.gov/about/>

Regulations and laws that are imposed on colleges and universities as conditions of funding, whether related to research or financial aid, and which relate to public purposes other than the funding itself, are the most difficult areas of regulation to analyze from the viewpoint of costs and benefits. This is because each discrete area may not by itself be sufficiently problematic for the institutions to object to or spend significant resources to fight. For example, an interest group supported by lobbyists may push for more disclosure relating to peer-to-peer file sharing. Many institutions may choose to live with the resulting costs of compliance, because they have existing programs in this area and the new requirements incur relatively slight costs. The same may be said for each of 20 other areas. But when 20 new requirements are imposed, none of which relates to the purpose of the funding, and each of which is the result of separate, discrete lobbying efforts by special interest groups, the end result may be a sum of additional costs that exceed the discrete and limited benefits. Further, the sum of the costs imposed is greater than the sum of the parts because the new requirements are so disparate and unconnected that the process of coordinating compliance in many different areas across many different college or university functions is greater still.

## I. Employment and Discrimination

### 1. Laws and Regulations

Federal employment and anti-discrimination laws apply to colleges and universities both directly as employers and, in some cases, indirectly as conditions of receipt of federal monies. The list of laws that regulate employment and, separately, discriminatory conduct at colleges and universities is long and the scope of the practices covered is wide. A partial and very incomplete list includes Title VII of the Civil Rights Act of 1964 (prohibiting employment discrimination based on race, color, religion, sex (including, by subsequent interpretation, sexual harassment) and national origin),<sup>100</sup> which was amended in 1972 to apply to colleges and universities, the Americans with Disabilities Act passed in 1990 (providing civil rights protection to individuals with disabilities and expanding implementation of sections 503 and 504 of the Rehabilitation Act of 1973),<sup>101</sup> the Age Discrimination Act of 1975,<sup>102</sup> Title IX of the Education Amendments of 1972 (prohibiting sex discrimination, including in athletics, but also prohibiting sexual harassment against students and other forms of discrimination in education by institutions receiving federal

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bdscomm/list/acsfa/hersbackgroundpaper.pdf.

100. 42 U.S.C. § 2000d (2006).

101. 42 U.S.C. §§ 12101–12213 (2006).

102. 42 U.S.C. §§ 6101–6107 (2006).



financial assistance),<sup>103</sup> Title VI of the Civil Rights Act of 1972 (prohibiting race and national origin discrimination by any educational institution receiving federal funds)<sup>104</sup> and many others.

## 2. What is Required?

The requirements of the employment and discrimination laws that apply to colleges and universities are far beyond the scope of this paper. However, for purposes of the topic here—government regulation of colleges and universities—it is worth noting, without discussion, two specific areas, out of many, in which the application of these laws to colleges and universities pose unique problems.

First, as applied to academic employment decisions (i.e., hiring, promotion, tenure, and termination of faculty), federal employment laws can have the effect of allowing enforcement agencies and courts to intrude into the academic decision-making of colleges and universities. Since academic judgments are frequently subjective and involve the exercise of academic expertise and experience, this intrusion can raise concerns about academic freedom, institutional autonomy, interference with and second guessing of decisions relating to academic excellence, and other matters of internal college and university governance.<sup>105</sup> Particular areas of concern include lawsuits involving tenure and promotion decisions and the application of the ADEA to tenured faculty.

Second, Title IX and Title VI, noted above, have both been interpreted by the Supreme Court to provide a private right of action to students against colleges and universities.<sup>106</sup> As such, these statutes, which apply only to recipients of federal money, allow the federal government, through agencies and courts, to become involved in the relationships between students and institutions of higher education.

## 3. Costs and Benefits

The benefits to the public of federal anti-discrimination laws “regulating” colleges and universities are clear and strong—the prevention or punishment of discrimination. This is a moral imperative, and virtually all colleges and universities would embrace the purposes of these laws as important to and consistent with their missions. In addition, there are undoubtedly real financial costs caused by discrimination—loss of workplace productivity, inability to hire and retain the best people, financial harm to individuals, loss of morale, and others.

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103. 20 U.S.C. §§ 1681-1688 (2006).

104. 42 U.S.C. § 2000d to d-7 (2006).

105. See GEORGE R. LANOUE & BARBARA A. LEE, *ACADEMICS IN COURT: THE CONSEQUENCES OF FACULTY DISCRIMINATION LITIGATION* 20–50 (1987).

106. See, e.g., *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

The costs to colleges and universities created by federal employment and anti-discrimination laws are also real and substantial. Higher education institutions are required to hire lawyers, consultants and managers to prepare compliance plans, to collect and maintain data, to respond to federal audits, to defend EEOC complaints filed by individual grievants, to defend lawsuits, to settle claims (even those without merit to avoid the costs of litigation), to change practices and procedures to comply with new laws and requirements, and so forth. A large university easily spends hundreds of thousands of dollars a year, or more, on these expenses necessitated by federal laws and regulations.

When discrimination exists, and it certainly has existed and continues to occur on most college and university campuses in one form or another, the benefits of laws that allow for redress outweigh the costs of “defense.” In this area, at least, most college and university administrators would not try to “balance” financial costs against moral imperatives and principles of right and wrong. If conduct is discriminatory, the benefits of laws that make it illegal and allow it to be redressed exceed the costs incurred, almost by definition—no institution wants to try to justify discrimination on a cost/benefit analysis. Indeed, most institutions use the same laws—or at least the standards they set—as their own internal rules in disciplining faculty, staff and students accused of wrongdoing.

The problem, of course, is that there are real and significant transaction costs in deciding what is right and wrong, deciding whether certain conduct is discriminatory, and responding to a universe of issues and claims that, most college and university administrators would also agree, exceed the number that are “true” or “worthy.” It is also true that employment disputes and lawsuits that second guess academic judgments do, in fact, lessen university autonomy and, to a certain extent, restrict academic freedom. If the conduct is discriminatory, under appropriate legal standards, the benefits of laws that allow redress, by litigation or otherwise, are worth it. But if the conduct at issue is appropriate, or if the legal line-drawing is so ambiguous and gray as to be almost impossible of after-the-fact resolution, then the substantial costs borne by the college and university are, in a real sense, wasted. Money that could be better spent serving the institution’s mission, including, importantly, promoting non-discrimination and diversity, is spent building a record or defending claims that lack merit.

#### V. THE COMPLIANCE FUNCTION AND THE ROLE OF COUNSEL

A description of compliance programs at colleges and universities and the related topic of the changing role of higher education counsel in dealing with regulatory and compliance issues are large topics unto themselves and beyond the scope of this paper. However, both of these topics—compliance programs and the role of counsel—represent two of the more

significant effects on colleges and universities of the inexorable increase in federal regulation of higher education over the past decades. Therefore, Part V will provide a very brief summary, really just an introduction, to these two important consequences of increased government regulation.

#### A. Compliance Plans and Programs

As discussed in Part I, the increase in federal funding of higher education after World War II led over the next six decades to an ever-increasing growth in federal laws and regulations that apply to colleges and universities. With the new laws came new enforcement mechanisms. Some of these mechanisms are unique to the specific laws and regulations (such as the specific administrative and litigation remedies for employment discrimination under Title VII); some, such as the False Claims Act,<sup>107</sup> apply broadly to all federal programs under which higher education institutions receive federal dollars. Some enforcement provisions create private rights of action; others empower the federal government to enforce the new legal requirements, whether by litigation, administrative agency action, or the simple but devastating threat of discontinuing and/or denying federal funding.

The risks to colleges and universities that flow from violating, or just being accused of violating, federal laws and requirements are significant. Certainly they include the costs of defense, possible fines and penalties, required refunds, and payment of damages; but, they also include potentially huge and even more damaging reputational harm and threats to future funding, whether from donors or the government. College and university administrators have long been aware of these dangers, and preventive lawyering has long been practiced by college and university lawyers. Efforts to comply with the growing body of federal requirements are not a new field. Nevertheless, for a variety of reasons, the growth of formal compliance plans and programs at colleges and universities is a relatively recent phenomenon.

College and university compliance plans and programs have, as a general matter, followed and tracked similar efforts in the broader for-profit corporate community. Compliance plans for corporations are based fairly directly on the Federal Sentencing Guidelines, which set out standards and criteria for compliance programs that may be considered as mitigating factors for a corporation found to have violated criminal laws.<sup>108</sup> In 1991, the United States Sentencing Commission issued a set of standards to guide federal judges in sentencing organizations found to have violated criminal

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107. 31 U.S.C. §§ 3729–33 (2006).

108. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2009), *available at* <http://www.ussc.gov/2009guid/GL2009.pdf> [hereinafter SENTENCING GUIDELINES].

laws.<sup>109</sup> The Guidelines were further amended in 2004. The corporate scandals of the early 2000s, including Enron and World Com, gave birth to the Sarbanes-Oxley legislation,<sup>110</sup> which focused even more attention on corporate compliance plans. The Federal Sentencing Guidelines are now considered the gold standard against which to measure an effective compliance plan for purposes of all legal requirements, not just the criminal laws. Compliance policies, plans and programs are intended, broadly, to “promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”<sup>111</sup>

College and university compliance plans and programs can take many different forms. Broadly speaking, they typically include a compliance officer or committee, reporting obligations to the Board of Trustees, an identified list of subject matter areas that pose compliance risks, and a process for reviewing and evaluating existing compliance activities, including training, monitoring and auditing in each of the subject matter areas. The different models, challenges of developing an effective program in a decentralized academic environment, and a discussion of the major subject matter areas that compliance programs typically address at colleges and universities were the subjects of a recent legal education program presented by the National Association of College and University Attorneys.<sup>112</sup>

### B. Role of Counsel in Compliance

Much has been written about the professional roles of lawyers who represent colleges and universities.<sup>113</sup> The critical issues often revolve around “who is the client,”<sup>114</sup> dealing with misconduct by institutional officials or the institution itself<sup>115</sup> and confidentiality and the attorney-client privilege.<sup>116</sup>

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109. See UNITED STATES SENTENCING COMMISSION, REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES (2003), available at [http://www.ussc.gov/corp/advgrprpt/AG\\_FINAL.pdf](http://www.ussc.gov/corp/advgrprpt/AG_FINAL.pdf).

110. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

111. SENTENCING GUIDELINES, *supra* note 108, at § 8B2.1(a)(2).

112. The materials developed for this program represent what is probably the single best source of information about how compliance programs work at colleges and universities. National Association of College and University Administrators Fall 2009 Workshop, College and University Compliance Programs: Obligations, Organization and Implementation (Nov. 11–13, 2009), <http://www.nacua.org/meetings/November 2009/home.html> (last visited Apr. 8, 2010). For more information: full materials from the workshop are available by request from National Association of College and University Administrators.

113. See, e.g., Symposium, *Focus on Ethics and the University Attorney*, 19 J.C. & U.L. 4 (1993).

114. See MODEL RULES OF PROF'L CONDUCT R. 1.13 (1998).

115. See, e.g., *id.* Rs. 1.2, 1.6, 1.13.

116. *Id.* R. 1.6. For examples of state laws see N.Y. C.P.L.R. 4503(a) (McKinney

The lawyer's role in compliance at colleges and universities raises all of these issues. More fundamentally, the college and university lawyer's role in dealing with regulatory requirements pushes the envelope of the traditional dichotomy between lawyer as counselor and lawyer as advocate. Compliance programs force college and university lawyers to consider a third role: lawyer as regulator.

A lawyer's traditional role includes advising and counseling a client on how to comply with the law, including federal regulations. If the college or university gets in trouble and is sued or investigated by the government or a private party, the lawyer's role also is to defend and protect the client with diligence and competence, consistent with the lawyer's duties to third parties and the administration of justice. But "compliance," as a relatively new function of colleges and universities, includes other kinds of duties and responsibilities. The requirements of an effective compliance plan include, as stated in the Sentencing Guidelines, that the college or university create an internal system to "prevent and detect" wrongful conduct, that the board "shall exercise reasonable oversight," that "[h]igh-level personnel of the organization [presumably including lawyers who, after all, are the experts on what must be complied with] shall ensure that the organization has an effective compliance and ethics program," that the college or university shall have "effective training programs," that the college or university "shall take reasonable steps to ensure that the organizations' compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct," that the college or university shall have in place "appropriate disciplinary measures," and that the organization "shall take reasonable steps to respond" to criminal conduct.<sup>117</sup>

All of these elements of a successful compliance program require the institution itself to enforce regulatory requirements and to identify and discipline cases of non-compliance. Further, to mitigate potential punishment, there are various federal regulations that encourage recipients of federal funds, including colleges and universities, to report wrongdoing that they self-identify. And even more significantly, some federal regulations affirmatively require self-disclosure to the government of wrongdoing identified by the recipient of federal funds. For example, self-disclosure is required for human subject research protocol violations, and at the formal "investigation" stage of a research misconduct case, when federal funds are involved, colleges and universities are required to notify ORI. The new amendments to the federal False Claims Act also allow a claim to be filed based on wrongful retention of federal funds, making disclosure (by returning funds) of any inadvertent over-billing a necessary

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2007); CAL. EVID. CODE § 954 (West 2009); TEX. R. EVID. R. 503 (Vernon 2003).

117. See SENTENCING GUIDELINES, *supra* note 108, at § 8B2.1.

step in compliance activities.

For all of these reasons, a college or university lawyer involved in compliance at a college or university may be faced not infrequently with the need to play what is neither a counseling nor an advocacy role, but which is, rather, a regulatory or enforcement function. To some extent whether a lawyer is required to play such a role may be affected by the lawyer's position in the compliance process. So, if the lawyer is the compliance officer, or the compliance office reports to the lawyer, or if the lawyer serves on the compliance committee, then the lawyer will be faced directly with playing the regulatory/enforcement roles required by the Sentencing Guidelines.

But even if the compliance and legal functions are separate, which is probably somewhat more common in colleges and universities, still the lawyer is likely to be called on to give legal advice to the compliance function or to advise administrators faced with violations of laws and regulations by institutional officials. In these situations, the overlapping requirements of the Rules of Professional Conduct (Rules 1.2, 1.6 and 1.13), the substantive requirements of disclosure created by the specific regulations at issue, the potential harm to the institution if wrongdoing is not dealt with or, worse, covered up, and the institution's own compliance plan—based as it almost always is on the Sentencing Guidelines requirements noted above—will force the lawyer, at the very least, to consider whether he or she must take on a more active regulatory/enforcement role. For example, the lawyer must decide whether the institution should take action against an individual wrongdoer (even a high-level official) or whether the institution itself should acknowledge and disclose wrongdoing to the government. In doing so, the lawyer acts more like a regulator or an enforcer than a counselor or advocate.

As the number and scope of federal regulations continues to grow, the tensions created for college and university lawyers by these multiple and inconsistent professional roles will undoubtedly grow as well. Federal regulation of colleges and universities thus not only changes and constrains the historic roles and missions of colleges and universities, but it also changes the fundamental role of the college and university lawyer.

# FIFTY YEARS OF ACADEMIC FREEDOM JURISPRUDENCE

LAWRENCE WHITE\*

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## I. INTRODUCTION

In 2008, when Congress passed the final version of the Higher Education Opportunity Act,<sup>1</sup> the legislation included a provision designed to drive down the cost of textbooks and other instructional materials. The provision—commonly referred to as the “textbook provision”<sup>2</sup>—starts with

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1. Pub. L. No. 110-315, 122 Stat. 3078 (2008) (codified at parts of 20 U.S.C. §§ 1001–1094a (Supp. II 2008)).

2. *Id.* § 112, 122 Stat. at 3107–10, (codified at 20 U.S.C. § 1015b) (emphasis added). The provision was obscure at the time it was enacted because, as a small item in a thousand-page rewrite of the nation’s most important higher-education law it prompted nothing more than muted expressions of concern when the bill was drafted. Now, with its July 1, 2010, effective date approaching, the higher-education community is waking up to some of the practical implications latent in the textbook provision. *See, e.g.,* Tamar Lewin, *Bookstores and Beyond*, N.Y. TIMES, November 1,

a short “purpose and intent” clause that reads in part:

It is the intent of this section to encourage . . . faculty, students, administrators, institutions of higher education, bookstores, distributors, and publishers, to work together to identify ways to decrease the cost of college textbooks and supplemental materials for students while supporting *the academic freedom of faculty members* to select high quality course materials for students.<sup>3</sup>

That passing reference to “academic freedom” marks the first time in American history that the term has been used in federal legislation. The legislation’s authors assumed we would know what the term means—or at least we must infer as much since “academic freedom” is not defined in the Act or anywhere else in the United States Code. The inclusion of that reference to academic freedom in the final version of the Act prompted no discussion in the legislative history, and we are left wondering why Congress thought that a bill imposing practical restrictions on faculty control over the “selection, purchase, sale, and use of course materials” could fairly be described as a measure “*supporting* the academic freedom of faculty members” under any commonly understood definition of support.<sup>4</sup>

The phrase “academic freedom” first appeared in a reported American court decision seventy years ago in the form of a semi-contemptuous aside in a state trial court decision.<sup>5</sup> Over the decades since then, courts—with

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2009, at Education Life Supplement 8; American Council on Education, *Implementing the Textbook Provision of the Higher Education Opportunity Act*, September 24, 2008, <http://www.acenet.edu/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=29289> (last visited April 7, 2010).

3. 20 U.S.C. § 1015b(a) (emphasis added).

4. *Id.*

5. That notorious case was *Kay v. Board of Higher Education of the City of New York*, 18 N.Y.S.2d 821 (1940). When the City College of New York extended an offer of employment to the eminent British philosopher Bertrand Russell, the appointment created a furor because of Lord Russell’s professed religious skepticism and advocacy of “immoral and salacious doctrines” in some of his popular writings. *Id.* at 826. Proceedings were commenced to revoke the appointment under New York’s Education Law, which effectively prohibited the Board of Higher Education from “appoint[ing] persons of bad moral character as teachers in the colleges of the City of New York.” *Id.* at 827. In the course of his decision ordering the revocation of Lord Russell’s appointment, the trial judge referred to an amicus brief filed by “three organizations”—unnamed, although one is known to be the American Civil Liberties Union—arguing that the college’s right to make the appointment was protected by “so-called ‘academic freedom.’” *Id.* at 829. Said the judge:

While this court would not interfere with any action of the board in so far as a pure question of “valid” academic freedom is concerned, it will not tolerate academic freedom being used as a cloak to promote the popularization in the minds of adolescents of acts forbidden by the Penal Law. This appointment affects the public health, safety, and morals of the community and it is the duty of the court to act. Academic freedom does not mean academic license.

*Id.*



altogether too rare exceptions—have treated academic freedom much as the United States Congress did in the 2008 Higher Education Opportunity Act: in passing; without definitional clarity; inconsistently; and with startlingly little regard for what the American Association of University Professors, in the most important explication of the term ever uttered, characterized as the reason why academic freedom exists in the first place: to foster “the free search for truth and its free exposition” on the nation’s college and university campuses.<sup>6</sup>

This article endeavors to trace the arc of more than half a century of academic-freedom jurisprudence in the United States. It argues that, to paraphrase the late Justice Potter Stewart’s malleable but by now overworked phrase, courts know academic freedom when they see it,<sup>7</sup> but are consistently unwilling or unable to ascribe to the concept a unitary, coherent, or (above all) useful meaning. It took the United States Supreme Court decades just to embrace the term and many years more to give it substance. Notwithstanding the sturdy foundation laid by two great decisions in the 1950s and ’60s—*Sweezy v. New Hampshire*<sup>8</sup> and *Keyishian v. Board of Regents of the University of the State of New York*<sup>9</sup>—American courts, including the Supreme Court, have spent a goodly portion of the last forty years stifling the evolution of academic freedom. Courts are coy about the constitutional underpinnings of academic freedom, persistently unclear about the meaning of the term, and unpredictable in the application of the principle of academic freedom to facts in particular cases.

Part II of this article addresses—all too briefly and in a manner not intended to be more than suggestive—the concept of academic freedom as defined and developed by scholars of American educational history and philosophy and as initially adopted by the United States Supreme Court in the landmark cases of the 1950s and ’60s. Borrowing from German concepts of faculty rights and responsibilities in the great medieval universities of Europe, “academic freedom” as that term was initially used by John Dewey, the American Association of University Professors, and other early twentieth-century higher-education theoreticians had a meaning that was, if not precise, at least clearly understood. Academic freedom, as one leading American scholar put it, meant “the right of professors to speak without fear or favor [and] the atmosphere of consent that surrounded the

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6. American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, in AAUP POLICY DOCUMENTS & REPORTS 3–11 (10th ed. 2006).

7. “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

8. 354 U.S. 234 (1957).

9. 385 U.S. 589 (1967).

whole process of research and instruction.”<sup>10</sup>

In Part III, we take a close look at the Supreme Court decisions in *Sweezy* and *Keyishian*—decisions we recognize in hindsight as the high-water mark for the judicial embrace of academic freedom. These two cases seemed, by the breadth of the language employed and the sweep of the holdings enunciated, to embody the continental view of academic freedom and promised strong judicial protection for academic freedom.

In Part IV, we examine ensuing lines of decisions that can best be described as retreats from a promising start. While referring in fits and starts to academic freedom, the Supreme Court has declined invitation after invitation to clarify the meaning and reach of the term, leaving the law in what can only be described as a confused state. Lower courts have further muddied the waters by drawing distinctions (for example, between “individual” and “institutional” academic freedom and “student” and “faculty” academic freedom) that do not reflect a sophisticated understanding of the origins of the term. We conclude Part IV with a brief discussion of a recent opportunity lost: the Supreme Court’s deliberate sidestep in *Garcetti v. Ceballos*<sup>11</sup> of the chance to draw distinct constitutional lines when professors speak candidly on matters of institutional governance.

## II. ACADEMIC FREEDOM: THE INITIAL ITERATION<sup>12</sup>

Academic freedom and the associated concept of academic tenure are relatively new phenomena in American higher education. The privately supported, predominantly sectarian institutions of higher education founded in this country in the seventeenth, eighteenth, and early nineteenth

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10. ROBERT HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 386–87 (1955).

11. 547 U.S. 410 (2006).

12. It is impossible to write about the history of academic freedom in this country without borrowing heavily from the work of Professors Richard Hofstadter and Walter Metzger, the subject’s preeminent authorities. Although more than a half a century old, their 1955 book *The Development of Academic Freedom in the United States* remains the best starting point for serious scholarship on the subject. Published as part of Columbia University’s extraordinary “American Academic Freedom Project,” this 527 page treatise comprehensively surveys the history of academic freedom and its relationship to academic tenure at American colleges and universities. Part I, written by Professor Hofstadter, focuses on what the authors call “the prehistory of academic freedom in our own country” from the founding of Harvard College in 1636 to the end of the Civil War. See HOFSTADTER & METZGER, *supra* note 10, at 78–113. Part II, written by Professor Metzger, chronicles the coming of the modern university and the development of “[a] self-conscious and well-formulated rationale for academic freedom” based on freedoms asserted by faculty and students in the great German universities of that epoch. *Id.* at xii, 275–506. Like other authors who have preceded me in exploring the history of academic tenure in the United States, I gratefully acknowledge the contributions of these two great Columbia University historians, reflected in what follows.

centuries used governance structures and instructional methods derived in large measure from Oxford and Cambridge, the institutions from which most of the colony's educators had graduated.<sup>13</sup> Governance was the responsibility of self-perpetuating boards of "fellows," who in turn appointed "tutors" to perform the mundane task of instructing students in class.<sup>14</sup> Until the middle of the eighteenth century, there was no rank higher than "tutor" on most American college faculties. Tutors were appointed for short fixed terms, with no guaranteed right to reappointment for successive terms.<sup>15</sup>

For much of the eighteenth century, faculty rights were defined more by what they were not than by what faculty status actually signified. Eighteenth-century tutors were ordinarily engaged under short "term" appointments and were required to stand for reappointment every two or three years.<sup>16</sup> Bequests establishing new professorships frequently fixed the appointment "durante vita"—for the life of the incumbent. Professors were freed from the obligation to apply for reappointment at periodic intervals, although, as historians observed, this was far from tenure in the modern sense, given the ease with which professors could be dismissed by governing boards for the most inconsequential of reasons.<sup>17</sup>

The modern concept of academic tenure owes its existence to three great shaping events of the nineteenth and early twentieth centuries: exposure of American educators to the German university and the German concept of *lehrfreiheit*, loosely translated as a faculty member's academic freedom as a teacher and researcher; enactment of the Morrill Act in 1862; and a series of path-breaking court cases decided a century ago known collectively as the "Economics" cases—cases that precipitated the establishment of the American Association of University Professors in 1915.

#### A. The German Influence

In the eighteenth and early nineteenth centuries, American colleges were overwhelmingly sectarian and served the avowed vocational purpose of preparing seminarians for careers as clergy members. Faculty did little original research and scarcely imagined their mission to include training in scholarship.<sup>18</sup> But in the nineteenth century, more than nine thousand

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13. Walter Metzger, *Academic Tenure in America: A Historical Essay*, in COMM'N ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE 114–16 (1973).

14. *Id.* at 110–11.

15. *Id.* at 120. For a lively description of higher education in colonial America, see *id.* at 114–51. See generally SAMUEL ELIOT MORISON, *THREE CENTURIES OF HARVARD 1636–1936* (1936); LAURENCE R. VEYSEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* (1965).

16. HOFSTADTER & METZGER, *supra* note 10, at 230.

17. Metzger, *supra* note 13, at 120.

18. HOFSTADTER & METZGER, *supra* note 10, at 229, 369.

Americans studied in what were at that time the world's preeminent research universities, the universities of Germany, and many of them joined the teaching ranks when they completed their studies and returned to the United States.<sup>19</sup> While overseas, they studied and socialized with colleagues who envisioned their jobs as members of university faculties quite differently, due in part to the German concept of *lehrfreiheit*. “By *lehrfreiheit*,” wrote Professors Hofstadter and Metzger, “the German educator meant two things[:]”

He meant that the university professor was free to examine bodies of evidence and to report his findings in lecture or published form—that he enjoyed freedom of teaching and freedom of inquiry. . . . This freedom was not, as the Germans conceived it, an inalienable endowment of all men, nor was it the superadded attraction of certain universities and not of others; rather, it was the distinctive prerogative of the academic profession, and the essential condition of all universities. In addition, *lehrfreiheit* . . . also denoted the paucity of administrative rules within the teaching situation: the absence of a prescribed syllabus, the freedom from tutorial duties, the opportunity to lecture on any subject according to the teacher's interest. Thus, academic freedom, as the Germans defined it, was not simply the right of professors to speak without fear or favor, but the atmosphere of consent that surrounded the whole process of research and instruction.<sup>20</sup>

Exposure to German academic governance opened the eyes of nineteenth-century American scholars to the hitherto radical notion that academic freedom protected faculty members from the very powers that were responsible for their appointment and continued employment: trustees and administrators. In a florid passage from his 1869 inaugural address as President of Harvard University, Charles W. Eliot extolled freedom from

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19. *Id.* at 367.

20. *Id.* at 386–87; see Walter P. Metzger, *The German Contribution to the American Theory of Academic Freedom*, in *THE AMERICAN CONCEPT OF ACADEMIC FREEDOM IN FORMATION: A COLLECTION OF ESSAYS AND REPORTS* 215 (Walter P. Metzger ed., 1977); FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* 412 (1962). In their treatise, Professors Hofstadter and Metzger reproduced correspondence exchanged in 1815 between the man who was soon to be the first president of the University of Virginia, Thomas Jefferson, and a young Harvard faculty member named George Ticknor whom Jefferson hoped to lure away to his new university. After Ticknor visited the University of Gottingen, he wrote to Jefferson:

No matter what a man thinks, he may teach it and print it; not only without molestation from the government but also without molestation from publick [sic] opinion . . . . If truth is to be attained by freedom of inquiry, as I doubt not it is, the German professors and literati are certainly on the high road, and have the way quietly open before them.

HOFSTADTER & METZGER, *supra* note 10, at 391.

institutional interference as the quintessential faculty right:

A university must, . . . above all, . . . be free. The winnowing breeze of freedom must blow through all its chambers. It takes a hurricane to blow wheat away. An atmosphere of intellectual freedom is the native air of literature and science. This university . . . demands of all its teachers that they be grave, reverent and high-minded; but it leaves them, like their pupils, free.<sup>21</sup>

In 1876, the Johns Hopkins University was founded as the first American institution offering graduate education on the German model.<sup>22</sup> The avowedly nonsectarian universities that opened their doors at the end of the century—Chicago and Stanford foremost among them—hired faculty members who were expected for the first time to engage in rigorous research.<sup>23</sup> As curricular boundaries expanded, so did the potential for ideological friction between faculty and institutional benefactors—and the perceived need for procedures to protect the faculty prerogative to conduct research free from external interference.

#### B. The Morrill Act

The Morrill Act of 1862 expanded and democratized American higher education in the years after the Civil War by making public lands available for the establishment of so-called “land-grant colleges.”<sup>24</sup> The origins of the Morrill Act trace back to the great London and New York expositions of the 1850s, which showcased the scientific and technological advances of the Industrial Revolution and persuaded a generation of American educators that the standard curriculum of the day was “hopelessly antiquated.”<sup>25</sup> The Morrill Act gave to every state that remained in the Union a minimum grant of 90,000 acres of public land to establish colleges dedicated to engineering, agriculture, mechanical arts, and vocational training. Subsequent legislation, enacted in 1890, extended the land-grant college program to the southern states that had seceded during the Civil War.<sup>26</sup>

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21. *Id.* at 394.

22. DONALD KENNEDY, *ACADEMIC DUTY* 26 (1997). Of the fifty-three professors who served on the Johns Hopkins faculty when the university was founded, nearly all had studied at German universities. They adopted the German method of instruction, relying on lectures, seminars, and laboratories. So profound was the German influence on pedagogy at Hopkins that the new university was playfully referred to as “Gottingen at Baltimore.” HOFSTADTER & METZGER, *supra* note 10, at 377.

23. KENNEDY, *supra* note 22, at 26–27.

24. Morrill Act, ch. 130, 12 Stat. 503 (1862) (which “apportioned to each State a quantity [of public land] equal to thirty thousand acres for each senator and representative in Congress”).

25. ALLAN NEVINS, *THE STATE UNIVERSITIES AND DEMOCRACY* 2 (1962).

26. Morrill Act, 26 Stat. 417 (1890) (giving funds from the sale of public lands to “each State and Territory for the more complete endowment and maintenance of

The nineteenth-century land-grant college enactments enormously increased the number of college and university faculty members. The new additions to the profession were primarily state government employees who enjoyed defined employment rights under state law. The land-grant colleges were the first to develop two of the most significant modern features of academic due process: codified procedures governing advancement from one academic rank to the next and the notion of “probationary service” prior to advancement to a tenured rank with the correlative “up or out” rule at the end of the probationary period.<sup>27</sup>

C. The Celebrated “Economics” Cases, the Founding of the AAUP, and the AAUP’s 1940 Statement of Principles on Academic Freedom and Tenure

Ideological turbulence roiled the economics profession at the beginning of the twentieth century, as traditional business-oriented departments of economics were challenged by a new generation of progressive faculty members who espoused free trade, the abandonment of the gold standard, the regulation of monopolies, public ownership of utility companies, and other positions deemed heretical by the corporate magnates serving as trustees at most of the public and private institutions of the day.<sup>28</sup>

Not surprisingly, schisms developed within leading economics departments and between radical economists and conservative university presidents and trustees. For the first time in the nation’s history, industrialists were making large fortunes and using them to support universities on an unprecedented scale. “Inevitably,” Hofstadter and Metzger dryly observed, “the increase in the size of gifts changed the relations of donor and recipient. Borrowing a term from economic history, one may say that the givers became entrepreneurs in the field of higher education.”<sup>29</sup> Just as inevitably, enormous gifts were rewarded with appointments to institutional governing boards; “thus, big businessmen and professors came into fateful contact.”<sup>30</sup>

Economics departments proved to be a particularly combustible meeting place. In 1901, the former President of Kansas State Agricultural College,

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colleges”). See also METZGER & HOFSTADTER, *supra* note 10, at 380–82.

27. Metzger, *supra* note 13, at 121, 123.

28. HOFSTADTER & METZGER, *supra* note 10, at 413–18.

29. *Id.* at 413–14.

30. *Id.* at 418. Before the Civil War, the largest philanthropic gift ever given to an American college was Abbott Lawrence’s \$50,000 gift to Harvard. In the 1880s, the estate of a California railroad magnate contributed the hitherto unimaginable sum of \$24 million to establish Stanford University; John D. Rockefeller gave \$34 million to the University of Chicago and contributed another \$46 million to establish a foundation called the General Education Board to provide financial support to secondary and postsecondary schools throughout the United States. *Id.* at 413–14.

Thomas Elmer Will, wrote that at least twelve faculty members from economics and political science departments had been removed from tenured positions in the preceding eight years for espousing “heretical social and economic writings” on such topics as the need to regulate monopolies, the advantages of free silver, the anti-democratic impulses of imperialism, and the need for immigration reform.<sup>31</sup> The most notorious of these cases involved Edward A. Ross, a tenured professor of economics at Stanford University. In 1900, Stanford President David Starr Jordan dismissed Professor Ross at the insistence of university trustee Jane Lathrop Stanford, the widow of the University’s founder, Leland Stanford.<sup>32</sup> Mrs. Stanford’s well-connected industrialist friends were offended by Professor Ross’s unorthodox advocacy of populist economic policies. Because of Ross’s national prominence as secretary of the American Economic Association, Ross’s firing captured the attention of national media, who “seized upon the incident as a parable of the fate of liberal professors in institutions dominated by the moneyed class.”<sup>33</sup>

Matters worsened in 1913, when another prominent economics professor, William Fisher, resigned from the Wesleyan University faculty at the insistence of the institution’s president. Professor Fisher’s offense was the off-campus delivery of a speech that advocated relaxing the rigid rules for the observance of the Sunday Sabbath. Professor Fisher’s colleagues were outraged when they learned of the president’s action and the Economics Department chairman—who had himself resigned in protest from the Stanford faculty in the wake of the Ross firing—attempted to organize a faculty boycott of the president’s efforts to hire a replacement for Professor Fisher. Other faculty members sought to interest the American Economic Association in conducting an investigation, but their effort yielded no published result because, as Professor Metzger tersely reports, “the chairman [of the investigating committee] became convinced that Fisher had not been faultless in conduct and because he wished to reserve full reportage for the worthy pure.”<sup>34</sup>

These cases offered important lessons for thoughtful proponents of faculty rights. They showed that presidents, trustees, and other powerful

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31. *Id.* at 420–21. President Will viewed the decade’s developments from a unique vantage point. In the election of 1896, Republican Party majorities in both houses of the Kansas legislature were displaced by a coalition of Democrats and Populists, who immediately assumed control of the governing board of the state land-grant college. All faculty contracts in the economics department were terminated and Will, an advocate of reform and a friend of Populist legislators, was appointed to the presidency. Two years later, the Republican Party returned to power. Will was dismissed, a new president was installed, the appointments of all the new members of the economics department were terminated, and their places were filled with loyal Republicans. *Id.* at 424–25.

32. Metzger, *supra* note 13, at 138.

33. *Id.* at 139.

34. *Id.* at 146–48.

people who were opposed to the expression of unorthodox views and willing to use their power to suppress such expression could repeatedly threaten the employment of faculty members who espoused progressive or unorthodox views. By the beginning of the twentieth century, leaders in the American academic community were tentatively beginning to draw the connection between two strands of thought—one philosophical, one legal. The German-inspired notion that a university could achieve greatness only by according faculty the unfettered right to determine for themselves what to teach and how to teach it became linked to the need for a codified system of procedural protections that would shield faculty members who exercised their academic freedom from the intemperate reactions of administrators and trustees. Professors Hofstadter and Metzger describe the moment these two strands first converged in a significant way, when Harvard's venerated President Charles W. Eliot delivered the Phi Beta Kappa address at that institution's commencement exercises in 1907.<sup>35</sup> Invoking more than a decade's turbulence in departments of economics at Harvard and other universities, Eliot focused his remarks on fractious relations between professors and lay boards of trustees: "So long as . . . boards of trustees of colleges and universities claim the right to dismiss at pleasure all the officers of the institution in their charge, . . . there will be no security for the teachers' proper freedom."<sup>36</sup> Eliot's statement was one of the first explicit references to professorial "freedom"—Eliot's term—to conduct research and propound ideas without external interference.

In 1913 Arthur Lovejoy, a philosophy professor at the Johns Hopkins University, and seventeen other Hopkins professors circulated a letter to colleagues at nine leading American universities urging them to support the formation of a national association of professors. Six hundred professors accepted Professor Lovejoy's invitation to become charter members of the new organization, christened the American Association of University Professors ("AAUP").<sup>37</sup>

Professor Lovejoy proposed two principal tasks for the new organization: (1) "the gradual formulation of general principles respecting the tenure of the professional office and the legitimate ground for the dismissal of professors," and (2) the establishment of "a representative judicial committee to investigate and report in cases in which freedom is alleged to have been interfered with by the administrative authorities of any university."<sup>38</sup> Professor Metzger captures the significance of Professor

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35. HOFSTADTER & METZGER, *supra* note 10, at 398.

36. *Id.*

37. The founding of the AAUP is amply chronicled in essays, reports, and books authored, in the main, by members of the AAUP's Committee A on Academic Freedom and Tenure. See, e.g., Ralph F. Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROBS. 431 (1963); HOFSTADTER & METZGER, *supra* note 10, at 468–90.

38. Metzger, *Academic Tenure*, *supra* note 13, at 135–36 (citation omitted).



Lovejoy's formulation of the AAUP's two principal undertakings:

The first proposal looked forward to tenure rules that would be shaped to the interest of professors rather than to the interest of lay controllers and that would be standardized for the entire nation rather than left to each campus ward. The second proposal, remarkable for its audacity, urged the organized professors to set themselves up as the judges of administrative conduct in all those tangled and bristling affairs that end in academic dismissals. But it was in the joining of these two proposals that their historic significance can be said to lie. For many years, professors had evidenced concern about their security of tenure. And for many years . . . professors had sought "academic freedom"—immunity from institutional sanctions in matters of expression and belief. What was so unusual and worthy of mark was the marriage of these two concerns in one professional plan of action.<sup>39</sup>

The AAUP's first significant achievement was the formulation in 1915 of the *General Declaration of Principles*.<sup>40</sup> The *1915 General Declaration* was one of the first efforts to draw an explicit analytic connection between academic freedom as the defining characteristic of American higher education and tenure as the most effective means for preserving and protecting academic freedom.<sup>41</sup> Ten years later, the American Council on Education called a conference for the purpose of discussing the principles of academic freedom and tenure.<sup>42</sup> Representatives of the AAUP and other higher-education organizations were invited to attend. The conference's tangible product was the 1925 statement from its Conference on Academic Freedom and Tenure, a document remarkable for two reasons: first,

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39. *Id.* at 136. As Professor Peter Byrne observed in one of the most widely cited articles on the origins of academic freedom in the United States:

[A]cademic freedom became conceived as an adjustment of rights among participants. Professors simultaneously demanded that no ideological test be applied to their work and that evaluation be performed by professional peers. These demands were justified largely by appeal to the exigencies of science: The error in any theory could be perceived only by trained specialists, and error must be tolerated if truth is to advance. The opinions of laypersons were not scientific; lay interference with scientists would only retard the discovery of truth.

J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 *YALE L.J.* 251, 273 (1989) (footnote omitted).

40. *1915 General Report of the Committee on Academic Tenure, reprinted in FREEDOM AND TENURE IN THE ACADEMY* 393 (William W. Van Alstyne, ed., 1993).

41. *Id.* at 399, 405–06. For comprehensive treatments of the *1915 General Report*, see Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 *GEO. L. REV.* 945, 953–61 (2009); Byrne, *supra* note 39, at 276–79.

42. Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 *LAW & CONTEMP. PROBS.* 3, 26 (1990).

because it constituted an explicit endorsement by a body of college presidents of the principle that academic tenure is essential to safeguard the academic freedom of faculty members; and second, because it was the first effort to develop codified rules of fair procedure for the adjudication of academic-freedom-related disputes by faculty bodies.<sup>43</sup>

The AAUP's 1940 *Statement of Principles on Academic Freedom and Tenure* ("1940 Statement of Principles") is widely accepted and widely cited as the most influential expression of academic freedom principles to be found anywhere in the extensive literature on American higher education.<sup>44</sup> Elaborating on themes tentatively expressed in the 1915 General Declaration and 1925 Conference Statement, the *1940 Statement of Principles* explains academic freedom's essential purpose in one hundred precise and carefully chosen words:

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.<sup>45</sup>

The *1940 Statement of Principles* follows these general precepts with three substantive rules, one pertaining to research, one to teaching, and one to expression outside of the research or pedagogical context. Each substantive rule is true to the structure of the general precepts, in that each rule enunciates a precise academic freedom followed by a "correlative" duty—a "but" clause—circumscribing or limiting that right:

Teachers are entitled to *full freedom in research and in the publication of the results*, subject to the adequate performance of their other academic duties; *but research for pecuniary return*

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43. Metzger, *supra* note 13, at 151–52. The 1925 Conference Statement is reprinted in XI AAUP BULL. 99 (1925).

44. The definitive history of the *1940 Statement of Principles* was written in 1990, on the fiftieth anniversary of its adoption, by none other than Professor Walter Metzger. See Metzger, *supra* note 42, at 3. For other treatments of the central role of the 1940 Statement of Principles in the history and development of academic freedom and tenure in the United States, see HARRY T. EDWARDS & VIRGINIA DAVIS NORDIN, *HIGHER EDUCATION & THE LAW* 218 (1979) ("[T]he definition of tenure which is most prevalent in American higher education is found in the 1940 Statement of Principles."); Matthew W. Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 IOWA L. REV. 1119, 1150–51 (1980) (noting that "the 1940 Statement . . . has become so widely accepted throughout American higher education that it has achieved judicial recognition as a usage of the profession" (footnote omitted)).

45. American Association of University Professors, *supra* note 6, at 3–11.

*should be based upon an understanding with the authorities of the institution.*

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

College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should *be free from institutional censorship or discipline, but their special position in the community imposes special obligations.* As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.<sup>46</sup>

Here, then, in 1940—the year in which the phrase “academic freedom” appeared for the first time in an American court decision—was the essence of what the phrase meant to academic philosophers and scholars. Academic freedom was a right bestowed upon college and university *faculty members*—not institutions, and decidedly not trustees, administrators or students—as a form of “insulation . . . from lay interference.”<sup>47</sup> It emanated from what a perceptive contemporary scholar of academic freedom referred to as the conviction on the part of college and university faculty members that adherence to the principle of external non-interference “eliminates the gravest evils of lay control over universities—ignorant interference with painstaking investigation and discussion of controversial problems—by [guaranteeing] that professors be evaluated only for professional competence and only (in the first instance) by peers.”<sup>48</sup> It encompassed three interconnected but conceptually distinct sub-rights: the right to conduct scholarly research without ideologically motivated interference; the right to make pedagogical decisions about what to teach students and how to engage in teaching; and the right to free expression both as a citizen (on matters of civic and political substance) and as a member of the campus community (on matters of institutional governance and management). In the wonderful phrase of former Harvard dean Henry Rosovsky, academic freedom is a component part of the “social contract” between faculty member and institution, “ensuring the

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46. *Id.* (emphasis added).

47. Byrne, *supra* note 39, at 278.

48. *Id.* at 279.

right to teach what one believes, to espouse unpopular academic and non-academic causes, [and] to act upon knowledge and ideas as one perceives them without fear of retribution from anyone . . . . Nothing can diminish the need for academic freedom; its absence has reduced universities to caricatures in many parts of the contemporary world.”<sup>49</sup>

### III. ACADEMIC FREEDOM IN THE COURTS: THE QUARTER-CENTURY EVOLUTION FROM DISSENT TO CONCURRENCE TO “SPECIAL CONCERN OF THE FIRST AMENDMENT” (1940 TO 1967)

Not until 1952—a dozen years after the AAUP formulated the lasting definition of academic freedom in the *1940 Statement of Principles*—did a United States Supreme Court Justice mention the concept for the first time. The case was *Adler v. Board of Education of the City of New York*,<sup>50</sup> the first in a series of Cold War public-employee loyalty-oath cases to reach the Court in the 1950s and 1960s. The Justice in question was William O. Douglas, a former professor at Columbia and Yale who by then had emerged as one of the Court’s champions of First Amendment rights.

*Adler* involved a facial challenge to the constitutionality of a New York statute—the so-called “Feinberg Law,” part of New York’s Education Law—denying employment to any public schoolteacher or applicant for a teaching position upon a showing that the jobholder or job applicant was a “subversive person.” The law defined a subversive as a person who “willfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means.” The law required the Board of Regents—the governing board for the state’s public school systems—to draw up a list of subversive organizations, and declared that membership in a subversive organization constituted “prima facie evidence of disqualification for appointment to or retention in” any teaching position in the state.<sup>51</sup> The Court rejected arguments to the effect that the Feinberg Law chilled speech and associational rights protected by the First Amendment. Describing employment in a state job as a “privilege,” the Court held:

It is clear that [teachers] have the right under our law to assemble, speak, think and believe as they will. It is equally clear that they have no right to work for the State in the school system on their own terms. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.

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49. HENRY ROSOVSKY, *THE UNIVERSITY: AN OWNER’S MANUAL* 179, 180, 183 (1990).

50. 342 U.S. 485 (1952).

51. *Id.* at 490–91.

Has the State thus deprived them of any right to free speech or assembly? We think not.<sup>52</sup>

Justice Douglas, in a dissent joined by Justice Hugo Black, warned that disqualifying persons from continued employment as teachers would “raise havoc with academic freedom”—a term he used but did not explain or define.<sup>53</sup> “What happens under this law is typical of what happens in a police state,” Justice Douglas continued. “A pall is cast over the classrooms. There can be no real academic freedom in that environment.”<sup>54</sup>

Justice Douglas’s references to academic freedom must have struck a chord in Justice Felix Frankfurter, another Associate Justice whose service on the Court was preceded by years of experience as a full-time faculty member (in his case at Harvard).<sup>55</sup> In another loyalty-oath case decided the same term as *Adler—Wieman v. Updegraff*<sup>56</sup>—the Court struck down an Oklahoma statute that automatically disqualified persons from serving as faculty members at state universities for belonging at any time in their pasts to Communist or subversive organizations. Observing that “[a] state servant may have joined a proscribed organization unaware of its activities and purposes,”<sup>57</sup> the Court ruled that the Oklahoma statute deprived state employees of procedural due process by making disqualification automatic and not affording affected state employees notice and an opportunity to show that they joined organizations “innocently” without awareness of their subversive intent.<sup>58</sup> Justice Frankfurter, joined by Justice Douglas, filed a concurring opinion that, while not using the term “academic freedom,” lyrically likened faculty members to “the priests of our democracy.” Faculty members, Justice Frankfurter wrote:

must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against

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52. *Id.* at 492 (citations omitted).

53. *Id.* at 509 (Douglas, J., dissenting).

54. *Id.* at 510–11 (Douglas, J., dissenting).

55. As Professor Areen notes in her recent law review article on academic freedom, Frankfurter had a long and honorable record of championing academic freedom while serving on the Harvard Law School faculty in the 1920s and '30s. Areen, *supra* note 41, at 968 n.104 (2009).

56. 344 U.S. 183 (1952).

57. *Id.* at 190.

58. *Id.* at 191.

infraction by national or State government.<sup>59</sup>

Almost a third of the concurrence was given over to a lengthy excerpt from testimony delivered that year—1952—by former University of Chicago President Robert Hutchins before the House of Representatives' infamous Cox Committee.<sup>60</sup> Dr. Hutchins's testimony—although, again, not using the phrase “academic freedom”—incorporated concepts and themes straight out of the AAUP's *1940 Statement of Principles*:

Now, a university is a place that is established and will function for the benefit of society, provided it is a center of independent thought. It is a center of independent thought and criticism that is created in the interest of the progress of society, and the one reason that we know that every totalitarian government must fail is that no totalitarian government is prepared to face the consequences of creating free universities.

It is important for this purpose to attract into the institution men of the greatest capacity, and to encourage them to exercise their independent judgment. . . .

A university, then, is a kind of continuing Socratic conversation on the highest level for the very best people you can think of, you can bring together, about the most important questions, and the thing that you must do to the uttermost possible limits is to guarantee those men the freedom to think and to express themselves.<sup>61</sup>

Five years later, in *Sweezy v. New Hampshire*,<sup>62</sup> the Court dealt for the first time not with a facial challenge to a loyalty-oath statute, but with a case involving an adverse employment action directed against a specific professor. Paul Sweezy, a noted economist and co-editor of a progressive economics journal, was invited to give a guest lecture at the University of New Hampshire in 1954. He titled the lecture “Socialism,” for which

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59. *Id.* at 196–97.

60. The Cox Committee—formally the Select Committee to Investigate Tax-Exempt Foundations and Comparable Organizations—was a relic of the McCarthy era on Capitol Hill. Established in 1952, the Cox Committee conducted a series of hearings to determine whether tax-exempt organizations “were using their resources . . . for un-American activities and subversive activities or for purposes not in the interest or tradition of the United States.” H.R.J. Res. 561, 82d Cong. (1952). Witnesses who testified before the Cox Committee included university presidents and faculty members, foundation executives, and union leaders. See *THE NONPROFIT SECTOR: AN OVERVIEW* 114–15 (J. Steven Ott ed., 2000).

61. 344 U.S. at 197–98 (Frankfurter, J., concurring). “By quoting Hutchins, Justice Frankfurter emphasized both how the academic workplace differs from other public workplaces, and the value of that difference to the nation. We might not want the state bureau of motor vehicles to be a hotbed of independent thought, but colleges and universities need to be if they are to produce new knowledge for the benefit of students and the nation.” Areen, *supra* note 41, at 970.

62. 354 U.S. 234 (1957).

transgression he was summoned to appear before the state attorney general and asked detailed questions about the substance of his lecture. Invoking his constitutional right against self-incrimination, he refused to answer the questions, and told the attorney general:

I stated under oath that I do not advocate or in any way further the aim of overthrowing constitutional government by force and violence. I did not so advocate in the lecture I gave at the University of New Hampshire. In fact, I have never at any time so advocated in a lecture anywhere. Aside from that I have nothing I want to say about the lecture in question.<sup>63</sup>

Sweezy then refused to respond to a series of specific questions about the substance of his lecture.<sup>64</sup> He was held in contempt, and subsequently challenged his contempt citation on the ground that the state statute authorizing the attorney general's investigation unconstitutionally infringed upon his First Amendment rights.

For a four-Justice plurality of the Court, Chief Justice Warren ruled in Sweezy's favor, albeit on fairly narrow due-process grounds. The Chief Justice held that Sweezy had a constitutionally protected "right to engage in political expression and association"<sup>65</sup> and that the state statute authorizing the attorney general's investigation did not establish with sufficient clarity that "the legislature wanted the information the Attorney General attempted to elicit from petitioner. It follows that the use of the contempt power, notwithstanding the interference with constitutional rights, was not in accordance with the due process requirements of the Fourteenth Amendment."<sup>66</sup> With some lack of clarity, the Chief Justice also expressed his view that Sweezy enjoyed "liberties in the areas of academic freedom," a phrase he explained in seven oddly clipped sentences:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly

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63. *Id.* at 260.

64. The attorney general asked him:

"Didn't you tell the class at the University of New Hampshire on Monday, March 22, 1954, that Socialism was inevitable in this country?"

"Did you advocate Marxism at that time?"

"Did you express the opinion, or did you make the statement at that time that Socialism was inevitable in America?"

"Did you in this last lecture on March 22 or in any of the former lectures espouse the theory of dialectical materialism?"

*Id.* at 243-44.

65. *Id.* at 250.

66. *Id.* at 250, 254-55.

comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>67</sup>

*Sweezy* is not remembered for Chief Justice Warren's indirect and somewhat stunted embrace of academic freedom. *Sweezy* warrants its status as one of the Supreme Court's great academic freedom cases on the strength of Justice Frankfurter's soaring concurring opinion, written for himself and Justice John Marshall Harlan. Rather than relying, as the plurality did, on the peculiar structure of New Hampshire's statute and the due process implications of a vague delegation of legislative authority to the state attorney general, Justice Frankfurter shone the spotlight where it belonged: on what he termed "the intellectual life of the university" and the threat posed by "governmental intervention."<sup>68</sup> He then quoted at length from *The Open Universities in South Africa*, a conference report prepared by two eminent South African jurists and educators in 1957:<sup>69</sup>

In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—"to follow the argument where it leads." This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself.

Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university.

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "*the four essential freedoms*" of a university—to determine for itself on academic

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67. *Id.* at 250.

68. *Id.* at 262.

69. Conference of Representatives of the Univ. of Cape Town and the Univ. of the Witwatersrand, *THE OPEN UNIVERSITIES IN SOUTH AFRICA* (1957).



*grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.*<sup>70</sup>

Justice Frankfurter's delineation of the "four freedoms" enjoyed by American colleges and universities has evolved over the years into what Professor Judith Areen rightly characterizes as "a touchstone for understanding constitutional academic freedom" in the United States.<sup>71</sup> Justice Frankfurter's concurring opinion also—Professor Areen's words again—"broke important, new conceptual ground"<sup>72</sup> by characterizing academic freedom not simply as a set of rights possessed by *faculty members* but as essential freedoms belonging to *the university* as an institutional whole. One wonders, with the benefit of hindsight, why Justice Frankfurter ignored the *1940 Statement of Principles*, by then more than a decade and a half old and already the subject of sustained scholarly commentary,<sup>73</sup> and focused instead on a new analytic strand imported from the intellectual history of South Africa—particularly in a case involving the assertion of protected constitutional rights by an *individual* scholar (Paul Sweezy), not the institution at which he gave his lecture. Still, Justice Frankfurter's concurrence in *Sweezy* remains to this day the fullest treatment ever accorded the principle of academic freedom in a Supreme Court case, and its quadripartite delineation of "the four essential freedoms" at the core of the principle is almost invariably the starting point for analysis when faculty members invoke their right to academic freedom.

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70. 354 U.S. at 262–63 (emphasis added).

71. Areen, *supra* note 41, at 971.

72. *Id.*

73. In 1952, Yale Professors Thomas Emerson and David Haber published the first edition of their magisterial work *Political and Civil Rights in the United States*. The book quickly became the nation's standard reference work on civil and political liberties and exerted an enormous influence on jurisprudence in those areas during and in the immediate aftermath of the McCarthy era. The Emerson-Haber treatise included a chapter on academic freedom, which was hailed by the scholarly community as the first systematic treatment of the subject in any widely circulated legal text. Will Maslow, Book Review, 53 COLUM. L. REV. 290, 290 (1952). Much of the scholarly writing on academic freedom in the 1940s and '50s highlighted the leading role played by the American Association of University Professors and the *1940 Statement of Principles* in defining and giving content to the concept of academic freedom. *E.g.*, HOFSTADTER & METZGER, *supra* note 10; ROBERT M. MACIVER, ACADEMIC FREEDOM IN OUR TIME (1955). (Curiously, however, it was not until 1969 that any federal or state court saw fit to cite the *1940 Statement of Principles* in a published judicial decision. In that case—*Greene v. Howard University*, 412 F.2d 1128 (D.C. Cir. 1969)—a tenure-track faculty member at a private university claimed that AAUP standards for notice of non-reappointment contained in the *1940 Statement of Principles* applied in his case because the faculty handbook contained a general reference to the applicability of AAUP standards in matters of academic tenure. In a footnote in *Greene*, the court declared that it could take judicial notice of the *1940 Statement of Principles* in determining how much notice was due under institutional policies. *Id.* at 1134 n.7.)

Ten years after *Sweezy*, in *Keyishian v. Board of Regents*,<sup>74</sup> the Supreme Court delivered the last of its great academic freedom decisions. Here, for the first time, the principle of academic freedom was invoked, not in a dissenting opinion, a concurring opinion, or a decision announced by a Court plurality, but in the decision of a Court majority—albeit a bare majority of five Justices. The plaintiffs in *Keyishian* were faculty members at the University of Buffalo who, when their private university was merged into the public State University of New York system in 1962, were required to take loyalty oaths under the very same statute—New York’s Feinberg Law—to which public school teachers in *Adler* had been subjected fifteen years earlier. In 1953, the New York General Assembly adopted legislation extending the Feinberg Law to state college and university faculty members. Under the law, faculty members were subject to removal for “treasonable or seditious utterances or acts,” and the faculty members in *Keyishian* attacked the law on the theory that its references to “treason” and “sedition” were unconstitutionally vague. This question, said the Court, had been expressly reserved and left unresolved in the *Adler* decision a decade and a half earlier. The Supreme Court agreed with the plaintiffs, struck down the Feinberg Law, and ruled that “no teacher can know just where the line is drawn between ‘seditious’ and nonseditious utterances and acts,” rendering the law unconstitutionally vague and for that reason unenforceable.<sup>75</sup>

In a short passage, the Court for the first time suggested—without quite coming out and saying so directly—that academic freedom had constitutional underpinnings:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. *That freedom is therefore a special concern of the First Amendment*, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.<sup>76</sup>

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74. 385 U.S. 589 (1967).

75. *Id.* at 599. Three years earlier, in *Baggett v. Bullitt*, 377 U.S. 360 (1963), a seven-member majority of the Court relied on the same grounds to invalidate loyalty oaths required of applicants for employment on the University of Washington faculty. The Court, without addressing the petitioners’ academic-freedom arguments, found the state loyalty-oath statute unconstitutional on vagueness and overbreadth grounds. *Id.* at 366.

76. *Keyishian*, 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F.

By 1967, the Supreme Court and lower courts had comfortably taken to using the term “academic freedom” in their opinions. Academic freedom was established as a legitimate jurisprudential principle protecting faculty members from censure or termination based on ideologically motivated resistance to their teaching, scholarship, political associations, or civic utterances.<sup>77</sup> The vast majority of academic freedom cases decided by courts in the first quarter-century after the formulation of the *1940 Statement of Principles* involved loyalty-oath challenges, and given the narrow range of factual situations in which faculty members asserted their right to academic freedom, it is perhaps not surprising that the precise contours of the right were still hazy and something of a doctrinal muddle. Supreme Court pronouncements suggested—but did not quite hold—that academic freedom was a constitutionally derived right emanating from free-speech and associational freedoms in the First Amendment. Justice Frankfurter had introduced some confusion by departing from the AAUP’s notion of academic freedom as a right possessed by faculty members and suggesting instead that it was a right enjoyed by the institutions that employed those faculty members. The distinction between individual and institutional academic freedom may have been insignificant in the 1940s and ’50s, when litigants were provoked largely by what Professor Areen and other scholars called “external challenges to academic freedom”<sup>78</sup>: challenges mounted by state legislators and policymakers in an attempt to dictate who was eligible to teach on college and university faculties—an effect just as offensive to academic institutions themselves as to faculty members. While external threats to academic freedom have never diminished and can probably never be expected to, new threats—internal

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Supp. 362, 372 (1943) (emphasis added; quotation marks and citations omitted, modification in original)); *see also* *Whitehill v. Elkins*, 389 U.S. 54 (1967). In *Whitehill*, another loyalty-oath case, the Court alluded to the constitutional dimension of academic freedom in a curiously elliptical way without coming straight out and *finding* that faculty members at state institutions enjoy a constitutionally protected right to academic freedom: “We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom.” *Id.* at 59.

77. *E.g.*, *Dickey v. Ala. State Bd. of Ed.*, 273 F. Supp. 613, 616 (M.D. Ala. 1967); *Hammond v. S.C. State College*, 272 F. Supp. 947, 949 (D.S.C. 1967); *Egan v. Moore*, 245 N.Y.S.2d 622, 624 (N.Y. App. Div. 1963) (“[T]he tradition of our great society has been to allow our universities in the name of academic freedom to explore and expose their students to controversial issues without government interference.”).

78. Areen, *supra* note 41, at 967; *see* Jonathan R. Cole, *Academic Freedom under Fire*, DAEDALUS, Spring 2005, at 1–5 (arguing that academic freedom protects against “the influence of external politics on university decision making”); Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U.L. REV. 125, 134 (2009) (describing *Sweezy* and *Keyishian* as cases in which “the interest of the university in presenting diverse ideas and the interest of individual employees in retaining their employment were aligned against state interference, which presented an external threat to academic freedom”).

threats—surfaced in the 1970s, '80s and '90s as faculties unionized, faculty handbook provisions became more codified, economic hard times jeopardized faculty security, and faculty members sought more frequently to invoke academic freedom as an obstacle to actions directed against them by university administrators. As the next several decades would illustrate, inconsistent doctrinal principles were strained to the breaking point when faculty interests did not align with institutions' and academic freedom assumed a new and more expansive meaning within the halls of academe.

#### IV. DIFFUSION OF THE CONCEPT OF ACADEMIC FREEDOM (1968 TO THE PRESENT)

The Supreme Court decisions in *Sweezy* and *Keyishian*, in the words of one leading scholar, “led some commentators to predict that the Court would eventually provide extensive protection for the academic judgments of individual faculty against interference by university administrators, thus giving constitutional status to traditional notions of academic freedom.”<sup>79</sup> An influential note in the *Harvard Law Review* one year after *Keyishian* predicted that the decision presaged “a more expansive judicial role” in vindicating the rights of aggrieved faculty members;<sup>80</sup> other commentators of the era characterized the two Supreme Court decisions in hyperbolic terms as the harbinger of a new “law of academic status”<sup>81</sup> and a jurisprudential breakthrough establishing an “emerging constitutional right”<sup>82</sup> of academic freedom.<sup>83</sup>

Today, we can see clearly that academic freedom as a jurisprudential principle has not evolved as expected. In the assessment of one leading scholar, academic freedom cases decided after *Keyishian*

[A]re inconclusive, the promise of their rhetoric reproached by the ambiguous realities of academic life . . . . There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding

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79. Byrne, *supra* note 39, at 301 (footnote omitted). Professor Byrne’s article is arguably the most illuminating work of scholarship on academic freedom produced in the last half-century, and even today, more than twenty years after it was written, it is timely, topical, and full of insights. For anyone interested in academic freedom, Professor Byrne’s article is mandatory reading, and its many trenchant observations inform much of the analysis to follow.

80. *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1051 (1968).

81. Mathew W. Finkin, *Toward a Law of Academic Status*, 22 BUFF. L. REV. 575, 575 (1973).

82. William P. Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROBS. 525 (1963).

83. Thomas I. Emerson & David Haber, *Academic Freedom of the Faculty Member as Citizen*, 28 LAW & CONTEMP. PROBS. 525 (1963); see also Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 130 (2007).

principle, the doctrine floats in the law, picking up decisions as a hull does barnacles.<sup>84</sup>

Other commentators have been just as direct: as one recently wrote in his introduction to a survey of post-*Keyishian* case law, “academic freedom is a term that is often used, but little explained, by federal courts. Academic freedom is largely unanalyzed, undefined, and unguided by principled application, leading to its inconsistent and skeptical or questioned invocation.”<sup>85</sup> In the concluding part of this article, we examine the sources of and reasons for doctrinal confusion over the meaning of academic freedom, we take a quick peek at the implications, and we end wistfully by ruing a recent opportunity for authoritative clarification of academic freedom in the 2006 *Garcetti* case—an opportunity the Supreme Court missed.

### A. Origins

As for the origins of the problem, we can discern four. First, seeds of confusion were sown in the initial Supreme Court decisions in *Sweezy* and *Keyishian*—incautiously worded and inadequately explained decisions that employed exaggerated rhetoric in defense of points that (in the phrase of a leading commentator) were “symbolic rather than practical.”<sup>86</sup> Second—again, an assertion of Professor Byrne’s provides the starting point—“American law operates on an impoverished understanding of the unique and complex functions performed by our universities,”<sup>87</sup> a truism that translates into pronounced and consistent judicial reluctance to intrude too deeply into academic decision making. Third, from *Sweezy* and *Keyishian* to the present day court decisions on academic freedom have been linked analytically to the First Amendment and the broader civil liberties of speech and assembly protected by the First Amendment.<sup>88</sup> That link—what Professor Byrne calls the “constitutionalization” of academic freedom<sup>89</sup>—has deflected academic freedom jurisprudence in new and not necessarily salutary directions. And fourth, a case law schism has developed between (on the one hand) decisions describing academic freedom as an *individual* right and (on the other) decisions casting academic freedom as a right attaching to the *institution*. We will explore each of these themes in

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84. Byrne, *supra* note 39, at 252–53.

85. R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793, 794 (2007) (internal quotations and footnotes omitted), *quoting in part* Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000) (en banc).

86. Byrne, *supra* note 39, at 296.

87. *Id.* at 254.

88. In the nice phrase of one scholar, courts have always approached academic freedom by defining it as a right that “exists in, around, or at least near, the First Amendment.” Frederick Schauer, *Is There A Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 907 (2006).

89. Byrne, *supra* note 39, at 291.

succeeding sections of this article.

### 1. Lack of Doctrinal Integrity in *Sweezy* and *Keyishian*

We start with the obvious observations—expressed best by Professor Byrne—that “the Supreme Court’s cases [on academic freedom] are few and vague”<sup>90</sup> and that the Court’s initial pronouncements in *Sweezy* and *Keyishian* were less than pellucidly clear. “These two cases,” Professor Byrne wrote more than twenty years ago, “exhaust the Supreme Court’s development of a university faculty member’s right of academic freedom.”<sup>91</sup> That is still true today.

In his trenchant critique of the Supreme Court’s reasoning in *Sweezy*, Professor Byrne describes “significant oddities about the plurality and concurring opinions” in that case.<sup>92</sup> The opinions are remarkable for “the vehemence of the rhetoric with which they praised” academic freedom, which may have “made the legal reach of the right of academic freedom appear soaring and expansive; observers might understandably have predicted a major role for the Court in identifying and rectifying violations of this vital principle.”<sup>93</sup> Professor Byrne continues:

Today we can see how misleading such a reading would have been. At the time of the *Sweezy* decision, the AAUP was deeply ambivalent about the constitutionalization of academic freedom, because some members feared the long-term consequences of having judges rather than professors elaborate and apply the protective rules of academic life. As a result of this reluctance, the AAUP did not file a brief in *Sweezy*, depriving the Court of knowledgeable counsel on the virtues and risks of its course.<sup>94</sup>

Another “curious feature” of the *Sweezy* decision, in Professor Byrne’s words, lay in the approach Justice Frankfurter took to crafting his influential concurring opinion:

Frankfurter’s opinion . . . looks solely to non-legal sources to describe the content of the right of academic freedom. In an important sense, this reliance was inevitable because the Court’s decision had no legal precursors and the words “academic freedom” had no meaning apart from their usage in academic contexts. Frankfurter never pauses, however, to comment on the different meanings words can have in different professional and social contexts. Thus he quotes with approval an aspirational

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90. *Id.* at 288.

91. *Id.* at 298.

92. *Id.* at 290.

93. *Id.* at 291 (citing and quoting Robert K. Carr, *Academic Freedom, the American Association of University Professors, and the United States Supreme Court*, 45 A.A.U.P. Bull. 5, 19–20 (1959)).

94. *Id.* at 291 (citing and quoting Carr, *supra* note 93, at 19–20).

political statement by academics about the four freedoms of a university, leaving ambiguous whether these four freedoms henceforth constitute positive limitations on state power. Frankfurter does not signal whether he is writing a judicial opinion or a professorial tract.<sup>95</sup>

When the Supreme Court next visited this terrain a decade later in *Keyishian*, it muddied the waters still more by producing an opinion that was “extraordinarily vague about the dimensions of the right of academic freedom.”<sup>96</sup> Describing the Court’s rhetoric as “fervid” and “quasi-religious,” Professor Byrne points out—in a criticism that could be applied more broadly to *all* the Court’s academic freedom cases before and after *Keyishian*—that the Court “failed to develop a principled distinction between protected and punishable academic speech” and fostered “ambiguity” by grounding academic freedom in “symbolic rather than practical” academic values.<sup>97</sup>

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95. Byrne, *supra* note 39, at 292 (footnote omitted). As Professor Byrne perceptively observes, Justice Frankfurter’s concurring opinion also introduced an element of doctrinal impurity by conflating professorial academic freedom with rights possessed by the university itself—one of the earliest manifestations of what subsequently ripened into confusion over the distinction *vel non* between so-called “individual” and “institutional” academic freedom:

Frankfurter’s loose and essayistic writing creates a further source of fertile ambiguity. The structures of both Warren’s and Frankfurter’s opinions follow the established First Amendment convention that the rights claimed by Sweezy were personal to him: As a speaker, he asserted his constitutional right as a limitation on state power. Yet, in finding a violation of academic freedom, Frankfurter repeatedly addresses the right of the university itself—rather than those of its faculty members as individuals—to be free from wrongful governmental interference. On the facts of the case, the distinction is unimportant because the “villain” was the state itself—the attorney general acting as an agent of the legislature to enforce political norms—and both the professor and the university were its “victims.” The confusion is crucial, nonetheless, because academic freedom had traditionally been understood as a personal right of the faculty member against university administrators and trustees.

*Id.*

96. *Id.* at 295.

97. *Id.* at 295–66. To do Professor Byrne’s argument justice, let me quote the critical paragraph:

The Court does not posit any direct benefit to the average citizen from academic freedom, such as higher wages or longer life. Rather, the value is found in the acculturation of the future leaders of the political order in a critical attitude toward authoritarian dogma and in tolerance of dissent. The view seems to be that a free education of this sort will graduate political leaders tolerant toward dissent within society as a whole . . . . The rhetoric of the *Keyishian* Court implies that the elements of free inquiry, discussion, dissent, and consensus are not important primarily because they lead to truth—although the attainability of such truth may be a formal premise of the doctrine—but because they express an invaluable sense of what kind of society we, as a people, desire; their value is symbolic rather than practical.

## 2. The Inhibiting Impact of Judicial Deference to Academic Decision Making

As a general rule, courts defer to the academic judgments colleges and universities make concerning the academic freedom of faculty candidates. This principle of judicial deference cautions courts not to substitute their own judgments for “academic decisions that are made daily by faculty members of public educational institutions—decisions that require ‘an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision making.’”<sup>98</sup>

Courts consistently adhere to the general rule that the merits of academic decisions made by colleges and universities are presumptively correct and not subject to judicial review.<sup>99</sup> Academic decisions “are usually highly decentralized”<sup>100</sup> and often involve a series of independent, successive judgments involving academic departments, deans, other academic professionals, and ultimately the president and governing board. Decisions in the academic realm are “a source of unusually great disagreement.

*Id.* at 296.

98. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (quoting *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89–90 (1978)). As Professor Byrne points out, the doctrine of judicial deference to academic decision making dates back to the early twentieth century. Byrne, *supra* note 39, at 324. In *Ward v. Board of Regents*, 138 F. 372, 377 (8th Cir. 1905), an appellate court held:

Questions concerning the efficiency of a teacher in an institution of learning, his usefulness, his relations to the student body and to the other members of the faculty, are so complicated and delicate that they are peculiarly for the consideration of the governing authorities of the institution. It may be perfectly apparent to them that the presence of a teacher is prejudicial to the welfare and discipline of the college, although it would be difficult, if not impossible, to make it so appear to a jury by the production of evidence in court.

99. *E.g.*, *Sola v. Lafayette Coll.*, 804 F.2d 40, 42–43 (3d Cir. 1986) (expressing “reluctance to interfere with the internal operations of academic institutions” and warning that judicial review “may threaten the college’s institutional academic freedom”); *EEOC v. Univ. of Notre Dame du Lac*, 715 F.2d 331, 339 (7th Cir. 1983) (“[C]ourts must be vigilant not to intrude into [discretionary academic determinations], and should not substitute their judgment for that of the college.”); *Lieberman v. Gant*, 630 F.2d 60, 67 n.12 (2d Cir. 1980); *Kunda v. Muhlenberg Coll.*, 621 F.2d 532 (3d Cir. 1980) (“Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and . . . must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.”); *Faro v. New York University*, 502 F.2d 1229, 1231–32 (2d Cir. 1974) (“Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.”); *Rowe v. N.C. Agric. & Tech. State Univ.*, 630 F. Supp. 601, 608 (M.D.N.C. 2009); *Huang v. Coll. of the Holy Cross*, 436 F. Supp. 639, 653 (D. Mass. 1977); *Johnson v. Univ. of Pittsburgh*, 435 F.Supp. 1328, 1353–55 (W.D. Pa. 1977); *Peters v. Middlebury Coll.*, 409 F. Supp. 857, 868 (D. Vt. 1976).

100. *Zahorik v. Cornell Univ.*, 729 F.2d 85, 92 (2d Cir. 1984).



Because the stakes are high, the number of relevant variables is great and there is no common unit of measure by which to judge scholarship, the dispersion of strongly held views is greater in the case of [academic] decisions than with employment decisions generally.”<sup>101</sup> Were a reviewing court, therefore, to wade into the substance of a particular academic dispute, it would find itself confronting an unwieldy record illuminating a high-stakes decision informed by the views of many academic professionals. The complexity of academic processes is one factor frequently cited by courts as a reason for deferring to the more experienced views of academic professionals.<sup>102</sup>

The principle of “academic abstention,” as Professor Byrne labels it,<sup>103</sup> is often cited by institutional defenders as one of the defining characteristics of institutional academic freedom (a term with which we will become familiar in a subsequent part of this article). That might be characterized—from the advocate’s perspective—as the useful part of the principle. But it should dawn on anyone who claims membership in the higher-education community that judicial deference to academic decision making has a downside as well: by discouraging courts from examining in detail what faculty members actually do, judicial deference fosters a jurisprudence “lacking in consistency” and in which courts and litigants are encouraged to “invoke the doctrine [of academic freedom] in circumstances where it arguably has no application.”<sup>104</sup>

### 3. First Amendment Distortion

One final factor—possibly the most significant—explains why academic freedom has received such an uneven and ultimately unsatisfying response in the four decades since the Supreme Court’s decision in *Keyishian*. It is encapsulated in what Professor Byrne calls the “constitutionalization” of academic freedom and the resulting importation into academic freedom jurisprudence of extraneous legal principles derived generally from First Amendment law.<sup>105</sup> The scholarship in this area tends to be turgid: put

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101. *Id.* at 93.

102. *E.g.*, *Negussey v. Syracuse Univ.*, 95-CV-1827, 1997 U.S. Dist. LEXIS 3853, at \*25 (N.D.N.Y. March 24, 1997) (basing its dismissal of the plaintiff faculty member’s denial-of-tenure lawsuit in part on “the complex, multilayered process of tenure review”); *Goulianos v. Ramapo Coll. of N.J.*, No. 82-3129, 1986 U.S. Dist. LEXIS 23141, at \*40 (D.N.J. July 7, 1986) (citing “the complex procedures used for determining tenure” as a ground for denying plaintiff faculty member the relief he sought in a tenure-denial case).

103. Byrne, *supra* note 39, at 323.

104. *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (en banc) (citing W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEBR. L. REV. 301, 303 (1998). Its name notwithstanding, Mr. Stuller’s article effectively synthesizes much of the law on academic freedom in the college and university setting.

105. Byrne, *supra* note 39, at 291.

simply (perhaps too simply), it can be summarized by stating that academic freedom is diminished when faculty members are categorized *first* as state employees and only secondarily as specially entitled professionals. When we define academic freedom as a *constitutional* right, we dilute it—on the simplest level by disqualifying faculty members at private institutions from its protection, and on another level by treating professors like public school custodians.<sup>106</sup> Let me explain.

At the heart of what we have described as the original meaning of academic freedom—the meaning borrowed from medieval continental universities and subsequently embodied in the AAUP’s 1915 *General Declaration of Principles* and 1940 *Statement of Principles*<sup>107</sup>—is the concept of an individual faculty member’s autonomous control over his own teaching and research. Professor Byrne refers to this nuclear kernel of academic freedom as “academic speech,” and his lovely explanation of the term warrants quotation nearly in full:

Academic speech—a term I use to encompass both scholarship and teaching—has unique value because of the disciplinary and ethical constraints under which it is produced. Scholars work within a discipline, primarily addressing other scholars and students. Their audience understands and evaluates their speech within a tradition of knowledge, shared assumptions and arguments about methodology and criteria, and common objectives of exploration or discovery. This learned and critical audience provides comfort and challenge to the academic speaker; he knows that his auditors will listen with care, consider with knowledge, and challenge with intelligence. The speaker cannot persuade her colleagues by her social standing, physical strength or the raw vehemence of her argument; she must persuade on the basis of reason and evidence (concepts vouchsafed, if only contingently, by her discipline). The ordinary criterion of success is whether, through mastery of the discipline’s discourse, the scholar improves the account of some worthy subject that the discipline has previously accepted.

Academic speech is rigidly formalistic. Every lecture or article must presuppose the history and current canon of the discipline; every departure from common understandings must be explained and justified . . . . To enter the discourse, the scholar must proceed through the university course of study—at great expense and personal sacrifice—in order to be certified by her peers as competent to engage in scholarly exchange. Students, even

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106. “Since the 1960’s, the First Amendment has protected state employees from employment penalties for exercising general civil rights of free speech, but it does not distinguish among professors, prosecutors, or janitors.” Byrne, *supra* note 39, at 264.

107. See *supra* notes 40–49 and accompanying text.

though adults in civil society, are admitted as neophytes and treated as intellectual dependents so long as they lack mastery or certification. Students and junior professors suffer real punishment for speech deemed inadequate by the masters . . . .

Yet within these constraints, the academic speaker in control of his methodology is free to reach conclusions that contradict previous dogma, whether within the academy or throughout the larger society. Indeed, such contradiction is prized as new knowledge, the mark of contribution, the *sine qua non* of the doctoral dissertation. Moreover, the community of scholars will close ranks behind even the most mediocre scholar whenever civil authority threatens to punish unorthodox scholarship. Those instances where it has failed to defend its fellows are incidents of permanent shame and regret.

This essential freedom has been at the core of professorial insistence on faculty autonomy within the university power structure. . . . The unique point is that academic speech can be more free than the speaker; that the speaker may be driven to conclusions by her respect for methodology and evidence that contradict her own preconceptions and cherished assumptions. The scholar cannot argue merely for her political party, religion, class, race, or gender; she must acknowledge the hard resistance of the subject matter, the inadequacies of friends' arguments, and the force of those of her enemies. That is what scholars mean by disinterested argument—not indifference to the outcome, but insistence that commitment not weaken the rigor and honesty by which the argument is pursued.<sup>108</sup>

Academic speech under this construct is something affirming and positive. It “contributes profoundly to society at large”<sup>109</sup> by empowering speech that is “truthful, gracious, well-considered, and generous to opponents.”<sup>110</sup> We protect it under the rubric of academic freedom, not just because we fear the negative consequences of suppressing speech (the default justification for vindicating First Amendment free-speech rights), but also because social and educational goals are furthered when the academy “holds expression to high standards.”<sup>111</sup> Conceived in this light, academic freedom emanates from qualities that are unique to the academy and “include[s] only rights unique or necessary to the functions of higher education.”<sup>112</sup> When faculty members are told what to teach, how to teach, or where their research interests should be confined, we are closest to the

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108. Byrne, *supra* note 39, at 258–59.

109. *Id.* at 261.

110. *Id.* at 260.

111. *Id.* at 261.

112. *Id.* at 264.

nub of academic freedom. To state a corollary, if faculty members stretch the concept of academic freedom by invoking it outside the core area—for example, by claiming freedom in their extramural utterances, freedom to criticize institutional officers, or an entitlement to a certain office or a certain parking space—then they may conceivably be asserting rights protected by the First Amendment or the Due Process Clause (if they teach at public institutions) but they are *not* articulating a colorable claim to infringement of their academic freedom in the pure sense of that term.

The constitutionalization of academic freedom has two practical consequences. First and most fundamentally, efforts by faculty members to invoke academic freedom by virtue of their status as members of the professoriate collide out of the box with one of the fundamental precepts of constitutional law: that constitutional rights are not profession-specific and membership in a particular profession does not bestow constitutional privileges unavailable to citizens at large. As courts and commentators have noted, journalists have had a notoriously difficult time getting courts to accept the argument that special evidentiary privileges derived from the First Amendment protect reporters' sources,<sup>113</sup> and some courts have used similar logic to find that faculty members do not enjoy special First Amendment privileges simply by virtue of their status as faculty members.<sup>114</sup>

Second, couching academic freedom as a constitutional right means perforce that it is a right enjoyed *only* by faculty members at public institutions and not available to professors at private institutions. In general terms, the Constitution imposes limitations only on the actions of state officers and employees; a private college or university is typically not considered an agency of state government and—at least as a matter of constitutional law—is free to regulate speech, association and assembly.<sup>115</sup>

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113. *Pell v. Proconier*, 417 U.S. 817, 829–35 (1974); Frederick Schauer, *supra* note 88, at 907; William Van Alstyne, *The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories*, 9 HOFSTRA L. REV. 1, 18–24 (1980). Professor Byrne writes:

Journalists obviously perform professional functions protected by the First Amendment, yet the freedom of the press protects any citizen who wishes to publish information or opinion. Indeed, the argument that the press should have a special right of access to government-controlled information has been resisted, in part, on the ground that First Amendment rights should not be reserved for members of a particular profession.

Byrne, *supra* note 39, at 264 n.47.

114. *E.g.*, *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488 (3d Cir. 1998).

115. *See Logan v. Bennington Coll.*, 72 F.3d 1017, 1028 (2d Cir. 1995) (holding that a private college's sexual harassment policy did not violate a charged faculty member's due-process rights because the college's disciplinary action against the professor "was in no way dictated by state law or state actors"); *see also State v. Schmid*, 423 A.2d 615, 619 (N.J. 1980) (citations omitted):

A private college or university, however, stands upon a different footing in relationship to the state. Such an institution is not the creature or instrument of

The anomalous result, as Professor Byrne observes, is that:

[f]aculty and students at state universities enjoy extensive substantive and procedural constitutional rights against their institutions while faculty and students at private institutions enjoy none. This is so despite the substantially similar functions usually served by state and private institutions; the dean of the University of Virginia Law School does not need to be restrained from instituting an assault against liberty any more than does the dean of the Harvard Law School.<sup>116</sup>

#### 4. Individual Versus Institutional Academic Freedom

Over the last half-century, nothing has introduced more confusion into the case law than the schism between one line of cases describing academic freedom as a right possessed by individual faculty members and another line recognizing academic freedom as a right possessed by and exercisable only in the name of the faculty member's employing institution. The schism originates in two dramatically variant conceptions of academic freedom: the individualistic conception embodied in the AAUP's 1940 *Statement of Principles*, with its explicit, reiterative emphasis on academic freedom as an entitlement belonging to "teachers," as contrasted with the notion embraced by Justice Frankfurter in his *Sweezy* concurrence that

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state government. Even though such an institution may conduct itself identically to its state-operated counterparts and, in terms of educational purposes and activities, may be virtually indistinguishable from a public institution, a private college or university does not thereby either operate under or exercise the authority of state government.

See generally WILLIAM KAPLIN & BARBARA LEE, *THE LAW OF HIGHER EDUCATION* § 1.5 (4th ed. 2006); Robert M. O'Neil, *Private Universities and Public Law*, 19 *BUFF. L. REV.* 155 (1969); Richard Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 *J.L. & EDUC.* 171 (1982); Note, *Legal Relationship Between the Student and the Private College or University*, 7 *SAN DIEGO L. REV.* 244 (1970); Annotation, *Action of Private Institution of Higher Education as Constituting State Action, or Action Under Color of Law, for Purposes of Fourteenth Amendment and 42 U.S.C.S § 1983*, 37 *A.L.R. FED.* 601 (1978).

116. Byrne, *supra* note 39, at 299. Professor Byrne's legal distinction between private and public universities may not, as a practical matter, be as significant as his treatment of the issue may suggest. Many private colleges and universities have voluntarily chosen to incorporate references to the AAUP's 1940 *Statement of Principles* in their faculty handbooks or other governing documents, and what public institutions may be prohibited from doing by the Constitution many private institutions commit themselves not to do as a matter of contract law. See *Greene v. Howard Univ.*, 412 F.2d 1128, 1133 n.7 (D.C. Cir. 1969) (holding that a private university's faculty handbook—which "accept[ed]" as guiding principles the policy of the American Association of University Professors—constituted contractually binding institutional obligations); Jim Jackson, *Express and Implied Contractual Rights to Academic Freedom in the United States*, 22 *HAMLIN L. REV.* 467 (1999); R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 *NEB. L. REV.* 793, 803–04 (2007).

academic freedom vindicates “four essential freedoms” possessed by *the university*, not the men and women who teach there. Fifty years ago, in an era when the preponderance of academic freedom cases arose in the context of loyalty-oath challenges, the distinction between individual and institutional academic freedom mattered little because threats to academic freedom came from sources external to the academic institution—legislative committees, state attorneys general—and the interests of individual faculty members aligned with their institutions.’ In the last thirty years, by contrast, almost all academic freedom cases have arisen in the context of “internal university disputes rather than threats from outside the university,”<sup>117</sup> and therein lies the most profound source of doctrinal complexity in the case law: when a faculty member alleges that his academic freedom is abridged because of a decision made by the institution’s own officials—a decision, for example, to deny tenure, or change a grade, or command that certain books be removed from a course syllabus—then individual and institutional prerogatives collide and the outcome of the case can hinge on which variant of academic freedom the court adopts.

On this most important of academic freedom issues, the Supreme Court, sad to relate, has sent mixed signals. In its earliest academic freedom case, Justice Frankfurter never used the phrase “academic freedom” and made no reference to the *1940 Statement of Principles*; instead, his concurring opinion focused on threats to institutional freedoms and the need to protect the autonomy of colleges and universities, rather than violations of the individual rights of the faculty member who brought the case.<sup>118</sup>

In its 1971 decision in *Tilton v. Richardson*,<sup>119</sup> the Court for the first time made reference to the *1940 Statement of Principles*—more than three decades after its promulgation—in a case involving the constitutionality of federal aid to sectarian institutions of higher education. Under Establishment Clause jurisprudence of the era, government funds could flow to support capital projects for the benefit of religious institutions only upon a judicial finding that facilities were not to be used for religious purposes. In *Tilton*, taxpayers filed suit to block the appropriation of federal funds to support the construction of libraries and classroom

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117. Areen, *supra* note 41, at 976.

118. *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (Frankfurter, J., concurring). As Professor Byrne notes:

Frankfurter writes as if the university were the real party to the suit, not Sweezy, to whom he refers at one point as “the witness,” rather than as the petitioner. Academic freedom is described by Frankfurter not as a limitation on the grounds or procedures by which academics may be sanctioned but as “the exclusion of governmental intervention in the intellectual life of a university.”

Byrne, *supra* note 39, at 312 (footnote omitted).

119. 403 U.S. 672 (1971).

buildings at four Catholic colleges in Connecticut. In asserting the constitutionality of federal aid for that purpose, the Court pointed to the lack of evidence to support the taxpayers' claim that the buildings would be used for religious purposes: "the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination. All four institutions, for example, subscribe to the 1940 Statement of Principles on Academic Freedom and Tenure endorsed by the American Association of University Professors."<sup>120</sup> While *Tilton* did not directly address the scope or meaning of academic freedom, it can be read to stand for the proposition that academic institutions traditionally protect the academic freedom of professors not only from the kinds of external threats that surfaced in *Sweezy* but also from threats that arise internally—the kinds of individual threats to which the *1940 Statement of Principles* is addressed.

Two years after *Tilton*, the pendulum swung in the other direction in *Regents of the University of California v. Bakke*.<sup>121</sup> In his opinion for the Court, Justice Lewis Powell held that a First Amendment-derived right of academic freedom permitted a state university to take race into account in admitting students when doing so furthered the academic goal of promoting diversity in the student body. Justice Powell rested his opinion on the fourth of Justice Frankfurter's "four essential freedoms": the right of the university to determine for itself on academic grounds who may be admitted to study.<sup>122</sup>

Justice Powell—like Justice Frankfurter before him—spent no time analyzing the rights of faculty members in making admission or other academic decisions. The faculty role was addressed explicitly, however, in *Regents of the University of Michigan v. Ewing*,<sup>123</sup> a case characterized by some scholars as the high water mark for academic freedom as an individual right possessed by individual members of the faculty.<sup>124</sup> *Ewing* involved the academic dismissal of a medical student after he failed the benchmark National Board of Medical Examiners test. The medical school's Promotion and Review Board—a nine-member faculty body—reviewed the student's academic record and recommended that he be dismissed. The student then filed suit alleging that his dismissal violated his procedural due process rights in a number of respects. For a unanimous Court, Justice John Paul Stevens affirmed the decision to dismiss the student, holding that "the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's

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120. *Id.* at 681–82.

121. 438 U.S. 265 (1978) (opinion by Powell, J.)

122. *Id.* at 312.

123. 474 U.S. 214 (1985).

124. Professor Areen's treatment of the *Ewing* decision is particularly complete and helpful. Areen, *supra* note 41, at 978–79.

academic career.”<sup>125</sup> Using classic academic abstention language, Justice Stevens said that courts should defer to academic decisions appropriately entrusted to faculty members; otherwise, courts would violate the “responsibility to safeguard their academic freedom.”<sup>126</sup> Courts are not “the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies,” and are not equipped to evaluate “the multitude of academic decisions that are made daily by faculty members of public educational institutions.”<sup>127</sup>

In a short but significant footnote, Justice Stevens attempted to synthesize the Supreme Court’s academic freedom decisions over the preceding three decades. He acknowledged that academic freedom has both an individual and institutional component, and that the two coexist uneasily and in some respects inconsistently:

Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, see *Keyishian v. Board of Regents*, 385 U.S., at 603; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself, see *University of California Regents v. Bakke*, 438 U.S. 265, 312 (1978); *Sweezy v. New Hampshire*, 354 U.S., at 263.<sup>128</sup>

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125. 474 U.S. at 225.

126. *Id.* at 226.

127. *Id.* (quoting *Bishop v. Wood*, 426 U.S. 341, 349 (1967)).

128. *Id.* at 226 n.12. “In other words,” Professor Areen concludes in her treatment of *Ewing*, “constitutional academic freedom protects both individual faculty members and institutions.” Areen, *supra* note 41, at 979. Professor Areen goes on to make an interesting point by deconstructing Justice Stevens’ choice of words in that footnote:

Justice Stevens used the word “academy,” however, rather than “institution.” (The word “academy” was also employed by Judge Posner in an academic freedom decision handed down eight months earlier.) The word “academy,” which commonly refers to a society or association of scholars, suggests that the Court agreed with the [AAUP’s] 1915 Declaration that academic freedom belongs to the faculty as a body rather than to the *institution* in a corporate sense.

*Id.* (footnotes omitted). The decision referred to in the parenthetical is *Piarowsky v. Illinois Community College, District 515*, 759 F.2d 625 (7th Cir. 1985). Judge Richard Posner in a characteristically pithy summation stated that academic freedom “is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy . . .” *Id.* at 629. Fourteen years later, in a short dissenting opinion in *Central State University v. American Association of University Professors, Central State University Chapter*, 526 U.S. 124 (1999), Justice Stevens was more explicit in defining the contours of academic freedom. “Buried beneath the legal arguments advanced in this case lies a debate over academic freedom,” he wrote. *Id.* at 130 (Stevens, J., dissenting). His opinion left no doubt that, in his view, academic freedom was a right protecting “individual faculty members”—not institutions—from what he termed “constraint” by department chairs, trustees, state legislators, and judges. *Id.* at 130–31. (Stevens, J., dissenting).



The next academic freedom decision of interest, *University of Pennsylvania v. Equal Employment Opportunity Commission*,<sup>129</sup> involved a question that up until that point had divided the federal appellate courts: whether academic freedom compelled the recognition of a common-law privilege protecting confidential peer review evaluations of faculty tenure candidates from production through civil discovery in race and sex discrimination cases. The University of Pennsylvania denied tenure to a female faculty member, and she filed an employment discrimination charge with the Equal Employment Opportunity Commission under Title VII<sup>130</sup> alleging that “her qualifications were ‘equal to or better than’ those of five named male faculty members who had received more favorable treatment.”<sup>131</sup> The EEOC undertook an investigation and issued a documentary subpoena requiring the university to produce the complete tenure dossiers—including confidential evaluations by external peer reviewers—of the complainant and her five male comparators. The university moved to quash the subpoena on the ground that academic freedom warranted a common-law evidentiary privilege protecting confidential peer review materials generated during the tenure review process.

Writing for a unanimous Court, Justice Harry Blackmun rejected the university’s First Amendment claim and called its reliance on what he called the “so-called academic-freedom cases”—by which he apparently meant *Sweezy* and *Keyishian*—“misplaced.”<sup>132</sup> The Court’s reasoning was, to put it charitably, obtuse: earlier cases, Justice Blackmun wrote, involved “direct” infringements of academic freedom, while in this case the impact of an EEOC subpoena on academic freedom was “extremely attenuated”—a characterization the Court did not effectively explain.<sup>133</sup> For our purposes, the significance of the *University of Pennsylvania* decision lies in its myopia with respect to the “individual” (as opposed to institutional) strand of academic freedom; perhaps because the party invoking academic freedom was a university, the Court made no mention, even obliquely, to the interests a faculty member might have in engaging in peer review without external coercion.

In *Grutter v. Bollinger*,<sup>134</sup> Justice Sandra Day O’Connor for a slender five-justice majority of the Court returned to ground plowed a quarter-century earlier in *Bakke* and held that the University of Michigan Law School was entitled to take race into account in making admission

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129. 493 U.S. 182 (1990).

130. Civil Rights Act of 1964, tit. VII, 78 Stat. 241, 253–266 (codified at 42 U.S.C. §§ 2000e–e17).

131. 493 U.S. at 185.

132. *Id.* at 183.

133. *Id.* at 198–99.

134. 539 U.S. 306 (2003).

decisions. Justice O'Connor reiterated Justice Powell's holding in *Bakke* that the First Amendment protects "four essential [academic] freedoms," one of which was the freedom to decide "who may be admitted to study."<sup>135</sup>

Justice O'Connor's decision left no doubt that in her mind and the minds of the other justices in the majority those freedoms belonged, not to individual faculty members, but to the university: "*universities*," she wrote, "occupy a special niche in our constitutional tradition."<sup>136</sup> Nothing in her opinion suggested that faculty members were entitled to assert academic freedom in their own names—although, as Justice Stevens had done in *Ewing*, Justice O'Connor mentioned in passing that a faculty body (in this instance, the law school's admission committee) had had a hand in formulating the challenged policy. Using academic abstention language borrowed from *Ewing*, Justice O'Connor stated that the faculty's "educational judgment" on the importance of racial diversity "is one to which we defer," citing *Ewing* as an exemplar of the Court's "tradition of giving a degree of deference to a university's academic decisions."<sup>137</sup>

To summarize: in the relatively small number of academic freedom cases it decided in the last half-century, the Supreme Court managed to be less than precise in distinguishing between two strands of doctrinal thought on what academic freedom means and what it protects. Its language has been predominantly *institutional* in outlook and it has more often than not characterized academic freedom as a right exercisable by universities—not faculty members—and grounded in freedoms belonging to universities in their own names. At the same time, the Court has occasionally toyed with the notion—expressed directly by Justice Stevens in his largely ignored dissent in the 1999 *Central State University* case<sup>138</sup>—that the First Amendment "protect[s] the academic freedom of *university faculty members*," not just institutional employers.<sup>139</sup> Pragmatically, the need to distinguish between the two strands has never been pressing because the Supreme Court has never decided an academic freedom case in which institutions and faculty members were not aligned. In every case, it mattered little to the outcome whether the particular "freedom" asserted—to teach, to admit students, to conduct research—protected faculty members or institutions, because faculty and institution occupied common ground in seeking to repel what Professor Areen and other scholars have called "external challenges" to academic freedom<sup>140</sup>—challenges mounted

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135. *Id.* at 363, 364.

136. *Id.* at 329 (emphasis added).

137. *Id.* at 328.

138. *See supra* note 115.

139. *Cent. State Univ. v. Am. Assoc. of Univ. Professors*, *Cent. State Univ. Chapter*, 526 U.S. 124, 134 (1999) (Stevens, J., dissenting) (emphasis added).

140. Areen, *supra* note 41, at 967; *see* Jennifer Elrod, *Critical Inquiry: A Tool for Protecting the Dissident Professor's Academic Freedom*, 96 CALIF. L. REV. 1669, 1679

by agencies and instrumentalities beyond campus boundaries.

However, as Professor Areen has cogently pointed out, academic-freedom litigation for much of the last forty years has “involved internal rather than external challenges to academic freedom.”<sup>141</sup> What should happen when a faculty plaintiff invokes academic freedom as insulation against an adverse institutional decision while in the same case the institution invokes its academic freedom to be free of external control? As one thoughtful appellate court observed, “the asserted academic freedom of a professor can conflict with the academic freedom of the university to make decisions affecting that professor.”<sup>142</sup> In such a case, which claim prevails? On that critical question, the Supreme Court has provided no guidance. Lower federal courts have come up with answers in a fashion that can only be described as maladroit, inconsistent, and ultimately unsatisfying.

## B. Practical Consequences

In general (and generalizations are notoriously dangerous when the subject is academic freedom), courts appear more willing to sustain claims of academic freedom when they arise in the context of nuclear academic speech—what one commentator has called the exercise of “profession-specific privileges”<sup>143</sup>—than when the subject matter of a faculty member’s lawsuit relates only distantly (or not at all) to the classroom or the laboratory. When the institution interferes with a faculty member’s freedom to select topics for classroom discussion, assemble a syllabus, assign grades, or conduct scholarly research and publish the results thereof, faculty members more often than not prevail when they claim that academic freedom protects their prerogatives in those areas. It is nevertheless fair to say that, even in the realms of teaching and scholarship, the cases do not line up, the logic of court decisions is inconsistent, and faculty members probably lose more often than they win when they challenge adverse institutional decisions on academic freedom grounds.

### 1. Freedom in the Classroom

In *Cohen v. San Bernadino Valley College*,<sup>144</sup> for example, a tenured

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(2008); Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third “Essential Freedom,”* 45 STAN. L. REV. 1835, 1840 (1993); cf. Matthew W. Finkin, *On “Institutional” Academic Freedom*, 61 TEX. L. REV. 817, 839 (1983); David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 231 (Summer 1990).

141. Areen, *supra* note 41, at 967.

142. *Keen v. Penson*, 970 F.2d 252, 257 (7th Cir. 1992).

143. Schauer, *supra* note 88, at 914.

144. 92 F.3d 968 (9th Cir. 1996).

faculty member successfully invoked academic freedom as a defense when a student complained that the faculty member had violated the college's policy against sexual harassment by using sexually oriented metaphors during classroom instruction.<sup>145</sup> And in *Dube v. State University of New York*,<sup>146</sup> an assistant professor of Africana studies equated Zionism with racism in a class titled "The Politics of Race."<sup>147</sup> Following complaints from the Anti-Defamation League of B'nai Brith and the American Jewish Committee, he was not allowed to teach the class again and was subsequently denied tenure.<sup>148</sup> In ensuing litigation, the faculty member prevailed on his argument that the institution had based its tenure denial decision on dissatisfaction with his discussion of controversial topics in the classroom.<sup>149</sup> Quoting *Keyishian*, the court held that "the First Amendment tolerates neither laws nor other means of coercion, persuasion or intimidation 'that cast a pall of orthodoxy' over the free exchange of ideas in the classroom."<sup>150</sup>

It goes without saying that many lower court decisions squarely contradict the holdings in *Cohen* and *Dube*. In *Edwards v. California University of Pennsylvania*,<sup>151</sup> for example, the court brusquely rejected a faculty member's contention that the institution's president and vice president for academic affairs had infringed his academic freedom by ordering him not to include "doctrinaire material" in his course syllabus: "we conclude," held the court without citation to a single higher-education case, "that a public university professor does not have a First Amendment right to decide what will be taught in the classroom."<sup>152</sup> In *Lovelace v. Southeastern Massachusetts University*,<sup>153</sup> a faculty member whose appointment was not renewed asserted that the institution had retaliated against him because "he refused to inflate his grades or lower his expectations and teaching standards."<sup>154</sup> The court rejected his assertion that the decision violated his academic freedom:

Whether a school sets itself up to attract and serve only the best and the brightest students or whether it instead gears its standard to a broader, more average population is a policy decision which, we think, universities must be allowed to set. And matters such as course content, homework load, and grading policy are core

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145. *Id.* at 970–71.

146. 900 F.2d 587 (2d Cir. 1990).

147. *Id.* at 589.

148. *Id.* at 588–89.

149. *Id.* at 589.

150. *Id.* at 598 (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967)).

151. 156 F.3d 488 (3d Cir. 1998).

152. *Id.* at 490, 491.

153. 793 F.2d 419 (1st Cir. 1986).

154. *Id.* at 425.

university concerns, integral to implementation of this policy decision. To accept plaintiff's contention that an untenured teacher's grading policy is constitutionally protected and insulates him from discharge when his standards conflict with those of the university would be to constrict the university in defining and performing its educational mission. The first amendment does not require that each nontenured professor be made a sovereign unto himself.<sup>155</sup>

## 2. Assignment of Grades

In *Parate v. Isibor*,<sup>156</sup> a civil engineering professor alleged that his appointment was not renewed because he refused to change a student's grade from B to A.<sup>157</sup> The court found that the university had violated his constitutionally protected academic freedom:

[T]he individual professor may not be compelled, by university officials, to change a grade that the professor previously assigned to her student. Because the individual professor's assignment of a letter grade is protected speech, the university officials' action to compel the professor to alter that grade would severely burden a protected activity.<sup>158</sup>

Another court reached a contrary conclusion in *Brown v. Armenti*,<sup>159</sup> a lawsuit by a tenured faculty member alleging that the university's president had ordered him to change a student's course grade from an F to an incomplete, which Brown refused to do.<sup>160</sup> The court dismissed the plaintiff's claim, concluding that a "public university professor does not have a First Amendment right to expression via the school's grade assignment procedures."<sup>161</sup> The court explicitly elected not to follow *Parate* on the ground—not clearly explained—that *Parate* did not reflect a "realistic view of the university-professor relationship."<sup>162</sup>

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155. *Id.* at 425–26 (citations and footnotes omitted).

156. 868 F.2d 821 (6th Cir. 1986).

157. *Id.* at 823–24.

158. *Id.* at 828.

159. 247 F.3d 69 (3d Cir. 2001).

160. *Id.* at 72–73.

161. *Id.* at 75.

162. *Id.* at 74, 75; see *Lovlace v. Se. Mass. Univ.*, 793 F.2d 419 (1st Cir. 1986); *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547 (5th Cir.). See generally Kevin A. Rosenfield, *Brown v. Armenti and the First Amendment Protection of Teachers and Professors in Grading Their Students*, 97 NW. U. L. REV. 1471 (2003); Evelyn Sung, *Mending the Federal Circuit Split on the First Amendment Right of Public University Professors to Assign Grades*, 78 N.Y.U.L. REV. 1550 (2003).

### 3. Research and Scholarship

An early and somewhat troubling case involving a faculty member's claim to academic freedom in the conduct of research was *McElearney v. University of Illinois at Chicago Circle Campus*, decided in 1979.<sup>163</sup> The plaintiff, a non-tenured faculty member, alleged that his contract was not renewed in part because his area of research "overlapped that of an already tenured professor, [and] the University thereby chilled [his] freedom of expression in violation of his First Amendment rights."<sup>164</sup> Describing his claim as "patently frivolous," the court affirmed summary judgment in the university's favor, holding that "[a]cademic freedom does not empower a professor to dictate to the University what research will be done using the school's facilities or how many faculty positions will be devoted to a particular area."<sup>165</sup>

Faculty plaintiffs fared better in two interesting cases that raised the same issue: whether academic freedom protected a faculty member's research results from discovery by corporate defendants in civil litigation. In *Dow Chemical Co. v. Allen*,<sup>166</sup> the manufacturer of a potentially carcinogenic herbicide sought administrative subpoenas to compel disclosure of an academic researcher's notes, working papers, and raw data relating to ongoing animal toxicity studies.<sup>167</sup> The researcher sought to quash the subpoenas on the ground that "scholarly research is an activity which lies at the heart of higher education, that it comes within the First Amendment's protection of academic freedom, and therefore judicially authorized intrusion into that sphere of university life should be permitted only for compelling reasons, which do not exist here."<sup>168</sup> The court agreed with the researcher:

[The subpoenas] threaten substantial intrusion into the enterprise of university research, and there are several reasons to think they are capable of chilling the exercise of academic freedom . . . . [E]nforcement of the subpoenas would leave the researchers with

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163. 612 F.2d 285 (7th Cir. 1979) (per curiam).

164. *Id.* at 287.

165. *Id.* at 287, 288. I describe the decision as troubling because summary judgment had been entered in the university's favor in the trial court, and on appeal the plaintiff-appellant was supposedly entitled to a presumption that the facts asserted in his complaint would be construed in the light most favorable to him. The assertion—if I may characterize it in these terms—that a tenure-track faculty member was terminated because a tenured member of his department resented an asserted overlap between the pair's research interests strikes me as non-frivolous. The cases cited by the court in support of the proposition that "[a]cademic freedom does not empower a professor to dictate to the University what research will be done using the school's facilities" were not cases involving academic research and were not even (in all instances) higher education cases. *Id.* at 288.

166. 672 F.2d 1262 (7th Cir. 1982).

167. *Id.* at 1265–66.

168. *Id.* at 1274.

the knowledge throughout continuation of their studies that the fruits of their labors had been appropriated by and were being scrutinized by a not-unbiased third party whose interests were arguably antithetical to theirs. It is not difficult to imagine that that realization might well be both unnerving and discouraging. Indeed, it is probably fair to say that the character and extent of intervention would be such that, regardless of its purpose, it would “inevitably tend[ ] to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.”<sup>169</sup>

To the same effect was *Cusumano v. Microsoft Corp.*,<sup>170</sup> decided a decade and a half after *Dow Chemical*. The case arose out of an antitrust prosecution against the Microsoft Corporation following its alleged efforts to monopolize the web-browser market by driving Netscape Communications out of business.<sup>171</sup> As part of its defense to a federal antitrust lawsuit, Microsoft subpoenaed research notes and recorded interviews from two faculty members—one from Harvard and one from the Massachusetts Institute of Technology—who were in the process of writing a book about the browser war between Netscape and Microsoft.<sup>172</sup> The two faculty members moved to quash the subpoena on the ground that “forcing them to disclose the contents of the notes, tapes, and transcripts would endanger the values of academic freedom safeguarded by the First Amendment and jeopardize the future information-gathering activities of academic researchers.”<sup>173</sup> The court agreed with the researchers, describing them as “information gatherers and disseminators” whose access to research materials could conceivably dry up if “their research materials were freely subject to subpoena.”<sup>174</sup> A drying-up of sources, continued the court, “would sharply curtail the information available to academic researchers and thus would restrict their output [and generate] fewer, less cogent analyses.”<sup>175</sup>

*Dow Chemical* and *Microsoft* were both cases in which researchers successfully invoked academic freedom to parry *external* subpoenas for production of research materials. *McElearney*, by contrast, was a paradigmatic example of an unsuccessful attempt to interpose academic freedom as a shield against *internal* university decision making. As a generalization, it is fair to summarize decades of lower court case law by reference to that dichotomy. Academic freedom shields sensitive research

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169. *Id.* at 1276 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957)).

170. 162 F.3d 708 (1st Cir. 1998).

171. *Id.* at 710–711.

172. *Id.* at 711.

173. *Id.* at 713.

174. *Id.* at 714.

175. *Id.*

results from externally compelled disclosure; it rarely aids a faculty member asserting research-related rights in the face of internal regulation or discipline. Faculty members have not prevailed on claims that they had an academic-freedom right to devote time to research<sup>176</sup>; occupy specific laboratory space<sup>177</sup>; submit applications for grants<sup>178</sup>; engage graduate students to perform work in their laboratories<sup>179</sup>; or travel for the purpose of conducting field research.<sup>180</sup>

Academic freedom for faculty research reached its nadir in *Urofsky v. Gilmore*.<sup>181</sup> *Gilmore* arose when six professors at public institutions of higher education in Virginia challenged a state law prohibiting state employees from accessing sexually explicit material on state-owned computers.<sup>182</sup> The professors argued that academic freedom guaranteed them the right to determine for themselves, without the input of the university, the subjects of their research and writing.<sup>183</sup> In a decision that drew widespread comment in the higher education community, the court rejected the proposition that academic freedom *ever* protected individual faculty members from the consequences of institutional decision making:

[T]o the extent the Constitution recognizes any right of “academic freedom” above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, . . . It is true, of course, that homage has been paid to the ideal of academic freedom in a number of Supreme Court opinions, often with reference to the First Amendment. Despite these accolades, the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom.

Moreover, a close examination of the cases indicates that the right praised by the Court is not the right Appellees seek to establish here. Appellees ask us to recognize a First Amendment right of academic freedom that belongs to the professor as an individual. The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.

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176. *Martinez v. Univ. of P.R.*, No. CIV.06 1713 JAF, 2006 WL 3791360 (D.P.R. Dec. 22, 2006).

177. *Naftchi v. N.Y. Univ.*, 14 F. Supp. 2d 473 (S.D.N.Y. 1998).

178. *Radolf v. Univ. of Conn.*, 364 F. Supp. 2d 204 (D. Conn. 2005).

179. *San Filippo v. Bongiovanni*, 961 F. 2d 1125 (3d Cir. 1992).

180. *Faculty Senate of Fla. Int’l Univ. v. Winn*, 477 F. Supp. 2d 1198 (S.D. Fla. 2007).

181. 216 F. 3d 401 (4th Cir. 2000) (en banc).

182. *Id.* at 404–05.

183. *Id.* at 405–06.



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Significantly, the Court has never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so. . . . [T]he Court has focused its discussions of academic freedom solely on issues of institutional autonomy. We therefore conclude that because the [Virginia law prohibiting computer use to access pornographic sites] does not infringe the constitutional rights of public employees in general, it also does not violate the rights of professors.<sup>184</sup>

The *Urofsky* decision, by essentially abandoning what we have called the “individual” strand in academic freedom jurisprudence and holding explicitly that academic freedom “inheres in the University, not in individual professors,”<sup>185</sup> generated strong dissent in the scholarly community.<sup>186</sup> It has also developed considerable judicial traction over the last decade.<sup>187</sup> It sounds an apt cautionary note on which to conclude this portion of the article: *Urofsky*, if nothing else, serves as an exemplar of contemporary judicial hostility to claims by faculty members for special exemption from expectations of behavior that apply to other state employees and other community members.

#### 4. “Speech as an Institutional Citizen”<sup>188</sup>

*Garcetti v. Ceballos*,<sup>189</sup> although not a higher-education case, promises to effect more change in academic freedom jurisprudence than any other

184. *Id.* at 410, 411, 414, 415.

185. *Id.* at 410.

186. See, e.g., Marni M. Zack, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893 (2005); Ruth L. Davison & John L. Strobe, *Permission v. Academic Freedom and Free Speech: A Review of Urofsky v. Gilmore*, 149 ED. LAW REP. 1 (2001); Note, *Constitutional Law—First Amendment—Academic Freedom—Fourth Circuit Upholds Virginia Statute Prohibiting State Employees from Downloading Sexually Explicit Material*, 114 HARV. L. REV. 1414 (2001).

187. E.g., *Stronach v. Va. State Univ.*, No. 3:07CV646-HEH, 2008 WL 161304, at \*3 (E.D. Va. Jan. 15, 2008) (“However definite the university’s right to academic freedom is after *Sweezy*, it is clear that it is the *university’s* right and not the *professor’s* right.”); *Martinez v. Univ. of P.R.*, No. CIV.06 1713 JAF, 2006 WL 3791360, at \*3 (D.P.R. Dec. 22, 2006) (“Plaintiff’s academic freedom claims must fail because ‘[t]o the extent the Constitution recognizes any right of “academic freedom” above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the university, not in individual professors.’”) (quoting *Urofsky v. Gilmore*, 216 F.3d 401, 409 (4th Cir. 2000)).

188. This phrase appears in Am. Ass’n of Univ. Professors, *Protecting an Independent Faculty Voice: Academic Freedom After Garcetti v. Ceballos*, ACADEME (Nov.-Dec. 2009), at 69.

189. 547 U.S. 410 (2006).

recent Supreme Court decision.

The question presented in *Garcetti* was “whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee’s official duties.”<sup>190</sup> Richard Ceballos was a long-serving deputy district attorney in the Los Angeles County District Attorney’s Office.<sup>191</sup> A defense attorney contacted Ceballos about a pending criminal case and told Ceballos that the affidavit that a sheriff’s deputy had prepared in support of a search warrant contained lies and serious factual errors.<sup>192</sup> The defense attorney said he had prepared a motion to challenge the warrant, and asked Ceballos to review the case; Ceballos read the deputy sheriff’s affidavit, then visited the location described in the affidavit.<sup>193</sup> With his own eyes Ceballos saw serious discrepancies in the affidavit’s description of the location.<sup>194</sup> Ceballos spoke on the telephone to the deputy sheriff who had prepared the affidavit and did not receive a satisfactory explanation for the discrepancies in the affidavit.<sup>195</sup> So Ceballos prepared a disposition memorandum recommending that the criminal proceeding be discontinued on the basis that the affidavit supporting the search warrant failed to establish probable cause for the search.<sup>196</sup>

Ceballos informed the defense attorney that he believed the affidavit contained false statements, and the attorney subpoenaed him to testify at the motion hearing.<sup>197</sup> In his testimony, Ceballos expressed his misgivings about the validity of the warrant. The court nevertheless denied the defense attorney’s motion to quash, and the criminal prosecution proceeded.<sup>198</sup> Ceballos claimed that, after he testified as a defense witness at the motions hearing, he was subjected to retaliatory employment actions by his supervisor, including transfer to another courthouse and denial of a promotion.<sup>199</sup> He filed suit, alleging that his supervisor had violated his First Amendment free-speech rights by retaliating against him because of what he had said in his disposition memorandum and court testimony.<sup>200</sup>

The starting point for the Supreme Court’s analysis was the venerable balancing test for public employee speech in *Pickering v. Board of Education*.<sup>201</sup> In that case, *Pickering*, a public school teacher, wrote a letter

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190. *Id.* at 413.

191. *Id.*

192. *Id.* at 413–14.

193. *Id.* at 414.

194. *Id.*

195. *Garcetti v. Ceballos*, 547 U.S. 410, 414 (2006).

196. *Id.*

197. *Id.* at 414–15.

198. *Id.*

199. *Id.* at 415.

200. *Id.*

201. 391 U.S. 563 (1968).

to the editor criticizing the local board of education and superintendent of schools for the way in which they had handled past proposals to raise revenue. Under *Pickering*, the First Amendment protects a public employee's right to speak as a citizen addressing matters of public concern.<sup>202</sup> *Pickering* requires a reviewing court to balance the interests of the teacher, as a citizen, in commenting upon matters of public concern against the interest of the employer in promoting the efficiency of the public services it performs through its employees. The Court found in *Pickering* that the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."<sup>203</sup>

"The controlling factor in Ceballos' case," stated the Court:

[I]s that his expressions were made pursuant to his duties as a calendar deputy. That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.<sup>204</sup>

The Court's holding, however, came with two caveats. First, it was important to the Court's reasoning that the parties stipulated that Ceballos's speech was made pursuant to his employment duties.<sup>205</sup> The Court recognized that, in some instances, it might be difficult to draw the line between employment-related and non-employment-related utterances. "We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate."<sup>206</sup>

Second, and the reason why *Garcetti* subsequently received so much attention in higher education circles, Justice Anthony Kennedy's opinion for the Court, in a carefully worded dictum, carved out a potential special rule for academic speech. Justice Kennedy was responding to a short sentence in Justice David Souter's dissent, in which Justice Souter said, "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . .

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202. *See id.* at 568.

203. *Id.* at 572.

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

205. *See id.*

206. *Id.* at 424.

official duties.’’<sup>207</sup> Justice Kennedy responded:

Justice Souter suggests today’s decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that *expression related to academic scholarship or classroom instruction* implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving *speech related to scholarship or teaching*.<sup>208</sup>

In the four years since *Garcetti* was decided, the academic community has watched anxiously to see what content lower courts would give the academic freedom caveat in Justice Kennedy’s opinion.<sup>209</sup> Case results are decidedly mixed.

In *Hong v. Grant*,<sup>210</sup> a tenured professor asserted that the University of California, Irvine’s decision to deny him an annual merit raise was motivated in part by administrative irritation over his criticisms of his department chair and dean.<sup>211</sup> The university filed a motion for judgment in its favor, arguing to the court that under *Garcetti* the faculty member had not engaged in constitutionally protected speech when he took it upon himself to criticize the department chair.<sup>212</sup> The question under *Garcetti*, the court said at the outset, was whether the professor’s words were uttered pursuant to his official duties—if they were, then they were not protected by the First Amendment because an employer has the right to restrict speech that owes its existence to the employee’s professional responsibilities.<sup>213</sup> To determine the scope of his official duties, the court examined the faculty handbook and other institutional policies and concluded that faculty members were expected to perform “a wide range of academic, administrative and personnel functions . . . . As an active participant in his institution’s self-governance, [the professor] has a professional responsibility to offer feedback, advice and criticism about his department’s administration and operation from his perspective as a tenured, experienced professor.”<sup>214</sup> The court concluded that, because the faculty member’s comments related to institutional governance, they “were

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207. *Id.* at 438 (Souter, J., dissenting).

208. *Id.* at 425 (emphasis added).

209. The AAUP maintains a special link on its web site for the compilation and analysis of post-*Garcetti* cases in higher education. The link takes the form of a bright red button on the AAUP home page labeled “Speak Up—Speak Out—Protect the Faculty Voice.” <http://www.aaup.org/AAUP/protectvoice> (last visited April 8, 2010).

210. 516 F. Supp. 2d 1158 (C.D. Cal. 2007).

211. *Id.* at 1160.

212. *Id.* at 1160–61.

213. *Id.* at 1161.

214. *Id.* at 1166–67.

made pursuant to his official duties as a faculty member and therefore do not deserve First Amendment protection. [The University] is entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities.”<sup>215</sup>

In *Renkin v. Gregory*,<sup>216</sup> a tenured professor applied for a grant from the National Science Foundation (NSF), and submitted a proposed budget along with his application.<sup>217</sup> The budget included a university salary match that committed university funds to defray a portion of the project budget.<sup>218</sup> The university approved the proposal.<sup>219</sup> But when the faculty member subsequently refused to execute a standard-form university letter apportioning the university’s matching funds and accused the dean of underbudgeting the project and contravening NSF regulations by allocating portions of the matching funds for improper purposes, the university cancelled the NSF grant and returned the funds to NSF.<sup>220</sup> The professor instituted suit against the university and the dean, alleging that the university had effectively reduced his pay by returning the grant funds and damaged his standing in the professional community by terminating the NSF grant, all as retaliation for the exercise of his First Amendment rights when he complained about the University’s misuse of matching funds.<sup>221</sup>

The Court’s analysis was straight out of *Garcetti*. When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the First Amendment does not insulate their communications from disciplinary consequences.<sup>222</sup> Determining what falls within the scope of an employee’s duties is a practical exercise that focuses on the duties an employee actually is expected to perform. The court quoted from the faculty handbook to the effect that faculty members are “responsible for teaching, researching, and public service.”<sup>223</sup> Under the research heading, the court found language in the university’s promotion and tenure policy gauging research productivity by “a faculty member’s grants and the projects developed from the grants.”<sup>224</sup> The court rendered judgment in the university’s favor:

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215. *Id.* at 1168. The court made no mention of Justice Souter’s reference in his *Garcetti* dissent to academic freedom or Justice Kennedy’s caveat about the applicability or non-applicability of the *Garcetti* decision to “academic scholarship or classroom instruction.” *Garcetti*, 547 U.S. at 425.

216. 541 F.3d 769 (7th Cir. 2008).

217. *Id.* at 770–71.

218. *Id.* at 771.

219. *Id.*

220. *Id.* at 771–72.

221. *Id.* at 773.

222. *Renkin v. Gregory*, 541 F.3d 769, 773 (7th Cir. 2008).

223. *Id.*

224. *Id.* at 770.

Renken complained to several levels of University officials about the various difficulties he encountered in the course of administering the grant as a PI [Principal Investigator] . . . . In so doing, Renken was speaking as a faculty employee, and not as a private citizen, because administering the grant as a PI fell within the teaching and service duties that he was employed to perform.<sup>225</sup>

*Hong, Renkin* and the vast majority of cases applying *Garcetti* in the faculty context involved faculty utterances at some remove from what Professor Byrne called “academic speech”<sup>226</sup>—speech made during the course of classroom teaching or the conduct of research. *Sheldon v. Dhillon*<sup>227</sup> is one of the few reported cases in which a faculty member was disciplined for speech uttered in a classroom—and, perhaps not surprisingly, the outcome was different from the outcomes in *Hong* and *Renkin*. June Sheldon taught biology and microbiology at San Jose Community College.<sup>228</sup> In the summer of 2007 she taught a course in human genetics.<sup>229</sup> During class a student asked Ms. Sheldon to explain how heredity does or does not affect homosexual behavior in males and females.<sup>230</sup> Sheldon answered the student’s question by “noting the complexity of the issue, providing a genetic example mentioned in the textbook, and referring students to the perspective of a German scientist named Dr. Gunter Dörner, who had “found a correlation between maternal stress, maternal androgens, and male sexual orientation at birth,” while cautioning that his “views were only one set of theories in the ‘nature versus nurture’ debate.”<sup>231</sup> She briefly described what the students would learn later in the course, that “homosexual behavior may be influenced by both genes and the environment.”<sup>232</sup>

After class, a student filed an anonymous complaint with the dean accusing Sheldon of making “offensive and unscientific statements.”<sup>233</sup> The student’s complaint was investigated by the dean in accordance with institutional policy, and several months later the dean sent Ms. Sheldon her findings: “Sheldon was teaching misinformation as science, and her

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225. *Id.* at 774. As in the *Hong* case, the court in *Renkin* rendered its judgment with no mention or discussion of Justice Souter’s dissenting reference to academic freedom or Justice Kennedy’s suggestion that *Garcetti* might apply differently to “academic scholarship or classroom discussion.”

226. *See supra* note 99 and accompanying text.

227. No. C-08-03438 RMW, 2009 WL 4282086 (N.D. Ca. Nov. 25, 2009).

228. *Id.* at \*1.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at \*2.

misstatements were grievous enough” to warrant her termination.<sup>234</sup> Ms. Sheldon filed a lawsuit against the college alleging that the college had retaliated against her in violation of her First Amendment rights by terminating her employment based on her answer to a question posed by a student in one of her classes.<sup>235</sup>

For one of the few times since the *Garcetti* case was decided, the faculty member prevailed. The court started by noting that the college premised its argument on the fact that, when she was teaching her class, Ms. Sheldon was performing her duties as a college employee, meaning that her speech was not constitutionally protected under *Garcetti*.<sup>236</sup> Not so, said the court, and quoted Justice Kennedy’s caveat on speech in the classroom. “Thus,” said the court, “*Garcetti* by its express terms does not address the context squarely presented here: the First Amendment’s application to teaching-related speech. For that reason, defendants’ heavy reliance on *Garcetti* is misplaced.”<sup>237</sup> The court framed a decisional rule that, to faculty proponents of academic freedom, undoubtedly acted as a healing balm after some of the language in other post-*Garcetti* decisions: “[T]eachers have First Amendment rights regarding their classroom speech. . . . If the [institution] acted in retaliation for her instructional speech, those rights will have been violated unless the defendants’ conduct was reasonably related to legitimate pedagogical concerns.”<sup>238</sup>

Two factors complicate the *Garcetti* holding when it is applied in the context of college and university faculty speech. One is that there is substantial lack of clarity as to what a faculty member’s “official duties” are. Faculty litigants typically advocate a narrow view, while—at least in the post-*Garcetti* cases decided so far—courts have taken a more expansive view as to the official duties of faculty members. The second factor complicating *Garcetti* analysis is the uncertainty over the meaning of Justice Kennedy’s academic-speech savings provision, and the very scant attention it has received in ensuing lower court decisions. Even when a faculty member speaks squarely within the ambit of his official duties, the Kennedy caveat suggests that there are certain categories of expression at the epicenter of the faculty member’s identity as a faculty member—remarks made to students during a class or views expressed in scholarly publications.

Once faculty expression leaves the classroom or the journal publication, it is still an open question whether courts will recognize other duties—even duties that look for all intents and purposes like duties that warrant academic freedom protection, duties like giving students mentoring advice,

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234. *Id.*

235. *Id.*

236. *Id.* at \*3.

237. *Id.*

238. *Id.* at \*4.

serving as the advisor for a student club or fraternity, participating in rank and tenure decisions, expressing to a dean one's displeasure over an administrative decision, or managing a grant budget—as meriting an academic freedom exception to the pretty straightforward rule enunciated for public-sector employees in *Garcetti*.

In a knowledgeable treatment of the *Garcetti* case that appeared in this journal a year after the case was decided, Larry Spurgeon described the holding in *Garcetti* as “elusive.”<sup>239</sup> Professor Spurgeon warned that if *Garcetti* is applied to the utterances of faculty members at public universities without teasing out the meaning of Justice Kennedy's academic-speech caveat, “it could provide a blunt weapon to those who would challenge the content of a professor's expression.”<sup>240</sup> Other scholars have sounded the same note: Professor Michael Olivas, who serves as General Counsel of the AAUP, wrote in an article that appeared on the Association's web site that “[d]isappointing rulings are already flowing from the decision. I am concerned about the more generalized *Garcetti* fears and silencing that occur in hard economic and political times. The professoriate is being restructured, and it is occurring on cats' feet.”<sup>241</sup> The AAUP commissioned a task force to study *Garcetti*, and in a report published in its journal *ACADEME* last year the Association sounded a dire warning about the implications of *Garcetti* for faculty nationwide<sup>242</sup>:

[I]n several [post-*Garcetti*] cases squarely addressing faculty speech, the lower federal courts have so far largely ignored the *Garcetti* majority's reservation, posing the danger that, as First Amendment rights for public employees are narrowed, so too may be the constitutional protection for academic freedom at public institutions, perhaps fatally. This report reaffirms the professional notion of academic freedom as existing apart from, and regardless of, any given mechanism for recognition of a legal right to academic freedom and situates a range of faculty speech firmly within the reservation articulated by the *Garcetti* majority.<sup>243</sup>

It is, of course, too soon to tell whether dire predictions about *Garcetti*'s

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239. Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 149 (2007).

240. *Id.*

241. Michael A. Olivas, *Garcetti: More Chilling than the Unabomber* (undated), <http://www.aaup.org/AAUP/protectvoice/opinions/Olivasop.htm> (last visited on April 8, 2010).

242. Am. Ass'n of Univ. Professors, *supra* note 188.

243. *Id.* at 67. *See, e.g.*, *Kerr v. Hurd*, 2010 U.S. Dist. LEXIS 24210 (S.D. Ohio Mar. 15, 2010) (the southern district of Ohio decided that (a) an academic physician's speech to his medical students on various types of delivery is speech on a matter of public concern, and (b) although that speech was within his 'hired' speech as a teacher of obstetrics, and that there is an academic exception to *Garcetti*).



potential impact on faculty expression will be realized in lower court interpretations of Justice Kennedy's cryptic language. Four years out, however, two conclusions can be voiced with confidence. Lower courts will continue to render inconsistent decisions. And as time passes *Garcetti* will be viewed by faculty members and administrators alike as a missed opportunity—a chance the Supreme Court could have seized to harmonize doctrinally divergent lines of cases on academic freedom, but for some reason chose instead to duck.

#### V. CONCLUSION

Here, then, are the salient features of a half-century of decided case law on the academic freedom rights of the nation's faculty members:

Those rights have been articulated in precious few Supreme Court decisions—hardly more than a half-dozen significant cases in fifty years.

Those rights have been diluted by lack of consensus over what academic freedom protects and who can invoke its protections. Some courts interpret Supreme Court precedents to extend academic freedom protections to individual faculty members; others interpret the same Supreme Court precedents as holding that only colleges and universities themselves are entitled to invoke academic freedom.

When threats to institutional autonomy arise from state legislatures and other sources external to the academic community, and when faculty members and institution are allied in an effort to oppose external meddling interference, academic freedom as a decisional determinant is strongest. When faculty members raise academic freedom as a defense to institutional discipline or adverse action, courts are surprisingly but consistently hostile and faculty members lose far more cases than they win.

More than half a century after the AAUP cogently articulated the rationale for academic freedom in the 1940 *Statement of Principles*, and more than half a century after the Supreme Court used the phrase for the first time in *Adler v. Board of Education of the City of New York*, academic freedom remains “poorly understood and ill-defined” as a jurisprudential principle guiding courts in the adjudication of disputes between faculty members and the institutions for which they work.<sup>244</sup>

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244. Olivas, *supra* note 140, at 1835.

# HIGHER EDUCATION AND DISABILITY DISCRIMINATION: A FIFTY YEAR RETROSPECTIVE

LAURA ROTHSTEIN\*

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## I. INTRODUCTION

In reflecting on fifty years of higher education and the intersection with disability discrimination, it is apparent that there have been dramatic and sweeping changes in many respects for individuals with disabilities and their experience in American higher education. From 1960 to 1973 there was virtually no consideration of these issues because there was no federal law prohibiting discrimination on the basis of disability (at that time referred to as “handicap”). While there might have been a few students on campus receiving state vocational rehabilitation funds to support their education, and a few state laws might have had some effect, attention to these issues for the most part was nonexistent in all aspects of American life, and certainly on college campuses.

Section 504 of the Rehabilitation Act of 1973<sup>1</sup> and the 1975 Individuals with Disabilities Education Act<sup>2</sup> combined to set the stage for changes, but it was not until 1979 that judicial guidance began, followed by a decade of litigation primarily on procedural and jurisdictional issues (with little focus on substantive application).<sup>3</sup> By 1990, and the passage of the Americans with Disabilities Act,<sup>4</sup> the number of students with disabilities prepared for college had increased, and the courts began focusing greater attention on the issues affecting them. Faculty members also began increasing their claims of disability discrimination about this same time.<sup>5</sup> In addition there was attention to the intersection of architectural barriers and the

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1. 29 U.S.C. § 794 (2006).

2. 20 U.S.C. §§1400–1482 (2006) (originally enacted as the Education for All Handicapped Children Act and now known as the Individuals with Disabilities Education Act (IDEA)).

3. The Supreme Court first addressed Section 504 of the Rehabilitation Act in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Following that decision, the Court addressed similar issues in four cases throughout the 1980s, discussed *infra* in Part III.E.

4. Pub. L. No. 101-336, 101 Stat. 327 (1990) (codified at 20 U.S.C. §§ 12101–12213 (2006)).

5. See, e.g., *Brousard-Norcross v. Augustana Coll. Ass’n*, 935 F.2d 974 (8th Cir. 1991).

interrelationship of professional education and professional licensing.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination by programs receiving federal financial assistance against otherwise qualified individuals with disabilities. To be considered “disabled,” the Act required that an individual have been substantially limited in one or more major life activities, have had a record of such a limitation, or have been regarded as having such a limitation.<sup>6</sup> A backlash to the broad definition of who is protected in the employment sector resulted in a contraction of coverage for individuals with disabilities through Supreme Court decisions in 1999 and 2002.<sup>7</sup> Advocates for individuals with disabilities responded by passing the ADA Amendments Act of 2008.<sup>8</sup> This amendment returned the definition to what many thought was its original intent.

This retrospective will broadly track the various stages of development in disability-discrimination law in higher education over the past fifty years. The primary focus will be on students with disabilities, although occasional reference will be made to employment issues and architectural-barrier access. While the early years of the last half century did not result in much activity with respect to disability issues, today these issues receive significant attention in higher education. Although they may create challenges for higher education personnel, it should be recognized that they have opened the door to, and dramatically improved the lives of, individuals with disabilities. The societal benefit has been that these individuals are much more likely to be contributing members of society instead of receiving governmental benefits for maintenance and support.

## II. “HANDICAPPED” STUDENTS NEED NOT APPLY: THE REHABILITATION ACT OPENS DOORS, 1960–1979

From 1960 to 1973 there were very few students with disabilities on college campuses. No government agency even counted them. Individuals with conditions such as learning disabilities were unlikely to be prepared for college. Those with mobility impairments faced campuses that had not been designed to be barrier free. Those with sensory impairments faced significant financial and logistical challenges in accessing higher education. Students with disabilities on campus might be those who had qualified for state vocational rehabilitation funding to assist them in job preparation, but their numbers were not significant.

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6. 29 U.S.C. § 706(6) (1976). This definition has been affected by the 2008 Amendments to the ADA, which are discussed *infra* Part VI.

7. Three decisions in 1999, well known as the *Sutton* trilogy, addressed disability discrimination. See discussion *infra* Part V.A. In 2002, two more disability-law decisions were handed down, discussed *infra* Part V.A.

8. Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified as portions of 42 U.S.C. §§ 12101–12210 and 29 U.S.C. § 785).

The year 1973 brought the opportunity for significant change. Section 504 of the Rehabilitation Act was passed, unlike most civil rights laws, with very little detailed planning and without an advocacy movement behind it. Rather, it primarily was the result of some Senate staffers who were working on the reauthorization of the Vocational Rehabilitation Act Amendments of 1954.<sup>9</sup> The Rehabilitation Act initially aimed to expand funding for rehabilitation services first created in the Vocational Rehabilitation Act, a veterans' benefit statute, and to widen the focus of rehabilitation services beyond job training.

Because other federal funding statutes had required that the recipient of federal support not discriminate on the basis of race or gender, it seemed logical that a similar requirement should be applied with respect to nondiscrimination on the basis of disability.<sup>10</sup> The 1973 amendments to the Rehabilitation Act thus prohibited federal employers (Section 501),<sup>11</sup> federal contractors (Section 503),<sup>12</sup> and recipients of federal financial assistance (Section 504)<sup>13</sup> from discriminating against otherwise qualified individuals with disabilities. Most colleges and universities received federal financial assistance in some form, and thus were subject to Section 504 of the Rehabilitation Act. The statutory provisions were deceptively short, without language to define the key terms.<sup>14</sup> Private higher-education programs, along with private health care providers, were the only major private sectors of society affected to a great extent by Section 504 of the Rehabilitation Act.

Then, nothing much happened. Because the Rehabilitation Act had been amended with little fanfare or press coverage, there was little awareness about it. Initially and for some time, few advocacy groups existed and those that did were not connected by the internet. As a result, the 1973

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9. See generally RICHARD SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (1984) (summarizing the foundation of the Rehabilitation Act and especially Section 504). For a brief summary overview of all disability discrimination laws, see generally LAURA ROTHSTEIN & JULIA ROTHSTEIN, DISABILITIES AND THE LAW ch. 1 (4th ed. 2009).

10. The 1973 materials used the term "handicap." By 1990, however, "handicapped" had fallen out of favor and had been replaced by "disabled," as seen in the title of the 1990s Americans with Disabilities Act.

11. 29 U.S.C. § 791 (2006).

12. *Id.* § 793.

13. 29 U.S.C. § 794.

14. For example, the entire text of Section 504 of the 1973 Rehabilitation Act read:

No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by the reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.

Pub. L. No. 93-112, 87 Stat. 355 (1973).

Rehabilitation Act was not initially used in any major comprehensive way to bring about broad social change.

At this time the Rehabilitation Act was certainly not the basis for any major activism by individuals seeking greater access to colleges and universities. Perhaps the reason was that, in 1973, there were few students with disabilities of college age with the skills and preparation to attend college. There were so few because it was not until 1975, when Congress enacted the Education for All Handicapped Children Act (now Individuals with Disabilities Education Act (IDEA))<sup>15</sup> that comprehensive education of students with disabilities began. And it would not be until several years later that a student with a disability would have been identified at an early age and received special education and related services throughout the years in K-12 education and thus be prepared for college.

In the meantime, except for the lawyers and advocates for special education and de-institutionalization, there were few attorneys with the expertise, interest, or willingness to handle a disability discrimination case, even if there were clients seeking their services. Taking a case in a new area of law would certainly be daunting, particularly where the statute had little legislative history and no regulatory guidance. While Congress had contemplated that the Department of Health, Education and Welfare (HEW)<sup>16</sup> would promulgate regulations, it took a lawsuit<sup>17</sup> and a sit-in (or “roll-in”) by a large number of wheelchair users at HEW to convince Secretary Joseph Califano in 1976<sup>18</sup> to develop the model regulations. And it was not until 1978 that the regulations became final.<sup>19</sup>

So, between the newness and vagueness of the law, the lack of legal expertise, and the lack of potential clients in a position to seek relief from discrimination, it is not surprising that it was not until 1979, six years after the enactment of Section 504 of the Rehabilitation Act, that the Supreme Court issued its first opinion on any law involving disability discrimination.

### III. THE COURTS BEGIN TO ILLUMINATE AND CONGRESS AMENDS AND ADDS: PROCEDURAL AND PROGRAMMATIC ATTENTION, 1979–

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15. 20 U.S.C. §§ 1400–1482 (2006). While many states had special education statutes in place, these were neither as comprehensive nor as well funded as the 1975 federal law.

16. HEW later became the Department of Health and Human Services upon the Department of Education’s creation.

17. *See Cherry v. Mathews*, 419 F. Supp. 922 (D.D.C. 1976).

18. Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (Apr. 28, 1976).

19. 43 Fed. Reg. 2132 (Jan. 13, 1978) (codified at 45 C.F.R. pt. 85 (2009)). The regulations relevant to colleges and universities included a number of provisions related to admissions and recruitment, treatment of students, academic adjustments, housing, financial and employment assistance for students, and nonacademic services (physical education and athletics, counseling and placement services, and social organizations). *See* 34 C.F.R. §§ 104.1–104.110.

1990

A. *Southeastern Community College v. Davis*: The First Supreme Court Case

In 1979, in *Southeastern Community College v. Davis*,<sup>20</sup> the Supreme Court addressed the denial of admission to nursing school of a deaf individual, Frances Davis. The program was specific in denying her admission because of concerns about safety of patients. The Court held that, “[a]n otherwise qualified person is one who is able to meet all of a program’s requirements in spite of his handicap.”<sup>21</sup> The Supreme Court thought it appropriate to determine qualification based on both academic and technical standards, a category including *all* nonacademic admissions criteria essential to participation.<sup>22</sup>

The Court applied this standard to the specific facts before it, noting that the record indicated that close, individual attention would be required to ensure patient safety.<sup>23</sup> This would mean that Frances Davis could not participate in the clinical aspects of the class, and exempting her from that prerequisite would constitute a “fundamental alteration” of the curriculum, a step not required under the statute.<sup>24</sup> In the view of the Court, this would be “affirmative action” requiring substantial expenditure.<sup>25</sup> The Court emphasized that

Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens.<sup>26</sup>

The Court dismissed the argument that because she might be able to receive a nursing license in another state, the college must admit her.<sup>27</sup> The Court determined that, even if that were the case, it did not require the college to lower its standards.<sup>28</sup> The Court reversed and remanded for

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20. 442 U.S. 397 (1979).

21. *Id.* at 406.

22. *Id.* (discussing 45 C.F.R. § 84.3(k)(3) (1978) and 45 C.F.R. pt. 84 app. A (1978)).

23. *Davis*, 442 U.S. at 409.

24. *Id.* at 410.

25. *Id.* at 411. This use of the term “affirmative action” is not the traditional use of the term and was not used by other courts in disability-discrimination cases after this decision.

26. *Id.* at 412.

27. *Id.* at 413 n.12.

28. *Id.* at 413.

further proceedings.<sup>29</sup>

The decision has proven to be a landmark decision and a reference point for all disability-discrimination claims that focus on whether the individual bringing the claim is “qualified.” It also served as a precursor to the many current cases involving the connection between professional education and professional licensing.

Following the precedent in the *Southeastern Community College* decision, professional-education programs leading to licensing, particularly programs for health care professions are given substantial deference by the courts regarding what are the essential requirements of the program, what constitutes a direct threat, and what would be unduly burdensome.<sup>30</sup>

Since *Southeastern Community College*, courts have addressed other professional-education disability-discrimination cases. In all cases where the substantive issues were addressed, the courts have required individualized assessments of whether the individuals were able to carry out the essential functions of the program with or without reasonable accommodations in spite of the disability.<sup>31</sup> Courts have not allowed myths, stereotypes, or prejudices to be determinative, but instead have required that appropriate officials made rationally justifiable decisions.<sup>32</sup> In most cases, the courts determined that the individual was not “otherwise qualified.”<sup>33</sup>

This standard of decision making has carried over from health-care professional programs to other higher-education and licensing situations and to the employment setting. Courts have now grappled with the qualifications of individuals with a wide array of disabling conditions in a wide variety of settings.<sup>34</sup>

Contrary to what some advocates for individuals with disabilities feared, the decision in *Southeastern Community College* was not the end of opportunities for individuals with disabilities in higher education and professional education. While it defined the key terms of qualification,

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29. *Id.* at 414.

30. See Laura Rothstein, *Millennials and Disability Law: Revisiting Southeastern Community College v. Davis: Emerging Issues for Students with Disabilities*, 34 J.C. & U.L. 167, 185, n.96 (2007) (discussing this line of cases).

31. See, e.g., *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974 (9th Cir. 2007); *Kalskett v. Larson Mfg. Co. of Iowa, Inc.*, 146 F. Supp. 2d 961 (N.D. Iowa 2001).

32. See e.g., *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19 (1st Cir. 1991). This case set the standard by requiring that these decisions be made by “relevant officials within the institution” who came to “rationally justifiable conclusions” about whether an action would lower academic standards or require substantial program alteration. See *id.* at 26. While not a Supreme Court decision, the case has been widely and consistently cited for this standard of decision making within higher education. See *infra* Section IV.B.

33. ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 3:3.

34. *Id.* §§ 3:2, 3:3.



other parallel legal developments in the 1970s were critical to the inclusion of individuals with disabilities in higher education and ultimately in professions, as well as in society generally.

### B. The Individuals with Disabilities Education Act: Preparing Students for Higher Education

The Individuals with Disabilities Education Act (IDEA),<sup>35</sup> enacted in 1975 under the title Education for All Handicapped Children Act, required public K-12 schools to provide free appropriate education in the least-restrictive environment to all age-eligible students.<sup>36</sup> The education was to be individualized to each student.<sup>37</sup> The Act also incorporated a detailed set of requirements related to finding and identifying students with disabilities and to developing individualized educational programs.<sup>38</sup> The elaborate set of procedural safeguards that ensured parents had access to an impartial hearing and that provided judicial review for students with disabilities was essential to the effectiveness of IDEA.<sup>39</sup>

Although it took some time for special education mandates to be phased in, and while there are still substantial challenges with full implementation, the IDEA has made an enormous difference in the participation of individuals with disabilities in society. IDEA made it possible for students with a wide array of impairments (ranging from mental retardation to sensory impairments to learning disabilities to psychological conditions) to participate in public education.

IDEA differs from the Rehabilitation Act and the Americans with Disabilities Act (ADA) by requiring more than nondiscrimination and reasonable accommodation. It requires schools to provide appropriate education,<sup>40</sup> which in many cases may be much more costly and complex than what is required at the college level. The result, however, has been that many individuals who in the past would have been institutionalized as children, or who would simply have dropped out of public schools, have graduated from high school and have been in a position to enter college and the work force.

### C. Regulatory Guidance

It took policymakers some time to provide guidance to colleges and universities about how to handle the influx of students with disabilities.

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35. 20 U.S.C. §§ 1401–1461 (2006).

36. 20 U.S.C. § 1412(a)(5) (2006).

37. *Id.* § 1412(a)(4) (2006).

38. *Id.* § 1413. This section specifies requirements state plans must meet for assistance eligibility.

39. *Id.*

40. *See* 20 U.S.C. § 1412(a)(1).

Although the Rehabilitation Act was enacted in 1973, it was not until 1977 that regulatory guidance was provided.<sup>41</sup> And even after the regulations were promulgated, the requirements were not widely known and perhaps not taken seriously.

The model regulations on postsecondary education<sup>42</sup> provided guidance on admission and recruitment,<sup>43</sup> general treatment of students,<sup>44</sup> academic adjustments,<sup>45</sup> housing,<sup>46</sup> financial and employment assistance,<sup>47</sup> and nonacademic services (including physical education and athletics).<sup>48</sup> Also in 1980, as part of the regulatory focus, institutions subject to Section 504 were required to engage in a self evaluation a year after the effective date of the model regulations.<sup>49</sup> This self-examination process began to improve the awareness and understanding of college policymakers and administrators that more attention to this issue was needed. Questions began to be asked about who was responsible for payment, how much was reasonable, and just how far were colleges required to go with these new types of students. The combination of the 1977 regulations and case law began to provide guidance. *Southeastern Community College v. Davis* in 1979, combined with the 1977 regulations, represented a turning point. States began to develop more extensive Rehabilitation Act programs and departments that provided both funding for services and technical assistance on rehabilitation and accommodations for education, higher education, and employment. Colleges and universities started paying attention and improvements followed.

#### D. Parallel Developments Outside Higher Education

Because the Rehabilitation Act applies only to *federal* agencies, *federal* contractors, and recipients of *federal* financial assistance, most of the private sector was not affected by disability-discrimination mandates during this timeframe. To a great extent, the only private programs receiving substantial federal support were colleges and universities and health care programs such as major hospitals. While there was some judicial guidance regarding other portions of the private sector that received federal financial assistance, for almost two decades higher education was the primary laboratory for interpreting disability-discrimination policies.

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41. 42 Fed. Reg. 22,676 (May 4, 1977) (now codified at 34 C.F.R. pt. 104).

42. 34 C.F.R. §§ 104.41–104.47 (2009).

43. 34 C.F.R. § 104.42 (2009).

44. *Id.* § 104.43.

45. *Id.* § 104.44.

46. *Id.* § 104.45.

47. *Id.* § 104.46.

48. *Id.* § 104.47.

49. 42 Fed. Reg. 22,676, 22,679 (now codified at 34 C.F.R. § 104.6(c) (2009)).

### E. Other Developments of Significance

*Southeastern Community College* provided the first major guidance—because it was the first Supreme Court case and because it addressed the important threshold issue of what it means to be “otherwise qualified.”<sup>50</sup> There were a number of other significant developments during the decade following this decision. These developments addressed primarily, although not exclusively, procedural issues.

Between 1979 and 1990, there were four other Supreme Court cases in higher education that directly or indirectly addressed disability-discrimination issues. The one with the greatest immediate ramifications was *Grove City College v. Bell*,<sup>51</sup> where the Court held that when an institution receives federal financial assistance, only the program receiving the assistance is covered by the applicable discrimination statute (including the Rehabilitation Act of 1973).<sup>52</sup> Congress responded to the decision in 1988 by enacting the Civil Rights Restoration Act.<sup>53</sup> This ensured that when an institution received federal assistance, all of its operations were covered by the relevant statute.<sup>54</sup>

In 1981 in *University of Texas v. Camenisch*<sup>55</sup> the Supreme Court granted certiorari, but then ducked the issue of higher-education institutional responsibility under Section 504 of the Rehabilitation Act for paying for accommodations and auxiliaries. A deaf graduate student was seeking interpreter services, but the Court determined that the case was moot and did not decide the substantive issue.<sup>56</sup> This question remains unresolved by the Supreme Court to this day. A key federal appellate decision, however, provided some guidance. In *United States v. Board of Trustees*,<sup>57</sup> the Eleventh Circuit held that universities may require students to first seek state vocational-rehabilitation funding or other sources of funding to pay for services, but that when such services are not available, the university must provide them, unless it can demonstrate that it is unduly burdensome to do so. Perhaps because universities are reluctant to have their discretionary budgets examined in litigation, few, if any, subsequent cases have involved universities raising the defense of undue financial burden.

A 1985 Supreme Court decision not receiving much attention at the time was a precursor of a more detailed examination of what it means to be

50. See *supra* Part III.A.

51. 465 U.S. 555 (1984).

52. *Id.* at 570–74.

53. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as scattered sections of 20 and 42 U.S.C.).

54. *Id.* § 4 (amending Section 504 of the Rehabilitation Act).

55. 451 U.S. 390 (1981).

56. *Id.* at 398.

57. 908 F.2d 740 (11th Cir. 1990).

disabled. In *County of Los Angeles v. Kling*<sup>58</sup> the Court held that Crohn's disease is not a disability, but did not provide a great deal of explanation of the reasons why. This detailed discussion would come fifteen years later.<sup>59</sup>

A 1986 Supreme Court case involved whether vocational rehabilitation funding could be used for a student enrolled in a program for religious training. In *Witters v. Washington Department of Services for the Blind*<sup>60</sup> the Court decided that it does not violate the First Amendment Establishment clause for state rehabilitation funds to be used for that purpose.

The most significant legislative activity during this time period other than the Civil Rights Restoration Act was the 1988 amendment of the federal Fair Housing Act<sup>61</sup> to include "handicap" as a protected class in housing discrimination.<sup>62</sup> Although the Rehabilitation Act regulations<sup>63</sup> already addressed some issues of housing discrimination on campus for students with disabilities, the FHA Amendments provided additional coverage for them.

The activities of this decade, in combination with the increasing number of students with disabilities entering college and seeking services, resulted in an enhancement of offices for disability services throughout the country.

#### IV. SUBSTANTIVE RIGHTS EXPAND, 1990–1999

##### A. The Americans with Disabilities Act Enhances Protection Against Disability Discrimination

Higher education institutions were already fairly experienced with disability discrimination issues by the time the ADA<sup>64</sup> was enacted in 1990. The ADA was much more comprehensive than the Rehabilitation Act because of its substantially greater prohibition of discrimination in the private sector. Title I of the ADA applies to all but the smallest employers.<sup>65</sup> Title II applies to state and local governmental agencies.<sup>66</sup>

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58. 474 U.S. 936 (1985).

59. See discussion of the *Sutton* trilogy *infra* Part V.A.

60. 474 U.S. 481 (1986).

61. 42 U.S.C. §§ 3601–3631 (2006).

62. Pub. L. No. 100-430, § 6(a), 102 Stat. 1619, 1620–22 (1988). This section amended 42 U.S.C. § 3604 to extend housing-discrimination protections to disability or handicap status.

63. 34 C.F.R. § 104.45 (2009).

64. 42 U.S.C. §§ 12101–12213 (2006). See also Sara Hebel, *How a Landmark Anti-Bias Law Changed Life for Disabled Students*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 26, 2001, at A23.

65. See 42 U.S.C. § 12111(5)(A) (2006) (excluding only businesses that employed fewer than fifteen persons working at least thirty calendar weeks in the preceding year).

And Title III applies to twelve categories of private providers of public accommodations, one of the categories being educational programs.<sup>67</sup> The ADA incorporates into its statutory provisions substantial clarifying language that resulted from the evolution of Rehabilitation Act case law. The ADA nondiscrimination language and definition of who is protected are virtually identical to the language of the Rehabilitation Act.<sup>68</sup> As a result, colleges and universities are not only subject to Section 504, but also to Title I (for employment), Title II (if they are a state or local institution), and—if private—Title III.

Unlike other programs, colleges and universities were already somewhat adept at addressing these issues when the ADA became law, and they were much further along in developing policies, practices, and procedures related to disability discrimination than other institutions. Given the importance of higher education as an avenue into full participation in American society, that was a good thing. Higher education could and has provided leadership in this area.

#### B. The Standard for “Reasonable Accommodation”

The case of *Wynne v. Tufts University Medical School*<sup>69</sup> established the standard for determining the burden related to reasonable accommodation. The case involved a medical student with a learning disability. He had been accommodated during the early part of his medical education through the use of modifications such as additional time on exams. After the school denied his request to take exams in a format other than multiple choice, he brought a Section 504 claim. The First Circuit, in remanding the case, established a standard for district courts to employ when making decisions about reasonable accommodations. The court required that the institution submit

undisputed facts demonstrating that the *relevant officials* within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a *rationaly justifiable* conclusion that the available alternatives would result either in *lowering academic standards* or requiring *substantial program alteration*.<sup>70</sup>

In establishing this standard, the court referenced *Southeastern*

66. *Id.* § 12131(1).

67. *Id.* § 12181(7)(J).

68. Compare 29 U.S.C. § 705(9) (2006) with 42 U.S.C. § 12102(2) (2006); compare 29 U.S.C. § 705(2)(A)(i) (2006) with 42 U.S.C. § 12112(8) (2006).

69. 932 F.2d 19 (1st Cir. 1991).

70. *Id.* at 26 (emphasis added).

*Community College v. Davis* and the Supreme Court's expectation that programs consider technological advances in making these assessments.<sup>71</sup>

Further proceedings applying this standard resulted in a decision that Wynne could not be reasonably accommodated by alternative format exams.<sup>72</sup> The 1991 decision, however, set out an extremely useful and often-cited standard for making determinations about reasonable accommodations, and indeed about making other decisions in disability-discrimination cases.

During this time, courts focused primarily on issues of reasonable accommodation, whether there was discrimination, and whether the student was otherwise qualified.<sup>73</sup> Little attention was given in higher education about whether the student's condition qualified as a "disability" under the Act.

### C. Standardized Testing for Entrance Into Higher Education

Before the ADA, the standardized tests for admission into higher-education programs (SAT, ACT, LSAT, GRE, etc.) were not subject to any nondiscrimination mandates because the provider did not receive federal funding. Title III of the ADA applies to private testing programs, and, with its enactment, the providers of these tests were required to provide reasonable accommodations to test-takers with disabilities. While many of those providers had done so voluntarily long before the ADA, because the users of the test (the colleges and universities) were themselves subject to Section 504, test-takers had no direct remedy against the test provider.

After the ADA was enacted, there were a number of lawsuits against testing agencies. Many of the cases involved the issue of additional time as an accommodation, but some also addressed whether the student's condition was a disability.<sup>74</sup> The results in these cases varied, the

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71. *Id.*

72. *Wynne v. Tufts University School of Medicine (Wynne II)*, 976 F.2d 791 (1st Cir. 1992).

73. See ROTHSTEIN & ROTHSTEIN, *supra* note 9, §§ 3:3, 3:8–3:20.

74. See *e.g.*, *Harris v. P.A.M. Transport, Inc.*, 339 F.3d 635 (8th Cir. 2003) (truck-driving school did not violate ADA for dismissal of student with medical condition who would be unable to obtain a commercial driver's license); *Biank v. Nat'l Bd. of Med. Exam'rs*, 392 F. Supp. 2d 42 (D. Mass. 2005) (student who had completed part one of medical licensing exam in sufficient time not entitled to additional time on part two to accommodate disability); *Gonzalez v. Nat'l Bd. of Med. Exam'rs*, 60 F. Supp. 2d 703 (E.D. Mich. 1999) (student had never performed below expectations and was not limited in the major life activities of reading and writing, therefore defendant was not required to give him extra time in his board exams); *Jacobsen v. Tillman*, 17 F. Supp. 2d 1018 (D. Minn. 1998) (no ADA violation in refusing to waive mathematics requirement for teacher licensure test or refusing to substitute another test). For more general information on examinations and courses, see ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 5:7 (2009).

outcomes depending on the specific facts of the case. The decisions, however, began providing precedent for addressing accommodations requests in related settings.

#### D. Professional Education and Professional Licensing Connection

The *Wynne* decision has come to be relied on by numerous other courts, which have praised its sound reasoning and utilized its rule as the standard for determining the reasonableness of accommodations. It is also an example of the fact that some of the most significant cases in higher education have involved the nexus between professional-preparation programs and professional licensing. This is because these are high stakes programs—both for the individual seeking the degree and license (in cost, time and prestige) and for the recipient of the services of a doctor, lawyer, or teacher. *Southeastern Community College* is, of course, the first and most significant case on that issue.

The application of the ADA to state professional licensing agencies (through Title II, applicable to state and local governmental agencies) created an even more important avenue of inclusion for professional-education students with disabilities. Before 1990, because these agencies did not receive federal financial assistance, they were not subject to the Rehabilitation Act. The ADA, however, ensured that students with disabilities who were graduating from medical school, law school, and other professional programs were not only protected from discrimination in their education programs, but were also entitled to nondiscrimination and reasonable accommodation in the licensing process. Two major areas became the focus of courts' attention.<sup>75</sup>

Many students with disabilities (particularly learning disabilities) had faced challenges in receiving accommodations on state licensing exams. Many individuals with mental-health and substance-abuse problems were concerned about the character and fitness questions asked by many state licensing boards about treatment and diagnosis for their conditions. Title II of the ADA provided them a basis to challenge these practices. Challenges to the practices related to accommodations were more successful than the character and fitness question challenges, but cases in this area continue.<sup>76</sup>

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75. See ROTHSTEIN & ROTHSTEIN, *supra* note 9, §§ 5:7–5:8.

76. See *e.g.*, *Applicants v. Tex. State Bd. of Law Exam'rs*, No. A 93 CA 740 SS, 1994 WL 923404 (W.D. Tex. Oct. 11, 1994) (allowing narrowly drawn questions asking about treatment for bipolar disorder, paranoia, and various other psychotic disorders within past ten years on licensing application); *Medical Soc'y of N.J. v. Jacobs*, Civ. A. No. 93-3670 (WGB), 1993 WL 413016 (D.N.J. Oct. 5, 1993) (prohibiting state medical board from asking questions about drug or alcohol abuse and mental and physical illness on licensing application); *In re Frickey*, 515 N.W.2d 741 (Minn. 1994) (state bar admissions board ordered to remove certain questions regarding mental health treatment from licensing application on grounds that such questions

A full discussion of these issues is beyond the scope of this article. It is important to recognize, however, that the application of the ADA to state licensing programs in combination with the application of Title III of the ADA to private standardized-testing agencies provided a more seamless experience for students with disabilities in higher education. The student now had protection in the initial admissions process, rights during the education program itself, and protection in the post-graduation entry into the professional stage. While the specific accommodations needed might be different and the qualifications for eligibility might be different, at least all stages of the process were covered by the nondiscrimination mandate.

#### E. Documentation Issues

During the 1990s, a number of questions related to documentation were addressed. These stem from the basic requirement under both Section 504 of the Rehabilitation Act and the ADA that for an individual to claim discrimination or to be eligible for reasonable accommodation, the disability must be “known.”

Unlike students receiving special education in the K-12 setting, where students with disabilities in higher education and in admissions and licensing settings seek accommodations and nondiscrimination, the burden is on the student to provide documentation that is appropriately current, prepared by someone qualified to evaluate the disability, and that demonstrates that the assessment and the recommendation for accommodations relate to that disability.

For the student who had academic deficiencies but had not provided notice of a disability, the courts did not require second chances.<sup>77</sup> The institution is not required to re-admit a student who did not make known the disability, request accommodations, and provide the appropriate documentation to justify accommodations. Similarly, the courts demonstrated substantial deference to higher-education institutions regarding their determinations about essential requirements for the programs. They also began giving some guidance on the degree of deference to be given to the individual’s treating evaluator versus the independent evaluator whom the program in question had employed.<sup>78</sup>

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would deter licensing applications from seeking appropriate counseling). For more general information on licensing and character and fitness issues, see ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 5:8 (2009).

77. *See, e.g.,* Salvador v. Bell, 622 F. Supp. 438 (N.D. Ill. 1985) (holding no illegal discrimination where claimant did not provide initial notice of disability).

78. *See* ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 3.2. For a more detailed discussion of the issue of students with learning disabilities in higher education, see Laura Rothstein, *Judicial Intent and Legal Precedents*, in POSTSECONDARY EDUCATION AND TRANSITION FOR STUDENTS WITH LEARNING DISABILITIES ch. 3 (Loring C. Brickerhoff et al. eds., 2d ed. 2002).



The two most highly publicized decisions on this issue were *Guckenberger v. Boston University*<sup>79</sup> and *Bartlett v. New York State Board of Law Examiners*.<sup>80</sup> The *Guckenberger* case was highly publicized in the media and involved how Boston University determined eligibility for accommodations for students with learning disabilities. The *Guckenberger* court held that requiring documentation to be created within the past three years imposed a significant additional burden on students with disabilities.<sup>81</sup> The court upheld a modified plan that allowed a student to procure a waiver of the testing standard when a qualified professional certified the testing as unnecessary.<sup>82</sup> The court further articulated the professional credentials required for testing for learning disabilities, attention deficit disorder, and attention hyperactivity deficit disorder.<sup>83</sup> A later decision in the case upheld the university's determination that a waiver of the foreign-language requirement would be a fundamental alteration of Boston University's academic program.<sup>84</sup> The *Bartlett* case, involving a claimant with a reading disability seeking accommodations on the bar exam, went up and down the trial and appellate courts (and was remanded by the Supreme Court at the same time that the Court decided the *Sutton* trilogy). Both involved requested accommodations for individuals with learning disabilities, *Guckenberger* at the undergraduate level and *Bartlett* on the New York state bar exam. These cases highlight the challenges resulting from the significant influx of students with learning disabilities into higher education and ultimately into the professions.

#### F. Athletes with Disabilities

During the 1990s the increased awareness of disability rights led to an increase in cases involving participation in college athletics. While many of these cases involved issues of athletes with learning disabilities and their eligibility to participate under NCAA rules, others addressed issues of substance abuse, HIV, health conditions, and other impairments.<sup>85</sup>

Although the highly publicized Casey Martin case<sup>86</sup> was not in the college setting, it highlighted one of the key issues for disability discrimination—essential functions and fundamental alterations. The case involved a professional golfer with a mobility impairment. He requested

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79. 974 F. Supp. 106 (D. Mass. 1997).

80. 527 U.S. 1031 (1999).

81. *Guckenberger*, 974 F. Supp. at 136–37.

82. *Id.* at 136–37.

83. *Id.* at 137.

84. *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 82, 87, 90 (D. Mass. 1998).

85. For a discussion of these cases see Laura Rothstein, *Don't Roll in My Parade: Sports and Entertainment Cases and the ADA*, 19 REV. LITIG. 399, 404–14 (2000). See also ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 3:11.

86. *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

the accommodation of using a golf cart during a PGA tournament. The Supreme Court decision highlighted the importance of an individualized assessment in determining that walking is not an essential requirement for this professional golf tournament, and reinforced the expectation of such assessments in other sports contexts. The Court decided that Martin's requested accommodation was reasonable.<sup>87</sup>

Cases involving athletes with HIV addressed concerns about direct threat to the health of others. Those involving substance abuse focused on whether behavior and conduct were factors in determining qualification to participate.<sup>88</sup>

There was a great deal of attention focused on athletes with learning disabilities because NCAA rules at that time had a discriminatory effect on many of these students. The eligibility requirements for standardized test scores and courses taken in high school were at issue. The application of the ADA to the NCAA was never completely resolved because the NCAA changed its eligibility rules in response to the litigation.<sup>89</sup> Some of these cases are ongoing.

#### G. Faculty and Discrimination Issues

While the focus of this overview is on students with disabilities, it should be noted that higher education faced some unique employment issues in the context of disability discrimination. Beginning in the late 1990s, there was an increase in these cases. Some of the cases addressed challenges of discrimination in the promotion and tenure process. The cases highlight the unique types of employment settings for higher education faculty and the difficulty in defining essential functions and whether the faculty member is otherwise qualified.<sup>90</sup>

#### H. Campus Services for Students with Disabilities Evolve

The combination of increasing numbers of students with disabilities entering higher education and the additional source of protection resulting from the ADA were certainly factors in postsecondary education's adding more services and creating disability service offices with more professional and trained staff. The influx of students expecting these services and the

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87. *Id.* at 691.

88. *See, e.g.*, *Salley v. Circuit City Stores, Inc.*, 160 F.2d 977 (3d Cir. 1998); *Nanos v. City of Stamford*, 609 F. Supp. 2d 260 (D. Conn. 2009).

89. In May 1998, the NCAA reached a settlement agreement with the Justice Department. While not conceding that the NCAA is subject to Title III of the ADA, the NCAA agreed to provide individualized assessment of athletes with respect to, *inter alia*, whether special education courses should count as core courses. *See* NCAA Consent Decree, <http://www.ada.gov/ncaa.htm> (last visited Feb. 21, 2010).

90. For an overview of this issue and these cases, see ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 3:26.

cost of some of the services resulted in programs becoming more stringent in determining eligibility for accommodations. This seemed to be particularly the case for students with learning and related disabilities.

The professionalization of campus offices for students with disabilities has been significant.<sup>91</sup> Fifty years ago, it would be unlikely that most campuses would even have an office for students with disabilities. If any attention was given to these issues, it would probably have come from the affirmative action office or some other general office on diversity. Today, virtually all institutions of higher education have such offices, which handle providing or coordinating and facilitating accommodations, evaluating documentation to determine the eligibility for services, and a range of other tasks.

### I. Department of Education Oversight and Technical Assistance

During this decade, the Department of Education (ED) Office for Civil Rights (OCR) began receiving more complaints of discrimination (many, but not all involving issues of learning disabilities), and began issuing Opinion Letters that provide insight and guidance, although not with the weight of a judicial decision. This avenue often proved less costly for both parties and a more efficient way to resolve issues than litigation did.

A 2009 report by the Government Accountability Office<sup>92</sup> provides some insight into the various roles that the Department of Education has played over time and highlights the lack of a coordinated approach taken by the ED with respect to students with disabilities. The three major offices within ED involved with these issues have different roles. The Office for Civil Rights (OCR) engages in enforcement, although it has been the lead office in providing technical assistance on disability issues to schools.<sup>93</sup> The Office of Special Education and Rehabilitative Services (OSERS) handles a range of support programs for parents and students, school districts, and state agencies in the areas of special education, vocational rehabilitation, and research with the goal of preparing students for postsecondary education.<sup>94</sup> The Office for Postsecondary Education (OPE) lacks technical expertise, but provides assistance to schools receiving grants for programs directly related to students with disabilities.<sup>95</sup> The GAO report highlights the lack of coordination and information

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91. The Association of Higher Education and Disabilities (AHEAD), with over 2500 members, provides substantial technical assistance on these issues, and has for many years.

92. U.S. GOV'T ACCTB'Y OFFICE, GAO-10-33, HIGHER EDUCATION AND DISABILITY: EDUCATION NEEDS A COORDINATED APPROACH TO IMPROVE ITS ASSISTANCE TO SCHOOLS IN SUPPORTING STUDENTS (2009).

93. *See id.* 25–27.

94. *See id.* 27–28.

95. *See id.* 28–29.

sharing among these three offices. A major GAO recommendation based on the study of these three programs was that they develop and implement a coordinated approach to provide better technical assistance to higher education.<sup>96</sup>

## V. PROTECTION FOR INDIVIDUALS WITH DISABILITIES CONTRACTS AND NEW ISSUES RECEIVE ATTENTION, 1999–2008

### A. Backlash to the Floodgates of Litigation

Most of the early Section 504 cases, both in higher education and in other settings, did not focus on whether the individual was disabled. It was almost always assumed that the person was covered. The ADA's coverage of the private sector substantially increased the amount of litigation involving disability-discrimination claims. With virtually all employers and places of public accommodation now covered, lawsuits abounded. But as the floodgates opened and more individuals with conditions such as back injuries and depression began seeking accommodations, particularly in the employment setting, employers began filing motions to dismiss on the basis that the individual was not "disabled" under the definition. The courts began to grant those motions, narrowing the definition of who is covered. This trend in lower courts ultimately led to the Supreme Court decisions known as the "*Sutton* trilogy."<sup>97</sup> In the context of nearsighted airline pilot applicants (whose vision was correctable with eyeglasses), a truck driver with monocular vision, and an individual with high blood pressure controlled by medication, the Court determined that whether a condition is "substantially limiting" must take into account the effect of mitigating measures such as eyeglasses and medication. The conditions of the individuals in these cases were held not to fall within the confines of that test.<sup>98</sup>

In 2002 the Supreme Court addressed what constitutes a major life activity, again a response to the groundswell of employment-discrimination cases involving a wide range of conditions. In the context of a woman working on an automobile assembly line who claimed that her repetitive stress syndrome was a disability, the Court set the standard.<sup>99</sup> The Court

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96. *See id.* 29–30.

97. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 525 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999). A 1998 Supreme Court decision involving a dental patient with HIV held that the disease qualified as an ADA disability. *Bragdon v. Abbott*, 524 U.S. 624 (1998). Previously, courts had determined with very little analysis that individuals with HIV or similar conditions were covered. *See, e.g., School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

98. *Sutton*, 527 U.S. at 482.

99. *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184 (2002). The case settled after remand.

determined that major life activities are those that involve tasks central to the daily lives of most people.<sup>100</sup> The case was remanded but settled, resulting in no further judicial guidance on whether the woman in question would be covered.

Under the Rehabilitation Act and the ADA, to be an otherwise qualified person with a disability, the individual must not pose a direct threat.<sup>101</sup> What was long uncertain was whether the direct threat must be to others or also to oneself. In 2002, the Court established that the standard for direct threat applies not only to threats to the health and safety of others, but also to oneself.<sup>102</sup>

The combined fallout of those cases was a substantial narrowing of the definition of who is protected under the statutes. Cases were much more quickly being dismissed or discharged via summary judgments determining that the individual was not covered by the ADA or the Rehabilitation Act. Individuals with conditions such as epilepsy, diabetes, and cancer, whose conditions had been routinely presumed to be disabilities before the late 1990s, were no longer protected. The courts thus did not reach the issue of whether the person was “otherwise qualified” or whether accommodations being requested were “reasonable.”

Also, probably related to the increase in litigation resulting from the ADA, defendants began raising other issues, such as Eleventh Amendment immunity from damages (for state agencies).<sup>103</sup> The result was that the courts did not focus as much on the substantive aspects of qualifications and reasonable accommodations; thus there is little guidance on these issues. Lower courts have only recently begun refocusing on the substantive issues.<sup>104</sup>

This trend in litigation had an interesting evolution in higher education. Soon after the passage of the Rehabilitation Act, the courts addressed some procedural issues, such as program specificity and immunity. Congress responded to some of these cases with amendments to the Rehabilitation Act. By 1979, and the decision in *Southeastern Community College v. Davis*, the courts were focusing on whether the individual was otherwise qualified and whether the program could accommodate the condition. The case law guidance on these issues was often in the higher-education context because most colleges and universities received federal financial assistance, and most employers and public accommodation programs did not. As a

100. *Id.* at 197.

101. That requirement initially appeared in the regulations under Section 504 (34 C.F.R. §1630.2(r)) and was later incorporated into the statutory language of the ADA (42 U.S.C. § 12113(b)).

102. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 77 (2002).

103. ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 1:8.

104. *Compare* *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983) *with* *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)).

result, when looking for precedent on the issue of whether one is otherwise qualified or on reasonable-accommodation issues, more precedent is found in the pre-1999 cases.

Although before the late 1990s, colleges and universities seemed rarely to raise defenses of immunity or whether the individual was disabled, today they are much more likely to do so. In fact, in 1999, the same day the Court decided the *Sutton* trilogy, it remanded the *Bartlett v. New York State Board of Law Examiners* case,<sup>105</sup> which involved an individual with a learning disability seeking accommodations on the bar exam. The Court instructed the lower court to determine whether Marilyn Bartlett's learning disability had been mitigated so that it was not substantially limiting to any major life activity.<sup>106</sup> Ultimately on remand, it was determined that she was substantially limited in the major life activity of reading, and that her self-accommodations in getting herself through law school had not changed that.<sup>107</sup> Therefore, she did have a substantial impairment justifying reasonable accommodations.

It is important to note, however, that colleges and universities still seem less likely to raise the definitional and immunity defenses, perhaps because they had become much more adept at accommodating and serving students with disabilities in the decade between *Southeastern Community College v. Davis* (1979) and the passage of the Americans with Disabilities Act (1990). Higher education had evolved practices, policies, and procedures before other sectors affected by the ADA (with the exception of K-12 education). Because they were more experienced at finding ways to accommodate the student with chemical sensitivities who requested chalk-dust-free classrooms, they were unlikely to raise the condition's status as a disability as a defense. Colleges and universities also followed the admonition in *Southeastern Community College v. Davis* that:

Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State.<sup>108</sup>

Colleges and universities have been the leaders in finding ways to use technology to accommodate students with a wide range of disabilities.

Although higher education was ahead of employers and public

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105. *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 226 F.3d 69 (2d Cir. 2000).

106. *Id.* at 86.

107. *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93 CIV. 4986(SS), 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001).

108. 442 U.S. 397, 412-13 (1979).

accommodation providers on disability discrimination issues, the road for higher education has not been entirely smooth. Beginning in the mid-1980s, large numbers of students with disabilities who had received the benefits of special education because of the 1975 Individuals with Disabilities Act began reaching college age. Their special education had better prepared them for college. They expected a certain level of services in college as a result. What became apparent was that these students and their parents did not realize that not everything that the IDEA required in high school was required in college. In high school, the burden was on the school, at its own expense, proactively to identify and evaluate the student. In high school, the student was to be provided appropriate education, not just reasonable accommodations. In contrast, the college student has the responsibility to make known a disability and to request accommodations. That includes paying for the cost of an evaluation. The burden shifts in college.

For students with learning disabilities, there have been a number of challenges.<sup>109</sup> With the increased number of such students, and reinforced by the *Bartlett* and other decisions, higher education has become insistent that students with learning disabilities provide appropriate documentation to justify the requested accommodations. That means that evaluations must be done by professionals with appropriate expertise, and that these evaluations must be recent. It also means that the student pays for these evaluations. These new expectations came as a shock to some parents. With increased awareness, however, today there is less surprise.

Disability-rights advocates fought early on for expansion of the 1973 Rehabilitation Act rights, so that more than those receiving federal support would be covered. Because the expansion took seventeen years, the interpretation of the Rehabilitation Act (after which the substantive rights under the ADA are modeled) developed to a large extent within higher education. A broader application of disability discrimination law at an earlier stage might have resulted in an earlier groundswell of litigation and in a much earlier narrowing of these laws, as occurred in *Sutton* and the recent immunity decisions. We would not have the body of case law that provides guidance on a variety of issues to draw on.

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109. The courts have recently adjudicated several cases involving medical students with learning disabilities. While the focus has been on whether the condition in question was a covered disability, courts have also reverted to earlier determinations and addressed whether the medical student in question was otherwise qualified. For cases focusing on students with learning disabilities, see ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 3:22.

## B. Other Developments

### 1. Immunity

In addition to the contraction of the definitional coverage of “disability” and the litigation in the last decade applying that narrowed definition, there were a number of other developments that occurred during this time.

The Supreme Court addressed the issue of governmental immunity for state and local governmental agencies for damage actions under various ADA settings.<sup>110</sup> These decisions do not resolve whether state universities are immune from damage actions by students with disabilities, but because of the application of the Rehabilitation Act to most of these institutions, it is less significant whether public higher education institutions need to raise the defense or are likely to do so.

### 2. Architectural barrier issues

While there has not been a high volume of litigation about architectural-barrier issues in college and university settings, there has been some attention by the courts and the Office for Civil Rights.<sup>111</sup> Cases have involved a range of issues including housing,<sup>112</sup> public spaces,<sup>113</sup> parking,<sup>114</sup> social events,<sup>115</sup> and classrooms.<sup>116</sup> The outcomes have varied,

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110. See *United States v. Georgia*, 546 U.S. 151 (2006) (holding that Title II validly abrogates state immunity insofar as it authorizes suits for conduct that independently violates the Fourteenth Amendment); *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding that ADA Title II had properly abrogated state immunity in cases involving “the fundamental right of access to the courts”); *Board of Trs. v. Garrett*, 531 U.S. 356 (2001) (holding states to be immune from ADA Title I claims for monetary damages).

111. See ROTHSTEIN & ROTHSTEIN, *supra* note 9, §§ 3:16–3:18.

112. See *e.g.*, *Kuchmas v. Towson Univ.*, Civil Action No. RDB 06-3281, 2008 WL 2065985 (D. Md. May 15, 2008) (statute of limitations did not bar student from claiming Fair Housing Act violations against university for inaccessible apartment; statute did bar claims against architect); *Grand Valley State Univ. (MI)*, 12 Nat’l Disability L. Rep. ¶ 275 (OCR 1997) (new townhouses being built for students must meet access requirements regardless of whether there currently are students seeking such housing; the availability of accessible dorm rooms does not exempt the university from making other housing accessible).

113. See *e.g.*, *Panzardi-Santiago v. Univ. of P.R.*, 200 F. Supp. 2d 1 (D.P.R. 2002) (prospective student with mobility impairment may have remedy in case involving whether public pathway was accessible).

114. See *e.g.*, *Brownscombe v. Dep’t of Campus Parking*, 203 F. Supp. 2d 479 (D. Md. 2002) (not a Section 504 violation to enforce parking code against student with a disability); *Penn. State Univ.*, 12 Nat’l Disability L. Rep. ¶ 86 (OCR 1997) (Penn State had provided adequate accessible parking spots at stadium).

115. See *e.g.*, *Levy v. Mote*, 104 F. Supp. 2d 538 (D. Md. 2000) (University’s club inaccessible; case against organizer of bar association meeting); Letter to Univ. of Mass. Dartmouth, 36 Nat’l Disability L. Rep. ¶ 255 (OCR 2007) (agreement by university to make public forum space, formerly on a grassy area not accessible by ramps, accessible).



but all of these cases highlight the increasing awareness of rights under the Rehabilitation Act and the ADA. Colleges are at risk of liability if they schedule social and athletic events at inaccessible locations.

### 3. Programs abroad and field placements

This era also gave rise to attention to foreign-study programs and other activities and events that are sponsored at a location other than the campus, as well as courses offered not for credit. The challenges of programs abroad include the different laws that apply in the host country as well as cost issues. While the unique qualities of off-campus programs affect accommodations analyses, institutions remain subject to non-discrimination requirements in their administration of them.<sup>117</sup>

For the student taking fieldwork or other off-campus work, often supervised by another program or agency, the challenges include the importance of communication and determining which program is responsible for costs that might be incurred.<sup>118</sup> A university should consider whether externship locations are accessible. While it is unlikely that *all* outside externship placements must be accessible, those placements should be in compliance with the ADA, and college must ensure reasonable access in a program as whole.

### 4. Hostile environment and retaliation issues

Also occurring at this time was the increase in claims of hostile

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116. See e.g., Letter to Univ. of Wyo., 31 Nat'l Disability L. Rep. ¶ 176 (OCR 2005) (when viewed in entirety, law school was accessible; classrooms were accessible; university provided notification about requesting move to other classrooms and student had not requested move).

117. See generally ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 3.20; see also Arlene Kanter, *The Presumption Against Extraterritoriality As Applied to Disability Discrimination Laws: Where Does It Leave Students with Disabilities Studying Abroad?*, 14 STAN. L. & POL'Y REV. 291 (2003); A.M. Rubin, *Students with Disabilities Press Colleges to Help Them Take Part in Foreign Study*, CHRON. HIGHER EDUC. (Wash., D.C), Sept. 27, 1996, at A47; see also *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015 (9th Cir. 2002) (college did not violate Section 504 or Title III of ADA by failing to provide certain accommodations in overseas program; although wheelchair access was not provided in some instances, a number of other accommodations were provided).

118. See generally ROTHSTEIN & ROTHSTEIN, *supra* note 9, § 3.20; see also *Hartnett v. Fielding Graduate Inst.*, 400 F. Supp. 2d 570 (S.D.N.Y. 2005), *aff'd in part, rev'd in part*, 198 F. App'x 89 (2d Cir. 2006) (requested accommodation denied because student failed to demonstrate potential benefit thereof); *Raffael v. City of New York*, Civil Action No. 00-CV-3837, 2004 WL 1969869 (E.D.N.Y. Sept. 7, 2004) (difficulty in commuting does not have to be accommodated); *University of Cal., Los Angeles*, 8 Nat'l Disability L. Rep. ¶ 314 (OCR 1996) (no Section 504 or ADA violation when student did not provide adequate notice of learning disability requiring accommodation in social-work field placement).

environment<sup>119</sup> retaliation,<sup>120</sup> or both for making a complaint or seeking accommodations. While often the institution of higher education will prevail in these claims, these cases highlight the importance of ensuring that administrators and faculty take care to avoid any conduct that might be viewed as hostile or retaliatory.

### 5. Violence and disruption on campus

One other major area of attention during this decade was a response to issues of violence and disruption on campus.<sup>121</sup> The presence of students with mental health problems requires colleges and universities to balance possible concerns about safety and a positive academic environment with considerations of privacy and nondiscrimination on the basis of disability.

Violence at institutions of higher education (such as Virginia Tech and Northern Illinois University) has resulted in a re-examination of release of student records to individuals who might need to know.<sup>122</sup> The revised FERPA regulations under the Federal Education Rights and Privacy Act,<sup>123</sup> respond by allowing disclosure of records without consent where there is an emergency related to the health or safety of a student or others.<sup>124</sup> An institution of higher education may consider the totality of the

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119. Rothman v. Emory Univ., 123 F.3d 446 (7th Cir. 1997) (law school did not create hostile environment for student with epilepsy by sending letter to bar examiners, nor did other incidents create a hostile environment, when the law school's actions were not related to student's epilepsy); Toledo v. Univ. of P.R., 36 Nat'l Disability L. Rep. ¶ 127 (D.P.R. 2008) (denying university's dismissal motion; student claimed harassment and discrimination after revealing schizoaffective disorder; accommodation of afternoon classes because of medication denied although the university had offered afternoon classes in the past); Guckenberger v. Boston Univ., 957 F. Supp. 306 (D. Mass. 1997) (denying dismissal of hostile-environment ADA claims).

120. Amir v. St. Louis Univ., 184 F.3d 1017 (8th Cir. 1999) (although dismissal of medical student with obsessive compulsive disorder was validly based on academic difficulties, student may have had basis for claim of retaliation); Bayon v. State Univ. of N.Y. at Buffalo, 32 Nat'l Disability L. Rep. ¶ 169 (W.D.N.Y. 2006) (awarding graduate student \$100,000 in case claiming retaliation for bringing ADA complaint); Letter to Alamance Comm. Coll., 32 Nat'l Disability L. Rep. ¶ 48 (OCR 2005) (finding that suspension of student was because of physical abuse of another student in violation of Student Code of Conduct, not in retaliation for requesting auxiliary aids).

121. See e.g., Tylicki v. St. Onge, 297 F. App'x 65 (2d Cir. 2008) (college student who was suspended after series of violent outbursts not entitled to manifestation hearing).

122. See Megan Devoran, *Communication as Prevention to Tragedy: FERPA in a Society of School Violence*, 1 ST. LOUIS U.J. HEALTH L. & POL'Y 425 (2008); Lynn Daggett, *FERPA in the 21<sup>st</sup> Century: Failure to Effectively Regulate Policy for All Students*, 58 CATH. U.L. REV. 59 (2008); Stephanie Humphries, *Institutes of Higher Education, Safety Swords, and Privacy Shields: Reconciling FERPA and the Common Law*, 35 J.C. & U.L. 145 (2008); Margaret O'Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679 (2003).

123. 34 C.F.R. pt. 99 (2009).

124. *Id.* §§ 99.31–99.32.

circumstances and disclose information about the threat to those necessary individuals where there is an “articulable and significant threat” to the health or safety of the student or others when there is a rational basis for doing so.<sup>125</sup> The educational agency must be prepared to justify the disclosure and must record the nature and threat and to whom the information was disclosed under the emergency exception. Such “necessary” individuals include the parents of an adult student.

It is beyond the scope of this article to review those concerns, and they have been addressed in detail in recent articles by this author.<sup>126</sup> The importance of proactive development of policies, rather than responding to events, should be emphasized.

#### 6. Millennials come to college

Most of the developments in this decade must be viewed in light of the generation of students coming into higher education with expectations often based on requirements from the K-12 context and with behaviors that reflect their experience with instant communication and the use of technology.

These students bring new challenges, and although the laws do not apply differently to them, an awareness of their expectations and behaviors and proactive planning in response to these could prevent a great deal of discord on disability issues.<sup>127</sup>

#### VI. A REVERSAL OF COURSE, 2008–2010

As was noted previously, the definition of “disability” was limited by Supreme Court decisions in 1999 and 2002. Following those decisions, there were many efforts to address that limitation, but it was not until September 2008 that Congress returned the definition of coverage to what disability-rights advocates thought had been intended at the outset.

In an amendment that did not receive much initial public attention because it occurred during the financial meltdown of fall 2008, Congress enacted the ADA Amendments Act of 2008, which took effect on January 1, 2009.<sup>128</sup> The Act clarifies that the intent of the ADA was to provide for

125. *Id.*

126. Laura Rothstein, *Disability Law Issues for High Risk Students: Addressing Violence and Disruption*, 35 J.C. & U.L. 101 (2009); Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT. L. REV. 531 (2008).

127. See Laura Rothstein, *Millennials and Disability Law: Revisiting Southeastern Community College v. Davis: Emerging Issues for Students with Disabilities*, 34 J.C. & U.L. 167 (2007).

128. ADA Amendments Act of 2008, P.L. 110-325, 122 Stat. 3553 (2008) (codified as parts of 42 U.S.C. §§ 12101–12114, 12201–12210, and 29 U.S.C. § 705) (Supp. II

broad coverage for disabilities.<sup>129</sup> The definition's amendment applies to both the ADA and to the Rehabilitation Act.<sup>130</sup>

The definition of disability basically remains the same and provides as follows:

a physical or mental impairment that substantially limits one or more major life activities of such individual;  
a record of such an impairment; or  
being regarded as having such an impairment. . . .<sup>131</sup>

. . . .

[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.<sup>132</sup>

For the student with a learning disability affecting learning, reading, concentrating, thinking, or communicating, these clarifications may mean a greater assurance of being covered by the definition.

A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.<sup>133</sup>

For a student with HIV, asthma, chemical sensitivities, Crohn's disease,<sup>134</sup> diabetes, and a number of other conditions that were not always covered before 2008, this clarification means that now there is a greater likelihood of having the case decided on issues other than the fact of disability.

To meet the requirement of "being regarded as having such an impairment" the individual must establish "that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."<sup>135</sup>

The definition of "disability" does not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an

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2008).

129. *Id.* § 4.

130. *Id.* § 7.

131. 42 U.S.C. § 12102(1).

132. 42 U.S.C. § 12102(2).

133. *Id.*

134. *See, e.g.,* County of Los Angeles v. Kling, 474 U.S. 936 (1985) (finding that Crohn's disease was not a disability).

135. 42 U.S.C. § 12102(3).

actual or expected duration of six months or less.<sup>136</sup> Although most colleges and universities probably accommodate the student with a broken leg or similar condition, the disability definition does not require this accommodation. This may also be important in a situation where a student with flu or another contagious disease is prohibited from attending class or excluded from university housing. This student may have other claims, but will probably not be able to claim disability discrimination.

The 2008 amendments further clarify that the determination of whether an impairment substantially limits a major life activity is to be made without regard to the ameliorative effects of mitigating measures. There is an exception for eyeglasses or contact lenses, but covered entities are prohibited from using qualification standards or selection criteria that are based on uncorrected vision unless these are job-related and consistent with business necessity.<sup>137</sup> It is not clear whether this definition will apply to professional education admission. For example, could acceptance to certain health care professional education residency program require an individual to have a certain level of vision without corrective measures?

At the time of this writing, the Equal Employment Opportunity Commission has proposed regulations relating to the ADA Amendments in the Notice and Public Comment phase, and other agencies will most certainly present proposals for regulations to implement various aspects of the ADA Amendments.<sup>138</sup> It remains to be seen whether the regulatory agencies will try to expand the definition beyond what the framework of the amended ADA provides, in which case the regulations may not withstand judicial scrutiny.

Because of the time it takes for cases to work their way through the judicial system, there has not yet been substantial guidance about how the courts will treat new cases under the amended definition of “disability” in the higher-education setting.<sup>139</sup> It may be that fewer cases will be dismissed based on the definition, but that the ultimate outcome will often favor the institution when issues of qualifications and accommodations are addressed. In light of the increasing demands on disability student service offices, it can be expected that there will continue to be a rigorous requirement to provide appropriate documentation to justify the disability.

136. *Id.* § 12102(4)(D).

137. *Id.* § 12102(4)(E).

138. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as amended, 74 Fed. Reg. 48,431 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630).

139. *See e.g.*, *Brodsky v. New England Sch. of Law*, 617 F. Supp. 2d 1 (D. Mass. 2009) (applying both pre- and post-2008 standards to case involving law student’s request for readmission after memory and organizational deficits had been identified); *Strahl v. Trs. of Purdue Univ.*, 39 Nat’l Disability L. Rep. ¶ 49 (N.D. Ind. 2009) (finding that student with Asperger’s Syndrome was disabled, but denying requested exemption from foreign language requirement).

Institutions, however, may be less likely to challenge whether the condition “substantially” limits a major life activity.

At the same time as Congress enacted the ADA Amendments Act of 2008, it also passed the Mental Health Parity and Addiction Equity Act.<sup>140</sup> This responded to longstanding criticisms about the differential treatment between health benefits for physical conditions and mental-health conditions. According to this new law, group insurance benefits (including caps and deductibles) provided by employers (if they have such a program) must be available on an equitable basis.<sup>141</sup> The current health care reform debate will most certainly have an impact on how this plays out in practice. The increased cost of providing health care services on campuses may result in across the board cuts in such services.

## VII. THE CRYSTAL BALL – 2010 AND BEYOND?

What are the next generation issues coming down the pipeline? And what are the likely trends with respect to legislation, regulation, and litigation? And how will those be affected by the challenges of limited resources?

The most recent government report indicates that students with disabilities represent about eleven percent of students in postsecondary education,<sup>142</sup> an increase from nine percent in 2000. The report highlights that students with disabilities are represented at a slightly higher rate in two-year schools than four-year schools.<sup>143</sup> The range of disabilities has changed somewhat over time, with a proportional increase in students with mental, emotional, or psychiatric conditions (including depression), attention deficit disorder, and learning disabilities from 2000 to 2008 (with 10 percent of students with disabilities having learning disabilities)<sup>144</sup> and a decrease in students with orthopedic or mobility impairments and those with health impairments.

The GAO report notes some of the challenges for postsecondary institutions,<sup>145</sup> including the transition of students from K-12 (and the lack of preparation for the change). Other challenges include providing the range of services (many are resource intensive or require specialized knowledge) and providing staffing for these needs (such as for coaching students with autism in social skills). Institutions will be challenged to find the resources to provide the costly accommodations (such as sign language interpreters and having staffing to provide accommodated exams). Lack of

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140. 29 U.S.C. § 1185a and 42 U.S.C. § 300gg-5.

141. 42 U.S.C. § 300gg-5(a).

142. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 92, at 8.

143. *Id.* at 10.

144. *Id.* at 11.

145. *Id.* at 10, 20–25.

awareness of some faculty members about the legal requirements relating to students with disabilities presents another problem. The growing number of veterans with disabilities will require attention, as will students with intellectual disabilities (a population that is expected to increase).

There are already signals of the future legal issues. As more institutions experiment with distance learning and online coursework, it is quite possible that students will seek assistance from the Office for Civil Rights, the courts, or both in seeking accommodations or raising other issues of discrimination. Lawsuits involving providing course materials on Kindle and website access may illuminate the direction on these issues. The internet and access to technology is likely to receive increased attention.

Health care reform is likely to affect access to mental health and other mental health services that may have particular impact for students with disabilities. These may be of particular importance for returning Middle East veterans. Another health-care-related issue is the increasing concern about contagious and infectious diseases and how students with disabilities might raise unique concerns about how such situations are handled. If there is a flu outbreak on campus, might students with disabilities (such as HIV) request nonexposure to those with contagious diseases, or will students who have contagious and infectious diseases try to claim disability protection?

In the area of professional education and its relationship to licensing, it is difficult to predict whether there will be an increase or a decrease in litigation. While judicial precedent has provided increased guidance on some of these issues, the economy and the high stakes of a professional education may drive more individuals to pursue legal remedies when they seek accommodations on licensing exams or raise issues about character and fitness questions asking about mental health or substance abuse. It is possible that the licensing agencies themselves may take a new look at these issues and reconsider some of their policies and practices.

There have been a number of recent media stories about service and emotional-support animals in a variety of settings.<sup>146</sup> It is likely that more cases in various arenas, including higher education, will address these issues. This is an area where the Department of Education (as well as other agencies) could assist in providing regulatory guidance.<sup>147</sup>

As the GAO Report notes, many of the emerging challenges have significant economic impact. This might mean that some colleges and universities decide to raise the undue-burden issue, although the chance

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146. Kelly Field, *These Student Requests Are a Different Animal*, CHRON. OF HIGHER EDUC. (Wash., D.C.), Oct. 13, 2006, at A30, A31; Sara T. Scharf, *How Much Is That Doggie in the Classroom?*, CHRON. OF HIGHER EDUC. (Wash., D.C.), June 1, 2007, at B5 (discussing the increase in student demands for on-campus pets).

147. The Department of Justice had issued proposed regulations before the ADA Amendments Act, but these were withdrawn after the Obama Administration began.

that discretionary budgets could be opened to public scrutiny might deter some of them from trying this defense.

It is likely that litigation will clarify the impact of the ADA Amendments Act and the broader definition of disability that it now includes. Early cases in the employment setting<sup>148</sup> indicate that although the definition is broader, individuals do not necessarily win their cases.<sup>149</sup> The broader coverage, however, may mean that students with learning and related disabilities and some mental health conditions (such as depression) may at least be considered “disabled” and thus have the opportunity to prove their case on other grounds.

Moreover, as noted in the GAO report, the return of veterans with a variety of conditions ranging from mobility impairments to post traumatic stress disorder will present new challenges for colleges and universities.<sup>150</sup> The Post-9/11 Veterans Assistance Act of 2008<sup>151</sup> provides funding for tuition and fees, housing, and other assistance for returning veterans. This is likely to increase the number of individuals on campus returning from active service. Not only might the services they request be challenging, but there may be legal issues about documentation. Individuals returning from active service may not be able to get the traditionally required documentation quickly from the military to justify an accommodation, and institutions will need to determine whether they can adapt their policies to this new population.

Where could federal agencies provide guidance to institutions so that they know what is required to comply? And where might a coordinated effort within the Department of Education provide useful technical assistance? As noted previously, one area is with respect to assistance animals. In this area, it will be important for the various agencies to consider the balancing of factors in the range of settings. The risks and challenges are different when an animal is in a residence hall room, at a food court in the student center, at a football stadium, in a classroom or library, or in another venue. Thought should be given to these various settings.

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148. See e.g., *Winsley v. Cook County Dep’t of Pub. Health*, 563 F.3d 598 (7th Cir. 2009) (driving not major life activity); *Lewis v. Pennsylvania*, 609 F. Supp. 2d 409 (W.D. Pa. 2009) (applicant with diabetes not regarded as disabled); *Perez-Rosario v. Hambleton Group, Inc.*, 39 Nat’l Disability L. Rep. ¶ 42 (D.P.R. 2009) (tasks that are rarely or occasionally performed by most people not major life activities).

149. In one of the few decisions to discuss the retroactive application of the ADA, the court in *Jenkins v. National Board of Medical Examiners*, No. 08-5371, 2009 WL 331638 (6th Cir. Feb. 11, 2009), held that the ADA Amendments Act applies to petitions for prospective equitable relief pending at the time of the Act’s adoption.

150. For a discussion of this issue, see Paul D. Grossman, *Foreword with a Challenge: Leading Our Campus Away from the Perfect Storm*, 22 J. POSTSECONDARY ED. & DISABILITY (2009).

151. P.L. 110-252 (2008).



The issue of housing is in need of attention. The changes in types of housing and new construction and the different types of campus housing highlight the need for attention in this area.

The high-profile, large-scale violence and individual suicide and violence events on campus highlight the importance of providing guidance on what is a direct threat and also the importance of providing mental health services on campus and ensuring that students get the needed services. The stressors of an economic downturn will certainly make attention to these issues essential.

We are probably in an era where there will be little legislative activity (other than on health care), but substantial regulatory guidance, and continued litigation and OCR activity. It is difficult to predict the outcome of various issues in these arenas with much certainty, but what is clear is that there is a dramatically increased awareness of disability rights on campus today and that the issue is here to stay.

#### VIII. CONCLUSION

Students with disabilities in postsecondary education have come a long way in the past fifty years. From a time when there were virtually none of them, they now make up over eleven percent of the student body. Along the way, higher-education institutions have learned to define what is essential about their educational programs, they have developed offices to provide disability services on virtually every campus, and they have faced numerous complaints to OCR and in the courts.

Ideally, most college and university attorneys have guided the administrators and educators on their campuses to become proactive in addressing these issues, thus avoiding costly and time-consuming litigation and dispute resolution. Those institutions that have a positive and proactive attitude and approach are more likely to avoid confrontations in the first place and to fare best in litigation and other disputes that do arise.

Finally, the Obama administration has demonstrated a proactive approach to education policy and a positive attitude towards ensuring equal access for individuals with disabilities. This attitude should help colleges and universities to have the tools to provide what is legally expected for participation of students with disabilities in the future.

# STRANGERS AT THE GATE:

## ACADEMIC AUTONOMY, CIVIL RIGHTS, CIVIL LIBERTIES, AND UNFINISHED TASKS

JAMES F. SHEKLETON\*

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The National Association of College and University Attorneys (NACUA) was founded following a conference held between April 16 and April 19, 1960, some five generations after those days of April 12 and April 13, 1861, when the Battle of Fort Sumter opened the American Civil War. In both centuries, the sixth and seventh decades were times of tumult as the nation and its people struggled with the engrained political, economic, social, and moral accommodations that comprise the heritage of slavery.<sup>1</sup>

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1. The line from slavery to segregation was short, and it was evident early on. In antebellum times, some states had adopted Slave Codes that “restricted the movements of Negroes; they forbade them to own firearms; they punished the exercise by them of the functions of a minister of the Gospel; they excluded them from other occupations; and they made it ‘a highly penal offense for any person, white or colored, to teach slaves. . . .’” Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 12 (1955) (quoting Senator Lyman Trumbull of Illinois, CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (addressing the Civil Rights Act of 1866). Senator Trumbull explained that “[s]ince the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the

The sixth and seventh decades of the twentieth century were also a time of other powerful, compelling movements. Totalitarian governments had recently usurped control of Eastern Europe and China, and politicians in Washington and across the nation, in the name of countering Communist subversion of the United States government, implemented a series of administrative and legislative actions designed to root out subversive organizations and to oust persons belonging to or associated with such organizations from public employment or positions of public influence.<sup>2</sup> Hard-pressed civil libertarians challenged statute after statute, action after action, to safeguard freedoms of speech and association and to establish rights of due process.<sup>3</sup>

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existence of slavery, and before it was abolished.” *Id.* The legislation that replaced the Slave Codes came to be known as the Black Codes. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426 (1968) (“Congress which approved the 1866 statute wished to eradicate the recently enacted Black Codes—laws which had saddled Negroes with ‘onerous disabilities and burdens, and curtailed their rights . . . to such an extent that their freedom was of little value’”) (quoting *The Slaughterhouse Cases*, 83 U.S. 36, 70 (1873)).

The Black Codes were precursors to de jure segregation, the Jim Crow laws that were very much in force when the National Association of College and University Attorneys was founded. *See* JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW* 84 (2003). Black Codes and Jim Crow segregation laws “had the same purpose and effect and social meaning: keeping blacks down and depriving them of equal status.” Akhil Reed Amar, *Becoming Lawyers in the Shadow of Brown*, 40 *WASHBURN L.J.* 1, 8 (2000) (“The 1860s Black Codes . . . were formally asymmetric: they imposed disabilities on blacks but not whites. Jim Crow was formally symmetric—blacks could not go to school X, but whites were likewise barred from attending school Y.”). If anything, the Jim Crow segregation codes were more rigid and pervasive than had been the Black Codes. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 7–8 (Oxford 2001).

2. The Communist takeover of Eastern Europe after World War II, together with the Chinese Communist push against the Nationalist Government, and the discovery of a spy ring in Canada, prompted an increase in “anti-subversive activity in the Legislative and Executive departments of the U.S. Government.” *Internal Security – Earlier Moves to Control Subversion*, 33 *CONG. DIG.* 132 (1954). By 1956, forty-two states, Alaska and Hawaii had enacted statutes penalizing “the advocacy of violent overthrow of the federal or state governments.” *Pennsylvania v. Nelson*, 350 U.S. 497, 514 n.4 (1956) (Reed, J., dissenting) (citing *DIGEST OF THE PUBLIC RECORD OF COMMUNISM IN THE UNITED STATES* 266–306 (Fund for the Republic 1955)).

3. *Wieman v. Updegraff*, 344 U.S. 183, 190–91 (1952) (challenging an Oklahoma statute that required each state officer and employee, as a condition of his employment, to take a “loyalty oath,” stating, *inter alia*, that he is not, and has not been for the preceding five years, a member of any organization listed by the Attorney General of the United States as “communist front” or “subversive”); *Id.* at 195, 198 (Frankfurter, J., concurring) (The Fourteenth Amendment limits “the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association”). Frankfurter quotes the testimony of Robert M. Hutchins, Associate Director of the Ford Foundation before the House Select Committee to Investigate Tax-Exempt Foundations and Comparable Organizations:

Now, the limits on this freedom [of scholars the freedom to think and to express themselves] cannot be merely prejudice, because although our

This was a time of monumental causes. The twentieth century civil rights struggles aimed to engage the conscience of the nation and to move government finally to redress the persistent indignities of de jure segregation and socially accepted racial discrimination.<sup>4</sup> The civil

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prejudices might be perfectly satisfactory, the prejudices of our successors or of those who are in a position to bring pressure to bear on the institution, might be subversive in the real sense, subverting the American doctrine of free thought and free speech.

*Id.* at 198. See also *Shelton v. Tucker*, 364 U.S. 479, 485–86 (1960) (“to compel a teacher to disclose his every associational tie is to impair that teacher’s right of free association”); *Greene v. McElroy*, 360 U.S. 474, 508 (1959) (due process violated where administrative agency had no statutory authority to terminate a contractor without providing an opportunity for hearing or confrontation of adverse witnesses).

Opponents of the civil rights movement did not hesitate to use the fear of subversives as an instrument of obstruction. They embroiled the NAACP in investigations premised, nominally, on allegations that it was a subversive organization. See *Shelton*, 364 U.S. at 480, 484 n.2 (noting that while the district court upheld an Arkansas statute that required each teacher or professor in the state “to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years,” the court also “held constitutionally invalid an Arkansas statute making it unlawful for any member of the National Association for the Advancement of Colored People to be employed by the State of Arkansas or any of its subdivisions”); DAVID ANDREW HARMON, *BENEATH THE IMAGE OF THE CIVIL RIGHTS MOVEMENT AND RACE RELATIONS: ATLANTA, GEORGIA, 1946-1981* at 84 (1996) (Georgia Attorney General Eugene Cook charged that the NAACP was a subversive organization whose membership was predominantly “South-hating white people with long records of affinity for, affiliation with, and participation in Communist, Communist-front, fellow-traveling and subversive organizations, activities and causes.”); Walter F. Murphy, *The South Counterattacks: The Anti-NAACP Laws*, 12 WEST. POL. Q. 371, 379 (1959) (Mississippi state officials declared that NAACP was a subversive organization). Additionally, the NAACP was attacked, somewhat more subtly, on the suspicion that communists might have infiltrated it. See, e.g., *Gibson v. Fla. Legislative Comm.*, 372 U.S. 539 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961). Such allegations carried some weight during the Cold War, for as late as 1965, large majorities of white Americans, of all ages, sections, religions, educational levels, occupations, incomes, geographic location, and political affiliations, believed that Communists had at least some influence on civil rights demonstrations. Hazel Erskine, *The Polls: Demonstrations and Race Riots*, 31 PUB. OP. Q. 655, 664 (1967).

4. The open manifestation of racial prejudice was still commonplace when NACUA was founded:

Across the South, some half a century ago, men and women, mostly young and black, challenged Jim Crow and the laws and administrators who enforced it, filling the jails and enduring extraordinary violence, intimidation, and harassment. Children made their way through gauntlets of cursing, spitting, screaming white parents. Activists, seeking to change the way things were, found themselves beaten in the train and bus stations, in the streets and parks, in the jails and prisons; churches, homes, schools, and buses were bombed and burned to the ground; in the rural South, “nigger hunts,” murder, terrorism, racial cleansing, and economic coercion and exploitation took their toll in black lives.

Leon F. Litwack, “*Fight the Power!*” *The Legacy of the Civil Rights Movement*, 75 J. S. HIST. 3 (2009). Professor Jesse H. Choper illustrated the “pervasiveness of the

libertarians sought to safeguard freedoms of thought and advocacy that lay at the very foundations of American popular government.<sup>5</sup> The efforts of

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American system of apartheid” at mid-century thusly:

In May of 1951, the state of Texas did not allow interracial boxing matches.

Florida did not permit white and black students to use the same editions of some textbooks.

In Arkansas, white and black voters could not enter a polling place in the company of one another.

In Alabama, a white woman was forbidden to nurse a black man in a hospital.

North Carolina required racially separate washrooms in its factories. South Carolina required them in its cotton mills. Four states required them in their mines.

In six states, white and black prisoners could not be chained together.

In seven states, tuberculosis patients were separated by race.

In eight states, parks, playgrounds, bathing and fishing and boating facilities, amusement parks, racetracks, pool halls, circuses, theaters, and public halls were all segregated.

Ten states required separate waiting rooms for bus and train travelers.

Eleven states required Negro passengers to ride in the backs of buses and streetcars. Eleven states operated separate schools for the blind.

Fourteen states segregated railroad passengers on trips within their borders.

Fourteen states segregated mental patients.

And in May of 1951 seventeen states required the segregation of public schools, four other states permitted the practice if local communities wished it, and in the District of Columbia the custom had prevailed for nearly ninety years.

Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 25–26 (1984). Consider also, the remarks of President John F. Kennedy on June 11, 1963, the day that federalized Alabama National Guard troopers ordered Governor George Wallace to step aside and to allow two black students to register at the University of Alabama:

My fellow Americans, this is a problem which faces us all--in every city of the North as well as the South. Today there are Negroes unemployed, two or three times as many compared to whites, inadequate in education, moving into the large cities, unable to find work, young people particularly out of work without hope, denied equal rights, denied the opportunity to eat at a restaurant or lunch counter or go to a movie theater, denied the right to a decent education, denied almost today the right to attend a State university even though qualified. It seems to me that these are matters which concern us all, not merely Presidents or Congressmen or Governors, but every citizen of the United States.

This is one country. It has become one country because all of us and all the people who came here had an equal chance to develop their talents.

We cannot say to 10 percent of the population that you can't have that right; that your children cannot have the chance to develop whatever talents they have; that the only way that they are going to get their rights is to go into the streets and demonstrate. I think we owe them and we owe ourselves a better country than that.

John F. Kennedy, Radio and Television Report to the American People on Civil Rights, (June 11, 1963), transcript available at <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03CivilRights06111963.htm>.

5. Justice Hugo Black put it thusly:

civil rights activists and civil libertarians changed the law, and the culture changed as well.

Changes intended to free a people and to protect a free people diminished the autonomy of the university, made it more accountable to government officials for academic decisions than ever before, and subjected elements of its mission to the vagaries of jurisprudential fashion. The convergent efforts of civil rights activists and civil libertarians gave rise to a series of decisions, regulatory changes, and legislation that can fairly be said to have had the most profound effect on the practice of college and university law of any developments during the first fifty years of NACUA's existence. A brief article can never do justice to topics rooted as deeply in the history of the United States as the Constitution itself, the Bill of Rights, or the Alien and Sedition Acts. This article seeks instead to review how changes forced by civil rights and civil liberties

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History indicates that individual liberty is intermittently subjected to extraordinary perils. Even countries dedicated to government by the people are not free from such cyclical dangers. The first years of our Republic marked such a period. Enforcement of the Alien and Sedition Laws by zealous patriots who feared ideas made it highly dangerous for people to think, speak, or write critically about government, its agents, or its policies, either foreign or domestic. Our constitutional liberties survived the ordeal of this regrettable period because there were influential men and powerful organized groups bold enough to champion the undiluted right of individuals to publish and argue for their beliefs however unorthodox or loathsome. Today however, few individuals and organizations of power and influence argue that unpopular advocacy has this same wholly unqualified immunity from governmental interference. For this and other reasons the present period of fear seems more ominously dangerous to speech and press than was that of the Alien and Sedition Laws. Suppressing laws and practices are the fashion. The Oklahoma oath statute is but one manifestation of a national network of laws aimed at coercing and controlling the minds of men. Test oaths are notorious tools of tyranny. When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people. Test oaths are made still more dangerous when combined with bills of attainder which like this Oklahoma statute impose pains and penalties for past lawful associations and utterances.

Wieman, 344 U.S. at 192–93 (Black, J., concurring); *See also* Justice Harlan writing for the majority:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly . . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due process clause of the Fourteenth amendment, which embraces freedom of speech . . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

*NAACP v. Alabama*, 357 U.S. 449, 460–61 (1958) (citations omitted).

activists drew attorneys from the remote periphery of college and university affairs—called upon occasionally to assist with routine business matters—inward to become essential participants in college and university governance and administration. Furthermore, it seeks to suggest why the controversies of the NACUA's first fifty years are likely to persist well into its second fifty years.

The article comprises four sections. Section I focuses upon three lines of cases as they stood when NACUA was formed, and suggests how civil rights, civil liberties and academic freedom fell into conflict. Section II outlines the ways in which civil rights and civil libertarian activism gave rise to pervasive regulation of internal college and university affairs. Section III reviews the circumstances that have politicized adjudication and increased the likelihood of continuing litigation challenging college and university activities. Section IV examines the race-related disparities that still bedevil disfavored minority communities and hamper efforts at self-improvement, and it predicts that the restrictive equal protection jurisprudence of the Burger, Rehnquist and Roberts Courts will be put aside because they constrain the ability of the nation to meet the demands presented by demographic changes that are already well advanced and that cannot be ignored.

#### I. CONSTITUTIONAL LITIGATION BRINGS GOVERNMENT REGULATION ONTO CAMPUS.

Constitutional litigation initiated by advocates of civil rights, civil liberties and academic freedom brought government regulation onto campus. The eventual sweep of the incipient changes in constitutional law was scarcely obvious when the attorneys who founded NACUA met in April, 1960, but the portents of change for higher education were already hard upon them. Three then-recent lines of cases had begun to converge: one proscribed racial discrimination in public university admissions;<sup>6</sup> another established student due process rights in disciplinary matters;<sup>7</sup> the third recognized that political investigations into what was studied and what taught interfered with “freedom in the community of American universities” and threatened to straightjacket the freedom of inquiry and teaching needed to deepen understanding of society, to inform social change and to protect the wellbeing of the nation.<sup>8</sup>

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6. *Infra*, note 10.

7. *Infra*, note 13.

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

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities

When the NACUA founders first gathered, the longstanding effort by the National Association for the Advancement of Colored People (NAACP) and the NAACP Legal Defense Fund had achieved significant jurisprudential progress towards disassembling through litigation the equal protection doctrines that undergirded segregation.<sup>9</sup> *Brown v. Board of Education* had overruled *Plessy v. Ferguson* insofar as concerned public education.<sup>10</sup> *Brown* had already been applied to secure court orders

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would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

*Id.*

9. Vance Knapp and Bonnie Kae Grover, *The Corporate Law Firm—Can It Achieve Diversity?*, 13 NAT'L BLACK L.J. 298, 300 (1994). “[A]t the request of the NAACP Legal Defense Fund, Charles Houston, Vice-Chancellor of Howard [University], had devised a legal strategy centering around carefully chosen test cases. The strategy would challenge the ‘Separate but Equal’ system in two stages. The first stage would establish the disparity between a fully funded graduate program and a Jim Crow program. The second stage would build upon those precedents, along with empirical data, to persuade the United States Supreme Court to declare desegregation illegal.” *Id.* For cases that marked the success of the first stage, see, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents*, 339 U.S. 637, 641–42 (1950); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948); *Mo. ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). For cases that marked the success of the second stage, see *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (*Brown I*) and *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955) (*Brown II*). See also Murphy, *supra* note 3, at 373.

[T]he shrewd tactics of Marshall and his staff yielded phenomenal success.

Some of the more sophisticated voting and jury restrictions together with racially restrictive real estate covenants were struck down, and the second half of the ‘separate but equal’ formula was enforced to a far greater extent than ever before. Finally, legally sanctioned segregation itself fell before this attack, first in the public schools, later in public recreational facilities, and then in public transportation.

*Id.*

10. *Plessy v. Ferguson*, 163 U.S. 537 (1896), arose as a challenge to a Louisiana statute which provided that:

[A]ll railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: provided, that this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to.

*Id.* at 540 (citing 1890 La. Acts No. 111, p. 152, § 1). The plaintiff, Homer Plessy, had purchased a first class ticket and seated himself in a coach designated for whites, but was forcibly ejected from the carriage and arrested. *Id.* at 541–42. The Court addressed the Fourteenth Amendment question thusly:



directing public authorities to stand aside and to unblock college and university doors that had previously been barred by prejudice arrayed in the trappings of academic judgment.<sup>11</sup> All the same, real progress in dismantling segregation and undoing socially accepted discrimination remained meager.<sup>12</sup>

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[T]he case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

*Id.* at 550–51. In opening his dissent, the first Justice John Marshall Harlan characterized the statute as requiring “separate but equal accommodations for white and colored persons,” and the phrase “separate but equal” was born. *Id.* at 552 (Harlan, J., dissenting); *cf. Brown I*, 347 U.S. at 495 (overruling, insofar as concerns public education, the *Plessy* doctrine that equal protection requirements may be met by segregated facilities so long as the facilities provided to each race are equal) (holding that “[s]eparate educational facilities are inherently unequal”).

11. *See, e.g., Lucy v. Adams*, 134 F. Supp. 235, 239 (N.D. Ala. 1955) (enjoining the University of Alabama dean of admissions from “denying the plaintiffs and others similarly situated the right to enroll in the University of Alabama and pursue courses of study thereat, solely on account of their race and color”); *Tureaud v. Bd. of Sup’rs of La. State Univ. and Agric. and Mech. Coll.*, 116 F. Supp. 248, 251 (E.D. La. 1953) (enjoining the Board “from refusing on account of race or color to admit the plaintiff, and any other Negro citizen of the state similarly qualified and situated, to the Junior Division of Louisiana State University for the purpose of pursuing the combined arts and sciences and law course offered by the University”).

12. Less than one percent of black school children attended integrated schools. “The decision was widely and openly flouted . . . Political and social forces (both local and national) did not support desegregation, providing no pressure for compliance. The Supreme Court, acting alone, lacked the power to implement *Brown*.” Gerald N. Rosenberg, *Tilting at Windmills: Brown II and the Hopeless Quest to Resolve Deep-Seated Social Conflict Through Litigation*, 24 *LAW & INEQ.* 31, 35 (2006). The record was little better in higher education. In the Fall 1965 term, black enrollments nationwide amounted to 4.6% of the total, while “other nonwhite,” comprising ethnic Asians, Latinos, and Indians, amounted to 1.1%. JAMES S. COLEMAN ET AL., *U.S. DEP’T OF HEALTH, EDUCATION AND WELFARE: EQUALITY OF EDUCATIONAL OPPORTUNITY* 370, tbl. 5.1.1, (1966), *available at* [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/33/42/82.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/33/42/82.pdf). Tellingly, except in the South, where black enrollments comprised 11.5% of total enrollment, and in the Southwest where combined minority enrollments reached 6%, more than 95% of the enrollment nationwide was white. *Id.* at 370, tbl. 5.1.2. The South educated 49% of all black students who pursued postsecondary education. *Id.* In New England, enrollment was 99% white; in the Rocky Mountain states, whites comprised 98% of the enrollment, and on the plains, 97%. *Id.* Enrollments for “other nonwhite minorities” exceeded 1% of the total in four regions: the Great Lakes (1.25%); the Southwest

Not long before the April 1960 meeting, twenty-nine black students enrolled at the Alabama State College for Negroes gathered, “according to a prearranged plan, entered as a group a publicly owned lunch grill located in the basement of the county courthouse in Montgomery, Alabama, and asked to be served.”<sup>13</sup> Over the next few days, ignoring directives against such actions, the students repeatedly engaged in public demonstrations, and some six weeks before the NACUA founders gathered, the leaders of the students were expelled.<sup>14</sup> The ensuing litigation confirmed that students enrolled at public colleges and universities enjoyed constitutional rights to procedural due process when threatened with expulsion.<sup>15</sup>

The example of student activism in furtherance of civil rights inspired thousands of other young people across the nation to advance their causes, however varied they might be, by banding together to confront authority, including university authorities.<sup>16</sup> The efforts of the civil rights activists melded with those of civil libertarians as student activists pressed claims for rights to procedural due process and free expression.<sup>17</sup>

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(1.52%); the Rocky Mountains (1.10%); and the Far West (2.78%). *Id.*

13. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 152 n.3 (5th Cir. 1961) *cert. denied*, 368 U.S. 930 (1961).

On the same date, John Patterson, as Governor of the State of Alabama and as chairman of the State Board of Education, conferred with Dr. Trenholm, a Negro educator and president of the Alabama State College, concerning this activity on the part of some of the students. Dr. Trenholm was advised by the Governor that the incident should be investigated, and that if he were in the president’s position he would consider expulsion and/or other appropriate disciplinary action.

*Id.*

14. *Id.* at 151–52 n.2.

15. *Id.* at 157–58; *See also Goss v. Lopez*, 419 U.S. 565, 576 n.8 (1975) (“Since the landmark decision of the Court of Appeals for the Fifth Circuit in [*Dixon*], the lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion.”).

16. Mario Savio, leading speaker of the University of California, Berkeley Free Speech Movement, put it thusly:

Probably the most meaningful opportunity for political involvement for students with any political awareness is in the civil rights movement. Indeed, there appears to be little else in American life today which can claim the allegiance of men. Therefore, the action of the administration, which seemed to the students to be directed at the civil rights movement, was felt as a form of emasculation, or attempted emasculation. The only part of the world which people could taste, that wasn’t as flat and stale as the middleclass wasteland from which most of the University people have come, that part of the world was being cleanly eliminated by one relatively hygienic administrative act. The student response to this “routine directive” was outraged protest.

MARIO SAVIO, EUGENE WALKER & RAYA DUNAYEVSKAYA, *THE FREE SPEECH MOVEMENT AND THE NEGRO REVOLUTION* 15 (1965).

17. *See, e.g., Grossner v. Trustees of Columbia.*, 287 F. Supp. 535 (S.D.N.Y.

Not quite three years prior to the meeting of the attorneys who created NACUA, the Supreme Court confronted another in a series of state statutes seeking to bar from public employment persons belonging to “subversive organizations.” *Sweezy v. New Hampshire* held substantial interest for college and university attorneys because it involved interrogation, by the New Hampshire Attorney General under New Hampshire’s Subversive Activities Act, of a faculty member about the content of a lecture delivered to a university class.<sup>18</sup>

Concerned that such an investigation “inevitably tends to check the ardor and fearlessness” with which scholars pursue their inquiries, Justice Felix Frankfurter elaborated a rationale to exclude “governmental intervention in the intellectual life of a university.”<sup>19</sup> To illustrate what was at stake in the litigation, Justice Frankfurter borrowed liberally from a statement crafted by South African university leaders opposed to government-imposed racial segregation of their institutions.<sup>20</sup> He focused on the observation that

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1968) (students motivated, *inter alia*, by opposition to university plans to demolish low income housing in a predominantly black neighborhood in order to construct a new gymnasium, which, though open to neighborhood residents, would provide separate entrances for residents and students); *Jones v. State Bd. of Educ. of Tenn.*, 279 F. Supp. 190 (M.D. Tenn. 1968) (students placing worms in food to protest food service, disrupting meetings, confronting in public university president and calling him names); *Goldberg v. Regents of the Univ. of Cal.*, 57 Cal. Rptr. 463 (Cal. Ct. App. 1967) (suit challenging suspension brought by students participating in University of California, Berkeley Free Speech Movement which was said to be fueled, in part, by student reactions to administrative limitations on demonstrations); *Cox v. Louisiana*, 379 U.S. 536, 545–46 (1965) (prosecution for disturbing the peace based upon leadership of “a group of young college students who wished ‘to protest segregation’ and discrimination against Negroes and the arrest of 23 fellow students. They assembled peaceably at the State Capitol building and marched to the courthouse where they sang, prayed and listened to a speech” urging participants to go to segregated restaurants, to order a meal and to remain seated for one hour if refused service); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961) (students suspended from Tennessee A & I University (now Texas A & M University at Kingsville) based upon allegations of their arrests in Mississippi while participating in the freedom rides in Mississippi to protest the segregation laws and practices of that state at interstate bus terminals and facilities entitled to due process hearing).

18. *Sweezy* 354 U.S. at 243–44 (1957). *See also* *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589 (1967) (interrogation of university professor and staff); *Shelton v. Tucker*, 364 U.S. 479 (1960) (university professor co-plaintiff in consolidated case); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (university professor and staff).

19. *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring).

20. CONFERENCE OF REPRESENTATIVES OF THE UNIVERSITY OF CAPE TOWN AND THE UNIVERSITY OF WITWATERSRAND, JOHANNESBURG, THE OPEN UNIVERSITIES IN SOUTH AFRICA (1957). The Conference of Representatives of the University of Cape Town and the University of the Witwatersrand resolved that:

- (i) It is opposed in principle to academic segregation on racial grounds;
- (ii) It believes that separate academic facilities for non-Europeans and Europeans could not be equal to those provided in an open university;
- (iii) It is convinced that the policy of academic non-segregation, which as far

colleges and universities should not be used to propound the views preferred by the state or nonacademic institutions or particular social classes, but should enjoy “the right to examine, question, modify or reject traditional ideas and beliefs,” and he quoted with approval the premise that colleges and universities must be free to determine for themselves “on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>21</sup>

The phrasing that Justice Frankfurter borrowed from the South Africans has often served to suggest a range of academic decisions that are entitled to degrees of judicial deference and that are to be accommodated, to the extent possible, when applying the First and Fourteenth Amendments to controversies between colleges and universities and their students or employees.<sup>22</sup>

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as possible the University of Cape Town has always followed, accords with the highest university ideals and has contributed to inter-racial understanding and harmony in South Africa.

*Id.* at 4 (quoting a December 12, 1956 Council of the University of Cape Town Resolution). See also Richard H. Hiers, *Institutional Academic Freedom—A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion?*, 30 J.C. & U.L. 531, 533–35 (2004) (discussing the context of the South African statement).

21. *Sweezy*, 354 U.S. at 262–63 (Frankfurter, J., concurring) (“It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”) (quoting *THE OPEN UNIVERSITIES IN SOUTH AFRICA*, at 10–12).

22. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (holding that a state university has a compelling interest in diversity for purposes of Fourteenth Amendment equal protection analysis) (“The freedom of a university to make its own judgments as to education includes the selection of its student body.” *Id.* (citing *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 312 (1978))). See also *Grutter*, 539 U.S. at 362–64 (Thomas, J., concurring in part and dissenting in part) (tying the idea of the judicial “idea of ‘educational autonomy’ grounded in the First Amendment” to Justice Frankfurter’s concurrence in *Sweezy*); *Bd. of Regents of the Univ. of Wis. v. Southworth*, 529 U.S. 217, 238–39 (2000) (Souter, J., concurring in judgment) (noting that Justice Frankfurter’s views in *Sweezy* were neither adopted nor rejected by the majority of the Court in that case) (“While we have spoken in terms of a wide protection for the academic freedom and autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching . . . we have never held that universities lie entirely beyond the reach of students’ First Amendment rights.”); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (assuming, *arguendo*, a Fourteenth Amendment substantive due process right) (citing, *inter alia*, the majority and concurring opinions in *Sweezy* for the principle that “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”); *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (stipulating that the Court did not question “the right of the University to make academic judgments as to how best to allocate scarce resources or ‘to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study’”); *but see Univ. of*

The three lines of authority that were newly emergent when the NACUA founders gathered in April of 1960 revealed a profound, ineluctable, and ironic conflict. The ideal of autonomy of colleges and universities from government action asserted by South African academics to oppose segregation had to be modified in order to end segregation at colleges and universities in the United States. In order to extirpate invidious discrimination from the American college and university, and in order to curtail personnel or student discipline decisions motivated by considerations of political convenience rather than academic judgment,<sup>23</sup> civil rights activists and civil libertarians had to break down in degrees the very autonomy that the courts were erecting to protect the American college and university from the chilling effects of Cold War anti-subversive legislation.<sup>24</sup>

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Penn. v. EEOC, 493 U.S. 182, 198 (1990) (characterizing *Sweezy* as involving content-based government regulations and noting that the subpoena of tenure files at issue in that litigation did not involve “governmental attempts to influence the content of academic speech through the selection of faculty or by other means” and that the release of the files to EEOC investigators was neither “intended to” nor would “in fact direct the content of university discourse toward or away from particular subjects or points of view.”).

23. The court records for *Dixon* establish political interference with academic decision-making with respect to the discipline of student civil rights activists. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 152 n.3 (5th Cir. 1961). By the mid-fifties, faculty members believed that political considerations were affecting administrative action. A report published in 1956 provides a measure of insight into the expectations of faculty members. *Notes on Research and Teaching: The Climate of Opinion and the State of Academic Freedom*, 21 AM. SOC. REV. 353 (1956). Most of the 125 participants in the poll of sociologists served at major private metropolitan universities. Although few had direct knowledge of incidences in which faculty member contracts were ended or not renewed because of their associations or activism, and although few believed that their own institutions would do such things, substantial majorities believed that faculty members contracts were not renewed because the individuals had refused to testify before investigating committees, had been identified as Communists or former communists or were identified as either too liberal or conservative by their administrations. *Id.* at 355. Nearly 29% of the respondents claimed to have direct knowledge that colleagues had been “spoken to” regarding their views or involvement in controversial issues, and 28% claimed direct knowledge that their institution discouraged invitation of liberal speakers. *Id.* at 356, tbl.5. Whether or not the participants in the poll had good information, the fact that the poll was undertaken and its results published in a leading academic journal reveals the concerns of the authors, as well as the editors’ judgment that the piece would hold the attention of their readership.

24. The Court’s concerns with anti-subversive legislation were not limited to the suppression of First Amendment freedoms for educators or for its application to universities or schools. *See, e.g.*, *Greene v. McElroy*, 360 U.S. 474, 508 (1959); *Kent v. Dulles*, 357 U.S. 116 (1958) (denial of passport based upon alleged Communist beliefs and associations not authorized under statute and implicated constitutional liberty interest in freedom to travel); *Speiser v. Randall*, 357 U.S. 513 (1958) (denial of state property tax exemption for failure to subscribe loyalty oaths); *Konigsberg v. State Bar*, 353 U.S. 252, 273–74 (1957) (remanding for reconsideration complaint that California State Bar arbitrarily denied admission for want of character) (“[T]he mere

As the Courts became more willing to set aside governmental actions that enforced or sustained segregation or that infringed fundamental constitutional rights, and as public opinion became more supportive,<sup>25</sup> the way became clear for litigation, statutes and regulations in pursuit of the most laudable objectives that tended, nevertheless, to delimit the bases and the procedures for college and university decision making.

## II. ADVOCACY GIVES RISE TO PERVASIVE REGULATION

Advocacy gave rise to the pervasive regulation of college and university relations with personnel and students, and sometimes, even of academic matters. Civil rights activists and civil libertarians turned initially to the federal judiciary to declare and to implement constitutional rights in order to secure relief from state laws and practices that discriminated against blacks or other minorities or that infringed rights to free speech, free association, due process, or equal protection. As the political climate changed, they sought to move the federal executive and legislative branches into action to curtail private discrimination.

Their endeavors have been stunningly successful. They expanded the protections from prejudiced or arbitrary action to numerous groups and set the modern example for concerted action to change government policy and social attitudes.<sup>26</sup> They created an environment in which college and

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fact of Konigsberg's past membership in the Communist Party, if true, without anything more, is not an adequate basis for concluding that he is disloyal or a person of bad character. A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action.").

25. By the mid-sixties, public opinion polling suggested a broadening antipathy towards segregationist reaction to black civil rights activists, albeit with reservations about public protest and distaste for rioting. Erskine, *supra* note 3, at 657–62. By the late-sixties, the public had become more tolerant of peaceful dissent. Hazel Erskine, *The Polls: Freedom of Speech*, 34 PUB. OP. Q. 483, 491, 494 (1970).

26. The protean example set by the NAACP and the NAACP Legal Defense Fund in coordinating selective litigation, organization, fundraising and political activism in order to force social change has been emulated often by other movements in the United States and other nations. See Helen Hershkoff, *Public Law Litigation: Lessons and Questions*, 10 HUM. RIGHTS REV. 157, 162 (2009) (noting that advocacy groups often model themselves on the NAACP). "[P]ublic law litigation in the USA through its professional and grassroots organization has constituted a political practice that generates resources, allies, and public sympathy." *Id.* See also Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2028 (2008) ("The success of these organizations is apparent on multiple levels. They have grown substantially in size, scale, and diversity. Their influence has been critical in protecting fundamental rights, establishing legal principles, developing social policy, and raising public awareness.").

Nor is the use of litigation to effect social change solely a liberal practice. See Hershkoff, *supra*, at 163; Anthony Paik et al., *Lawyers of the Right: Networks and Organization*, 32 LAW & SOC. INQUIRY 883, 884 (2007) ("Conservative lawyers have created scores of organizations devoted to their causes, but relatively little scholarly

university dealings with students and staff implicated legally enforceable rights at many turns, some arising from the Constitution, others from statute or regulation, and sometimes in matters that bore directly upon the exercise of academic judgment.

Decisions arising from the civil rights movement or from the efforts of civil libertarians established the principle that the power of government should not be used to enforce private discrimination,<sup>27</sup> transformed equal

attention has focused on the entrepreneurs who built these organizations or on the particular contributions of lawyers.”); John C. Calmore, “*Chasing the Wind*”: Pursuing Social Justice, Overcoming Legal Miseducation, and Engaging in Professional Re-Socialization, 37 Loy. L.A. L. Rev. 1167, 1169 (2004) (“[C]onservative and reactionary advocates have effectively rearticulated and redeployed the term ‘public interest.’ These advocates now oppose many of the causes that the earlier public interest lawyers sought to advance.”) (citation omitted); John P. Heinz et al., *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 LAW & SOC’Y REV. 5, 6 (2003) (“Scholars have produced extensive research on lawyers who serve causes associated with America’s political left, but much less empirical work has focused on the characteristics of lawyers who serve conservative causes . . .”).

Public interest litigation provides an effective means to force consideration “whether or how a government policy or program shall be carried out.” Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1295 (1976). In particular, recourse to the courts empowers persons who cannot otherwise influence institutions to force them to reform practices that activist organizations find objectionable. Charles F. Sabel & William Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1056 (2004); Andrew P. Morriss, *Litigating To Regulate: Massachusetts v. Environmental Protection Agency*, 2007 CATO SUP. CT. REV. 193, 193–94 (2007) (noting “a broader trend toward regulation through litigation. A wide range of interest groups, including state politicians, private interest groups, and federal regulators, is increasingly using the courts as a vehicle to impose regulatory measures the interest groups cannot obtain from legislatures and agencies.”). It should be noted that this form of activism has a history as long as the nation’s history. De Tocqueville observed over one hundred and seventy years ago that:

Armed with the power of declaring the laws to be unconstitutional, the American magistrate perpetually interferes in political affairs. He cannot force the people to make laws, but at least he can oblige them not to disobey their own enactments and not to be inconsistent with themselves . . . . Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate; hence all parties are obliged to borrow the ideas, and even the language, usual in judicial proceedings in their daily controversies.

ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA, bk. xvi, pt. 1, 233–34 (H.C. Mansfield ed., Barnes & Noble 2003) (1862).

27. See e.g., *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 151–52 (1970) (“Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race or the race of his companions, or in any way act to compel or encourage racial segregation.”); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724–26 (1961) (municipal authority violated the Equal Protection Clause by financing with municipal support and operating as a public facility a parking structure one of whose tenants operated a segregated restaurant and held under a lease that required compliance with state and local law but that did not require equal access to the restaurant).

protection jurisprudence,<sup>28</sup> enjoined discriminatory denial of college and university admission,<sup>29</sup> applied equal protection analysis to the missions of single sex colleges and universities,<sup>30</sup> expanded the reach of the due

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By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so “purely private” as to fall without the scope of the Fourteenth amendment.

*Id.* at 725; *Barrows v. Jackson*, 346 U.S. 249, 258 (1953) (holding that any attempt to enforce a restrictive covenant against a signer who declined to incorporate the covenant in a subsequent instrument of transfer would involve the state action violating the Equal Protection Clause); *Shelley v. Kraemer*, 334 U.S. 1, 13, 20 (1948) (holding that while voluntary compliance with a racial restrictive covenant presents no action by the state that might violate the Fourteenth Amendment, any attempt to enforce the covenant against willing buyers and sellers through the courts constitutes state action and violates the Amendment).

28. *Brown v. Bd. of Educ.* 347 U.S. 483, 495 (1954) (*Brown I*) (holding that, insofar as concerns public education, the *Plessy* doctrine that equal protection requirements may be met by segregated facilities so long as the facilities provided to each race are equal violated the Fourteenth Amendment).

29. *See, e.g., Meredith v. Fair*, 306 F.2d 374 (5th Cir. 1962), *cert. denied*, 371 U.S. 828 (1962), *enforced*, 313 F.2d 532 (5th Cir. 1962) (vacating two state court decrees barring the University of Mississippi from admitting a black student and enjoining his admission by the university); *Kirstein v. Rector & Visitors of Univ. of Va.*, 309 F. Supp. 184 (E.D. Va. 1970) (the Commonwealth of Virginia may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the state) The Equal Protection Clause “prohibit[s] prejudicial disparities before the law. This means prejudicial disparities for all citizens—including women.” *Id.* (quoting *White v. Crook*, 251 F. Supp. 401, 408 (M.D. Ala. 1966) (holding that women may not be denied the right to jury service)); *Holmes v. Danner*, 191 F. Supp. 394, 410 (M.D. Ga. 1961) (enjoining the University of Georgia from, *inter alia* “subjecting Negro applicants to requirements, prerequisites, interviews, delays and tests not required of white applicants for admission; and from making the attendance of Negroes at said University subject to terms and conditions not applicable to white persons; and from failing and refusing to advise Negro applicants promptly and fully regarding their applications, admission requirements and status as is done by the defendant and his associates in the case of white applicants; and from continuing to pursue the policy, practice, custom and usage of limiting admissions to said University to white persons”); *Lucy v. Adams*, 134 F. Supp. 235, 239 (N.D. Ala. 1955) (enjoining the University of Alabama dean of admissions from “denying the plaintiffs and others similarly situated the right to enroll in the University of Alabama and pursue courses of study thereat, solely on account of their race and color”); *Tureaud*, 116 F. Supp. 248 at 251 (issuing a temporary injunction enjoining the Board from refusing on account of “race and color” to admit the plaintiff, and any other Negro citizen of the state similarly qualified and situated, “to the Junior Division of Louisiana State University for the purpose of pursuing the combined arts and sciences and law course offered by the University”).

30. *United States v. Virginia*, 518 U.S. 515, 542–46 (1996) (holding that where the state failed to prove that admitting women to the Virginia Military Academy would compromise the institutional mission or its use of adversative pedagogical approaches); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 727–31 (1982) (holding that state may



process clause to protect students<sup>31</sup> and government employees,<sup>32</sup> affirmed the use of § 1983 to pursue damage remedies against public officials whose actions in office or in the course of employment infringed constitutionally protected rights,<sup>33</sup> confirmed the use of § 1981 to challenge private

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not justify maintenance of a single-sex program as compensation for prior discrimination against the disfavored sex or where there is no showing that exclusion of the opposite sex is essential for program effectiveness).

31. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158–59 (5th Cir. 1961) (holding that the students disciplined for participation in a lunch counter sit-in and civil rights demonstrations at state and municipal government buildings entitled to notice of specific charges, witnesses and their evidence, together with an opportunity to present their own statements, witnesses and evidence); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 547, 552–53 (S.D.N.Y. 1968) (holding that although receipt of public money does not convert private university discipline into government action, the challenged regulations, which provided, *inter alia*, that “[p]icketing or demonstrations may not be conducted within any University building,” and the challenged disciplinary action would have met constitutional standards; the regulations were neither vague nor unreasonable nor was the process of applying the rules fundamentally unfair); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174, 182 (M.D. Tenn. 1961) (holding that students suspended from Tennessee A & I University after an *ex parte* hearing, without notice to the plaintiffs based upon allegations of their arrest in Mississippi while participating in the freedom rides in Mississippi to protest the segregation laws and practices of that state at interstate bus terminals and facilities entitled to due process hearing); *Goldberg v. Regents of the Univ. of Cal.*, 57 Cal.Rptr. 463, 473–74 (Cal. Ct. App. 1967) (holding that the students participating in University of California, Berkeley Free Speech Movement protests were entitled to due process hearing).

32. The constitutional employment cases from the civil rights era have an attenuated relation to the civil rights movement. *But see Shelton v. Tucker*, 364 U.S. 479, 484 n.2 (1960) (noting that while the district court upheld an Arkansas statute that required each teacher or professor in the state “to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years,” district court also “held constitutionally invalid an Arkansas statute making it unlawful for any member of the National Association for the Advancement of Colored People to be employed by the State of Arkansas or any of its subdivisions.”). In the course of deciding cases involving McCarthy era requirements that public employees accept loyalty oaths and disclose membership, the Court found it “sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.” *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952). *See also Cafeteria Workers v. McElroy*, 367 U.S. 886, 897–98 (1961) (although, absent statute or regulation, government employment is at-will, an employee may not be dismissed on arbitrary or discriminatory grounds). Although the facts at bar in *Bd. of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), did not involve civil rights activists, these cases established the principle that termination of public employment might implicate due process requirements, not only where the action violated substantive due process guarantees against arbitrary and capricious state action or where it infringed upon protected speech or associational rights, but also where it deprived a public employee of liberty interests or state-created property interests.

33. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (“The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law, ‘whether that action be executive, legislative, or judicial.’”) (quoting

discrimination in admission or employment policies,<sup>34</sup> confirmed protections under the due process clause for advocates of social or political change,<sup>35</sup> reinforced protections under the free speech clause for advocates of social or political change,<sup>36</sup> and extended protections under the freedom

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*Ex parte Va.*, 100 U.S. 339, 346 (1879)); *Adickes*, 398 U.S. 144, 149–52 (1970) (reversing a grant of summary judgment).

Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in The Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes.

*Id.* at 152. *See also* *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (§ 1983 provides recourse against government actors for infringement of constitutional rights arising under color of state law) (“Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law”).

34. *Runyon v. McCrary*, 427 U.S. 160, 172 (1976) (admissions); *Johnson v. R.R. Express Agency*, 421 U.S. 454, 459–60 (1975) (employment); *Alfred H. Mayer Co.*, 392 U.S. at 441–42 (employment) (overruling *Hodges v. United States*, 203 U.S. 1 (1906)).

35. *Garner v. Louisiana*, 368 U.S. 157, 160, 163 (1961) (holding that the convictions were “so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment.”) In this case, Southern University students who sought to be served at lunch counters reserved for white patrons, although they “did and said nothing except that one of them stated that she would like a glass of iced tea,” were arrested [and convicted] for disturbing the peace “by sitting there.” *Id.*

36. *Healy v. James*, 408 U.S. 169, 181, 185 (1972) (holding that a college or university’s denial of official recognition, without justification, to college organizations burdens or abridges student associational rights) (a university could not ban its students from forming a chapter of Students for a Democratic Society based upon its disagreement with views espoused by parent organization); *Cox*, 379 U.S. 536, 545–46 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 229–33, 236 (1963) (holding that “The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.”) (One hundred and eighty-seven black high school and college students walked in small groups to the state capitol grounds, and there still in the same small groups, walked single file or two-by-two in an orderly way through the grounds, each group carrying placards bearing such messages as “I am proud to be a Negro” and “Down with segregation,” without obstructing traffic, although drawing a group of onlookers; when told to disperse, the students listened to a “religious harangue” by one of their leaders, and loudly sang “The Star Spangled Banner” and other patriotic and religious songs, while stomping their feet and clapping their hands; they were then arrested); *Dickey v. Ala. State Bd. of Educ.*, 273 F. Supp. 613, 616–18 (M.D. Ala. 1967) (state school officials cannot infringe on their students’ right of free and unrestricted expression as guaranteed by the Constitution of the United States where the exercise of such right does not materially and substantially interfere with requirements of appropriate discipline in the operation of the school). In *Dickey*, the institution established a rule to the effect that the student paper could not publish editorials that were critical of the state governor or legislature, and it expelled the editor of the student paper who circumvented the rule by publishing a blank space where the editorial would have been and secured publication of the editorial in a local newspaper

of association clause to organizations dedicated to advocacy of social or political change.<sup>37</sup>

The successes achieved through such litigation opened the way for constitutional challenges to a wide range of college and university practices. Individuals and interest groups litigated to establish student rights to use campus facilities for religious activities,<sup>38</sup> to engage in commercial activities on campus,<sup>39</sup> to carry firearms on campus,<sup>40</sup> to employ disparaging speech,<sup>41</sup> to receive student fee support for religious

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of general circulation—the editorial defended a student publication that contained, *inter alia*, excerpts from the speeches of Bettina Aptheker, a Communist who gained notoriety at the University of California, and Stokely Carmichael, president of the Student Non-Violent Coordinating Committee, and an advocate of violent revolution and black power.

37. *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 466 (1958) (a state may not require advocacy organization to disclose the identities of its members or contributors); *La. ex rel. Gremillion*, 366 U.S. 293, 296 (1961) (disclosure of organizational membership lists infringes associational rights where there is a likelihood that disclosure will result in reprisals against and hostility to the members); *NAACP v. Button*, 371 U.S. 415, 438 (1963) (a state may not, in the guise of regulating the legal profession, interfere with “the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights”).

38. *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (“Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulations of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards.”).

39. *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 472, 475 (1989) (upholding a prohibition of student sponsored parties at which an outside merchant sought to sell china, crystal and silverware to university students in view of the substantial government interests in the university setting in “promoting an educational rather than commercial atmosphere on [campus], promoting safety and security, preventing commercial exploitation of students, and preserving residential tranquility.”).

40. *Swait v. Univ. of Neb. at Omaha*, No. 8:08CV404, 2008 WL 5083245, at \*2–\*3 (D. Neb. Nov. 25, 2008) (holding that because states may prohibit carrying a concealed weapon, the bald claim that a student was wrongly disciplined, in part, because he carried a concealed weapon does not, without more, establish a Second Amendment violation) (citing *District of Columbia v. Heller*, 128 S. Ct. 2783, 2816–17 (2008) (prohibition of carrying of firearms in sensitive places such as schools exemplify presumptively valid regulatory measures)).

41. *Stanley v. Magrath*, 719 F.2d 279 (8th Cir. 1983) (holding that the university violated students’ First Amendment rights to free expression where it cut student newspaper’s funding because it disapproved of the “Humor Issue” of the *Minnesota Daily*, styled in the format of sensationalist newspapers, containing articles, advertisements, and cartoons satirizing Christ, the Roman Catholic Church, evangelical religion, public figures, numerous social, political, ethnic groups, social customs, popular trends, and liberal ideas, using frequent scatological language and explicit and implicit references to sexual acts, and eliciting numerous letters deploring the content of the “Humor Issue” from church leaders, members of churches, interested citizens, students, and legislators, who in many cases were responding to the complaints of constituents); *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993

speech,<sup>42</sup> to be relieved of the obligation to pay fees that benefitted organizations whose activities some students found to be objectionable,<sup>43</sup> to be free from faculty oversight of adherence to established academic standards,<sup>44</sup> to obtain state-funded scholarship support for enrollment at religious institutions,<sup>45</sup> and to set aside state constitutional restrictions on state funding for scholarships at religious institutions.<sup>46</sup> Faculty members sought to protect themselves from institutional oversight of classroom speech that students found harassing,<sup>47</sup> from college and university control over grading,<sup>48</sup> and from state control over use of computer technology.<sup>49</sup>

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F.2d 386, 392–93 (4th Cir. 1993) (holding that, given the First Amendment limitations on regulation of expressive content and requirements of viewpoint neutrality, university’s interest in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education did not justify imposition of discipline based upon its hostility towards the content of a fraternity fundraiser denominated as an “ugly woman contest” with “racist and sexist” overtones).

42. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (holding that a university practice of withholding eligibility for student fee funding from a student newspaper because of the paper’s religious content violated the First Amendment requirement that the program be administered in a viewpoint neutral fashion).

43. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 231–34 (2000) (holding that a university may require objecting students to pay general activity fees, provided that it employs viewpoint neutral mechanisms in the allocation of funding support).

44. *Hosty v. Carter*, 412 F.3d 731, 737–38 (7th Cir. 2005), *cert. denied*, 546 U.S. 1169 (2005) (if a student board acts as publisher of student paper operated by the university as a non-public forum underwritten at public expense, a university may not censor it); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1286 (10th Cir. 2004) (university may require acting student to speak lines in a play even though she regarded the expression as conflicting with tenets of her religious faith); *Brown v. Li*, 308 F.3d 939, 952 (9th Cir. 2002) (a university may require a student to complete an assignment according to reasonable standards governing “how to research within an academic specialty and how to present his results to other scholars in his field”).

45. *Witters v. Wash. Dept. of Servs. for Blind*, 474 U.S. 481, 487–88 (1986) (aid to student enrolled in a sectarian college provided through a state program extending vocational assistance to the visually handicapped was not “state action sponsoring or subsidizing religion.”) (emphasis in original).

46. *Locke v. Davey*, 540 U.S. 712, 721 n.3 (2004) (state funded scholarship program is not a forum).

47. *Hardy v. Jefferson Comm. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) (sexist and racially vulgar speech in class on social deconstructivism and language, which explored the social and political impact of certain words, germane and protected); *Silva v. Univ. of N.H.*, 888 F. Supp. 293, 313–17 (D. N.H. 1994) (writing instructor’s classroom use of sexual metaphors to explain principles of writing was protected expression; instructor was wrongfully disciplined under subjective standards employed in university’s sexual harassment policy).

48. *Keen v. Penson*, 970 F.2d 252, 253, 258 (7th Cir. 1992) (faculty member properly disciplined for withholding grade from student until the student apologized for remarks she made about course testing, then failing the student and sending her demeaning and insulting letters — even assuming a professorial right of expression, such a right must be balanced “against the University’s interest in ensuring that its

College and university staff members sought to require that spousal benefits be provided to same sex domestic partners.<sup>50</sup> Such precedents represent only a sampling of the causes that have been brought to secure government assistance through the courts to reverse college and university actions or policy.

The executive power was brought to bear on racial discrimination in federal employment and by federal contractors. Executive orders fixed policies that federal employment should be nondiscriminatory;<sup>51</sup> that federal agencies should undertake affirmative action to increase minority access to federal openings;<sup>52</sup> and that federal contractors and subcontractors should accept obligations in their own employment practices both to eschew discrimination and to undertake affirmative action.<sup>53</sup> In due course, executive orders provided for the systematic

students receive a fair grade and are not subject to demeaning, insulting, and inappropriate comments”); *Parate v. Isibor*, 868 F.2d 821, 828–30 (6th Cir. 1989) (a university professor has a First Amendment right to assign grades and evaluate students as determined by his or her independent professional judgment) (“the individual professor may not be compelled, by university officials, to change a grade that the professor previously assigned to her student.”).

49. *Urofsky v. Gilmore*, 216 F.3d 401, 404–05 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) (challenging Virginia statute that limited use of state computer equipment to view sexually explicit materials unless the use was duly authorized for bona fide research projects or other undertakings).

50. *See, e.g., Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 451–52 (concluding that the fact that a university benefits policy allowed “unmarried opposite-sex couples” to sign an affidavit that they were “married” for purposes of receiving benefits defeated the university’s claim that benefits were based on marital status because “marital status” depends on compliance with legal rules, not an affidavit).

51. Exec. Order No. 10590, 20 Fed. Reg. 409 (Jan. 18, 1955) (“[excluding and prohibiting] discrimination against any employee or applicant for employment in the Federal Government because of race, color, religion, or national origin”); Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 6, 1961) (reaffirming the substance of Executive Order 10590) (compliance overseen by a presidential Committee on Equal Employment Opportunity); Exec. Order No. 11246, 30 Fed. Reg. 12319, § 101 (Sept. 24, 1965) (“It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin. . .”).

52. Exec. Order No. 10925, 26 Fed. Reg. 1977, § 201 (Mar. 6, 1961) (initiating a review “to consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination within the executive branch of the Government”); Exec. Order No. 11246, 30 Fed. Reg. 12319, § 101 (Sept. 24, 1965) (“It is the policy of the Government of the United States . . . to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice.”).

53. Exec. Order No. 10925, 26 Fed. Reg. 1977, § 310 (Mar. 6, 1961) (obligating federal contractors and subcontractors to agree to “not discriminate against any employee or applicant for employment because of race, creed, color, or national origin” and to take “affirmative action to ensure that applicants are employed, and that

administration of such nondiscrimination and affirmative action policies through well-established federal agencies.<sup>54</sup>

The federal legislative power was the last to be brought into play. In the years between Reconstruction<sup>55</sup> and 1960, states, exercising police powers, took the lead in banning employment discrimination based on race, creed, and color.<sup>56</sup> Later the national government, employing variously its power to enforce the Fourteenth Amendment, its power under the Commerce Clause, and its Spending Power, adopted statutory requirements that extended to state and local government and to private business prohibitions against discrimination in employment<sup>57</sup> and program access<sup>58</sup> on the basis

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employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.”); Exec. Order No. 11114, 28 Fed. Reg. 6485 (June 25, 1963) (extending 10925 to “all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the Credit of the Federal Government pursuant to such grant, contract, loan, insurance or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance or guarantee”); Exec. Order No. 11246, 30 Fed. Reg. 12319, § 202 (Sept. 24, 1965) (continuing contractor and subcontractor nondiscrimination and affirmative action obligations).

54. Exec. Order No. 11246, 30 Fed. Reg. 12319, §§ 103–105, 201 (Sept. 24, 1965) (making the Civil Service Commission responsible for nondiscrimination and equal employment opportunity in federal employment, and charging the Department of Labor with oversight of contractor compliance with nondiscrimination and affirmative action requirements).

55. The Civil Rights Acts of 1866 and 1871 gave rise to 42 U.S.C. §§ 1981, 1982, 1983 and 1985, although these statutes were little used after *Plessy* until civil rights activists and civil libertarians invoked them for their purposes. See Comment, *Legal Sanctions to Enforce Desegregation in the Public Schools: The Contempt Power and the Civil Rights Acts*, 65 YALE L. J. 630 (1956) (“The contempt power of the federal courts and the Federal Civil Rights Acts appear to afford sanctions which can be used to help eliminate resistance to legally valid attempts to establish and maintain a nondiscriminatory school system.”).

56. The first such statute was New York’s Ives-Quinn Act, which was signed into law in 1945. It banned employment discrimination based on race, creed and color. HASIA R. DINER, *THE JEWS OF THE UNITED STATES, 1654 TO 2000* at 206 (2006). By 1960, California, Colorado, Connecticut, Delaware, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, Pennsylvania, Washington and Wisconsin had adopted some form of antidiscrimination legislation. HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972* at 21 (1990).

57. Title VII of the Civil Rights Act of 1964, grounded on the Interstate Commerce Clause and on § 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 458 (1976) (Brennan, J., concurring) (“Congressional authority to enact the provisions of Title VII at issue in this case is found in the Commerce Clause, Art. I, § 8, cl. 3, and in § 5 of the Fourteenth Amendment, two of the enumerated powers granted Congress in the Constitution.”); *Id.* at 453 n.9 (extension of Title VII of Civil

of race, creed or color, national origin, sex, religion,<sup>59</sup> age,<sup>60</sup> disability,<sup>61</sup> against employment discrimination based upon immigration status<sup>62</sup> or, for federal contractors, Vietnam Era Veteran<sup>63</sup> status. To enforce these new rights, Congress provided for an assemblage of administrative and judicial remedies and, by authorizing recovery of attorney fees, created substantial incentives for private enforcement through the courts.<sup>64</sup>

Practices intended to assure compliance with civil rights law and civil liberties law became ubiquitous features of college and university life, affecting both public and private institutions. The ever-present threat of constitutional litigation challenging governance decisions or administrative practices obligated public colleges and universities to secure advice about complex, nuanced constitutional problems that rarely arise in private sector legal practice. Private institutions often came within the ambit of

Rights Act of 1964 to States was pursuant to Congress' § 5 power).

58. Title VI of the Civil Rights Act of 1964, grounded on the Spending Clause. *See Guardians Assn. v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 598–99 (1983). Title IX of the Education Amendments of 1972 was also grounded on the Spending Clause. *See Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60, 64 (1992).

59. Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2 (2006) (grounded on § 5 of the Fourteenth Amendment when state action is involved). In the absence of state action, the Commerce Clause serves to provide that basis for action against private parties. *See Katzenbach v. McClung*, 379 U.S. 294 (1964) (providing a broad definition of the commerce power to regulate businesses having any relation to interstate commerce).

60. Age Discrimination in Employment Act (ADEA) 29 U.S.C. § 623 (2006) (grounded on the Commerce Clause). *See EEOC v. Wyoming*, 460 U.S. 226, 243 (1983) (finding the ADEA to be a valid exercise of the Commerce Clause). *See also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that the ADEA is not a valid exercise of § 5 of the Fourteenth Amendment and is not sufficient to abrogate state immunity under the Eleventh Amendment).

61. Title I of the Americans with Disabilities Act, 42 U.S.C. § 12112 (2006) (grounded in the Commerce Clause). *See Bd. of Trustees for the Univ. of Ala. v. Garret*, 531 U.S. 356 (2001) (holding that Title I of the ADA does not appropriately abrogate state immunity through the Fourteenth Amendment).

62. Immigrations Reform and Control Act, 8 U.S.C. § 1101 (2006). *See Hoffman Plastics Compound v. NLRB*, 357 U.S. 93 (2002) (applying IRCA through its own interpretation of the Commerce Clause and rejecting the NLRB's interpretation).

63. Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. § 4212 (2006) (grounded in the Commerce Clause).

64. Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2006). *See Sean Farhang, The Political Development of Job Discrimination Litigation, 1963-1976*, UC BERKELEY: CENTER FOR THE STUDY OF LAW AND SOCIETY JURISPRUDENCE AND SOCIAL POLICY PROGRAM 11 (2008), available at <http://escholarship.org/uc/item/3pk6v8sk> ("Civil rights advocates insisted upon fee shifting (among other provisions) with the specific aim and hope of actually mobilizing private enforcers in significant numbers. That the volume and efficacy of Title VII litigation far exceeded anyone's expectations is a story of *underintended* consequences: the effects occurred in precisely the realm intended, but their magnitude was far greater than expected.") (emphasis in original).

legislation, such as Title VII of the Civil Rights Act of 1964, that was enacted under the Commerce Clause, but typically their dependency on federal aid brought them within the reach of statutes, such as Title VI of the Civil Rights Act of 1964 or § 504 of the Rehabilitation Act of 1973, that were enacted under the Spending Power.<sup>65</sup> Thus, in one way or another, the management of statutory civil rights compliance requirements became critical to virtually all colleges and universities, and, since Title VI has been held to incorporate constitutional equal protection standards,<sup>66</sup> all institutions, public or private, became conversant with some areas of federal constitutional law.

Compliance with civil rights statutes necessitated substantial, sustained investment of staff and financial resources in order to document observance of detailed regulatory requirements in matters as varied as the contents and posting of required notices or as the provision of player access to athletic trainers.<sup>67</sup> Compliance administration required attention to matters both of procedure and of substance. Colleges and universities needed to review periodically decision making processes to assure their consistency with procedures specified by regulations<sup>68</sup> and they needed to document that

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65. Over the period between 1997–98 to 2005–06, the federal contribution to the total annual revenue of private not-for-profit degree-granting institutions ranged from a low of 10.11% in 1999–2000 to a high 17.54% in 2001–02. NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 2008, tbl. 353, [http://nces.ed.gov/programs/digest/d08/tables/dt08\\_353.asp](http://nces.ed.gov/programs/digest/d08/tables/dt08_353.asp). Participating in federal student financial aid programs triggers the obligation to comply with legislation enacted under Spending Power. *Grove City Coll. v. Bell*, 465 U.S. 555, 565 (1984) (institutions participating in federal financial aid programs are subject to Title IX). Private universities, as well as public universities, may come within the sweep of Executive Order 11246 when they contract to furnish supplies or services to a federal agency or to allow the use of personal property, including leases. *See Partridge v. Reich*, 141 F.3d 920, 924–25 (9th Cir. 1998) (“The Grant Act instructs executive agencies to use procurement contracts whenever ‘the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government.’” 31 U.S.C. § 6303. Conversely, the Act requires executive agencies to use grants or cooperative agreements when ‘the principal purpose of the relationship is to transfer a thing of value . . . to carry out a public purpose . . . instead of acquiring . . . property or services for the direct benefit or use of the United States Government.’ 31 U.S.C. §§ 6304–6305.”).

66. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 284–87 (1978).

67. *See, e.g.*, 41 C.F.R. §§ 60-1.41, 60-1.42 (2009) (specifying contents for posters required by OFCCP); U.S. Equal Employment Opportunity Commission, EEOC Poster Request Form, <http://www1.eeoc.gov/employers/poster.cfm>; 34 C.F.R. § 106.41(c)(8) (2009) (“A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors . . . Provision of medical and training facilities and services”); VALERIE M. BONNETTE & LAMAR DANIEL, TITLE IX ATHLETICS INVESTIGATOR’S MANUAL 72 (1990).

68. Procedural regulations include those arising under FERPA, § 504 or the ADA. FERPA establishes detailed procedural notice requirements that are pre-requisites to



substantive decisions avoided proscribed standards and otherwise remained within the bounds of acceptable practice in order to secure the deference accorded to university decisions, even in academic matters.<sup>69</sup>

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disclosure of directory information. 34 C.F.R. § 99.37 (2009). OCR proscribes pre-admission inquiries into student disabilities, but allows post-admission “confidential inquiries of students about disabilities that may require accommodation,” although students are not required to answer. Letter from Stephanie Monroe, Assistant Secretary for Civil Rights, Office of Civil Rights, to Colleague, at 2–3 (Mar. 16, 2007), *available at* <http://www.ed.gov/about/offices/list/ocr/letters/colleague-20070316.pdf>. Regulations implementing the ADA also proscribe substantive eligibility standards for program eligibility that “screen out or tend to screen out an individual with a disability or any class of individuals with disabilities.” 28 C.F.R. §§ 35.131(b)(8) (public universities) or 36.301(a) (private universities).

69. Even quintessentially academic decisions relating to degree requirements may be subject to scrutiny under § 504 of the ADA, and alterations in degree requirements may be required unless doing so would constitute a fundamental alteration of the program. 34 C.F.R. § 104.44(a) (2009) (§ 504) (mandating such modifications to “academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap,” except where the “[a]cademic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section”); 28 C.F.R. § 35.130(b)(7) (2009) (ADA Title II) (mandating “reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity”); and 28 C.F.R. § 36.302(a) (2009) (ADA Title III) (mandating “reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford . . . services . . . to individuals with disabilities, unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the . . . services”). Courts have melded procedural and substantive considerations when trying to assess whether a university reasonably determined not to waive a program requirement, seeking evidence that the decision was reached through a deliberative process involving responsible parties that examined the challenged program requirement and considered possible alternatives. *See Wynne v. Tufts Univ. Sch. of Medicine*, 932 F.2d 19, 27–28 (1st Cir. 1991) (en banc) (the institution had an obligation to demonstrate “that its determination . . . was a reasoned, professional academic judgment, not a mere *ipse dixit*”) (such a demonstration requires “consideration of possible alternative . . . discussion of the unique qualities of” challenged requirements, a record indicating when the discussion took place and who participated in it); *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 82, 87–88 (D. Mass. 1998) (holding that where there was no dispute that a university considered whether foreign language degree requirements were fundamental to a liberal arts curriculum, the test is satisfied even if other experts might disagree with the university’s conclusion). Concerns to protect bona fide academic decision-making also arise in connection with constitutional claims. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225, (1985) (assuming that students have a substantive due process right to be free from arbitrary action, but declining to question a university academic decision “unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment”); *Bd. of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89–91 (1978) (declining to extend procedural due process requirements from disciplinary settings to govern academic decision-making, since academic decisions “requires an expert evaluation of

The increasing need for staff and resources to manage civil rights and civil liberties alone might justify the claim that the efforts of civil rights activists and civil libertarians have had the most profound effect on the practice of college and university law of any set of developments during the first fifty years of NACUA's existence. Still, a focus on such administrative matters would miss the true significance of these developments.

The changes in the college and university legal environment initiated by the early activists drew lawyers to the very core of the institution. They made indispensable the assistance of attorneys both to safeguard individual rights recognized by the courts or established under statute or rule and to protect a college or university's ability to make and to implement autonomous, sound academic decisions. The lawyer's work was not to intrude upon institution autonomy, but to help its decision-makers exercise their autonomy in ways that would withstand scrutiny by outside judges or regulators. The lawyer became an essential participant in college and university governance to assure that the decision-making would not run afoul of external constraints imposed by one or another of the organs or branches of government.

### III. POLITICAL REACTION

The political reaction to the successes of civil rights advocates and civil libertarians contributed to the purposeful politicization of the federal judiciary. Although civil rights and civil liberties litigants wielded claims of constitutional rights to force change upon an unwilling or timorous academy, the true focus of their efforts was elsewhere. Changes that affected the university represented only portions of broader political agendas that sought fundamental changes in American society. Ending segregation and protecting free expression were but two thrusts; other efforts that created equal or greater controversy included vindication of voting rights,<sup>70</sup> expansion of procedural protections against police or prosecutorial misconduct<sup>71</sup> and protection against the establishment of religion.<sup>72</sup>

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cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.”).

70. *Reynolds v. Sims*, 377 U.S. 533 (1964) (legislative districts must be based on population, not geography); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (racial gerrymandering).

71. *Miranda v. Arizona*, 384 U.S. 436 (1966) (right to remain silent and to obtain counsel); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to court-appointed counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusion of evidence obtained by unreasonable search); *Rogers v. Richmond*, 365 U.S. 534 (1961) (exclusion of coerced confession).

72. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (prayer in school);

As should be expected from such a sweeping agenda, the political initiatives that employed adjudication to advance change also gave rise to political counter-initiatives that drew the judiciary, and adjudication, deep into partisan politics.<sup>73</sup> The result has been a politically charged legal environment that places additional uncertainties and costs on efforts to address aspects of college and university missions that intersect with partisan politics. On the fiftieth anniversary of NACUA's founding, the end of these struggles does not appear to be in sight.

Already in 1964, Barry Goldwater made the Supreme Court a central issue in his presidential campaign.<sup>74</sup> Although Goldwater had argued against desegregation of the schools, his principal complaints were that the Court's decisions eroded the authority of state officials to address local problems and that the Court construed the Constitution to obtain social ends.<sup>75</sup> Criticizing strongly decisions that banned prayer in school, redefined protections for persons accused of criminal conduct, and ordered reapportionment of state and congressional legislative districts, Goldwater promised to do what he could to reverse decisions he found objectionable.<sup>76</sup>

Goldwater's presidential gambit did not succeed, but his challenge to the Court resonated. Ever since, the role of the federal judiciary in controlling the reach and bounds of state and federal legislation has been a central feature of American presidential and congressional politics.

In his 1968 campaign, Richard M. Nixon took up Goldwater's tactic. He combined an attack on crime and with an attack on the Court, and the

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Engle v. Vitale, 370 U.S. 421 (1962) (also discusses prayer in school).

73. *Brown* and *Sweezy* were decided during the tenure of Chief Justice Earl Warren. The Warren Court effected broad, pervasive changes in many areas of law and touched upon many ideological, religious and political sensibilities, and many proprietary and pecuniary interests. These included fundamental changes in criminal procedure (expanded use of exclusionary rules, right to counsel, right to trial by jury, line-ups, self-incrimination, cruel and unusual punishment, commitment of mentally ill, rights of juveniles, limitation on military courts), First Amendment jurisprudence involving freedoms of expression (defamation, obscenity) and association (legal services), the establishment of religion, voting rights (one person one vote, poll taxes, reapportionment, ballot access, residency restrictions), privacy rights (miscegenation, restrictions on contraceptives), and debtors' rights and expatriate's rights. See, e.g., generally, Choper, *supra* note 4, at 25. This was scarcely the first time in the twentieth century that the Supreme Court found itself squarely in the center of partisan politics. Robert A. Schapiro, *Must Joe Robinson Die?: Reflections on the 'Success' of Court Packing*, 16 CONST. COMMENT. 561(1999).

74. Walter F. Murphy and Joseph Tanenhaus, *Public Opinion and Supreme Court: The Goldwater Campaign*, 32 PUB. OP. Q. 31, 32 (1968).

75. *Id.* at 33 (noting his emphasis on law and order and his position that the Constitution neither requires states to maintain racially mixed schools nor permits federal involvement in education) (citing BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* 35 (1960) as authority for Goldwater's views on the Court's desegregation decisions).

76. *Id.*

gambit seemed to contribute to his victory.<sup>77</sup> Once in office, President Nixon concluded that there was something that the president could do to affect the course of judicial decision-making. He sought to use judicial selection as a policy-making device by seeking out judicial candidates who shared his views and who would be likely to propound them long after his term in office ended.<sup>78</sup> The insight appears to have been that:

[T]he role the judiciary will play in different historical eras depends as much on the type of men who become judges as it does on the constitutional rules which appear to set at least the outer limits of judicial action.<sup>79</sup>

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77. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 215 (2002).

78. Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 879 (2005). Goldman excerpts recommendations from a White House aide that President Nixon reviewed and forwarded to his attorney general:

Through his judicial appointments, a President has the opportunity to influence the course of national affairs for a quarter of a century after he leaves office . . . . In approaching the bench, it is necessary to remember that the decision as to who will make the decisions affects what decisions will be made . . . . [T]he President [should] establish precise guidelines as to the type of man he wishes to appoint—his professional competence, his political disposition, his understanding of the judicial function—and establish a White House review procedure to assure that each prospective nominee recommended by the Attorney General meets the guidelines.

*Id.* at n.44 (quoting Memorandum from Tom Charles Huston, White House Aide, to Richard M. Nixon, President, United States 2 (Mar. 25, 1969) (on file with the Nixon Presidential Materials Project of the National Archives & Records Administration, College Park, Maryland)); *See also* Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2183 n.44 (2006) (noting that although consideration of a prospective judge's ideology has a long history in the federal judicial appointment process, open consideration of ideology is a relatively recent origin); Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215 (1999)

The same-party appointment rate for U.S. presidents from 1869–1992 is 93.5% for the federal district courts and 92.2% for the federal circuit courts. Even President Carter, who set up an independent process for judicial nominations, had a same-party appointment rate of 85.4%. Such systematic behavior has at times resulted in large swings in the partisan make-up of the federal judiciary. Franklin Roosevelt's long tenure in office, for example, resulted in a dramatic change in the partisan make-up of federal courts. Only 22% of the district and circuit court judgeships were held by Democratic appointees when he came to office; when he left, nearly 70% of these seats were held by Democratic appointees. Moreover, the political effects of judicial selection survive even the repudiation of a party at the polls. There is a considerable lag before a new Administration can appoint a significant number of new judges. It took Eisenhower a full eight years to erase the majority margin of Democrats appointed by Roosevelt and Truman.

*Id.* at 218 (citations omitted).

79. Sheldon Goldman, *Unpicking Pickering in 2002: Some Thoughts on the Politics of Lower Federal Court Selection and Confirmation*, 36 U.C. DAVIS L. REV.

What President Nixon attempted, Ronald Reagan implemented, creating a centralized judicial nomination process with an expressly ideological objective.<sup>80</sup> Presidential efforts to perfect the use the judicial selection process as an instrument to shape public policy have recurred since that time.<sup>81</sup>

The inevitable result of this purposeful politicization of judicial appointments has been mounting concern that politicization may compromise the integrity of federal adjudication.<sup>82</sup> In many settings,

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695, 698 n.11 (2003) (quoting Memorandum, *supra* note 78).

80. David S. Law, *Appointing Federal Judges: The President, The Senate, And The Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 485–86 (2005) (noting that President Reagan established a high-level, centralized process to review the ideology of candidates); Goldman, *supra* note 79, at 700–01 (noting that Reagan White House Counsel Fred F. Fielding faulted a Circuit Court candidate for being “relatively moderate on civil rights issues” and overturning a statute requiring parental notification before an unmarried, minor child could obtain an abortion) (citing Judicial Selection Materials, Aug. 1984 [1 of 3] CF 514, Fielding Files, Ronald Reagan Library, Simi Valley, California)).

It has been argued that, the Huston memorandum notwithstanding, the Carter administration first interjected political consideration into the judicial selection process by expressly seeking to increase the number of women and minority judges on the federal bench. Elliot E. Slotnick, *Symposium: Federal Judicial Selection in the New Millennium*, 36 U.C. DAVIS L. REV. 587, 590–91 (2003) (instead of relying upon congressional recommendations, President Carter created special commission to nominate federal judges and charged each body reviewing candidates “to make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees” and to assure that candidates “possess[] and [have] demonstrated a commitment to equal justice under the law”).

81. Goldman, *supra* note 79, at 697–703. In 2004, both the Democratic and Republican parties made judicial selection standards express parts of their campaign platforms. *Id.* at 872–73.

Partisan concerns among senators who must vote to confirm nominees also factor largely in the politicization of the federal judiciary. “The Senate confirms 90 percent of Supreme Court nominees when it is controlled by the president’s party, but only 59 percent when the president’s party is in the minority.” Law, *supra* note 80, at 499. Moreover, senators use their role in judicial appointment processes for political and electoral purposes. Adam Burton, *Pay No Attention to the Men Behind the Curtain: The Supreme Court, Popular Culture, and the Counter-majoritarian Problem*, 73 UMKC L. REV. 53, 81 (2005).

82. Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL’Y 875, 884 (2008) (“One of the chief flaws of Justice Brennan-style non-originalism is that it takes hotly contested issues like abortion out of the democratic process in the fifty states, where compromise is possible, and puts them under the power of the Supreme Court, which cannot produce compromise solutions. The constitutionalization and nationalization of the abortion dispute in *Roe v. Wade* has embittered the confirmation process for all federal judges and has roiled our politics for more than three decades.”); Morriss, *supra* note 26, at 193 (complaining that a politicized majority of the Court assumed the roles of super-legislature and super-administrative agency quite at odds with the intent of the framers for a more limited judicial role); Nash, *supra* note 78, at 2206 (cautioning that the perception of judicial politicization may be a problem; that it may erode public confidence in the impartiality of the judiciary or that it may reflect an accurate perception of a social reality); Robert

federal judges tend to reflect the ideological preferences of the party that appointed them to office<sup>83</sup> or their own ideological proclivities.<sup>84</sup> As the

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J. Pushaw, Jr., *Partial-Birth Abortion And The Perils Of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 519, 529 (2008) ("if the Justices continue to apply their impressionistic and politicized constitutional common law, they cannot legitimately complain about the growing public perception of the Court as just another political organ").

Some critics worry about evidence that a politicized Supreme Court has contorted the growth of the law by favoring certain types of litigation and certain types of parties. Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1458–59 (2009) (noting that the Supreme Court has accepted 18 antitrust cases since 1992 and has decided them all in the defendant's favor and that "[a]lthough the Court on average grants certiorari to less than two percent of petitions, the U.S. Chamber of Commerce's backed-petitions between 2004 and 2007 were granted at a disproportionate rate of twenty-six percent"); Michael L. Rustad, *The Uncert-Worthiness of the Court's Unmaking of Punitive Damages*, 2 CHARLESTON L. REV. 459, 474–76 (2008) (noting that since 1994, the Court has given corporate defendants challenging state punitive damage awards an unbroken string of victories, while trenching on state tort reform and displacing litigation involving other critical matters involving criminal law, civil rights, and consumer law).

Concerns have also been voiced about the politicization of state courts. See, e.g., Emily Chow, *Health Courts: An Extreme Makeover of Medical Malpractice with Potentially Fatal Complications*, 7 YALE J. HEALTH POL'Y L. & ETHICS 387, 410 (2007) ("The ABA's Commission on the Twenty-First Century Judiciary found that recent state judicial election campaigns have been politicized due to the participation of 'interest groups that formed to promote a specific political issue.'") (citing AM. BAR ASS'N, COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 22 (2003)); Stucke, *supra*, at 1457 ("Business lobbyists, once focusing on legislation, are now more active in the selection of state supreme court judge.").

Other voices question whether the politicization of the federal appointment process may distort the outcome of the selection process by limiting the class of viable judicial candidates to persons who share a limited range of views. Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1474 (2008) (concluding that this tendency towards a more intellectually homogeneous bench works to the disadvantage of minority groups). But see Judge William H. Pryor Jr., *Not-So-Serious Threats to Judicial Independence*, 93 VA. L. REV. 1759, 1781 (2007) (arguing that the Framers considered the process for appointing judges a matter of accountability to the people and "those who are willing to endure the hardships of a controversial appointment may be more independent than others," as illustrated by the services of Justice Hugo Black, whose membership in the Ku Klux Klan and legal defense of a Klansman accused of killing a Catholic priest contributed to the controversy over his nomination).

83. Thomas J. Miles & Cass R. Sunstein, *The Real World Of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 767 (2008) (finding that based upon a review of published decisions reviewing administrative actions by the Environmental Protection and the National Labor Relations Board, judges appointed by Democrats are significantly more likely to uphold "liberal" administrative decisions and judges appointed by Republicans are significantly more likely to uphold "conservative" administrative decisions, with roughly equal frequency and the likelihood of ideological voting is greater still when judges sit on panels composed entirely of appointees from their own party). After studying 400 federal racial harassment cases between 1981 and 2003, researchers "found that the race of judges matters, as does their political affiliation. On the other hand, our findings also indicate that judges of all

history of constitutional adjudication during the twentieth century made clear, changes in the ideological dispositions that predominant on the Supreme Court may transform utterly the accepted understanding of the meaning of the Constitution and the reach of governmental power,<sup>85</sup> and

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racism are attentive to the merits of the case.” Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1156 (2009). Although the judges’ political association factors significantly in how they decide racial harassment cases, Professors Chew and Kelley conclude that “the judges’ race remains a stronger influence than the judges’ political affiliation, as suggested by the 20% difference in plaintiffs’ win rate between White Democratic judges and African American Democratic judges. Logistic regression analyses also confirm that both the judges’ political affiliation and the judges’ race are independently significant to case outcomes, and that the judge’s race has more of an effect. For instance, the modeling indicates that while having a Republican judge decreases the plaintiff’s chance of winning by an average of 0.5, appearing before an African American judge increases the plaintiff’s chance of winning by about three times.” *Id.* at 1158.

84. Goldman, *supra* note 79, at 873 (liberal judges tend to favor plaintiff civil rights, political liberties, or due process rights; conservative judges tend to support government claims that regulation of rights and liberties is in the greater public interest, and moderate judges fall in between) (citing JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 329–31, 422–24 (2002)).

85. At the dawn of the century, in *Lochner v. New York*, 198 U.S. 45 (1905), the Court saw economic regulation as “a question of which of two powers or rights shall prevail—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract,” and imposed stringent requirements—comparable to strict scrutiny standards—on legislation deemed to interfere “with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.” *Id.* at 57–58. The *Lochner* strictures were abandoned during the Depression, shortly after Franklin D. Roosevelt called for legislation to increase the number of justices on the court. Schapiro, *supra* note 73; Pushaw, *supra* note 82, at 521–23 (“constitutional law has been marked by abrupt shifts, not incremental doctrinal tinkering. For instance, in 1937, the Court suddenly abandoned a century-and-a-half of case law imposing limits on Congress and instead interpreted Article I as conferring virtually untrammelled legislative power. This turnaround reflected five Justices’ perception of sound governmental and economic policy during the Depression. President Roosevelt solidified this jurisprudence by appointing Justices based primarily on their political commitment to the New Deal, not on judicial experience or legal acumen. A generation later, the Warren Court dismantled most precedent concerning individual rights and reinterpreted the Constitution to implement ideas about liberty and equality that incorporated progressive social and moral views. Even the supposedly conservative Burger and Rehnquist Courts occasionally unleashed unprecedented thunderbolts, such as *Roe v. Wade*.”) and at 524–25 (contrasting *stare decisis* in common law and in constitutional construction driven by the ideological views of the justices, yielding “an idiosyncratic common law in which *stare decisis* is either invoked selectively (to defend a previous revolutionary case implementing some preferred policy that had no constitutional roots) or flatly rejected, prior decisions are freely modified, and legislatures have no input.”). See also Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 761 (2009) (elaborating a thesis that the “strong rights we know today — the rights we associate with strict scrutiny and compelling state interests — first emerged in the period from 1937 to 1943, as a

consequently the rules of constitutional construction that bind lower courts.<sup>86</sup> The purposeful politicization of federal judicial selection processes and the decades of judicial activism, particularly by deeply divided courts, have created an environment in which neither officials nor activists can be certain whether constitutional doctrines adopted at one point in time will be accepted by subsequent panels of the Supreme Court. The resulting uncertainty itself is likely to produce increased litigation over ranges of politically sensitive issues,<sup>87</sup> and, as the twentieth century record has shown, colleges and universities, public and private, are often enmeshed in politically sensitive activities, either of their own making or at

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response to Franklin Roosevelt's court-packing plan and the Court's attempt to rehabilitate itself and address the grave wrongs of fascism that were so evident in the period before World War II" by weakening its oversight of economic regulation, while strengthening its role in cases involving speech, religion, and race).

86. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'") (quoting *Rodrigues de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 649 (2004) (asserting that lower federal courts "must respect the decisions of their judicial superiors as controlling authority").

87. Douglas O. Linder, *Trends in Constitution-Based Litigation in the Federal Courts*, 63 UMKC L. REV. 41, 69–70 (1994) (uncertainty in the law seems to encourage litigation; as uncertainty as to litigation outcomes increases, so will the number of trials and the number of appeals will increase as uncertainty as to the outcomes of appeals increases; appeal rates also increased in circuit courts of appeal that were ideologically balanced, and where the random assignment of panel judges was most likely to determine the outcome; decisions that substantially extend constitutional protections often appear to have the predictable effect of encouraging lawsuits that make similar claims); *Grutter v. Bollinger*, 539 U.S. 306, 348 (2003) (Scalia, J., concurring) ("Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anticonstitutional holding that racial preferences in state educational institutions are OK, today's *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation."); Wendy Parker, *The Legal Cost of the "Split Double Header" of Gratz and Grutter*, 31 HASTINGS CONST. L.Q. 587, 587 n.4, 611 (2003) (citing authorities with like views) (Professor Parker disputes Justice Scalia's apprehensions, since she regards the University of Michigan Law School program upheld in *Grutter* as both confirming the legality of race sensitive admissions programs and providing a workable model for such programs); Daniel J. Schwartz, Note, *The Potential Effects of Nondeferential Review on Interest Group Incentives and Voter Turnout*, 77 N.Y.U. L. REV. 1845, 1869–73 (2002) (deferential treatment of legislation creates incentives for activists to pursue legislative or electoral agenda, while judicial activism creates incentives for interest group litigation); Abram Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 27 (1982) (reforms facilitating class actions "coincided almost exactly with the invention of 'public interest law' in the late 1960's and with the general surge of reformist zeal into the courts").



the instance of their students or faculties.<sup>88</sup> Thus, on the fiftieth anniversary of NACUA's founding, there is no reason to expect that the flow of litigation intended to shape college and university policies and practices will abate.<sup>89</sup>

#### IV. UNFINISHED TASKS

In the next half century, the nation will have to put aside views of equal protection that strangle equal opportunity. A half century after the great push for racial justice, racial disparity remains a stubborn fact in America. The Court has conceded that racial disparities present real and persistent problems.<sup>90</sup> In his *Bakke* opinion, Justice Lewis Powell declared that, "No

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88. See *supra* notes 8, 11, 13–19, 29–32, 34–37, 39–51 and accompanying text.

89. Activist groups from across the political spectrum, such as the People for the Ethical Treatment of Animals (PETA), the Foundation for Individual Rights in Education (FIRE), the Center for Individual Rights (CIR), the Student Press Law Center (SPLC) and Public Citizen actively promote their support of litigation and actively pursue cases involving universities. "PETA has built a powerful network of caring voices through public education, litigation, research and investigations, rescues, media campaigns, and grassroots activism." People for the Ethical Treatment of Animals, *The PETA Guide to Compassionate Living*, available at <http://www.peta2.com/COLLEGE/pdf/CompassionateLiving.pdf#xml=http://www.peta2.com/search/taxis/search/pdfhi.txt?query=litigation+division&pr=default&prox=page&roder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&rdepth=0&sufs=0&order=dd&cq=&id=4b4abb5e11> (last visited Mar. 28, 2010). "FIRE supports precedent-setting litigation in defense of the First Amendment as an integral part of our effort to end the scourge of unconstitutional speech codes on public campuses and to ensure truth-in-advertising and informed consent on private campuses." Foundation for Individual Rights in Education, FIRE's Programs, <http://www.thefire.org/about/programs/> (last visited Mar. 28, 2010). "The Center for Individual Rights (CIR) is a nonprofit public interest law firm dedicated to the defense of individual liberties against the increasingly aggressive and unchecked authority of federal and state governments." The Center for Individual Rights, CIR's Mission: Fighting for Individual Rights, [http://cir-usa.org/mission\\_new.html](http://cir-usa.org/mission_new.html) (last visited Mar. 28, 2010). "The Student Press Law Center is an advocate for student First Amendment rights, for freedom of online speech, and for open government on campus. The SPLC provides information, training and legal assistance at no charge to student journalists and the educators who work with them." Student Press Law Center, Student Press Law Center Vision and Missions Statements, <https://www.splc.org/mission.asp> (last visited Mar. 28, 2010). Public Citizen Litigation Group, founded in 1972, "specializes in cases involving regulation, consumer rights, access to the courts, open government, and the First Amendment, including internet free speech." Public Citizen, Litigation Group, <http://www.citizen.org/litigation> (last visited Mar. 28, 2010).

90. The phrase, "the Court," employed in this section of the article suggests a degree of consensus that does not truly exist on the Roberts Court as presently constituted. The views appear to be held in substantial degree by four justices and accepted as influential at least for purposes of framing analyses by a fifth. The fact that a plurality of justices, if not a majority, employ, albeit occasionally with caveats, the views ascribed to the Court, is the basis for treating it as the Court's analysis at the time that this article was submitted for publication.

The phrase is intended to capture views that are generally consistent with those embraced by the Chief Justice and Justices Scalia, Thomas and Alito in *Parents*

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Involved in *Cnty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). See generally *id.* at 720 (insofar as these involve conflation of racial classification with racial discrimination and subject to strict scrutiny) and 731–32 (“The sweep of the mandate claimed by the district is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action.”); see also *id.* at 751 (Thomas, J., concurring) (“The Constitution does not permit race-based government decisionmaking simply because a school district claims a remedial purpose and proceeds in good faith with arguably pure motives.”); *id.* at 755 (“Establishing a strong basis in evidence requires proper findings regarding the extent of the government unit’s past racial discrimination. The findings should define the scope of any injury and the necessary remedy, and must be more than inherently unmeasurable claims of past wrongs. Assertions of general societal discrimination are plainly insufficient.”) (citations and internal punctuation omitted); *id.* at 760 (“General claims that past school segregation affected such varied societal trends are ‘too amorphous a basis for imposing a racially classified remedy,’ because ‘[i]t is sheer speculation’ how decades-past segregation in the school system might have affected these trends. Consequently, school boards seeking to remedy those societal problems with race-based measures in schools today would have no way to gauge the proper scope of the remedy. Indeed, remedial measures geared toward such broad and unrelated societal ills have ‘no logical stopping point,’ and threaten to become ‘ageless in their reach into the past, and timeless in their ability to affect the future.’”) (citations and internal punctuation omitted).

Justice Kennedy’s views are more nuanced, but he shares substantial analytical points of departure with the Chief Justice and Justices Scalia, Thomas and Alito. He agrees that plans that “classify individuals by race and allocate benefits and burdens on that basis . . . are to be subjected to strict scrutiny.” *Id.* at 783 (Kennedy, J., concurring in part and dissenting in part). At the same time, Justice Kennedy emphasizes that the purpose for “searching judicial inquiry into the justification for such race-based measures” is to determine “what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.” *Id.* (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). Justice Kennedy also invokes the assertion that the Court “never has held that societal discrimination alone is sufficient to justify a racial classification,” and he turns anew to *Croson* for the explanation that to “accept [a] claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for ‘remedial relief’ for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.” *Id.* at 794–95 (quoting *Croson*, 488 U.S. at 505–06). Justice Kennedy adds that “[f]rom the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law. The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices.” *Id.* at 795.

Justices Stevens, Ginsburg and Breyer place the emphasis differently. Justice Stevens demurs from the view that all racial classifications must be analyzed under strict scrutiny and regards the contrary view as resting only on the “citation of a few recent opinions—none of which even approached unanimity.” *Id.* at 799–800 (Stevens, J., dissenting). Justice Stevens holds “the view that a decision to exclude a member of a minority because of his race is fundamentally different from a decision to include a member of a minority for that reason.” *Id.* at 800 n.3.

Justice Breyer rejects the view that the Court’s precedents entail that conclusion

one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups.”<sup>91</sup> In her *Grutter* concurrence, Justice Ruth Bader Ginsburg recognized that “[i]t is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.”<sup>92</sup> In her *Gratz* dissent, Justice Ginsburg stated more pointedly that:

In the wake of a system of racial caste only recently ended, large disparities endure. Unemployment, poverty, and access to health care vary disproportionately by race. Neighborhoods and schools remain racially divided. African-American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions. Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education. Equally credentialed job applicants receive different receptions depending on their race. Irrational prejudice is still encountered in real estate markets and consumer transactions. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice.<sup>93</sup>

No Justice has disputed either the history of discrimination to which Justice Powell alluded or Justice Ginsburg’s summary of the ongoing disparities that rive deeply American society.

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that “the test of ‘strict scrutiny’ means that all racial classifications — no matter whether they seek to include or exclude — must in practice be treated the same,” *Id.* at 832 (Breyer, J., dissenting), and maintains that “from local government the longstanding legal right to use race-conscious criteria for inclusive purposes in limited ways.” *Id.* at 834. Still, if only for purposes of argument, Justice Breyer does address questions involving the use of race to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply, whether race-conscious limits stigmatize or exclude, whether they exacerbate racial tensions and whether they impose burdens unfairly upon members of one race alone but instead seek benefits for members of all races alike.” *Id.* at 834–35.

Justice Ginsburg did not write separately in *Parents Involved*, but she previously rejected the view that the same strict scrutiny standard of review controls judicial inspection of all official race classifications. *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting) (strict scrutiny “would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.”) (citations and internal punctuation omitted).

Justice Sotomayor’s views as a member of the Court remain to be seen.

91. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 297 n.36 (1978) (Powell, J).

92. *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring).

93. *Gratz v. Bollinger*, 539 U.S. 244, 299–301 (2003) (Ginsburg, J., dissenting) (citations and internal punctuation omitted).

Despite such acknowledgement of inconvenient reality, the Court now tilts toward applications of constitutional principles that render government nearly impotent to mitigate real, pernicious, and persistent problems that keep disfavored minorities at the margins of the social, economic, and political life of the nation. Except insofar as necessary to “remedying the effects of past intentional discrimination”<sup>94</sup> or as one of several elements considered to achieve diversity in higher education,<sup>95</sup> Justices Antonin Scalia and Clarence Thomas appear quite prepared to ban all government use of racial classification, and Chief Justice John Roberts and Justice Samuel Alito are not far removed from that opinion.<sup>96</sup> Under this position,

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94. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 504 (1989) (“While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.”); *Parents Involved*, 551 U.S. at 720; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (“[This] Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.”).

95. *Parents Involved*, 551 U.S. at 722 (“[W]hat was upheld in *Grutter* was consideration of ‘a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.’”) (citation omitted).

96. Justice Clarence Thomas took the most extreme position, as expressed in his *Parents Involved* concurrence:

The dissent accuses me of ‘feel[ing] confident that, to end invidious discrimination, one must end *all* governmental use of race-conscious criteria’ and chastises me for not deferring to democratically elected majorities. . . . Regardless of what Justice Breyer’s goals might be, this Court does not sit to ‘create a society that includes all Americans’ or to solve the problems of ‘troubled inner city schooling.’ . . . We are not social engineers. The United States Constitution dictates that local governments cannot make decisions on the basis of race. Consequently, regardless of the perceived negative effects of racial imbalance, I will not defer to legislative majorities where the Constitution forbids it.”

*Parents Involved*, 551 U.S. at 766 n.14 (Thomas, J., concurring). The position that the Fourteenth Amendment “dictates that local governments cannot make decisions on the basis of race” closes the door quite firmly on all but a few programs. *Id.*

Justice Antonin Scalia predictably assumed a proximate position:

But if the Federal Government is prohibited from discriminating on the basis of race . . . then surely it is also prohibited from enacting laws mandating that third parties—*e.g.*, employers, whether private, State, or municipal—discriminate on the basis of race . . . . As the facts of these cases illustrate, Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.

*Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) (citations omitted). Racial decision-making here appears to be very nearly per se discriminatory, whether the product of federal or state policy.

The Parthian shot with which Chief Justice John Roberts closes his *Parents Involved* majority opinion places him at a short remove from Justices Thomas and

equal protection requires that decisions affecting individual citizens be based on non-racial factors. In effect, government cannot address race-related societal conditions head-on through programs that take into account the race of beneficiaries or participants, but must instead thrash about for proxy factors in hopes that proxy programs may also ameliorate adverse, race-related societal conditions.<sup>97</sup>

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Scalia, who together with Justice Alito, joined the Chief Justice's opinion, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748 (Roberts, C.J.). The Chief Justice reasons that "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable *on a nondiscriminatory basis*," and what was required was "determining admission to the public schools *on a nonracial basis*. . . . What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?" *Id.* at 747 (paraphrasing and partially quoting *Brown II*, 349 U.S. at 300–01) (emphasis in *Parents Involved*). The Chief Justice here conflates the *Brown II* holding with respect to nondiscrimination with the remedy designed to break apart segregated schools. *Brown II* does not address the issue that was present in *Parents Involved*. While *Brown II* did hold, in essence, that the way to stop racial segregation of schools included requiring measures to assign students to schools on a nonracial basis, it scarcely held that the constitutional guarantees would be satisfied so long as a state, as pervasive regulator of education, merely ended de jure segregation, even if the plenipotent regulator of education accommodated socially produced segregation. The Chief Justice merely chopped the *Brown II* opinion to create from its parts positions never taken therein.

97. See, e.g., *Parents Involved* 551 U.S. at 747 (Roberts, C.J.) (declining to express any opinion, even in dicta, about other means to increase student diversity within K-12 systems, observing that decisions about "where to construct new schools, how to allocate resources among schools, and which academic offerings to provide to attract students to certain schools—implicate different considerations than the explicit racial classifications at issue" in *Parents Involved*); *Crosby*, 488 U.S. at 526 (Scalia, J. concurring) ("A State can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race.").

The problem with proxies is that they often fail of their intended purpose. It has been held, for example, that wealth is not a proxy for race. *Hallmark Developers, Inc. v. Fulton County, Ga.*, 466 F.3d 1276, 1284 (11th Cir. 2006) (citing *James v. Valtierra*, 402 U.S. 137, 140–42 (1971) (California law requiring "referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority" does not violate Equal Protection Clause)). Hence, an admission preference for economically disadvantaged students would tend to benefit Blacks, Hispanics and members of Indian tribes, whose average per capita income between 2006 and 2008, inclusive, was 56.5%, 49.7% and 53.2% of the average for non-Hispanic whites. U.S. CENSUS BUREAU, MEAN INCOME IN THE PAST 12 MONTHS, *available at* [http://factfinder.census.gov/servlet/STTable?\\_bm=y&-geo\\_id=01000US&-qr\\_name=ACS\\_2008\\_3YR\\_G00\\_S1902&ds\\_name=ACS\\_2008\\_3YR\\_G00\\_&lang=en&-redoLog=false&-CONTEXT=st](http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2008_3YR_G00_S1902&ds_name=ACS_2008_3YR_G00_&lang=en&-redoLog=false&-CONTEXT=st) (last visited Mar. 28, 2010). As a practical matter, though, national demographics obviate the use of wealth-based measures to address racial disparities. Although the percentage of whites falling below the poverty level is small compared to other groups, the raw number of whites is nearly as large as the aggregate racial minority populations. Thirteen and two tenths percent (13.2%) of

Three positions developed since *Bakke* by bare majorities of the Burger, Rehnquist and Roberts Courts undergird the positions that circumscribe so tightly the power of the American people to mitigate the effects of race-related societal problems. First, the majorities systematically conflate racial classification and racial discrimination, as though these were semantic twins.<sup>98</sup> Second, since *Bakke*, majorities of the Court have adhered steadfastly to a rule that “remedying past societal discrimination does not justify race-conscious government action.”<sup>99</sup> Third, since *Bakke*,

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whites were below poverty levels between 2006 and 2008, compared to 29.2% for Hispanics, 34.1% for blacks and 37% for Indians, but the populations affected were, 25,551,296, 12,983,831, 12,098,493 and 866,963, respectively. U.S. CENSUS BUREAU, SELECTED CHARACTERISTICS OF PEOPLE AT SPECIFIED LEVELS OF POVERTY IN THE PAST 12 MONTHS, available at [http://factfinder.census.gov/servlet/STTable?\\_bm=y&-geo\\_id=01000US&-qr\\_name=ACS\\_2008\\_3YR\\_G00\\_S1703&-ds\\_name=ACS\\_2008\\_3YR\\_G00\\_-&-redoLog=false&-CONTEXT=st](http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2008_3YR_G00_S1703&-ds_name=ACS_2008_3YR_G00_-&-redoLog=false&-CONTEXT=st) (last visited Mar. 28, 2010). Policy-makers simply cannot rely upon wealth-based proxies to construct programs that address the distinctively race-related societal problems.

Finding an appropriate proxy is not always an easy task, for some proxies may themselves be deemed to be race-based and therefore constitutionally suspect. Compare *Grace v. City of Detroit*, 760 F. Supp. 646, 651 (E.D. Mich. 1991) (“Residence is not race; and although Defendant appears to argue that the residency requirements here are a means of excluding whites from consideration, assuming that this is a lawful means of accomplishing affirmative action, the rules actually discriminate against non-residents of all races.”) (holding that Detroit requirement that police candidates reside in the city for at least sixty days prior to the date of application for employment unconstitutionally burdened the right to travel) and *U.S. v. Caruthers*, 458 F.3d 459, 467 (6th Cir. 2006) (for purposes of establishing reasonable suspicion to justify an investigative detention under the Fourth Amendment, labeling an area “high-crime” raises special concerns of racial, ethnic, and socioeconomic profiling).

98. In *Bakke*, Justice Powell asserted that “[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.” *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 307 (1978)) (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (prohibiting interracial marriage), *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (prohibiting interracial cohabitation) and *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (*Brown I*) (maintaining racially segregated school systems)); see also *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“all ‘governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.”) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

99. *Parents Involved*, 551 U.S. at 731; *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996) (“[A]n effort to alleviate the effects of societal discrimination is not a compelling interest”); *Croson*, 488 U.S. at 498–99 (“While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia.”) *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . [A]s the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.”); *Bakke*, 348 U.S. at

majorities of the Court have held that any line drawn on the basis of race implicates the equal protection clause and must be subject to the most exacting judicial scrutiny.<sup>100</sup>

Each of these positions suffers from serious historical and doctrinal defects, but trying to detail the internal weaknesses of the Court's analyses would require a far more extensive review than can be accommodated in the present article. There is yet another weakness in the Court's position that would assure its eventual demise even if it were doctrinally sound.<sup>101</sup>

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307–09 (Powell, J., for the court) (“[R]emedying of the effects of ‘societal discrimination,’ an amorphous concept of injury that may be ageless in its reach into the past.”); *but see* *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564–65 (1990), *overruled by Adarand*, 515 U.S. at 227 (O’Connor, J.) (“We hold that benign race-conscious measures mandated by Congress—even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.”).

100. “Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.” *Bakke*, 438 U.S. at 291. In *Parents Involved*, 551 U.S. at 741–43, Justice Roberts cites several cases as authority for this proposition, including *Johnson v. California*, 543 U.S. 499 (2005); *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244; *Adarand*, 515 U.S. 200; *Metro Broadcasting*, 497 U.S. 547, and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267.

101. In addition to other matters, the doctrine labors under the burden of being the product of a politicized judiciary. *See supra* notes 79 through 83, discussing the politicization of judicial appointments since the Nixon presidency. The Justices who developed the core doctrines and embraced them enthusiastically were appointed by presidents who sought deliberately to use judicial appointments as an instrument of political policy. The *Bakke* decision, 438 U.S. 265, was handed down by a panel of Justices that included four Nixon appointees: Chief Justice Warren Burger; Justice Harry A. Blackmun; Justice Powell and Justice William H. Rehnquist and one Ford appointee, Justice John Paul Stevens. Justices of the United States Supreme Court, available at <http://www.unitedstatesreports.org/justices/index.html> (last visited Apr. 9, 2010). The alignment of the Justices in that case was convoluted, for Nixon appointee Justice Powell’s seminal dissertation on the constitutionality of race-based classification was not joined by Nixon appointees Chief Justice Warren Burger, Justice Blackmun or Justice Rehnquist. The Chief Justice, Justice Rehnquist and Eisenhower appointee Justice Potter Stewart joined Ford appointee Justice Stevens’ writing that would have overturned the admissions policy on statutory grounds, forming thus the plurality that struck down the policy. Kennedy appointee Justice Byron White subscribed to the view that racial and ethnic distinctions of any sort are inherently suspect and call for the most exacting judicial examination. Nixon appointee Justice Blackmun agreed that strict scrutiny was critical, but did not regard affirmative action programs as inherently at odds with the Fourteenth Amendment.

The *Bakke* pattern has been largely consistent since that time. For example, *Wygant*, 476 U.S. 267, reflected the views of Reagan appointee Justice O’Connor, Nixon appointees Chief Justice Warren Burger, Justice Powell and Justice Rehnquist and Kennedy appointee Justice White. The *Croson*, 488 U.S. 469, outcome was controlled by Reagan appointees Justice O’Connor, Justice Scalia and Justice Kennedy, Nixon appointee Chief Justice Rehnquist, and Kennedy appointee Justice White. The *Adarand*, 497 U.S. 547, majority included George H.W. Bush appointee Justice Thomas and Reagan appointees Justice O’Connor, Justice Scalia and Justice Kennedy

and Nixon appointee Chief Justice Rehnquist. *Parents Involved*, 551 U.S. 701, reflected the views of George W. Bush appointees Chief Justice Roberts and Justice Alito, George H.W. Bush appointee Justice Thomas and Reagan appointees Justice Scalia and Justice Kennedy.

The version of equal protection elaborated by the Burger, Rehnquist Roberts Courts also suffers because the substance of the doctrine appears to constitutionalize policy preferences advanced for strategic partisan purposes. When Ronald Reagan ran as the Republican candidate, he used race to split the traditional Democratic labor and lower middle class base. THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS 164 (1992). While his “story of a ‘Chicago welfare queen’ . . . who supposedly drove a Cadillac, bought thick steaks with food stamps and vacated in resorts on taxpayer funds[.]” is perhaps the most memorable use of racially charged rhetoric, Holloway Sparks, *Queens, Teens, and Model Mothers: Race, Gender, and the Discourse of Welfare Reform*, in RACE AND THE POLITICS OF WELFARE REFORM 194 n.10 (Sanford F. Schram et al. eds., 2003), Reagan also made opposition to affirmative action an express element in his campaign:

We must not allow this noble concept . . . of equal opportunity to be distorted into federal guidelines or quotas which require race, ethnicity or sex – rather than ability and qualifications – to be the principal factor in hiring and education. Instead we should make a bold commitment to economic growth, to increase jobs and education for all Americans.

KEVIN L. LYLES, THE GATEKEEPERS FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS 133 (1997) (quoting a Reagan Campaign press release).

Such race-charged rhetoric was particularly effective with the working class and lower middle class Democrats who saw civil rights policies as “benefiting minorities at the expense of the working and middle class” and believed that federal regulatory policy “had shifted away from provision of such essential goods as job safety and the policing of monopolies to the imposition of forced busing and racial preferences.” Edsall & Edsall, *supra*, at 174 (1992). See also Charlotte Steeh & Maria Krysan, *The Polls—Trends Affirmative Action And The Public, 1970-1995*, 60 Pub. Op. Q. 128, 135–36 (1996) (finding that white support for race-based preferences or economic aid remained below 20% between 1970 and 1995, while black support for such measures dropped from 80% in 1970 to 40% in 1995).

While it may well be the case that Reagan was trying to take advantage of discussion generated by *Bakke*, 438 U.S. 265, the close alignment between his rhetoric and the substantive equal protection doctrines shaped by Justices that he appointed creates the appearance that the Court’s doctrines embody political preferences, not jurisprudential ones. That appearance augurs poorly for the sustainability of the doctrines. Just as the political character of *Dred Scott v. Stanford*, 60 U.S. (19 How.) 393 (1857), compromised its authority, so too does the political instrumentality of jurisprudential choices forced by partisan judges undercut the authority of the Court’s holdings. See Harry V. Jaffa, *Dred Scott Revisited*, 31 Harv. J. of Law & Pub. Pol. 197, 208-11 (2008) (arguing that *Dred Scott* should be understood as “part of a Slave Power conspiracy involving two Presidents [Franklin Pierce and James Buchanan], a Chief Justice [Roger Taney], and a United States Senator [Stephen A. Douglas], and providing the foil for Abraham Lincoln’s campaign”); Lucas E. Morel, *The Dred Scott Dissents: McLean, Curtis, Lincoln, and the Public Mind*, 32 J. of Sup. Ct. Hist. 133, 134 (2007) (pressure from influential Southerners led to the reassignment of the opinion to Chief Justice Taney).

While the politicized character of the equal protection doctrines propounded by the Burger, Rehnquist and Roberts Courts would not necessitate their abandonment, if they were sound and suited to the needs of the nation, the partisan appearance of the doctrines, coupled by their maintenance by a set of Justices selected for partisan



Where the Court's doctrinal experiments diminish the power of the nation's people to mitigate long-standing, unremittingly serious, disruptive societal disparities, the compounding pressure of the public need will force change.

Sound statecraft can neither ignore nor deny social, economic, or political problems that divide and weaken the nation. As *Worcester v. Georgia*,<sup>102</sup> *Dred Scott*,<sup>103</sup> *Plessy*,<sup>104</sup> *Lochner*<sup>105</sup> and *Brown I*<sup>106</sup> made plain, the judicial power cannot reach the social circumstances that manifest themselves through the demand for or opposition to political action; nor can the judicial power sustain constructions of the constitution that deny the people the use of the resources of their government to eliminate or to mitigate perceived obstacles to the public weal.<sup>107</sup>

Through its *Bakke* line of equal protection decisions, the Court has prevented the American people from using race-related criteria to channel

purposes, taints the doctrines with partisanship, compromises their authority, as well as that of the Court, and provides ongoing partisan incentives to overturn the decisions.

102. 31 U.S. (6 Pet.) 515 (1832).

103. 60 U.S. (19 How.) 393 (1856).

104. 163 U.S. 537 (1896).

105. 198 U.S. 45 (1905).

106. 347 U.S. 483 (1954).

107. *Dred Scott* held that slavery was a form of property affirmatively acknowledged in the constitution and that Congress did not have the power to forbid slavery in the territories and that territorial laws purporting to forbid slavery were nugatory. *Dred Scott*, 60 U.S. at 450–52. The decision did nothing, of course, to temper the roiling discord over slaveholding and slave economies. See *supra* note 11 for a discussion of *Plessy v. Ferguson*, 163 U.S. 537 (1896); *supra* note 13 for a discussion of the meager short-term effects of *Brown I* and *Brown II*; *supra* note 86 for a discussion of *Lochner*. *Worcester* illustrates how even a decision that is well grounded in the Constitution and sound moral judgment can run afoul of strong political currents. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). The case arose from the prosecution under Georgia law of a missionary residing with the Cherokee people and resisting efforts to arrange for their expulsion from their lands in Georgia. The Court held that,

The Cherokee nation . . . is a distinct community occupying its own territory, with boundaries accurately described, the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

*Id.*, at 561. The Court ordered Georgia to release the missionary. *Id.*, at 562–63. President Andrew Jackson famously observed that, “the decision of the [S]upreme [C]ourt has fell still born, and they find that they cannot coerce Georgia to yield to its mandate.” FRANCIS P. PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 212 (1984). The decision limiting state encroachment on Indian treaty lands did nothing to relieve pressure to open the lands for white settlement, and federal authorities secured the Treaty of New Echota in 1835, opening the way for eventual removal the Cherokee. Treaty of New Echota § 16, Dec. 29, 1835, 7 Stat. 478, reprinted in 2 *INDIAN AFFAIRS: LAWS AND TREATIES, TREATIES* 446 (Charles J. Kappler ed., 1904) <http://digital.library.okstate.edu/kappler/Vol2/treaties/che0439.htm#mn2>.

assistance to individuals who have suffered the consequences of race-related disparities. By creating a constitutional disability to mitigate the effects of racial discrimination, the Court sets the nation at odds with its very history.

Throughout the nation's existence, racial discrimination has been a societal cancer whose morbid effects imperiled the stability of the republic, and for this reason the people have ever returned to the task of applying the power of government to rid the nation of the lingering corruption. Slavery was the bane of the early republic, jeopardizing approval of the Constitution<sup>108</sup> and leading inexorably to secession and war.<sup>109</sup> The nineteenth century fight to establish the power of the national government to effectuate the union victory in the Civil War and to protect the rights of freed slaves through appropriate legislation was sharp and successful,<sup>110</sup> though the intended benefits of the Reconstruction Amendments were

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108. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), revolved around the interpretation of Article IV, § 2, Cl 3, of the constitution. This Constitution provision states: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up, on claim of the party to whom such service or labor may be due." U.S. CONST. ART. IV, § 2, CL. 3.

Historically, it is well known, that the object of this clause was to secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slave-holding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted, that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was, to guard against the doctrines and principles prevalent in the non-slave-holding states, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

*Prigg*, 41 U.S. at 611.

109. Jaffa, *supra* note 101, at 197–98 ("The Civil War clearly was a test, as Lincoln said at Gettysburg, of whether any nation 'conceived in Liberty, and dedicated to the proposition that all men are created equal' could long endure. The test came when eleven states "seceded" following the election of Abraham Lincoln in 1860. The Republican platform in that year contained a pledge to end any further extension of slavery into the new territories from which new states might be formed. The seceding states found it intolerable that all new states would be free states, so that eventually three-fourths of the states might be able to abolish slavery by constitutional amendment, without the consent of the slave states.")

110. See *The Slaughterhouse Cases* at 83. Thirteenth, Fourteenth and Fifteenth Amendments, respectively, to confirm the outcome of the Civil War, to empower Congress to outlaw the Black Codes and to empower blacks to protect their interests through the political process); Bickel, *supra*, note 1, at 63 (noting that the framers of the fourteenth amendments viewed it as providing only limited correction to state legislation motivated by racial hostility and that they expected that achieving the objectives of the amendment would await "further legislation, in enabling acts or other provisions.").

substantially diminished by the decisions of the Court that culminated in *Plessy*.<sup>111</sup> The twentieth century effort to persuade government to prohibit segregation and overtly discriminatory practices was long and difficult.<sup>112</sup> The trammels that the Court, following *Bakke*, has sought to impose upon the political will of the American people are no more likely to endure than were the obstacles raised by the Court in *Dred Scott* or *Plessy*. The inexorable need to eliminate race-related divisions that set communities against one another cannot long be stayed, and the nation must have the latitude to provide assistance to individuals who have borne the burdens of race-related disadvantage if it is to break the cycles of disadvantage that plague generation after generation of disfavored minority communities.

The remainder of this article comprises three parts. Part A attempts to document the circumstances that make it unlikely that the informal working social networks will provide minority communities with opportunity, and it suggests that circumstances will oblige government to develop programs to improve opportunities for the nation's minority populations. Part B examines the deep national tradition of investing in the American people to expand the people's prospects and to enhance the people's capacity for self-government, and it emphasizes the longstanding public investment in education and in higher education. Part C concludes that, as it did in *Bakke*,<sup>113</sup> *Grutter*,<sup>114</sup> and *Gratz*,<sup>115</sup> the college or university will again play a role in seeking to assure that the promise of equal protection does not strangle the prospects for equal opportunity.

#### A. Separate lives

People belonging to racial minorities tend to encounter very different challenges in their lives from those that confront people who are white. For example, minority populations remain at the margins of American prosperity and are most likely to be excluded from the benefits and safety enjoyed by the white majority. There is a serious personal toll caused by

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111. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 342 (1949) ("The purposes of the framers [of the Fourteenth Amendment] received short shrift at the hands of the Supreme Court. The revolution in the federal system, which was the Amendment's principal goal, fell victim to the Court's doctrine that only state action was reached. The privileges and immunities clause was officially killed in the *Slauterhouse* cases. The due process clause, though also hampered by the state-action doctrine, became the cornerstone of the judicial defense of property and the system of natural liberty. While the equal protection clause, its natural-rights sweep and state-inaction coverage completely ignored, was relegated to a secondary position.").

112. See *supra* notes 3-4, 9, 12-18, 27-37, 51-59, 64-66, 71, 75-77 and accompanying text.

113. 438 U.S. 264 (1978).

114. 539 U.S. 306 (2003).

116. 539 U.S. 244 (2003).

racial discrimination, which affects the well-being and family life of individuals belonging to disfavored minority groups. Moreover, children born into minority groups still face disproportionately separate and unequal educational opportunities. Minority populations remain underrepresented among the professions and management and business ownership. The ordinary workings of informal social networks reinforce and perpetuate race-related disparities in economic circumstances, well-being, education, and work. The nation cannot ignore the fact that the lives of people belonging to disfavored racial minority groups follow separate and unequal paths from those of the white majority.

### 1. Minority populations at the margins

On average, persons in racial minority groups earn little more than half of what white Americans earn.<sup>116</sup> Earnings for minority communities are more sensitive to economic downturn than those of white Americans.<sup>117</sup> Although the nation made significant progress in reducing poverty, members of minority communities are still more likely to live in poverty than white Americans.<sup>118</sup>

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116. The average per capita income between 2006 and 2008, inclusive, for Blacks, Hispanics and members of Indian tribes was 56.5%, 49.7% and 53.2% of the average for non-Hispanic whites. Average earnings for Asians were 94.4% those of the average for non-Hispanic whites. U.S. CENSUS BUREAU, MEAN INCOME IN THE PAST 12 MONTHS (IN 2008 INFLATION-ADJUSTED DOLLARS), 2006-2008 AMERICAN COMMUNITY SURVEY 3-YEAR ESTIMATES, *available at* [http://factfinder.census.gov/servlet/STTable?\\_bm=y&-geo\\_id=01000US&-qr\\_name=ACS\\_2008\\_3YR\\_G00\\_S1902&-ds\\_name=ACS\\_2008\\_3YR\\_G00\\_&-\\_lang=en&-redoLog=false&-CONTEXT=st](http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2008_3YR_G00_S1902&-ds_name=ACS_2008_3YR_G00_&-_lang=en&-redoLog=false&-CONTEXT=st).

117. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR, & JESSICA C. SMITH, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, 5 (2009), *available at* <http://www.census.gov/prod/2009pubs/p60-236.pdf> (“Real median income for households of each race category and those of Hispanic origin declined between 2007 and 2008 . . . The income of non-Hispanic White households declined 2.6 percent (to \$55,530); for Blacks, income declined 2.8 percent (to \$34,218); for Asians, income declined 4.4 percent (to \$65,637); and for Hispanics, income declined 5.6 percent (to \$37,913). In comparison to the respective income peaks before the 2001 recession, 2008 household income was 4.3 percent lower for all races combined (from \$52,587 in 1999), 2.7 percent lower for non-Hispanic Whites (from \$57,059 in 1999), 7.8 percent lower for Blacks (from \$37,093 in 2000), 5.8 percent lower for Asians (from \$69,713 in 2000), and 8.6 percent lower for Hispanics (from \$41,470 in 2000).”).

118. Data on poverty rates from 1959 only permit comparison of whites and blacks, but the figures provide a stark measure of the gains that were made in reducing poverty. In 1959, poverty rates for whites and blacks stood at 18.1% and 55.1%, respectively. *Id.* at 45, 47. Despite the relative progress, whites are still nearly one third as likely as blacks to fall below poverty levels. “In 2008, the poverty rate increased for non-Hispanic Whites (8.6 percent in 2008—up from 8.2 percent in 2007), Asians (11.8 percent in 2008—up from 10.2 percent in 2007), and Hispanics (23.2 percent in 2008—up from 21.5 percent in 2007). The poverty rate in 2008 was statistically unchanged for Blacks (24.7 percent).” *Id.* at 13.

Members of a minority group are more likely to be unemployed.<sup>119</sup> Not surprisingly given higher unemployment rates, they are also more likely than whites to lack health insurance.<sup>120</sup> Members of a minority group are more likely than whites to report that cost was a barrier to healthcare<sup>121</sup> and to report fair or poor health status, obesity, diabetes, and no leisure-time physical activity.<sup>122</sup>

Racial or ethnic minorities are more likely to be the targets of hate crimes<sup>123</sup> and less likely to be the perpetrators of hate crimes.<sup>124</sup> Minorities

119. In the 2006–2008 reporting period, unemployment rates for non-Hispanic Whites stood at 5.2%; Blacks at 12%; Hispanics at 7.4%; Asians at 5%, and American Indians at 12%. U.S. CENSUS BUREAU, 2006–2008 AMERICAN COMMUNITY SURVEY, EMPLOYMENT STATUS: 3 YEAR ESTIMATES [http://factfinder.census.gov/servlet/STTable?\\_bm=y&-geo\\_id=01000US&-qr\\_name=ACS\\_2008\\_3YR\\_G00\\_S2301&-ds\\_name=ACS\\_2008\\_3YR\\_G00\\_](http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2008_3YR_G00_S2301&-ds_name=ACS_2008_3YR_G00_). For January 2010, the seasonally adjusted unemployment figures stood at 8.7% for Whites, 16.5% for Blacks, 12.6% for Hispanics; seasonally adjusted figures were not available for Asians, but the unadjusted number was 8.4%. BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION—JANUARY 2010, tbls. A-2, A-3. <http://www.bls.gov/news.release/pdf/empstat.pdf>.

120. In 2008, the uninsured rate for non-Hispanic Whites was 10.8%; for Blacks it was 19.1%; for Hispanics 30.7%; and for Asians it was 17.1%. CARMEN DENAVAS-WALT, *supra* note 116, at 23.

121. Julie C. Bolen et al., State-Specific Prevalence of Selected Health Behaviors, by Race and Ethnicity—Behavioral Risk Factor Surveillance System, 1997 (2000), <http://www.cdc.gov/mmwr/PDF/ss/ss4902.pdf> (“Whites were the least likely racial or ethnic group to report that cost was a barrier to obtaining health care. The median percentage was 9.4% for whites (range: 5.4%-24.3%), 13.2% for blacks (range: 6.6%-27.7%), 16.2% for Hispanics (range: 7.9%-30.1%), 12.6% for American Indians or Alaska Natives (range: 9.2%-26.7%), and 11.6% for Asians or Pacific Islanders (range: 4.7%-16.3%).”). Cf. DEP’T OF HEALTH AND HUMAN SERVS., MENTAL HEALTH: CULTURE, RACE, ETHNICITY SUPPLEMENT TO MENTAL HEALTH: REPORT OF THE SURGEON GENERAL 38 (2001) available at <http://download.ncadi.samhsa.gov/ken/pdf/SMA-01-3613/sma-01-3613A.pdf>. (“Racism and discrimination . . . have been documented in the administration of medical care. They are manifest, for example, in fewer diagnostic and treatment procedures for African Americans versus whites.”).

122. Bolen, *supra* note 121, at 14, 25.

123. Federal Bureau of Investigation statistics document that 51% of all hate crimes were based on race, and 12/7% were based on ethnicity or national origin. FED. BUREAU OF INVESTIGATION, 2008 HATE CRIME STATISTICS, available at <http://www.fbi.gov/ucr/hc2008/victims.html>. Of the 4,934 victims of these racial bias crimes, 72.9% were victims of an offender’s anti-black bias, 16.8% were victims because of an anti-white bias, 3.4% were targeted because of an anti-Asian/Pacific Islander bias, 1.3% were victims because of an anti-American Indian/Alaskan Native bias. 5.6% were victims because of a bias against a group of individuals in which more than one race was represented (anti-multiple races, group). *Id.* Hate crimes motivated by the offender’s bias toward a particular ethnicity/national origin affected 1,226 victims, 64.6% of whom were victims of an anti-Hispanic bias and 35.4% were targeted because of a bias against other ethnicities/national origins. *Id.*

124. Race data reported in 2008 for the 6,927 known hate crime offenders revealed that, 61.1% were white, 20.2% black, 5.9% were groups made up of individuals of various races (multiple races, group), 1.1% Asian/Pacific Islander, 0.7% were

are more likely than whites to be victims of violent crimes.<sup>125</sup> Minorities are more numerous in prison populations than would be predicted on the basis of their percent in the general population,<sup>126</sup> and they less likely to be on probation.<sup>127</sup>

Even without taking into consideration the mechanics of racial discrimination, life in general is poorer, less healthy, and more dangerous for disfavored racial minorities.

## 2. The personal toll of racial discrimination

Minorities are more likely than whites to live with high levels of stress and are subject to higher levels of stress-related disorders, such as hypertension and transitory illness.<sup>128</sup> Reaction to racial discrimination

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American Indian/Alaskan Native, and 11.0 % were unknown. *Id.* These data do not break down the race of the hate crime defenders by nature of the hate crime, i.e., it cannot be determined from this report which percent of hate crime offenders of particular racial or ethnic groups were engaged in race or ethnic hate crimes. *Id.*

125. For the period 2002-2006, the victim rates by race per 1000 population per year for violent crimes were: white 22.6, black 29.1, Hispanic 24.1, Asian/Pacific Islander 10.6 and American Indian/Alaska Native 56.4. ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: ASIAN, NATIVE HAWAIIAN, AND PACIFIC ISLANDER VICTIMS OF CRIME 3 tbl. 2 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/anhpivc.pdf>. In 2005, 49% of all homicide victims were black – 52% of all male victims were black and 35% of all female victims were black. ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: BLACK VICTIMS OF VIOLENT CRIME 3 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/bvvc.pdf>.

126. In 2007, 2.1 million were men and 208,300 women were incarcerated. WILLIAM J. SABOL & HEATHER COUTURE, BUREAU OF JUSTICE STATISTICS, BULLETIN, PRISON INMATES AT MIDYEAR 2007 at 7 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim07.pdf>. “Black males represented the largest percentage (35.4%) of inmates held in custody, followed by white males (32.9%) and Hispanic males (17.9%).” *Id.* White women comprised 46.4% of the female prison population, black women, 32.5%, and Hispanic women, 15.4%. *Id.* at 7 tbl. 9. By contrast, in 2007, the nation’s male population was 80.4% white, 12.4% black and 15.8% Hispanic; its female population was 79.5% white, 13.2% black and 14.4% Hispanic. U.S. CENSUS BUREAU, POPULATION ESTIMATES, ANNUAL ESTIMATES OF THE POPULATION BY SEX, RACE, AND HISPANIC ORIGIN FOR THE UNITED STATES: APR. 1, 2000 TO JULY 1, 2007, (2007) available at <http://www.census.gov/popest/national/asrh/NC-EST2007/NC-EST2007-03.xls>.

127. In 2008, whites comprised 56% of the adults on probation, blacks 29%, Hispanic’s 13%, Asians 1%. LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, BULLETIN PROBATION AND PAROLE IN THE UNITED STATES 2008 at 24 app. tbl.5 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus08.pdf>.

128. DEP’T OF HEALTH AND HUMAN SERVICES, *supra* note 121, at 38.

In a national probability sample of minority groups and whites, African Americans and Hispanic Americans reported experiencing higher overall levels of global stress than did whites. The differences were greatest for two specific types: financial stress and stress from racial bias. Asian Americans also reported higher overall levels of stress and higher levels of stress from racial bias, but sampling

appears to be a significant factor in the levels of stress reported.<sup>129</sup> The physiologic effects of chronic stress may even explain consistent patterns of prematurity and low birth weights for black mothers and for second generation Hispanic mothers.<sup>130</sup> The higher rate of premature, low birth weight infants has further consequences for family life, since such infants “are far more likely than other infants to suffer major developmental

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methods did not permit statistical comparisons with other groups. American Indians and Alaska Natives were not studied.

*Id.*

129. The Department of Health and Human Services Report observed:

Recent studies link the experience of racism to poorer mental and physical health. For example, racial inequalities may be the primary cause of differences in reported quality of life between African Americans and whites. Experiences of racism have been linked with hypertension among African Americans. A study of African Americans found perceived discrimination [used in the report to refer to ‘self-reports of individuals about being the target of discrimination or racism. The term is not meant to imply that racism did not take place’] to be associated with psychological distress, lower well-being, self-reported ill health, and number of days confined to bed . . . . Perceived discrimination was linked to symptoms of depression in a large sample of 5,000 children of Asian, Latin American, and Caribbean immigrants. Two recent studies found that perceived discrimination was highly related to depressive symptoms among adults of Mexican origin and among Asians.

*Id.*

130. “[B]lack infants are two to three times as likely as their white counterparts to be born prematurely and/or with low birth weight.” Paula Braveman, *Racial Disparities at Birth: The Puzzle Persists*, ISSUES IN SCI. AND TECH. (2008), available at [http://www.issues.org/24.2/p\\_braveman.html](http://www.issues.org/24.2/p_braveman.html); see also S Iyasu et al., *Infant Mortality and Low Birth Weight Among Black and White Infants — United States, 1980–2000*, 51 MORBIDITY AND MORTALITY WKLY. REP. 589, 589–92 (July 12, 2002), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5127.pdf>.

Chronic stress could lead to adverse birth outcomes through neuroendocrine pathways. Neuroendocrine and sympathetic nervous system changes caused by stress could result in vascular and/or immune and inflammatory effects that could lead to premature delivery as well as inadequate fetal nutrition.

Braveman, *supra*.

Hispanic women (despite poverty) and poor birth outcomes of their U.S.-born daughters (whose income and education levels are generally higher around the time of childbirth than those of their immigrant mothers), black immigrants also have better birth outcomes than U.S.-born black women. In contrast to the unfavorable (compared to whites) birth outcomes of black women born and raised in the United States, birth outcomes among black immigrants from Africa and the Caribbean are relatively favorable, especially after considering their income and education. As with the comparison of racial disparities in different socioeconomic groups noted above, it is very difficult to explain this disparity by maternal birthplace with genetic differences. If the basis for the differences in birth outcomes by maternal birthplace were genetic, one would expect the immigrants (presumably with a heavier “dose” of the adverse genes) to have worse outcomes, not better.

*Id.*

problems, including cognitive, behavioral, and physical deficits during childhood.”<sup>131</sup>

Parents who belong to minority groups cannot responsibly ignore racial discrimination. They must raise their children to live with racial hostility. Parents in minority communities are wise to coach their children about the hostility that awaits them once the children leave the home and enter school.<sup>132</sup> Minority children are more likely to be victims of racial disparagement at school, and children who perceive themselves as having been subject to racial disparagement are more likely than their classmates to exhibit behavioral problems that interfere with their education, such as depression, attention deficit hyperactivity disorder, oppositional defiant disorder, and conduct disorder.<sup>133</sup> Depression was the most predictable consequence of racial discrimination for minority children.<sup>134</sup> Even though there was no significant association for white children between believing themselves to have been targets of racial discrimination and depression, among minorities, children who perceived themselves as having been subject to racial disparagement were 2.6 to 3.9 times more likely than whites to develop symptoms of depression.<sup>135</sup>

Because of racial discrimination, individuals who belong to disfavored minority groups face pervasive challenges that differ from those confronting majority groups and that lead disproportionately to physical and psychological adversity.

### 3. Educational challenges for children born to minority groups

On average, school districts with heavy minority populations are substantially less well-funded than those with low minority enrollment, receiving 11.4 percent less funding per pupil than school districts with low minority enrollment.<sup>136</sup> Not only are such schools underfunded, but also

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131. *Id.* Premature, low birth weight infants also “have poorer prospects for employment and wages as adults. Prematurity and low birth weight . . . also predict poor adult health, including diabetes, high blood pressure, and heart disease, all of which raise risks of disability and premature mortality.” *Id.*

132. Robert M. Seller et al., *Racial Identity Matters: The Relationship between Racial Discrimination and Psychological Functioning in African American Adolescents*, 16 J. RES. ON ADOLESCENCE 187, 209 (2006) (“[T]eaching African American adolescents that other groups may hold negative attitudes toward African Americans should lead to better outcomes for African American adolescents when they encounter racial hassles.”).

133. Tumaini R. Coker et al., *Perceived Racial/Ethnic Discrimination Among Fifth-Grade Students and Its Association With Mental Health*, 99 AM. J. OF PUB. HEALTH 878, 881–83 (2009).

134. *Id.*

135. *Id.*

136. School districts with heavy minority populations receive on average 11.4% less funding per pupil than school districts with low minority enrollment. As would be expected, school districts in high poverty areas are also less well funded per pupil than



academic quality is marginal. The larger the minority enrollments in a school, the less likely it is to meet annual yearly progress goals established under No Child Left Behind standards.<sup>137</sup> Underfunded schools with dubious quality enroll disproportionately large numbers of minority students. Schools that were targeted as needing improvement under NCLB standards enrolled thirty-two percent of all black children enrolled in K-12 schools during 2003–2004, twenty-eight percent of Hispanic students, twenty-one percent of all American Indian students, seventeen percent of all Asian students and only nine percent of white students.<sup>138</sup>

School performance is affected, not only by resources, but also by family and community expectations. Parental education levels showed a greater influence on student achievement than race, and students whose parents had more education outperformed their classmates whose parents had less formal schooling; a fact that may well reflect the fact that more highly educated parents tend to have greater economic resources to invest in their children's education and greater expectations that the investments in education will translate into greater future economic opportunity.<sup>139</sup>

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districts with low poverty levels with an 8.1% disparity between funds per pupil. Kati Haycock, Mary Lynch, and Jennifer Engle, *Opportunity Adrift: Our Flagship Universities are Straying from their Public Mission* 4 (2010), available at <http://www.edtrust.org/sites/edtrust.org/files/publications/files/Opportunity%20Adrift%28%29.pdf>.

137. Only 55% of the schools with minority enrollments of 75% or greater met the annual yearly progress goal. Kerstin Carlson Le Flock et al. 3 STATE AND LOCAL IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT — ACCOUNTABILITY UNDER NCLB: INTERIM REPORT xxii (2007), available at <http://www2.ed.gov/rschstat/eval/disadv/nclb-accountability/nclb-accountability.pdf>. Seventy percent of schools with minority enrollments of 25% to 75% met AYP goals, as did 86% of schools enrolling less than 25% minorities. *Id.*

138. *Id.*, at 151.

139. D. SNYDER ET AL., DIGEST OF EDUCATION STATISTICS 2008 at 86 (2009), <http://nces.ed.gov/programs/digest/d08>. As noted, *supra* notes 117 through 119 and accompanying text, persons belonging to minority groups are more likely to live in poverty, and poverty forces families to choose between allocating scarce resources to contribute to their children's education or other pressing needs and it forces individuals to choose whether it is in their best interests to forego work for further education. See also Carlotta Berti Ceroni, *Poverty Traps and Human Capital Accumulation*, 68 ECONOMICA 203, 204 (2001) ("Education involves variable opportunity costs in terms of forgone income rather than fixed direct costs in most countries"); Tanya Araújo & Miguel St. Aubyn, *Education, Neighborhood Effects And Growth: An Agent-Based Model Approach*, 11 ADVANCES IN COMPLEX SYSTEMS 99, 103 (2008) (devising an economic model to predict the interplay between neighborhood effects and individual economic decision-making, "[s]tudying implies a period of time without earnings, so the agent compares the present value of its income as a skilled worker with the present value of an unskilled workers' income."); Maria Emma Santos, *Human Capital and the Quality of Education in a Poverty Trap Model* 16 (Oxford Poverty & Human Dev. Initiative, Working Paper No. 30 2009), available at [http://www.ophi.org.uk/pubs/OPHI\\_WP\\_30.pdf](http://www.ophi.org.uk/pubs/OPHI_WP_30.pdf) ("One possible explanation for the observed differences may be that many public schools in Argentina form private cooperatives to which parents contribute voluntarily to complement funds received

Here, again, some minorities are at a disadvantage. In 2008, 91.5 percent of whites over 18 years of age completed high school and 32.6 percent completed college or university; the corresponding percentages for blacks were 83.3 percent, and 19.7 percent, and for Hispanics, they were 62.3 percent and 13.3 percent—at these completion rates it could take generations for the gradual increases in minority education achievement to reach parity with whites.<sup>140</sup> The effects of neighborhood educational levels on educational achievement are approximately the same as those of parent education.<sup>141</sup> Not surprisingly, given the toxic mix of low funding, low performing schools, and lower education completion rates, dropout rates for blacks and Hispanics remain higher than for whites.<sup>142</sup>

Postsecondary education participation rates have come more nearly into alignment with overall population distributions. In 2007, whites comprised 64 percent of total postsecondary enrollment and 74.3 percent of the overall population; the corresponding figures for blacks comprised thirteen percent and 12.3 percent, and for Hispanics the percentages were at eleven percent and fifteen percent.<sup>143</sup>

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from the government. Although this fund usually represents a small percentage of the school budget, schools with children from the more advantaged social sectors will be in a better position to buy additional educational material or improve the infrastructure. Moreover, schools with students coming from the very disadvantaged social sectors cannot count on such extra funds (or they are very meagre). These schools also need to use a large fraction of public funding for purposes other than strictly educational, i.e., satisfying the students' most urgent basic needs such as providing them with daily meals.”).

140. D. SNYDER ET AL., *supra* note 139, at 25. Race was also related to student performance on subject-matter achievement tests; Asian and white students achieved comparable testing scores, while black, Hispanic and American Indian children consistently lagged on these measures. *See id.* (citing statistics). These results are likely collinear to some extent with differences in parental education.

Assuming that higher parental education correlates to higher income and greater incentives and ability to invest in children's education, even if minority children were to complete college at the rate of 35%, it could take eight generations for minority populations to achieve completion rates that would be at parity to wealthy white populations. Carlotta Berti Ceroni, *supra* note 139, at 212, 214 (estimating the number of generations it would required for the descendants of persons whose incomes are in the bottom quartile and whose education is high school or less to reach levels of income and education at which the wealth and education of original populations would not predict the economic or educational achievement of the descendants).

141. Yannis M. Ioannides & Linda Datcher Loury, *Job Information Networks, Neighborhood Effects, and Inequality*, 42 J. OF ECON. LITERATURE 1056, 1081–82, 1084 (2004) (reviewing literature).

142. In 2007, dropout rates for blacks and Hispanics (8.4 and 21.4 percent, respectively) remained higher than the rate for Whites (5.3 percent). D. SNYDER ET AL., *supra* note 139, at 3. When dropout rates were first differentiated by race — albeit reported only white and black, in 1967, the rate for whites was 15.4% and for blacks 28.6%. *Id.* at 169. In 1972, when rates for Hispanics were added, the statistics were 12.3%, 21.2% and 34.3%, respectively for whites, blacks and Hispanics. *Id.*

143. In 2007, 64% of students enrolled in postsecondary institutions were white,

Despite such superficial comparability, noteworthy disparities remain. Minority populations are more somewhat less likely to enroll in programs at the baccalaureate level. Public four year institutions are sixty-seven percent white, and private-not-for profit institutions are seventy percent white.<sup>144</sup> In contrast, white enrollments at two year institutions are sixty percent and sixty-one percent, respectively.<sup>145</sup>

The overall percentages of enrollment only show part of the trend towards racial separation in postsecondary education. Many students, particularly whites, attend institutions that enroll seventy-five percent or more of members of their own race. Some fifty-two percent of white students attended institutions where more than seventy-five percent of the enrollment was white; the comparable figures for other minorities were thirteen percent for black students eleven percent of the black enrollment was in historically black colleges or universities); six percent for Hispanic students; and eight percent for American Indian students (usually tribal colleges located on reservations).<sup>146</sup>

Minority students are much less likely to study at the most well-funded public institutions in their states. While combined black, Hispanic, and American Indian enrollments comprised thirty percent of the 2007 freshmen class for all colleges and universities, they comprised only thirteen percent of the entering classes at flagship institutions.<sup>147</sup> The flagship colleges and universities not only enjoy the greatest breadth and depth of learning resources and the greatest prestige, but that also afford the greatest opportunity to establish the social connections with students and alumni that afford preferential access to jobs, further study and other forms of advancement.

Generations after *Brown I*,<sup>148</sup> the nation's elementary and secondary schools continue to fail persons belonging to disfavored minority groups; and generations after *Bakke*,<sup>149</sup> the most prestigious institutions still accommodate few persons belonging to the most disadvantaged minority

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13% were black, 11% were Hispanic, 7% were Asian/Pacific Islander, 1% were American Indian/Alaska Native, and 3% were nonresident aliens. M. PLANTY ET AL., THE CONDITION OF EDUCATION 2009 at 94 (2009), available at [http://nces.ed.gov/programs/coe/2009/pdf/38\\_2009.pdf](http://nces.ed.gov/programs/coe/2009/pdf/38_2009.pdf). This shows significant progress, compared to the 1965 data, see James S. Coleman et al., *supra* note 12. Census bureau population statistics for the period 2006-2008, report 74.3% of the population as white, 12.3% as black, .8% as American Indian or Alaska Native, 4.4% as Asian, 0.1% as Native Hawaiian, 8% as other or two or more races and 15% as Hispanic, whatever their race. U.S. CENSUS BUREAU, *supra* note 116.

144. M. PLANTY ET AL, *supra* note 143, at 230-31. Private for-profit institutions, in contrast, are only 53% white. *Id.* at 231.

145. *Id.*

146. *Id.* at 232.

147. Haycock, *supra* note 136, at 7, 19.

148. 347 U.S. 483 (1954).

149. 438 U.S. 265 (1978).

groups.

#### 4. Underrepresentation among the professions, management, and business ownership

Minorities are underrepresented across the professions. Only ten percent of American lawyers are minorities, “about four percent of lawyers are African American, 3.3 percent are Hispanic, 2.3 percent are Asian American, and 0.2 percent are Native American.”<sup>150</sup> Judges reflect similar percentages. Overall one out of ten judges belongs to a minority group, six percent of judges are black, three percent are Hispanic, one percent are Asian, and 0.1 percent are American Indian.<sup>151</sup> Healthcare fields reflect similar trends. Blacks, Hispanics and American Indians comprise only nine percent of the nation’s nurses, six percent of its physicians, and five percent of dentists.<sup>152</sup> The pattern is similar in the sciences and engineering. Whites hold 72.4 percent of the positions in the sciences, blacks 4.3 percent, Hispanics 4.2 percent, Asians 16.9 percent, and American Indians 0.5 percent.<sup>153</sup> For engineering employment, the respective figures are 74.8 percent, 3.2 percent, 5.4 percent, 14.5 percent and 0.2 percent.<sup>154</sup>

Minorities continue to be underrepresented in management positions, 83.6 percent of such positions are held by whites, 8.3 percent by blacks, 7.1 percent by Hispanics, and 6.3 percent by Asians.<sup>155</sup> Among chief executive officers, 90.8 percent are white, 3.9 percent are black, 4.8 percent are Hispanic, and 4 percent are Asian.<sup>156</sup> Minority corporate leaders are more likely to encounter career difficulties than their white counterparts. Minorities are more likely to suffer from lack of mentoring, to be excluded from social and informational networks, and to receive low-status assignments.<sup>157</sup> Women and racial or ethnic corporate leaders are more likely to be promoted to corporate leadership during times of financial stress when corporate performance results in erosion of stock prices.<sup>158</sup>

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150. Chew, *supra* note 83, at 1127.

151. *Id.* at 1125.

152. SULLIVAN COMMISSION ON DIVERSITY IN THE HEALTHCARE WORKFORCE, MISSING PERSONS: MINORITIES IN THE HEALTH PROFESSIONS 2 (2004), available at <http://www.aacn.nche.edu/Media/pdf/SullivanReport.pdf>.

153. NATIONAL SCIENCE FOUNDATION, WOMEN, MINORITIES, AND PERSONS WITH DISABILITIES IN SCIENCE AND ENGINEERING: 2009 at 219 (2009).

154. *Id.*

155. U.S. BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2008 at 14 (2009)

156. *Id.*

157. Alison Cook & Christy Glass, *But Can S/he Lead? Market Assessments of Black Leadership in Corporate America*, 13 J. WORKPLACE RIGHTS 337, 338–39 (2008) (reviewing literature).

158. *Id.* at 345, 347.

Consequently:

[The] financial state of the firm combined with negative share price fluctuations will likely result in a greater struggle for Black leaders to effectively lead the firm[, and] they are more likely to be singled out as unfit leaders rather than as capable individuals appointed to struggling firms.<sup>159</sup>

Minority businesses ownership rates remain well below the 30 percent minority share of the nation's population, and minority owned businesses tend to be small businesses employing small percentages of the national workforce and earning a small percent of national business revenues. In 2002, businesses owned by blacks, Hispanics, Asians, and American Indians comprised 17.7 percent of all businesses, but they only employed 4.3 percent of the nation's workforce, and their revenues only amounted to 2.9 percent of business receipts.<sup>160</sup>

In 2006, minorities comprised 32.2 percent of the overall federal government workforce, but minority employment was greatest at the lowest pay grades, 43.3 percent, and lowest at the senior pay level, 14.8 percent.<sup>161</sup> The demographics of the highest ranks of federal employment were comparable to those of corporate management, 85.2 percent of those at senior pay levels were white, 6.4 percent black, 3.7 percent Hispanic, 3.8 percent Asian and 0.8 percent American Indian.<sup>162</sup>

Fifty years after the civil rights movement occupied the center of

159. *Id.* at 347.

160. U.S. CENSUS BUREAU, 2002 SURVEY OF BUSINESS OWNERS (2002), *available at* <http://www.census.gov/econ/sbo/historic.html#aian>. Black-owned firms accounted for 5.2% of all nonfarm businesses in the U.S., 0.7% of their employment, and 0.4% of their receipts. U.S. CENSUS BUREAU, SURVEY OF BUSINESS OWNERS - BLACK-OWNED FIRMS: 2002, [http://www.census.gov/econ/sbo/02/blacks\\_of.html](http://www.census.gov/econ/sbo/02/blacks_of.html). Hispanic-owned firms accounted for 6.8% of all nonfarm businesses in the United States, 1.4% of their employment and 1.0% of their receipts. U.S. CENSUS BUREAU, SURVEY OF BUSINESS OWNERS - HISPANIC-OWNED FIRMS: 2002 (2002), *available at* [http://www.census.gov/econ/sbo/02/hispanic\\_of.html](http://www.census.gov/econ/sbo/02/hispanic_of.html). Asian-owned firms accounted for 4.8% of all nonfarm businesses in the U.S., 2.0% of their employment and 1.4% of their receipts. U.S. CENSUS BUREAU, SURVEY OF BUSINESS OWNERS - ASIAN-OWNED FIRMS: 2002, [http://www.census.gov/econ/sbo/02/asians\\_of\\_all.html](http://www.census.gov/econ/sbo/02/asians_of_all.html). American Indian- and Alaska Native-owned firms accounted for 0.9% of all nonfarm businesses in the United States, almost 0.2% of their employment, and more than 0.1% of their receipts. U.S. CENSUS BUREAU, SURVEY OF BUSINESS OWNERS - AMERICAN INDIAN- AND ALASKA NATIVE-OWNED FIRMS: 2002 (2002), *available at* [http://www.census.gov/econ/sbo/02/aian\\_of.html](http://www.census.gov/econ/sbo/02/aian_of.html).

161. OFFICE OF PERSONNEL MANAGEMENT, TRENDS BY GENERAL SCHEDULE AND RELATED (GSR) GRADE GROUPINGS (ALL EMPLOYEES), tbl. 1-5, *Demographic Profile of the Federal Workforce* (2006), *available at* <http://main.opm.gov/feddata/demograp/table1-5.pdf>.

162. *Id.* General Schedule ranks 14–15 were quite similar: 79.2% white; 9.7% black; 4.1% Hispanic; 6% Asian and 0.9% American Indian. *See supra* notes 155, 156 and accompanying text for corporate figures.

American culture and politics, disproportionately few men and women who are members of minority groups have been able to reach the centers of power that shape the professions, drive the nation's economy and influence public policy.

#### 5. Informal social networks reinforce and perpetuate race-related disparities

Informal social networks play crucial roles in disseminating information about opportunities for employment. Numerous studies have documented the role that social networks play in labor markets. In some instances as many as fifty to sixty percent of jobs result from social contacts, and these results hold for “a variety of occupations, skill levels, and socioeconomic backgrounds.”<sup>163</sup> Minorities, in particular, are more likely to have found their jobs through informal networking.<sup>164</sup> Although social networks provide significant assistance in locating jobs, there “is little evidence that using contacts to find work results in higher wages or increased occupational prestige.”<sup>165</sup> “[D]ifferential network contacts and differential resources accruing from these contacts may explain part of the continuing inequality between whites and blacks, and between men and women;” and, of course, since education often figures among the circumstances that factor into the creation of social network ties, the abiding educational disadvantages of many minority neighborhoods and schools obstructs minority access to advantageous networks.<sup>166</sup> White men are more likely

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163. Antoni Calvó-Armengol & Matthew O. Jackson, *The Effects of Social Networks on Employment and Inequality* 94 AM. ECON. REV. 426, 426 (2004) (citing Mark Granovetter, *The Strength of Weak Ties*, 78 AM. J. OF SOCIOLOGY 1360 (1973) and Albert Rees, *Information Networks in Labor Markets*, 56 AM. ECON. REV. 559 (1966)); Ted Mouw, *Social Capital and Finding A Job: Do Contacts Matter?*, 68 AM. SOC. REV. 868, 868 (2003) (same, reviewing literature); Ioannides & Loury, *supra* note 141, at 1058, 1065–66 (reviewing literature) (citing findings that about half of all workers heard about their current job through a friend or relative and a meta-study that estimated that 30 to 60 percent of jobs were found through friends or relatives). In the context of high tech industry hiring, the effects of race on applicant success disappear once personal and professional contacts are included in the analyses for once “personal and professional contacts account for 60.4 percent of applicants and 80.8 of those receiving offers.” *Id.*

164. Roberto M. Fernandez & Isabel Fernandez-Mateo, *Networks, Race, and Hiring*, 71 AM. SOC. REV. 42, 42 (2006). There is limited evidence that people tend to refer information about job opportunities to members of their own race more frequently than to members of other races, although not exclusively, and that whites may be less likely to refer opportunities at all, less likely to refer them to other races and more likely to receive information about opportunities from other races. *Id.* at 56–57, 66. This study was based on a single factory and it did not find that referral translated into hiring or that race played an easily predictable role in hiring. *Id.* at 66.

165. Mouw, *supra* note 1633, at 869–70, 878; Fernandez, *supra* note 164, at 42.

166. Alexandra Kalev, Frank Dobbin, & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 594 (2006) (citations omitted); *but see* Mouw *supra*,

than others to find good jobs through network ties because their networks are composed of other white men who dominate management positions.

Given the important roles played by social networks, the high unemployment rates among members of disfavored minority groups and limited access to high status positions may have compounding effects that prolong the social, economic, and political disadvantages of minority communities and their members. Just as social networks can enhance individual access to critical information and opportunity, they may also obstruct opportunity: “Agents in the network with worse initial starting conditions have a lower expected discounted stream of future income from remaining in the network than agents in the network with better initial starting conditions.”<sup>167</sup> The paucity of opportunities available through a person’s social network might encourage individuals to drop out of the job market, and dropping out may itself disrupt further the flow of information through the whole social network.<sup>168</sup> Each person who drops out of the job market no longer serves as a source of job information for his social contacts, making it harder for them to identify opportunity:

As a larger drop-out rate in a network leads to worse employment status for those agents who remain in the network, . . . slight differences in initial conditions can lead to large differences in drop-out rates and sustained differences in employment rates.”<sup>169</sup>

In the end, “network relationships can change as workers are unemployed and lose contact with former connections. Long unemployment spells can generate a desocialization process leading to a progressive removal from labor market opportunities and to the formation of unemployment traps.”<sup>170</sup>

The social network analysis information flow explanation for race-related

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note 163, at 888, 891 (finding that among higher status workers, “social capital measures, such as average education, employment levels, or the occupational status of social network members, do not have a causal effect on labor market outcomes—or, if they do, it is not via the information and influence of contact networks,” in part because the existence of potential social advantages among higher status workers does not predict their attempt to use contacts to obtain referrals for jobs). With respect to the interplay between education and social network formation, *see* Ioannides & Loury, *supra* note 141, at 1064–66 (education affects access to advantageous social network contacts and job offers); Mouw, *supra* note 163, at 886 (education level and education level of friends correlates to wages); Calvó-Armengol, *supra* note 163, at 426 n.3 (The gap between wages for white and blacks is roughly on the order of 25 percent to 40 percent, and can be partly explained by differences in skill levels and quality of education. *See supra* notes 136–149 and accompanying text (documenting disparity in educational resources and outcomes).

167. Calvó-Armengol, *supra* note 163, at 427.

168. *Id.* at 426 (citing studies that suggest blacks are 2.5 to 3 times more likely than whites to drop out of labor markets).

169. *Id.* at 427.

170. *Id.* at 443.

higher employment drop-out rates and sustained inequality in wages and employment rates does not depend upon postulates about psychological disposition to favor people from the same social groups.<sup>171</sup> But, by the same token, social network analysis does not explain the factors that may influence employer hiring decisions.<sup>172</sup> Here, the tendency to favor social ties with similar people may play a substantial role in hiring. The role of race, gender, social class, and religion, as well as behaviors and values in influencing such choices is well documented.<sup>173</sup> Minorities are not only more likely to have poor access to information about job opportunities, but they are also more likely to encounter difficulties exploiting the information available to them, and, in addition to everything else, they are more likely to encounter discrimination and bias in the selection process.<sup>174</sup>

Informal social networking mechanisms that facilitate access to information about opportunities and informal preferences for persons with similar backgrounds and interests tend, on the whole, to be of greater help to whites trying to improve themselves in the mainstream economy,<sup>175</sup> but their utility depends upon starting points and backgrounds. Persons from disfavored minority groups are less likely than whites to enjoy socially, economically and educationally advantageous starting points and their backgrounds are less likely than whites to approximate those of the majority of existing professionals or managers. Hence, there is little basis

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171. *Id.* at 427, 439.

172. See Mouw, *supra* note 163, at 886 (in contexts where educational credentials are material, it is difficult to differentiate between selection based upon referral by persons whose social and educational standing is similar to the person referred or selection based upon the similarity between the social and educational standing of the person selecting employees and the person referred); Fernandez, *supra* note 164, at 46–47 (noting that some employers avoid hiring through referrals); *Id.* at 65–66 (finding some indication that, although Asian males working in the factory being analyzed were the most active in referring Asian applicants, hiring officials tended to limit the number of persons hired through Asian referrals).

173. Mouw, *supra* note 163, at 872, 886, 888; Ioannides & Loury, *supra* note 141, at 1064.

174. Alison Cook, *supra* note 157, at 339–40 (citing literature).

175. It goes without saying that social network analysis has also proven useful to explain how individuals enter into and operate within criminal enterprises. See, e.g., Christopher R. Browning, *Illuminating the Downside of Social Capital: Negotiated Coexistence, Property Crime, and Disorder in Urban Neighborhoods*, 52 AM. BEHAVIORAL SCI. 1556 (2009) (hypothesizing “that as network interaction and reciprocated exchange among neighborhood residents increase, offenders and conventional residents become increasingly interdependent” and the residents belief in their collective ability to regulate criminal activity reduced in neighborhoods characterized by high levels of network interaction and reciprocated exchange); Garry Robins, *Understanding individual behaviors within covert networks: the interplay of individual qualities, psychological predispositions, and network effects*, 12 TRENDS ORGAN. CRIM. 166 (2009) (noting that criminal networks tend to operate as covert networks and discussing the significance of psychological factors in the analysis of covert networks).



for believing that the ordinary operation of social networks will ultimately provide members of disfavored minority communities with opportunities to extricate themselves from the serial disadvantages that confront them from birth.

#### 6. Disfavored racial minority groups follow separate and unequal paths from those of the white majority

Nearly three score years have passed since *Brown I*<sup>176</sup> opened the way to repudiating *Plessy*.<sup>177</sup> For all that has been attempted and achieved in the intervening years, the stubborn facts remain that persons who are black, Hispanic or American Indian, and even in many respects, Asian, continue to confront social, economic and material circumstances that are different and far more difficult than those that confront their fellow citizens who are white. From birth through childhood, in school and in the workforce, persons who belong to disfavored minority groups must contend with active discrimination, lack of economic resources, inadequate education, poor health and poor healthcare, and few informal sources for information and assistance in finding opportunities to better their prospects.

Particularly given the pervasive government involvement in regulating and operating the nation's school systems, and given the importance that a solid education plays in providing access to advantageous social networks, the Court's rigid equal protection regime seems singularly disingenuous. A nation whose schools fail its minority communities is scarcely a neutral bystander; its failings actively contribute to perpetuating conditions that impede the ability of minority communities to heal themselves. The equal protection that the Court has propounded since *Bakke*<sup>178</sup> operates to perpetuate the very race-related disparities that have strained the national fabric throughout the nation's history.

Irrespective of divergent opinions on questions jurisprudence, partisan preference, or even morality, the nation cannot ignore the cumulative, pervasive, and generational disadvantages that confront persons born into racial minorities. In 2005, 44.4 percent of the children born in the United States belonged to a racial or ethnic minority.<sup>179</sup> For at least the fifteen years between 1990 and 2005, pregnancy rates for minority women have

176. 347 U.S. 483 (1954).

177. 163 U.S. 537 (1896).

178. 438 U.S. 537 (1896).

179. Non-Hispanic white women gave birth to 55.6% of all live infants in 2005. Black and Hispanic women accounted for 14.0% and 23.8% of the total respectively. STEPHANIE J. VENTURA, JOYCE C. ABMA, WILLIAM D. MOSHER, & STANLEY K. HENSHAW, NATIONAL CENTER FOR HEALTH STATISTICS, ESTIMATED PREGNANCY RATES FOR THE UNITED STATES, 1990–2005: AN UPDATE 58 NATIONAL VITAL STATISTICS REPORTS 1, 11 tbl. 3, *Number and Percent Distribution of Pregnancies, by Outcome of Pregnancy, by Age, and by Race and Hispanic Origin of Women: United States, 2005* (2009), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58\\_04.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_04.pdf).

exceeded those of non-Hispanic white women.<sup>180</sup> There is every reason to expect increases in the number of persons born in America to a lifetime of race-related adversity.

The combination of perverse and pervasive race-related disadvantages, a burgeoning population subject to such disadvantages and a paucity of informal social means to relieve such disadvantages creates the practical necessity, even the urgency, of empowering government to intervene and to extirpate the vestigial remains of the nation's heritage of slavery. The need is pressing; soon half the nation will have been born to race-related adversity. Jurisprudential doctrines that impede the ability of the people to use their government to bring equal opportunity into reach for persons of all races will be challenged, and, in the end, *Bakke*<sup>181</sup> and *Parents Involved*<sup>182</sup> will be bent or put aside to allow the people of the United States to use their government to help them to help themselves.

#### B. Higher Education as an Extra-Constitutional Mechanism to Remedy Disparities

Higher education provides the nation an extra-constitutional mechanism to strengthen and to preserve the republic; and, in that service, it will continue to play a role in the nation's efforts to help individuals overcome the disadvantages that befall members of disfavored minority communities. Institutions of higher education have long played a distinctive role in western society. They facilitate both individual growth and societal development.<sup>183</sup> These twin objectives led to the founding of American

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180. *Id.* at 12 tbl.4, *Estimated total pregnancy, total fertility, and total induced abortion rates, by race and Hispanic origin: United States, 1990, 1996, 2000, 2003, 2004, and 2005*, [http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58\\_04.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_04.pdf).

181. 438 U.S. 265 (1978).

182. 551 U.S. 701 (2007).

183. Already in the middle ages, "the social role of the medieval university consisted primarily of training for more rational forms of the exercise of authority in church, government, and society." Walter Rüegg, *Themes*, in 1 A HISTORY OF THE UNIVERSITY IN EUROPE, UNIVERSITIES IN THE MIDDLE AGES 21 (Hilde de Ridder-Symoens ed., 1991). The university was the catalyst that permitted the growth of nation states and international businesses; it provided the corps of leaders, trained in the skills of complex analysis, writing and mathematics and possessing the capacity to create the complex bureaucracies required to support the work of nations and international finance and enterprise; and it afforded a means to channel talented individuals from middle and upper classes into constructive endeavors. Peter Moraw, *Careers of Graduates*, in 1 A HISTORY OF THE UNIVERSITY IN EUROPE, UNIVERSITIES IN THE MIDDLE AGES 246 (Hilde de Ridder-Symoens ed., 1991) (explaining that founding or expanding medieval universities was motivated by "the 'prestige' and the practical, economic, and administrative benefits accruing to communities and rulers" social changes that resulted from the activities of the learned classes were unintended consequences); *id.* at 247 (citing the Northern Italian city states to illustrate how emerging cities and states needed specialists for domestic administration and legal systems in order to secure their autonomy and to gain competitive advantages over

universities.<sup>184</sup> College and university programs designed to meet these objectives not only provide individual students with skills that open the way to employment in business, government or the professions within the larger society, but also help individual students to gain access to social networks, and the advantages that they provide, that might otherwise not be open to them.<sup>185</sup> Nor is the utility of these programs in facilitating mobility across social networks a coincidental feature of the university mission, it is a core feature of the mission, and one that contributes significantly to protecting the nation.

The historic role of public colleges and universities in educating those who were not born to privilege or opportunity, coupled with the stubborn demographic facts that disproportionately burden persons in disfavored minority groups, pulled public universities into the conflicts that came before the Court in *Bakke*,<sup>186</sup> *Grutter*<sup>187</sup> and *Gratz*.<sup>188</sup> Higher education's historic mission, and the nation's persistent race-related disparities,<sup>189</sup> assure that the colleges and universities will be involved as the nation struggles to overcome the lingering effects of racial discrimination and to undo the Court's ill considered precedents.

1. American colleges and universities serve as extra-constitutional social mechanisms to secure representative government

Leading members of the founding generation understood the nation's security required more than a formal constitution whose division of power,

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their neighbors); *id.* at 255 (a university degree provided a "qualification which was largely or to some extent independent of birth and property was important everywhere, but supremely important in the modernization of less advanced societies.").

184. Benjamin Franklin expressed similar view during colonial times when he first advanced proposals for the creation of the University of Pennsylvania. BENJAMIN FRANKLIN, PROPOSALS RELATING TO THE EDUCATION OF YOUTH IN PENSILVANIA (1748), available at <http://www.archives.upenn.edu/primdocs/1749proposals.html> ("The good Education of Youth has been esteemed by wise Men in all Ages, as the surest Foundation of the Happiness both of private Families and of Common-wealths. Almost all Governments have therefore made it a principal Object of their Attention, to establish and endow with proper Revenues, such Seminaries of Learning, as might supply the succeeding Age with Men qualified to serve the Publick with Honour to themselves, and to their Country.").

185. See, e.g., Ioannides & Loury, *supra* note 141, at 1064–66 (education affects access to advantageous social network contacts and job offers); Mouw, *supra* note 163, at 886 (education level and education level of friends correlates to wages); Calvó-Armengol, *supra* note 163, at 426 n.3 (The gap between wages for white and blacks is roughly on the order of 25 percent to 40 percent, and can be partly explained by differences in skill levels and quality of education).

186. 438 U.S. 265 (1978).

187. 539 U.S. 306 (2003).

188. 539 U.S. 244 (2003).

189. See *supra* notes 116–180 and accompanying text.

checks, and balances raised hedges against the concentration of power that enabled despotism. The eminently practical early American leaders saw that security was inextricably linked to expanding access to social and economic opportunities. The founders knew that the hope that drew people to the new nation was less the desire for political freedom than the opportunity to be free from the restraints on personal prospects that were inherent in the class system that divided eighteenth century European society.

The tyranny of that class system chafed the European masses and constrained their social and economic prospects. Even in England, where social mobility was easier than in continental Europe, the vast majority of wealth and opportunity was controlled by aristocrats, landed gentry, merchants and entrepreneurs, and the mass of people “could never be sure of full employment.”<sup>190</sup> Europe’s class-related barriers to individual advancement, not its monarchical political systems, caused the restiveness that spurred massive immigration to the new world.<sup>191</sup> In the new world, the very lack of hereditary aristocracy facilitated the ascent from poverty to the highest ranks of national leadership, not only of Alexander Hamilton and Benjamin Franklin, and of the whole colonial leadership.<sup>192</sup> This chance for self-improvement drew the poor of Europe to America, and their pursuit of opportunity expanded the American settlements and enlarged the economic prospects for all.<sup>193</sup>

Members of the founding generation understood well the social dynamic that led to American political independence, and they saw necessity for government investment in programmatic measures that improved the lives and livelihood of the American people, that drew them together socially and economically and that thereby reinforced their political bonds.<sup>194</sup>

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190. T. S. ASHTON, *AN ECONOMIC HISTORY OF ENGLAND: THE EIGHTEENTH CENTURY 20–23* (1972).

191. Gottfried Achenwall, *Some Observations on North America from Oral Information by Dr. Franklin*, 14 HANNOVERISCHES MAGAZIN, 17tes, 18tes, 19tes, 31tes, 32tes Stücke (Feb. 27, Mar. 2, 6, Apr. 17, 20, 1767), cols. 257-96, 482-508 <http://franklinpapers.org/franklin/framedVolumes.jsp> (Translated from “Einige Anmerkungen über Nordamerika, und über dasige Grosbritannische Colonien. (Aus mündlichen Nachrichten des Hrn. Dr. Franklins.)” “Frequently poor Scots, Irish, Germans go to America, to seek there the fortune they do not believe they can find in the Old World.” *Id.*

192. JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 13* (2000).

193. See Achenwall, *supra* note 191 (recounting how the prospects of profiting from sales to internal migrants spurred the growth of settlements in the wilderness and how laborers save to set themselves up as independent farmers).

194. John Adams, for example, captured all these themes in 1779, when he proposed amendments to the Massachusetts Constitution that committed the legislature to support education throughout the commonwealth, including support for a university at Cambridge. JOHN ADAMS, *THE REVOLUTIONARY WRITINGS OF JOHN ADAMS* (C. Bradley Thompson ed., 2000), available at <http://oll.libertyfund.org/title/592/76884>

There can be no surprise that members of the founding generation favored investment in education as a public good.

Washington and Jefferson early emphasized the essential role of education in creating the opportunity that strengthens representative government. They regarded public colleges and universities as an extra-constitutional mechanism to preserve the republic by broadening the diffusion of learning across social classes and enlarging the population of persons possessing the skills required for democratic governance and useful in diversifying the economy. They believed that higher education would play a critical role in preparing leaders who understood thoroughly the distinctive American form of government and an educated citizenry able to hold its leaders to account.<sup>195</sup> They expected colleges and universities to

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("Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties, and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislators and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings, sincerity, good humor, and all social affections and generous sentiments among the people.")

195. Letter from George Washington, President of the United States, to Governor Robert Brooke, Governor of Va. (Mar. 16, 1795), *available at* <http://bit.ly/cx11A0> ("It is with indescribable regret, that I have seen the youth of the United States migrating to foreign countries, in order to acquire the higher branches of erudition, and to obtain a knowledge of the Sciences. Altho' it would be injustice to many to pronounce the certainty of their imbibing maxims, not congenial with republicanism; it must nevertheless be admitted, that a serious danger is encountered, by sending abroad among other political systems those, who have not well learned the value of their own.").

The Commissioners of the University of Virginia saw the distinctive role of the university as embracing the preparation of the nation's leaders, and to such ends established curricula:

To form the statesmen, legislators and judges, on whom public prosperity and individual happiness are so much to depend; To expound the principles and structure of government, the laws which regulate the intercourse of nations, those formed municipally for our own government, and a sound spirit of legislation, which, banishing all arbitrary and unnecessary restraint on individual action, shall leave us free to do whatever does not violate the equal rights of another; To harmonize and promote the interests of agriculture, manufactures and commerce, and by well informed views of political economy to give a free scope to the public industry; To enlighten them with mathematical and physical sciences, which advance the arts, and administer to the health, the subsistence, and comforts of human life; . . .

THOMAS JEFFERSON, REPORT OF THE COMMISSIONERS FOR THE UNIVERSITY OF VIRGINIA (1818), *available at* [http://mailer.fsu.edu/~njumonvi/jefferson\\_uva.htm](http://mailer.fsu.edu/~njumonvi/jefferson_uva.htm). The

play a seminal role in improving the nation's society and economy by bringing "into action that mass of talents which lies buried in poverty."<sup>196</sup> Moreover, both Washington and Jefferson believed that institutions of higher education had unique potential to help reduce the regional and religious prejudices that separated members of the populace from one another and fed the seeds of disharmony.<sup>197</sup> Jefferson emphasized the role of education in preventing the concentration of power in new aristocracies based upon wealth and family connection.<sup>198</sup>

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Commissioners saw public elementary education as laying the ground for good citizenship, since it served to assist a pupil.

To understand his duties to his neighbors and country, and to discharge with competence the functions confided to him by either; To know his rights; to exercise with order and justice those he retains; to choose with discretion the fiduciary of those he delegates; and to notice their conduct with diligence, with candor, and judgment; And, in general, to observe with intelligence and faithfulness all the social relations under which he shall be placed. To instruct the mass of our citizens in these, their rights, interests and duties, as men and citizens, being then the objects of education in the primary schools, whether private or public, in them should be taught reading, writing and numerical arithmetic, the elements of mensuration, (useful in so many callings,) and the outlines of geography and history.

*Id.*

196. Thomas Jefferson saw that the nation would benefit by choosing:

[F]rom the elementary schools [pupils] of the most promising genius, whose parents are too poor to give them further education, to be carried at the public expense through the colleges and university. The object is to bring into action that mass of talents which lies buried in poverty in every country, for want of the means of development, and thus give activity to a mass of mind, which, in proportion to our population, shall be the double or treble of what it is in most countries.

Letter from Thomas Jefferson, President of the United States, to José Correa da Serra (Nov. 25, 1817), *available at* <http://www.yamaguchy.netfirms.com/7897401/jefferson/1817.html>.

197. *See, e.g.,* Washington Letter, *supra* note 195 ("The time is therefore come, when a plan of Universal education ought to be adopted in the United States. Not only do the exigencies of public and private life demand it; but if it should ever be apprehended that prejudice would be entertained in one part of the Union against another; an efficacious remedy will be, to assemble the youth of every part under such circumstances, as will, by the freedom of intercourse and collision of sentiment, give to their minds the direction of truth, philanthropy, and mutual conciliation."); Letter from Thomas Jefferson, President of the United States, to Thomas Cooper (Nov. 2, 1822), *available at* <http://etext.virginia.edu/jefferson/quotations/jeff1370.htm> ("And by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality.").

198. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), *available at* <http://www.yamaguchy.netfirms.com/7897401/jefferson/1813b.html> ("Worth and genius would thus have been sought out from every condition of life, and completely prepared by education for defeating the competition of wealth and birth for public trusts."). Jefferson's concerns seem to resonate with those that prompted Adams to write into his 1779 draft of the Massachusetts Constitution a directing that the

Nor were the views of Washington and Jefferson idiosyncratic musings of the elite leadership. As early as 1785, still constituted under the Articles of Confederation, Congress recognized formally the national interest in fostering education. The Ordinance of 1785 regulating the disposition of western lands purchased from the Indians specified that “[t]here shall be reserved the lot N 16, of every township, for the maintenance of public schools, within said township,” and “the Federal Government has included grants of designated sections of the public lands for school purposes in the Enabling Act of each of the States admitted into the Union since 1802.”<sup>199</sup> Some eighty years later, Congress pledged resources of the national government to expand access to the university.

The Morrill Act of 1862 nationalized the policy goal of using the public university to facilitate individual social mobility thereby to enrich society. The Morrill Act subsidized state university creation, provided that states agreed to establish:

[A]t least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.<sup>200</sup>

The Morrill Act reflected a broader commitment to spur national development by subsidizing the efforts of individuals to improve their livelihoods and the ability of industrialists to create an infrastructure for settlement and commerce. The Homestead Act of 1862 subsidized the development of unoccupied federal lands.<sup>201</sup> The Pacific Railway Act of

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legislature spread “the opportunities and advantages of education in the various parts of the country, and among the different orders of the people.” See JOHN ADAMS, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS, *supra* note 194.

199. The General Land Ordinance of 1785, *reprinted in* 28 JOURNALS OF THE CONTINENTAL CONGRESS 375, 378 (Jon Fitzpatrick ed., 1933), *available at* [http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=028/lljc028.db&recNum=389&itemLink=D%3Fhlaw%3A2%3A.%2Ftemp%2F~ammem\\_CU6H%3A%3A%230280006&linkText=1](http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=028/lljc028.db&recNum=389&itemLink=D%3Fhlaw%3A2%3A.%2Ftemp%2F~ammem_CU6H%3A%3A%230280006&linkText=1); United States v. Wyoming, 331 U.S. 440, 443 (1947) (“Consistent with the policy first given expression in the Ordinance of 1785, the Federal Government has included grants of designated sections of the public lands for school purposes in the Enabling Act of each of the States admitted into the Union since 1802.”); *see also* Northwest Territory Ordinance of 1787, *reprinted in* 28 JOURNALS OF THE CONTINENTAL CONGRESS 334, 340, *available at* [http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=028/lljc028.db&recNum=389&itemLink=D%3Fhlaw%3A2%3A.%2Ftemp%2F~ammem\\_CU6H%3A%3A%230280006&linkText=1](http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=028/lljc028.db&recNum=389&itemLink=D%3Fhlaw%3A2%3A.%2Ftemp%2F~ammem_CU6H%3A%3A%230280006&linkText=1) (“Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”).

200. 7 U.S.C. § 304 (2006).

201. The Homestead Act, ch. 75, 12 Stat. 392 (1862) (homesteading ended in

1862 granted lands to railroad promoters, who had proven their ability to promote land sales to and to encourage settlement, both for the right of way as well as additional lands whose sale proceeds—collected from settlers who purchased railroad land—would help to finance the railroad construction.<sup>202</sup>

In the twentieth century, four pieces of landmark legislation renewed the public investment in higher education and supported unprecedented growth and expansion of the nation's college and university system. The G.I. Bill subsidized veteran access to higher education and laid the groundwork of interest in higher education that fueled the enrollment growth from the 1950s through the 1970s.<sup>203</sup> The National Defense Education Act of 1958 provided, *inter alia*, federal matching funding to establish student loan programs with priorities for students studying science, mathematics, engineering or modern foreign languages, and it provided federal funds for graduate fellowships to support students science, humanities, technology and mathematics.<sup>204</sup> The Economic Opportunity Act of 1964 created the work-study program that subsidized low-income student employment while at college.<sup>205</sup> The Pell Grant program originated as the Basic Educational

1976).

202. The Pacific Railway Act of 1862, ch. 120, 12 Stat. 489; EMERSON DAVID FITE, *SOCIAL AND INDUSTRIAL CONDITIONS IN THE NORTH DURING THE CIVIL WAR* 13 (1963).

203. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (1944); Christopher P. Loss, "*The Most Wonderful Thing Has Happened to Me in the Army*": *Psychology, Citizenship, and American Higher Education in World War II*, 92 J. AM. HIST. 864, 876 (2005) (noting that the army sought three objectives by supporting investment in soldiers, enhancing understanding of American history and values, improving economic prospects by providing soldiers with an avenue for skills enhancement and professional credentials, and, most critically, providing soldiers with opportunities, through education, to improve their psychological strength); URSULA DELWORTH & GARY R. HANSON, *STUDENT SERVICES: A HANDBOOK FOR THE PROFESSION* 14 (2d. ed. Jossey-Bass Publishing 1989).

204. National Defense Education Act of 1958, Pub. L. 85-864, 72 Stat. 1580 (1958). Section 101 of the Act announced the policy objective of the legislation:

The defense of this Nation depends upon the mastery of modern techniques developed from complex scientific principles. It depends as well upon the discovery and development of new principles, new techniques, and new knowledge. We must increase our efforts to identify and educate more of the talent of our Nation. This requires programs that will give assurance that no student of ability will be denied an opportunity for higher education because of financial need; will correct as rapidly as possible the existing imbalances in our educational programs which have led to an insufficient proportion of our population educated in science, mathematics, and modern foreign languages and trained in technology.

*Id.*

205. Economic Opportunity Act of 1964, 42 U.S.C. § 2701 (2006). President Lyndon Johnson explained the purpose the provision when he introduced legislation to initiate a war on poverty: "There is no more senseless waste than the waste of the brainpower and skill of those who are kept from college by economic circumstance. Under this program they will, in a great American tradition, be able to work their way



Opportunity Grants<sup>206</sup> was established by the Education Amendments of 1972.<sup>207</sup>

The evolving economic and social conditions of the nation have made the extra-constitutional functions of higher education more essential to preserving the republic than ever before. At the onset of the twenty-first century, responsible political leaders continue to view the human capital development role of education in general and of colleges and universities, in particular, as playing critical roles in enhancing national security<sup>208</sup> and spurring economic development.<sup>209</sup>

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through school.” President Lyndon B. Johnson, President’s Message to Congress Proposing a Nationwide War on the Sources of Poverty (Mar. 16, 1964), transcript available at <http://www.fordham.edu/halsall/mod/1964johnson-warpoverty.html>.

206. 20 U.S.C. § 1070a (2006).

207. Pub. L. No. 92-318, 86 Stat. 248 (1971). In 1971, Senator Claiborne Pell of Rhode Island introduced legislation to pursue what he called “a radical approach to Federal aid to education, in that it provides, as a matter of right, a basic educational opportunity grant . . . to every student pursuing a postsecondary education at an institution of higher education.” 117 Cong. Rec. 2008 (1971) (statement of Sen. Pell). Senator Birch Bayh of Indiana reiterated the purpose of the act to establish access to higher education as:

[A] basic Federal right. By establishing a minimum level of scholarship assistance for each needy student who wishes to pursue postsecondary education, we hope to break forever the bonds that have tied generation upon generation to the ghettos and economic backwaters of America.

117 Cong. Rec. 30403 (1971) (statement of Sen. Bayh).

208. *Homeland Defense: Exploring the Hart Rudman Report: Hearing before the Subcomm. on Technology, Terrorism, and Government Information of the S. Comm. on the Judiciary*, 107th Cong. 28 (2001) (statement of Gary Hart, Warren Rudman, Lee Hamilton, and Donald Rice, Members of the U.S. Commission on National Security/21st Century), available at <http://www.gpo.gov/fdsys/pkg/CHRG-107shrg239/pdf/CHRG-107shrg239.pdf> (“In the world we have entered, knowledge and agility are vital. This Commission views U.S. shortcomings in science policy and education as national security problems. We recommend major investments to bolster science and mathematics teaching, and a doubling of the public research and development budget within this decade.”).

209. *Challenges to American Competitiveness in Math and Science: Hearing before the Subcomm. on 21st Century Competitiveness of the Committee on Education and the Workforce*, 109th Cong. 13–14 (2005) (statement of Norman R. Augustine, Retired Chairman and CEO, Lockheed Martin Corporation), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109hhr10921303/pdf/CHRG109hhr10921303.pdf>

A number of studies have shown that over half the jobs created in America during the past half century were the direct consequence of earlier investments in science and technology. That is, the ability to provide jobs for our citizen’s and support their standard of living can be seen to depend to a very substantial degree on our nation’s competitiveness in science and technology. . . . How well equipped is America to deal with these challenges? On the positive side, we have built what is generally recognized to be the world’s finest higher education system, but it is noteworthy that over half the PhD’s awarded in engineering in our universities are granted to foreign citizens. Until recently, many of these talented individuals remained in

The deepest grains of American experience and political thought abjure aristocracy, both in its social and its political form. Time and again, the nation's leaders have invested the resources of the nation to sweep away barriers grown from wealth and connection and to expand educational and economic opportunities to the American people. The Justices of the Burger, Rehnquist, and Roberts majorities seem to have lost sight of this broader constitution.<sup>210</sup> Unlike those who framed the Constitution or the Fourteenth Amendment, these Justices seem not to have understood the perpetual need to tend the broader constitution. The nation can never surrender its power to protect and repair the broader constitution by drawing in from the margins of society peoples that prejudice or circumstance have pushed aside; and, of course, the nation must take the disadvantaged as it finds them, even if that means that government must reach out to those whose disadvantages reflect vicissitudes that fall disproportionately on members of disfavored minority communities.

2. Two hundred years of American public policy make it inevitable that institutions will attempt to extend access for members of minority groups.

The convictions that have informed American public policy for well over two hundred years make inevitable university efforts to extend access

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America and became major contributors to our society, but more recently fewer foreign students are enrolling in America's universities and of those who do more are returning home once their academic work is completed. Further, only 20 percent of bachelor's degrees in engineering are received by women; still fewer by minorities, with the consequence that this major potential source of talent goes underutilized.

*Id.*

*See also*, NATIONAL RESEARCH COUNCIL, INTANGIBLE ASSETS: MEASURING AND ENHANCING THEIR CONTRIBUTION TO CORPORATE VALUE AND ECONOMIC GROWTH: SUMMARY OF A WORKSHOP at 24–24 (Christopher Mackie rapporteur, 2009) (describing a presentation by Carol Corrado supporting the claim that “advanced education (mainly college education) was necessary for managers to evaluate innovations. In this view, education plays a direct role in the innovation process and in business growth in a way that goes beyond simply augmenting raw hourly labor input.”).

210. Here I employ the term “constitution” in the broad sense known in antiquity to suggest the distinctive ways, formal and informal, in which particular communities organize and govern themselves. *See* ARISTOTLE, POLITICS, in 21 ARISTOTLE IN 23 VOLUMES bk. iv, 1289a (H. Rackham trans., Harvard Univ. Press 1944) (“a constitution is the regulation of the offices of the state in regard to the mode of their distribution and to the question what is the sovereign power in the state and what is the object of each community”); *Id.*, bk. vii (discussing how the interplay of physical and political geography, climate, crops and population must be considered when developing a form of government for a city state); PLATO, THE LAWS, in 10 PLATO IN TWELVE VOLUMES bk. v, 747d-747e (R.G. Bury trans., Harvard Univ. Press 1968) (suggesting that different communities require different forms of government to accommodate differences and temperament and morality caused by climate and food).

to persons belonging to disfavored minority groups. The unmistakable expectation of American policy-makers from colonial times to this is that college and university programs afford all persons opportunities for an education that will expand their access to social advantages, improve their ability to provide for themselves, their families and their communities, and deepen their understanding of the principles of representative government. Colleges and universities contribute directly to the security of the nation by assisting persons from all social classes and distinctive groups within society, whatever their privileges or disadvantages, to master the skills on which American society and government depend and to join in the work of leading the nation.

So long as the stubborn disparities of wealth and education that separate some racial or ethnic minority communities from the white majority persist, so too will colleges and universities be subject to pressure to design admission policies or academic programs to alleviate the continuing effects of racial discrimination.<sup>211</sup> Providing individuals opportunities through

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211. See, 109 Cong. Rec. S11982 (2005) (statement of Sen. Obama)

In America, the promise of a good education for all makes it possible for any child to rise above the barriers of race or class or background and achieve his or her potential. We live in a world where the most valuable skill you can sell is knowledge. Yet we are denying this skill to too many of our children. This denial has grave consequences, with those consequences falling inequitably on children of color. Of every 100 white kindergartners, 93 graduate from high school, and 33 earn at least a bachelor's degree. But for every 100 Hispanic kindergartners, only 63 graduate from high school, and only 11 obtain that college degree. The school age population of Hispanic students is growing five times faster than the student population at large. If we fail to do better in educating deserving Hispanic youth, this failure will have grave consequences for us all, not just with increased unemployment but in missed opportunities for innovation and competitiveness.

*Id.*

See also, NATIONAL SCIENCE BOARD, A NATIONAL ACTION PLAN FOR ADDRESSING THE CRITICAL NEEDS OF THE U.S. SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS EDUCATION SYSTEM 71 (2007):

Addressing the needs of students with disabilities, English language learners, students from low socio-economic backgrounds, as well as students who have completed high school but who are not prepared for college or the workforce, is a challenge the entire community must acknowledge and accept. These unique student populations often come from impoverished families and attend racially or ethnically segregated and substandard schools. They need to be provided with opportunities and resources for success, including opportunities for STEM education and careers. Making use of the entire talent pool is a priority issue for STEM education since demographics will require major contributions to the workforce from those groups who have been "left behind." We are obligated to provide a level of education that will permit every young person to reach her/his potential. It is also in our best interest to nurture our most talented students. Major revolutions of the 21st century—globalization and technology—require that we foster a culture of innovation and the support the next generation of innovators who will help shape our future . . . . We can and must address both the skills gap and the performance

study to acquire the habits of thought, the information and the skills at using information that are the hallmark of educated people positions them to establish the social contacts that facilitate advancement.<sup>212</sup> Higher education, thus, provides a uniquely powerful instrument to equip persons from disfavored minorities to overcome disadvantages that fall disproportionately upon them and their communities.

When government seeks to break the cycle of race-related disadvantage, colleges and universities will number among the resources that it will employ to address that task.

#### V. CONCLUSION

The nation's colleges and universities will participate in the effort to correct the equal protection decisions of the Burger, Rehnquist and Roberts Courts in order to assure that errant notions equal protection do not strangle equal opportunity. The equal protection decisions of the Burger, Rehnquist and Roberts Courts will inevitably result in further litigation. Even assuming *arguendo*, that these doctrines had merit, they constrain the ability of the nation to meet the demands presented by demographic changes that are already well advanced and that cannot be ignored.

Nearly one half the children born in America in 2005 belonged to minority groups.<sup>213</sup> Most of these children face lives that are very different from white children born that year, greater poverty, poorer health, greater exposure to crime, poorer education, poorer employment prospects, and fewer avenues to break free from such adversity.<sup>214</sup> In 2023, many of them will be graduated from high school and will begin to enroll in colleges and universities. In 2030, they will be old enough to be elected to the House of Representative; in 2035, they will be eligible for election to the Senate; and, in 2040, they will be eligible to be elected President. The nation's future well-being depends upon its ability to free these very children from the serial disadvantages that presently burden persons who are members of disfavored minorities. There is no time to wait for generational, social

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gap. We cannot pit equity and access against competitiveness and innovation.

*Id.*

*See also*, Congressional Commission on the Advancement of Women and Minorities in Science, Engineering and Technology Development, Land of Plenty Diversity as America's Competitive Edge in Science, Engineering and Technology 30–32 (2000) (contrasting underrepresentation of racial minorities in science, engineering and technology fields, and high drop-out rates for those who enroll, with substantially higher than average persistence rates — 98% versus 36% over six years — for students who were selected by means other than standardized testing and provided all selected students with a “rigorous, intensely focused academic workshops during their senior year in high school.”).

212. *See supra* notes 147, 163–173, 185, and accompanying text.

213. *See supra* note 179–180 and accompanying text.

214. *See supra* notes 116–180 and accompanying text.

changes to overcome or to undo the impediments to progress that obstruct the lives of persons in disfavored minorities.

In a world where education is the key to economic independence and national security, the danger of ignoring the disadvantages that confront these children is immediate and great. The Court lost its bearings before and embraced doctrines that impaired the ability of the nation to address the challenges that changing society presented. *Dred Scott*<sup>215</sup> and *Lochner*<sup>216</sup> could not stay the will of the people to remove the problems bedeviled the nation, nor should any expect that *Bakke*<sup>217</sup> or *Parents Involved*<sup>218</sup> shall survive. What will replace the restrictive version of equal protection created by the Burger, Rehnquist and Roberts Courts remains to be seen, but it will surely afford latitude to consider race where consideration of race helps to provide sensible assistance in mitigating race-related disadvantages.

The wisest leaders of the nation have always understood that the security of the nation depends both upon the protections inscribed in the formal constitution and upon policies that provide real opportunities for its people. The nation has always invested in programs that help disadvantaged individuals to overcome the circumstances of their birth and upbringing. It has always provided them with education or other opportunities to improve themselves, their families, and their communities. At a time when serial disadvantages disproportionately beleaguer members of minority communities and when those communities are fast growing to comprise half of the available workforce, the well-being of the nation requires that the needs of those communities be addressed. Because it is an instrument to extend opportunity, the nation's leaders will continue to expect the higher education to find ways to meet the needs of persons belonging disfavored minorities. Hence, it is inevitable that colleges and universities will be drawn into the contest to reshape equal protection jurisprudence to support, rather than to strangle, programs that extend equal opportunity.

When NACUA was founded, the effort to dismantle segregation and to undo socially accepted discrimination was accelerating to full swing, but the successes achieved in those days have brought neither an end to the gross social, educational, and economic disparities associated with race, nor relief from the human and economic costs of such disparities. The great national endeavor remains unfinished, but it is a task that the nation can never put aside. The ideal of liberty that shaped the nation was grounded firmly in the realization that individual freedom can exist only within a community where government is made responsive to all and where each has a fair opportunity to advance self and family. As the nation

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215. 60 U.S. 393 (1857).

216. 198 U.S. 45 (1905).

217. 438 U.S. 265 (1978).

218. 551 U.S. 701 (2007).

continues its struggle to perfect the republic, its colleges and universities will play their roles; and it appears certain that during the early decades of NACUA's second fifty years, higher education lawyers will help to rework the nuances of equal protection jurisprudence and to assist in developing programs, consistent with the Constitution, to carry forward the unfinished task of providing equal opportunities for all persons to improve themselves through study.

# RACE AND HIGHER EDUCATION: THE TORTUOUS JOURNEY TOWARD DESEGREGATION

MARY ANN CONNELL\*

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## I. INTRODUCTION

When I graduated from the University of Mississippi in 1959, there was not an African-American student in my class or in the University at all. Despite the Supreme Court's unanimous opinion in *Brown v. Board of Education*<sup>1</sup> that "in the field of public education the doctrine of 'separate but equal' has no place,"<sup>2</sup> massive resistance to desegregation was in full sway in my state and continued for years in Alabama, Georgia, Florida, Louisiana, Mississippi, and South Carolina.<sup>3</sup>

The long journey toward desegregation of higher education institutions has taken many tortuous turns. It has wound its way from complete statutory and constitutional state mandates for racial segregation in education to recognition by all states that the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 stand for equal educational opportunity irrespective of race. There have been many important changes in higher education over the past fifty years, but none is more important than desegregation of our educational institutions. We would not be addressing issues today such as affirmative action, the future of historically black institutions, race-restrictive scholarships, and race-exclusive student organizations if this nation had not fought the battle to desegregate its schools, colleges, and universities. The legal leadership of Thurgood Marshall, Earl Warren, and John Minor Wisdom, among others, and the courage and moral leadership of James Meredith, Autherine Lucy, Hamilton Holmes, Charlayne Hunter, Rita Sanders Geier, Constance Baker-Motley, William Winter, Duncan Gray, Jr., Will Campbell, and countless others, caused this nation, especially the Deep South, to break down walls of separation because of race and to include people as people, no matter their race, color, creed, religion, national origin, disability, or sexual orientation.

This paper focuses on race and the desegregation of our schools, colleges, and universities. Before I share my own personal reflections on this subject, and to place them in context, I will recount the history of

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1. 347 U.S. 483 (1954)

2. *Id.* at 495.

3. See MARK YUDOF, DAVID L. KIRP, BETSY LEVIN, & RACHEL F. MORAN, EDUCATIONAL POLICY AND THE LAW 373 (2002); see also NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE DEEP SOUTH DURING THE 1950s 77 (1969).



higher education desegregation from the pre-*Brown* days until now.<sup>4</sup> My emphasis will be on those events taking place in the Deep South because my roots are there. However, it should not be ignored that struggles for racial equality and full acceptance were and are on-going in other parts of the country as well.<sup>5</sup>

## II. THE PRE-*BROWN* GRADUATE SCHOOL CASES

Prior to *Brown*, the Supreme Court decided four cases dealing with higher education desegregation at the graduate or professional school level.<sup>6</sup> Inequality was found in each case because there were specific benefits enjoyed by white students that were denied to black students with the same educational qualifications.

### A. *Missouri ex rel. Gaines v. Canada* (1938)

The first of the four pre-*Brown* higher education cases, *Missouri ex rel. Gaines v. Canada*,<sup>7</sup> presented the question of whether the state of Missouri's providing funds for its black residents to receive a law school education in other states, but denying them admission to its own law school, satisfied the requirement of equal protection. At that time, Missouri law prohibited attendance of blacks and whites at the same educational institution. However, law schools at the state universities in four adjacent states—Kansas, Nebraska, Iowa and Illinois—would admit nonresident black students.<sup>8</sup>

The Missouri Supreme Court upheld the tuition payment plan, emphasizing the advantages afforded by the law schools of the adjacent states.<sup>9</sup> The United States Supreme Court, however, in a 6-2 decision found such advantages to be beside the point: "The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to Negroes solely upon the

4. The author relies heavily in presenting the history of the desegregation of higher education institutions on an article published by the *Mississippi Law Journal* in 1993: Mary Ann Connell, *The Road to United States v. Fordice: What Is the Legal Duty of Public Colleges and Universities in Former De Jure States to Desegregate?* 62 *Miss. L. J.* 285 (1993) (Permission from the *Mississippi Law Journal* is on file with the author).

5. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973), *reh'g denied*, 414 U.S. 883 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

6. See generally RICHARD KLUGER, *SIMPLE JUSTICE* (1975) for an excellent, readable account of the NAACP's strategy in the pre-*Brown* cases.

7. 305 U.S. 337 (1938), *reh'g denied*, 305 U.S. 676 (1939).

8. *Id.* at 342-43.

9. *State ex rel. Gaines v. Canada*, 113 S.W.2d 783, 790 (Mo. 1937).

ground of color.”<sup>10</sup>

The Court forced the State of Missouri to provide a law school education for both races within its own state. However, the decision did not preclude the establishment of separate law schools for blacks and whites. Choosing that alternative, the Missouri legislature quickly appropriated \$200,000 to Lincoln University to provide a Jim Crow institution for the education of black law students.<sup>11</sup> Approximately thirty students enrolled in the school in September 1939. Housed along with a movie theater and a hotel in the former site of a cosmetic school, Lincoln University’s law school did not begin to rise to the level of the University of Missouri.<sup>12</sup> The Missouri Supreme Court sent the *Gaines* case back to the circuit court for a judgment on the equality of facilities.<sup>13</sup> The unexplained disappearance of Lloyd Gaines abruptly halted this second round of litigation and left open the unresolved question of the constitutionality of the separate-but-equal doctrine.<sup>14</sup>

While *Gaines* did little more than emphasize the “equal” in the separate-but-equal doctrine, the case was immensely important as a symbol of support of the rights of black citizens and of the Supreme Court’s intention to uphold those rights. After World War II, The National Association for the Advancement of Colored People (NAACP), encouraged by growing public awareness of the race issue and by Gunnar Myrdal’s powerful attack in 1944 upon the moral rectitude of the United States in tolerating the continued existence of segregation,<sup>15</sup> began preparation for its next higher education case.

#### B. *Sipuel v. Board of Regents* (1948)

In 1946, the University of Oklahoma School of Law denied admission to Ada Lois Sipuel, an honor graduate of Langston University, a historically black institution, solely because of her color.<sup>16</sup> Both the district and the Oklahoma Supreme Court denied Sipuel’s plea for a writ of mandamus.<sup>17</sup>

10. *Id.* at 349.

11. JEAN LYON PREER, *LAWYERS V. EDUCATORS: BLACK COLLEGES AND DESEGREGATION IN HIGHER EDUCATION* 53 (1982).

12. Gil Kujovich, *Equal Opportunity in Higher Education and the Public College: The Era of Separate But Equal*, 72 *MINN. L. REV.* 29, 118–19 (1987).

13. *State ex rel. Gaines v. Canada*, 131 S.W.2d 217, 220 (Mo. 1939).

14. In 2006, the University of Missouri awarded Gaines an honorary law degree and the Missouri state bar awarded him a law license, posthumously. David Stout, *Quiet Hero of Civil Rights History: A Supreme Triumph, Then Into the Shadows*, *N.Y. TIMES*, July 12, 2009, at A21.

15. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

16. *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948), *mandamus denied sub nom.*, *Fisher v. Hurst*, 333 U.S. 147 (1948).

17. *Sipuel v. Bd. of Regents of Univ. of Okla.*, 180 P.2d 135, 136 (Okla. 1947); *Id.*

She appealed to the U.S. Supreme Court. Thurgood Marshall, counsel for the NAACP Legal Defense Fund representing Sipuel, called upon the Court for the first time to reexamine the constitutionality of the separate-but-equal doctrine. Foreshadowing *Brown*, he argued that there was no rational justification for segregation in higher education and that segregation fostered feelings of humiliation, deprivation and inferiority totally incompatible with the fundamental egalitarianism of the American way of life.<sup>18</sup>

Only four days after oral argument, the Court handed down its three paragraph per curiam opinion.<sup>19</sup> Relying exclusively on *Gaines*, the Court ordered the State of Oklahoma to provide Sipuel a law school education in conformity with the Equal Protection Clause, but failed to order that she be admitted to the University of Oklahoma Law School.<sup>20</sup> Upon remand, the district court directed university authorities to either admit Sipuel to its law school, open a separate law school for her, or close the white law school until it opened one for blacks.<sup>21</sup> The Board of Regents quickly assigned three white law professors to instruct Sipuel in roped-off rooms in the state capitol, while it hurriedly began to establish a law school for black students at Langston.<sup>22</sup> Only one student attended the new law school at Langston, which closed after eighteen months.<sup>23</sup> After its closure, Sipuel was admitted to the University of Oklahoma Law School, from which she graduated in 1951.<sup>24</sup>

### C. *Sweatt v. Painter* (1950)

In 1946, the University of Texas Law School denied admission to Heman Marion Sweatt, a black mailman, solely because of his race.<sup>25</sup> Sweatt sought mandamus to compel his admission. The trial court found that the State had violated Sweatt's constitutional right of equal protection by denying him a legal education, but denied relief.<sup>26</sup> Instead, the court continued the case for six months to allow the State to hastily create a new law school for blacks at Texas State University, a historically black

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at 144.

18. PREER, *supra* note 11, at 76–77.

19. *Sipuel*, 332 U.S. at 631–33.

20. *Id.*

21. *Fisher v. Hurst*, 333 U.S. 147, 150 (1948); *see also* Tracy Miller, Comment, *Desegregation and the Meaning of Equal Educational Opportunity in Higher Education*, 17 HARV. C.R.-C.L. L. REV. 555, 567 (1982).

22. KLUGER, *supra* note 6, at 259.

23. MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* 123 (1987).

24. *Id.*

25. *Sweatt v. Painter*, 339 U.S. 629, 631 (1950), *reh'g denied*, 340 U.S. 946 (1950).

26. *Id.* at 631–32.

university. At the end of the six months, the trial court denied Sweat mandamus, finding that the State had provided a law school for black students, which he refused to attend.<sup>27</sup>

Sweatt appealed, asserting that the two schools were not equal.<sup>28</sup> The Texas trial and appellate courts disagreed and again denied Sweatt relief.<sup>29</sup> Upon appeal, the U.S. Supreme Court declined to re-examine *Plessy v. Ferguson*,<sup>30</sup> but did take note of the substantial inequality in the educational opportunities offered white and black law students by the State of Texas and ordered the University of Texas to admit Sweatt.<sup>31</sup> This was the first time the Court compelled the admission of a black student to a school previously maintained only for white students on the ground that the separate schools were unequal.<sup>32</sup>

#### D. *McLaurin v. Oklahoma State Regents* (1950)

In the last of the pre-*Brown* higher education cases, George W. McLaurin, a sixty-eight-year-old retired black professor, who had long before earned a master's degree, applied for admission to the University of Oklahoma's doctoral program in education for the 1947–48 term.<sup>33</sup> The University denied his admission solely on the basis of his race.<sup>34</sup> McLaurin sought injunctive relief.<sup>35</sup> The district court held that the Oklahoma statute that made it a misdemeanor to maintain a school at which blacks and whites were enrolled was unconstitutional.<sup>36</sup> The Oklahoma legislature amended the statute to permit attendance of black students at institutions of higher learning attended by white students, but required the programs of instruction to be operated on a segregated basis.<sup>37</sup>

The University admitted McLaurin to its graduate school but required him to sit apart from other students in a desk in an anteroom adjoining the classroom, to sit at a special desk on the mezzanine of the library, and to sit at a special table and eat at a designated time in the cafeteria where he

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27. *Id.* at 632.

28. *Id.*

29. *Sweatt v. Painter*, 210 S.W.2d 442 (Tex. 1948).

30. 163 U.S. 537 (1896) (upholding a Louisiana statute requiring that all railway companies provide “equal but separate accommodations” for black and white passengers against an equal protection challenge).

31. *Sweatt*, 339 U.S. at 636.

32. KLUGER, *supra* note 6, at 282.

33. *McLaurin v. Okla. State Regents*, 87 F. Supp. 526, 527 (W.D. Okla. 1948).

34. *Id.*

35. *Id.*

36. *Id.* at 528.

37. *McLaurin v. Okla. State Regents*, 339 U.S. 637, 639 (1950). “Segregated basis” was defined as “classroom instruction given in separate classrooms, or at separate times.” *Id.* at 639 n.1.

could not mix with white students.<sup>38</sup> McLaurin sought to have these conditions of his admission removed, but the district court denied him relief.<sup>39</sup> Upon appeal, the U.S. Supreme Court found these conditions hampered McLaurin's educational pursuits, thereby denying him equal protection of the law: "We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race. Appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races."<sup>40</sup>

Riding on the successes in the higher education cases and on several direct attacks on the separate-but-equal doctrine in interstate transportation cases,<sup>41</sup> the NAACP in 1950 launched a full-scale attack on the constitutionality of race-based segregation at the elementary-secondary level. From this assault came the unanimous opinion of the Supreme Court in *Brown v. Board of Education (Brown I)*.<sup>42</sup>

### III. *BROWN* AND ITS EXTENSION TO HIGHER EDUCATION

In a unanimous opinion written by Chief Justice Earl Warren, the *Brown I* Court concluded that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."<sup>43</sup> The following year, the Court rendered its implementation decision, *Brown v. Board of Education (Brown II)*,<sup>44</sup> remanding the cases to the district courts with guidelines to place responsibility for desegregation on local school officials and to assure progress with "all deliberate speed."<sup>45</sup>

The Court affirmed that the precedent it set in the *Brown* decisions clearly applied to higher education as well by ordering the University of Florida Law School to admit Virgil Hawkins, a black student who had been seeking admission since 1949.<sup>46</sup> The Court also ordered Louisiana State University to admit black students to a combined undergraduate and law school program,<sup>47</sup> Memphis State University to admit black students,<sup>48</sup> and

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38. *Id.* at 640.

39. *McLaurin*, 87 F. Supp. at 531.

40. *McLaurin*, 339 U.S. at 642.

41. *See, e.g.*, *Henderson v. United States*, 339 U.S. 816, 824 (1950) (holding compulsory segregation on interstate trains unconstitutional).

42. 347 U.S. 483 (1954) (*Brown I*).

43. *Id.* at 495.

44. 349 U.S. 294 (1955) (*Brown II*).

45. *Id.* at 301.

46. *Florida ex rel. Hawkins v. Bd. of Control*, 350 U.S. 413 (1956).

47. *Tureaud v. Bd. of Supervisors*, 347 U.S. 971 (1954).

48. *Booker v. Tenn. Bd. of Educ.*, 240 F.2d 689 (6th Cir. 1957), *cert. denied*, 353 U.S. 965 (1957).

Wichita Falls Junior College to admit black residents of Wichita Falls.<sup>49</sup>

Pursuant to court orders, Tennessee and Texas had desegregated their graduate and professional schools before *Brown*.<sup>50</sup> Following *Brown*, the six border states of Delaware, Maryland, West Virginia, Kentucky, Missouri and Oklahoma, along with the District of Columbia, took legislative and administrative action to abolish de jure segregation in public higher education.<sup>51</sup> Arkansas, Virginia, and North Carolina made “limited and circumscribed” efforts to desegregate their public universities.<sup>52</sup> The Universities of Arkansas and Virginia, for example, admitted blacks only for courses not offered at the black public colleges.<sup>53</sup>

Massive resistance to desegregation took place in Alabama, Georgia, Florida, Louisiana, Mississippi and South Carolina. These states used a potpourri of administrative, legislative, educational, and legal techniques to deny blacks admission to white colleges and universities. For example, admission tests were introduced, letters of recommendation from alumni and graduation from an accredited institution were required (most historically black institutions were not accredited), and subjective character assessments of applicants were made.<sup>54</sup> Statutes were passed ordering the closure of institutions ordered by a court to desegregate.<sup>55</sup>

Events surrounding the desegregation of the Universities of Alabama, Georgia, and Mississippi epitomized the politics of massive resistance in these Deep South states. In February 1956, Autherine Lucy entered the University of Alabama under court order.<sup>56</sup> Following two days of unrest and one day of rioting, the Board of Trustees suspended Lucy on February 6, 1956, supposedly for her safety and that of others. Lucy sued the University unsuccessfully to have the suspension overturned.<sup>57</sup> The University claimed that Lucy slandered the institution in her statements and permanently expelled her.<sup>58</sup> The University thus reverted to its all-white status which it maintained for another seven years.<sup>59</sup>

49. *Wichita Falls Junior Coll. Dist. v. Battle*, 204 F.2d 632, 635 (5th Cir. 1953), *cert. denied*, 347 U.S. 974 (1954).

50. *Gray v. Univ. of Tenn.*, 343 U.S. 517 (1952); *Sweatt v. Painter*, 339 U.S. 629 (1950).

51. U.S. COMM’N ON CIVIL RIGHTS, *EQUAL PROTECTION OF THE LAWS IN PUBLIC HIGHER EDUCATION* 51–56 (1960).

52. *Id.* at 56–59.

53. *Id.* at 56.

54. *Id.* at 56–58.

55. *Id.* at 69–96.

56. *Id.* at 84–89.

57. *Id.*

58. *Id.* Thirty-six years later, on May 9, 1992, Autherine Lucy Foster received her Master’s degree in elementary education and her daughter, Grazia Foster, received an undergraduate degree in corporate finance from the University of Alabama. *Student Rises from ‘56 Riot*, *THE CLARION-LEDGER* (Jackson, Miss.), May 9, 1992, at A2.

59. *United States v. Alabama*, 628 F. Supp. 1137, 1142 (N.D. Ala. 1985).

Five years later, in 1961, the federal district court ordered the University of Georgia to admit Hamilton Holmes and Charlayne Hunter, thereby ending 160 years of segregation at the University. Riots ensued, and the two were suspended. The court immediately ordered them reinstated.<sup>60</sup> Both students graduated in 1963.

In 1962, the Court of Appeals for the Fifth Circuit ordered the University of Mississippi to admit James Meredith to its undergraduate program.<sup>61</sup> Stalling and delaying implementation of the court's order, the University's governing board withdrew the authority of University officials to act further on the matter and turned it over to Governor Ross Barnett, who appointed himself registrar and denied Meredith's application for admission.<sup>62</sup> President Kennedy ordered federal marshals to assist in enforcing court orders to admit Meredith by escorting him through the registration process. A riot followed in which two were killed and over 300 injured. President Kennedy federalized the National Guard and deployed 3,000 regular Army troops to stop the violence. Federal marshals escorted Meredith to and from classes to assure his safety until he graduated in the summer of 1963.<sup>63</sup>

In January of 1963, Harvey Gantt broke the color line in South Carolina as he was admitted to Clemson College without disruption and with no federal forces.<sup>64</sup> Six months later, however, President Kennedy federalized Alabama's National Guard to force Governor George Wallace to step aside from his defiant stance at the "schoolhouse door" at the University of Alabama and admit Vivian Malone and James Hood to enroll at that institution.<sup>65</sup> While the color line in higher education was broken during

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60. *Holmes v. Danner*, 191 F. Supp. 394 (M.D. Ga. 1961), *aff'd*, 364 U.S. 939 (1961). Holmes subsequently achieved Phi Beta Kappa, and Hunter became a news broadcaster for the Public Broadcasting System. In 1988 Charlayne Hunter-Gault delivered the commencement address 25 years after her own graduation and was featured on the cover of the alumni magazine. University of Georgia, 40<sup>th</sup> Anniversary of UGA's Desegregation Timeline (Jan. 9, 2001), [http://www.uga.edu/news/desegregation/history/index\\_time.html](http://www.uga.edu/news/desegregation/history/index_time.html)

61. *Meredith v. Fair*, 305 F.2d 343, 361 (5th Cir. 1962) (finding that Meredith's application had been turned down solely because he was a Negro in violation of the Constitution), *cert. denied*, 371 U.S. 828 (1962). Forty years later, the University of Mississippi held a yearlong "Open Doors" program to recognize Meredith's contribution to desegregating higher education and changing race relations at that institution. *James Meredith Returns to University of Mississippi for Ceremonies Marking 40<sup>th</sup> Anniversary of School's Integration*, JET 38–39 (Oct. 21, 2002).

62. CHARLES W. EAGLES, *THE PRICE OF DEFIANCE 275–96* (2009). Professor Eagles' recent book is the definitive study of this tragic event.

63. DAVID G. SANSING, *MAKING HASTE SLOWLY: THE TROUBLED HISTORY OF HIGHER EDUCATION IN MISSISSIPPI 156–57, 195* (1991).

64. JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS 208* (1993). Gantt subsequently became mayor of Charlotte, North Carolina. *Id.*

65. Phillip Scott Arnston, *Thirty Years Later: Is the Schoolhouse Door Still*

the first ten years after *Brown II*, progress was slow and delay was the order of the day.

#### IV. THE CIVIL RIGHTS ACT OF 1964 AND THE *ADAMS* LITIGATION

Because progress in providing blacks with equal educational opportunities was moving so slowly, Congress responded to the call for stronger federal action by passing the Civil Rights Act of 1964.<sup>66</sup> Title VI of the Act states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>67</sup>

The Department of Health, Education, and Welfare (HEW) was given responsibility for enforcing Title VI in educational institutions receiving federal funds by withholding those funds from institutions that discriminated against blacks. The Department implemented regulations which prohibit a recipient of federal funds from denying, or providing a different quality of service, financial aid, or other programs on the basis of race, color, or national origin.<sup>68</sup>

The legislation also gave the Attorney General authority to file desegregation suits on behalf of private citizens.<sup>69</sup> However, not until 1969 did HEW begin examination of ten states that continued to operate dual systems of public higher education: Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Virginia.<sup>70</sup> HEW found that these states were in violation of Title VI and ordered them to submit statewide plans for desegregation within 120 days.<sup>71</sup> Five of the states ignored the directive and the other five submitted unacceptable plans, yet the Department did nothing.<sup>72</sup> It filed no formal complaints, instituted no enforcement proceedings, and made no referrals to the Justice Department for prosecution.<sup>73</sup>

HEW's failure to act led to the massive and lengthy *Adams* litigation, a class-action suit brought by the NAACP Legal Defense Fund against HEW, charging that the Department had defaulted in its obligation to enforce Title VI.<sup>74</sup> The plaintiffs asked the district court to compel HEW to enforce

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*Closed? Segregation in the Higher Education System of Alabama*, 45 ALA. L. REV. 585-86 (1994).

66. 42 U.S.C. §§ 2000a-h (2000).

67. *Id.* § 2000d (2000).

68. 34 C.F.R. § 100.3(b) (2000).

69. 42 U.S.C. §§ 2000c-6, d-1 (2000).

70. *Adams v. Richardson*, 356 F. Supp. 92, 94 (D.D.C. 1973).

71. *Id.*

72. *Id.*

73. *Adams v. Richardson*, 480 F.2d 1159, 1164 (D.C. Cir. 1973) (en banc).

74. *Adams*, 356 F. Supp. at 94-95. The case is referred to as the "Adams"



the law, either by obtaining acceptable desegregation plans from the states or by cutting off federal funds to those colleges and universities that failed to produce acceptable desegregation plans. In 1973, the district court found that HEW had failed to uphold its responsibilities under Title VI and issued an injunction ordering the Department to institute compliance procedures against the ten states operating dual systems of higher education. That same year, the Court of Appeals for the District of Columbia upheld the district court and admonished HEW for failing to fulfill its enforcement responsibility.<sup>75</sup>

The Department of Education was created in 1979 and assumed responsibility for enforcement of Title VI.<sup>76</sup> The *Adams* litigation continued over the next seventeen years, with various Education Department secretaries as defendant. Finally, in 1990, the Court of Appeals for the D.C. Circuit ruled that no private right of action against government enforcement agencies existed under Title VI, and dismissed the case for lack of jurisdiction.<sup>77</sup>

Despite ending “not with a bang but a whimper,” the impact of the *Adams* litigation was enormous. From this litigation came desegregation plans for seventeen states, involvement of the Justice Department in cases against Tennessee, Louisiana, Mississippi, and Alabama, and the HEW Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education (Revised Criteria),<sup>78</sup> which still serve as the guidelines for measuring a state’s compliance with the requirements of Title VI. The Revised Criteria require states having a history of de jure segregation to take affirmative steps to enhance the quality of black state-supported colleges and universities, to place new “high-demand” programs on traditionally black campuses, to eliminate unnecessary program duplication, to increase the percentage of black academic employees, and to increase the enrollment of blacks at traditionally white public colleges.<sup>79</sup> Even as late as 2005, the Office for Civil Rights continued to monitor cooperative desegregation partnership

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litigation after Kenneth Adams, a Mississippi high school student whose name appeared first in alphabetical order on the complaint.

75. *Adams*, 480 F.2d at 1164.

76. Department of Education Organization Act of 1980, Pub. L. No. 96-88, 93 Stat. 668 (1979). For a good discussion of the powerful role of the executive branch in school desegregation, see Lia Epperson, *Undercover Power: Examining the Role of the Executive Branch in Determining the Meaning and Scope of School Integration Jurisprudence*, 10 BERKELEY J. AFR.-AM. L. & POL’Y. 146 (2008).

77. *Women’s Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990).

78. 43 Fed. Reg. 6658 (Feb. 15, 1978).

79. See *Elements of a Plan*, 43 Fed. Reg. at 6661. For excellent, understandable coverage of Title VI, the *Adams* litigation, the implementing regulations, and the Revised Criteria, see WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 1450–52 (4th ed. 2006).

agreements with a number of states.<sup>80</sup>

#### V. DETERMINING THE SCOPE OF THE DUTY TO DESEGREGATE

The crux of the legal debate in the post-*Brown* higher education desegregation cases was whether Title VI and the Equal Protection Clause require a state to adopt race-neutral policies and practices (stop segregating by race), or whether a state with a former de jure system of higher education must do more and go beyond race-neutrality to ensure that any remaining vestiges of the formerly segregated system are removed.<sup>81</sup> While the Supreme Court clearly extended the mandates of *Brown I* to higher education institutions in *Brown II*, it gave no guidance to colleges and universities regarding their affirmative duty to desegregate.

The Revised Criteria, placing an affirmative duty upon school districts to integrate, were first incorporated into a major desegregation decree in *United States v. Jefferson County Board of Education*.<sup>82</sup> Writing for the Fifth Circuit in 1966, Judge John Minor Wisdom “transformed the law of school desegregation . . .”<sup>83</sup> Judge Wisdom placed an affirmative duty on school boards to achieve a unitary system that he defined as “not white schools or Negro schools—just schools.”<sup>84</sup>

##### A. *Green v. New Kent County School Board* (1968)

Mirroring to a large extent Judge Wisdom’s landmark ruling in *Jefferson County*, the Supreme Court went far beyond its previous school desegregation rulings by holding unanimously, in *Green v. New Kent County School Board*,<sup>85</sup> that school boards have an “affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”<sup>86</sup> In *Green*, the New Kent County Virginia school board continued to operate segregated schools for eleven years after *Brown* and modified this practice only after Title VI mandated cutting off federal funds to school districts that continued to operate racially segregated schools.<sup>87</sup> To comply with this mandate, the school board adopted a “freedom-of-choice” plan that

80. See 90 Md. Op. Atty. Gen. 153, 2005 WL 3024511 (Md. A.G., Nov. 8, 2005).

81. KAPLIN & LEE, *supra* note 79, at 1453.

82. 372 F.2d 836 (5th Cir. 1966). The seven cases consolidated for appeal involved public schools in Alabama and Louisiana. *Id.* at 845.

83. BASS, *supra* note 64, at 220. Judge Wisdom regarded his opinion in *Jefferson County* as the “most important of his career.” JACK BASS, UNLIKELY HEROES 298 (1981).

84. *Jefferson County*, 372 F.2d at 890.

85. 391 U.S. 430 (1968).

86. *Id.* at 437–38.

87. *Id.* at 433–34.

allowed students to choose which school to attend.<sup>88</sup> During the three years of operation, no white students attended the all-black high school and only fifteen percent of black students enrolled in the historically white school.<sup>89</sup>

Justice Brennan, writing for the Court, stated that the ultimate goal in America is to dismantle the dual school system and achieve a “unitary, nonracial system of public education.”<sup>90</sup> In addition, the Court stated that “[t]he burden of a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.”<sup>91</sup>

The importance of the Court’s opinion in *Green* cannot be overemphasized.<sup>92</sup> There had been forerunners to be sure, but none had used the express words “affirmative duty.”<sup>93</sup> The mandate of the Court was clear—there exists an affirmative duty imposed on the states by the Fourteenth Amendment to take whatever steps are necessary to eliminate racial discrimination in education. But, the question remained: does that duty extend to public higher education institutions, as well as elementary/secondary schools, in former de jure states? Confusion and debate raged in the lower courts over the applicability, or lack thereof, of the mandate of *Green* outside the elementary/secondary field.

#### B. *Alabama State Teachers Association v. Alabama Public School and College Authority* (1969)

*Alabama State Teachers Association v. Alabama Public School and College Authority* (ASTA)<sup>94</sup> was the first case after *Green* to address the affirmative duty of a state to dismantle a dual system of higher education. The plaintiffs sought to prevent the State of Alabama from constructing a four-year degree-granting branch of Auburn University in near-by Montgomery, the home of historically black Alabama State Teachers College.<sup>95</sup> They argued that precedents from elementary/secondary cases imposed on the State a duty to use new construction or expansion of facilities to maximize desegregation and effectuate the dismantling of the dual system.<sup>96</sup> Constructing and operating a branch of historically white

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88. *Id.*

89. *Id.* at 437.

90. *Id.* at 436.

91. *Id.* at 439.

92. See YUDOF ET AL., *supra* note 3, at 376 (2002) (“*Green* has a historic place in the evolution of constitutional standards, and it triggered a major change in the nature and pace of desegregation in the South.”).

93. ARTHUR SELWYN MILLER, TOWARD INCREASED JUDICIAL ACTIVISM 124–25 (1982) (describing *Green* as “a constitutional revolution of the first magnitude”).

94. 289 F. Supp. 784 (M.D. Ala. 1968), *aff’d per curiam*, 393 U.S. 400 (1969).

95. *Id.* at 785.

96. *Id.* at 787.

Auburn University within seven miles of historically black Alabama State would not maximize desegregation but would, instead, increase racial disparity of students and faculty between the two schools.<sup>97</sup>

The three-judge district court judicially noticed that Alabama had operated a dual system of higher education that had not been dismantled and had an affirmative duty to dismantle the system.<sup>98</sup> However, the court held that the scope of the State's duty differed from and was less strict than its duty to desegregate public elementary and secondary school systems.<sup>99</sup> While acknowledging the Supreme Court's recent decision in *Green*, the *ASTA* district court did not find its mandate to apply to the operation of an education system at the college level where freedom of choice rather than compulsory attendance existed.<sup>100</sup>

The Supreme Court affirmed the judgment in an unsigned opinion.<sup>101</sup> Justice Douglas objected in dissent, finding the delineation between higher and lower education in desegregation obligations was "an amazing statement" in light of the fact that the forerunners of *Brown* were cases involving higher education institutions.<sup>102</sup>

### C. *Sanders v. Ellington* (1968)

During the same year that *ASTA* was decided, the District Court for the Middle District of Tennessee reached a completely opposite conclusion as to the applicability of *Green* to higher education in *Sanders v. Ellington*.<sup>103</sup> The facts in *Sanders* were remarkably similar to those in *ASTA*. In 1968, the University of Tennessee, a historically white institution, announced plans to construct a new building to provide more adequate space and facilities for its growing evening-school center in Nashville (UT-N).<sup>104</sup> Rita Sanders,<sup>105</sup> a law student at Vanderbilt University and an instructor at predominantly black Tennessee Agricultural and Industrial State University (later Tennessee State University (TSU)), also situated in Nashville, initiated a class-action suit seeking to enjoin the building of the new facility and expansion of UT-N's curricular offerings.<sup>106</sup> Sanders alleged that such expansion would duplicate programs offered at TSU, negatively affect

97. *Id.* at 787.

98. *Id.*

99. *Id.* at 790.

100. *Id.*

101. *Ala. State Teachers Ass'n v. Ala. Pub. Sch. and Coll. Auth.*, 393 U.S. 400 (1968) (per curiam).

102. *Id.* at 401 n.2 (Douglas, J., dissenting).

103. 288 F. Supp. 937 (M.D. Tenn. 1968).

104. *Id.* at 941.

105. Rita Sanders later married and became Rita Sanders Geier; hence, the change in names of the plaintiff in this litigation.

106. *Sanders*, 288 F. Supp. at 939.

the desegregation efforts of TSU, and impede the desegregation of Tennessee's other institutions of public higher education.<sup>107</sup> The United States intervened and expanded the request for relief by asking the court to order the State to present a plan to produce "meaningful desegregation of the public universities of Tennessee."<sup>108</sup>

District Court Judge Frank Gray, Jr., relying on *Green*, held that "there is an affirmative duty imposed upon the State by the Fourteenth Amendment . . . to dismantle the dual system of higher education which presently exists in Tennessee."<sup>109</sup> By this time, all public institutions of higher learning in Tennessee had adopted non-discriminatory, open admission policies. Judge Gray held, however, that the existence of these non-discriminatory policies alone does not "discharge the affirmative duty imposed upon [Tennessee] by the constitution."<sup>110</sup> Finding that these policies were not working effectively to dismantle the effects of de jure segregation, the district court ordered the State to submit a plan designed to achieve desegregation of the higher education institutions of Tennessee, with particular attention to TSU, which remained over 99% black.<sup>111</sup>

The district court denied the plaintiffs' plea for an injunction halting construction of the new facility for UT-N because the focus of UT-N was the education of adult learners taking evening classes—a time when there were few, if any, such classes being offered at TSU.<sup>112</sup> Therefore, the court said, the two schools would not compete with each other in a manner that would perpetuate the dual system.<sup>113</sup> Judge Gray refused, however, to base his holding on *ASTA*, but chose instead to become the first court to adopt for higher education the scope of the affirmative duty defined in *Green*.<sup>114</sup>

Over the following years, the defendants in the *Sanders* litigation submitted a series of plans that focused on other-race enrollment and employment. Each plan produced incremental desegregation at the historically white institutions ("HWIs"),<sup>115</sup> but had essentially no effect on TSU, which remained overwhelmingly black. The parties and the court

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107. *Id.* at 940.

108. *Id.* at 939.

109. *Id.* at 942. Judge Gray based his conclusion that the dual system still existed upon the fact that "the historically white institutions still have overwhelmingly white enrollments, and Tennessee A & I State University still has an overwhelmingly Negro enrollment." *Id.* at 940.

110. *Id.* at 942.

111. *Id.* at 940.

112. *Id.* at 941–42.

113. *Id.* at 941.

114. Note, *Constitutional Law—Desegregation—States Are Required to Take Affirmative Action to Desegregate Higher Education Facilities*, 22 VAND. L. REV. 208, 211 (1968).

115. In this article, the abbreviation "HBIs" will refer to historically black institutions; the abbreviation "HWIs" will refer to historically white institutions.

realized that even after years of litigation and the attempted implementation of countless plans, desegregation was not being achieved and had little prospect of being reached as long as UT-N remained a direct competitor of TSU. As a consequence, in 1977, the district court ordered the merger of UT-N into TSU.<sup>116</sup> The merger, however, did not end the case. The complexity of the issues expanded exponentially as the State worked to merge a vibrant UT-N into TSU.

In 1984, after years of litigation and implementation of countless plans, the parties reached a Stipulation of Settlement that provided programmatic and physical plant enhancements to TSU to speed its desegregation efforts and programs to further the recruitment and retention of black faculty and students on the campuses of the HWIs.<sup>117</sup> The district court approved the Stipulation, and the Sixth Circuit affirmed.<sup>118</sup> Calmness appeared for a while. Meanwhile, in the Fourth Circuit, another major desegregation battle was ongoing.

#### *D. Norris v. State Council of Higher Education (1971)*

Three years after *ASTA* and *Sanders*, the District Court for the Eastern District of Virginia stepped into the fray in *Norris v. State Council of Higher Education*<sup>119</sup> and halted the expansion of historically white Richard Bland College (RBC) from a two-year to a four-year institution in an area where a predominantly black four-year institution, Virginia State College, already existed. The plaintiffs contended that a racially identifiable dual system of higher education still existed in Virginia, that the state had an affirmative duty to dismantle the dual system, that RBC had not made satisfactory progress in desegregating its faculty and student body, that expansion of RBC would impede Virginia State in its efforts to attract white students and faculty, and that Richard Bland would duplicate programs offered by Virginia State because the two schools were only seven miles apart.<sup>120</sup> Relying on the Supreme Court's affirmance of *ASTA*, the defendants argued that the State's good faith, racially neutral admission and employment policies satisfied the State's constitutional obligation to dismantle its previously segregated system.<sup>121</sup>

116. *Geier v. Blanton*, 427 F. Supp. 644, 661 (M.D. Tenn. 1977).

117. By this time, the district court had allowed two additional intervening parties: Dr. Raymond Richardson, a professor of mathematics at TSU, and a group of parents, teachers, and faculty at TSU (the "Richardson Intervenors") and TSU professor Dr. Coley McGinnis and a group of TSU faculty and students, whose primary interest was to see that the merger of UT-N and TSU was properly carried out. *Id.*

118. *Geier v. Alexander*, 593 F. Supp. 1263 (M.D. Tenn. 1984), *aff'd*, 801 F.2d 799 (6th Cir. 1986).

119. 327 F. Supp. 1368 (E.D. Va. 1971), *aff'd per curiam sub nom.*, Bd. of Visitors of the Coll. of William & Mary v. *Norris*, 404 U.S. 907 (1971).

120. *Id.* at 1369.

121. *Id.* at 1369-72.

The *Norris* court rejected defendants' position and their reliance on *ASTA*, holding instead that the affirmative duty set forth in *Green* applied equally to higher education institutions: "The means of eliminating discrimination in public schools necessarily differ from its elimination in colleges, but the state's duty is as exacting."<sup>122</sup> Finding that Virginia still operated a racially identifiable dual system of higher education and that expanding RBC would frustrate the efforts of Virginia State to desegregate, the court enjoined the expansion.<sup>123</sup> This was the first time that a court had enjoined the improvement of an all-white state college.<sup>124</sup> Even though *Norris* reached an entirely different conclusion of law from *ASTA*, the Supreme Court summarily affirmed the case.<sup>125</sup>

With per curiam affirmances of two cases reaching diametrically opposite results, the Court permitted confusion to reign for years.<sup>126</sup> Major desegregation suits were filed against the states of Louisiana, Mississippi, Tennessee, and Alabama, but there were no clear legal standards by which to judge the state's liability or the extent of permissible remedies. As Judge Gray pondered in *Geier v. Dunn*, "[w]hat, then, is the law which this court must follow in the instant case, given these two apparently diametrically opposed results [*ASTA* and *Norris*], each of which was affirmed summarily by the Supreme Court?"<sup>127</sup>

#### E. *Bazemore v. Friday* (1986)

In 1986, the Supreme Court rendered its decision in *Bazemore v. Friday*,<sup>128</sup> a case which was to become the focal point for those who did not think the affirmative mandates of *Green* extended to higher education. In *Bazemore*, the Court addressed 4-H and Homemaker clubs that had been segregated by law in North Carolina before enactment of the Civil Rights Act of 1964. In response to the Act, the clubs opened membership to any eligible person, regardless of race. At the time of the suit, however, the

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122. *Id.* at 1373.

123. *Id.*

124. Comment, *Integrating Higher Education: Defining the Scope of the Affirmative Duty to Integrate*, 57 IOWA L. REV. 898 (1972).

125. *Bd. of Visitors of the Coll. of William & Mary v. Norris*, 404 U.S. 907, 907 (1971).

126. Deon D. Owensby, *Affirmative Action and Desegregating Tennessee's Higher-Education System: The Geier Case in Perspective*, 69 TENN. L. REV. 701, 708 (2002) ("The Supreme Court created greater confusion in the desegregation cases by not distinguishing *Norris* or *ASTA*, two cases with completely opposite results on the same issue.").

127. 337 F. Supp. 573, 578 (M.D. Tenn. 1972); see also *Knight v. Alabama*, 900 F. Supp. 272, 280-81 (N.D. Ala. 1995) (Judge Murphy writing: "If this case should again be appealed and the higher courts return the case to this Court, the Court earnestly seeks guidance.").

128. 478 U.S. 385 (1986).

clubs were still racially segregated, not by law but by choice.<sup>129</sup>

After a lengthy trial, the district court found no evidence of race-based discrimination after 1964 and concluded that any current racial imbalance in the clubs “was the result of wholly voluntary and unfettered choice of private individuals.”<sup>130</sup> The Fourth Circuit affirmed, as did the Supreme Court in a bitterly divided 5-4 decision. Emphasizing the voluntary aspect of club membership, as opposed to the compulsory nature of public school attendance, Justice White, writing for the majority, found *Green* not controlling: “however sound *Green* may have been in the context of the public schools, it has no application to this wholly different milieu.”<sup>131</sup> The Court found that where attendance and participation is based on voluntary free choice, discontinuing prior discriminatory practices and adopting neutral admission policies “is all the Constitution requires.”<sup>132</sup>

The dissenting justices strongly criticized what they saw as the majority’s “winking at the Constitution” and “relieving the State of the overall obligation to desegregate in one context while imposing that obligation in another.”<sup>133</sup> Justice Brennan, in dissent, rejected the majority’s reliance on the voluntary, non-compulsory nature of the club activities: “[I]t is clear that the State’s obligation to desegregate formerly segregated entities extends beyond those programs where participation is compulsory to voluntary public amenities such as parks and recreational facilities.”<sup>134</sup>

#### VI. “FREEDOM OF CHOICE” ARRIVES IN THE CIRCUITS: WILL IT BE *GREEN* OR *BAZEMORE*?

The Court did not discuss higher education in *Green* or *Bazemore*, nor did it send a clear message as to what standard the circuits should apply when determining the scope of the duty of a former de jure public university to desegregate. Did the affirmative duty of *Green* extend to higher education or did the “freedom of choice” factor in *Bazemore* lessen that duty? Cases pending before the Fifth, Sixth, and Eleventh Circuits, and the subsequent split in these circuits, probed at this question.

##### A. The Sixth Circuit Follows *Green* (1986)

In 1986, after eighteen years of going back and forth in the district and appellate courts in the Tennessee higher education litigation arising from

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129. *Id.* at 407.

130. *Id.* (White, J., concurring).

131. *Id.* at 408.

132. *Id.*

133. *Id.* at 409, 419 (Brennan, J., dissenting).

134. *Id.* at 418.



*Sanders v. Ellington*,<sup>135</sup> the Sixth Circuit in *Geier v. Alexander*<sup>136</sup> declined to find *Bazemore* controlling and reaffirmed its earlier decision in *Geier v. University of Tennessee*<sup>137</sup> that *Green* was the controlling standard in the case:

[T]he *Green* requirement of an affirmative duty applies to public higher education as well as to education at the elementary and secondary school levels. Nothing in the *Bazemore* decision, where the compelling interest of a state in the education of its citizenry was not involved, requires us to reexamine these holdings.<sup>138</sup>

Basing its opinion, in large part, on the distinction between “clubs” dealt with in *Bazemore* and “education” in *Green*, the Sixth Circuit refused to extend *Bazemore* to any level of education:

It appears fallacious to attempt to extend *Bazemore* to any level of education. While membership in 4-H and Homemaker Clubs offers a valuable experience to young people and families, particularly in rural areas, it cannot be compared to the value of an advanced education. The importance of education to the individual and the interest of the state in having its young people educated as completely as possible indicate clearly that the holding in *Green* rather than that of *Bazemore* applies.<sup>139</sup>

Since the beginning of the Tennessee higher education desegregation litigation, both the district and appellate courts had been consistent in holding that the affirmative mandates of *Green* were just as applicable to

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135. 288 F. Supp. 937 (M.D. Tenn. 1968) (declaring affirmative duty to do more than adopt race-neutral admission standards and ordering State to present plan for desegregating higher education institutions, but refusing to halt expansion of UT-N program), *enforced sub nom.*, *Geier v. Dunn*, 337 F. Supp. 573 (M.D. Tenn. 1972) (finding that defendants had not dismantled the dual system or were “in any realistic sense on their way toward doing so” and ordering State to develop plan that would ensure a “white presence” on TSU campus), *modified sub nom.*, *Geier v. Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977) (concluding that desegregation plan had not worked and ordering merger of UT-N and TSU under governance of Tennessee Board of Regents), *aff’d sub nom.*, *Geier v. Univ. of Tenn.*, 597 F.2d 1056 (6th Cir. 1979) (affirming defendant had affirmative duty to dismantle dual system of public higher education, open admissions policy failed to dismantle dual system, expanding UT-N impeded progress of desegregating TSU, and merger of TSU and UT-N was appropriate remedy), *cert. denied*, 444 U.S. 886 (1979); *Geier v. Alexander*, 593 F. Supp. 1263 (M.D. Tenn. 1984) (approving Stipulation of Settlement providing programmatic and physical plant enhancements to TSU, over objection of Justice Department to use of quotas and preferential treatment of minority students).

136. 801 F.2d 799 (6th Cir. 1986) (affirming district court’s approval of consent decree following Stipulation of Settlement).

137. 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979).

138. *Geier v. Alexander*, 801 F.2d 799, 805 (6th Cir. 1986) (quoting *Geier v. Univ. of Tenn.*, 597 F.2d 1056, 1065 (6th Cir. 1979)).

139. *Id.*

public colleges and universities as they were in the elementary/secondary sector. Likewise, they had been consistent in rejecting the freedom of choice argument put forward by the State of Tennessee. While the scope of the duty to desegregate was well-settled in the Sixth Circuit, such was not the case elsewhere.

## B. The Fifth Circuit Follows *Bazemore* (1990)

### 1. *Ayers v. Allain* (the Mississippi case)

The Mississippi higher education desegregation case, *Ayers v. Allain*,<sup>140</sup> began in 1975 when Jake Ayers and other private plaintiffs sued the Governor of Mississippi, the Board of Trustees of State Institutions of Higher Learning, and other state officials for maintaining a racially dual system of public higher education in violation of both the Equal Protection Clause and Title VI.<sup>141</sup> The United States intervened. The plaintiffs claimed that since *Brown*, the defendants had perpetuated a dual system of higher education in which there continued from former de jure days separate institutions for blacks and whites.<sup>142</sup> The plaintiffs further contended that the historically black institutions (HBIs) were “markedly inferior” to the historically white institutions (HWIs) due to discriminatory practices in student admissions, employment of faculty and staff, mission designations and funding, and operation of HWIs in close proximity to HBIs.<sup>143</sup> Plaintiffs alleged that defendants had failed in their affirmative duty to eliminate lingering vestiges of segregation. Defendants responded by contending that they had adopted non-discriminatory admission and employment policies toward students, faculty and staff, and that any racial identifiability in the public universities was the result of the freedom of choice of students in choosing the universities they wish to attend.<sup>144</sup>

In 1987, after twelve years of pretrial discovery and procedures, the district court conducted a five-week trial with 71 witnesses and 56,700 pages of exhibits.<sup>145</sup> In reaching his decision, Judge Neal Biggers noted that until 1962, when the Fifth Circuit ordered the University of Mississippi to admit James Meredith as a student, the Board of Trustees of Mississippi’s eight public colleges and universities had continued to operate a racially dual system of higher education that was “both separate and unequal.”<sup>146</sup> However, the issue before the court at this time, the district court said, “is whether the defendants are currently committing

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140. 674 F. Supp. 1523 (N.D. Miss. 1987) (*Ayers* I).

141. *Id.* at 1525.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 1526.

146. *Id.* at 1528.

violations” of the Constitution and Title VI.<sup>147</sup>

Ruling in favor of defendants, the court found that since 1962 defendants had adopted racially neutral admission and employment policies, had fulfilled their affirmative duty to disestablish the former de jure segregated system of higher education, and were not in “current violation of the Constitution or Statutes of the United States.”<sup>148</sup> Judge Biggers opined: “Although the various institutions continue to be identifiable by the racial makeup of the student populations, this is not a substantial result of current admission practices and procedures but is instead the result of a free and unfettered choice on the part of individual students.”<sup>149</sup> The district court further found that the defendants had adopted racially neutral hiring policies and had worked affirmatively to attract other-race faculty and staff, thereby satisfying their affirmative duty with respect to employment.<sup>150</sup> He also found that the missions assigned to the respective state institutions were educationally sound, based on nondiscriminatory purposes, and justified by a need to conserve scant resources.<sup>151</sup>

In making these findings, the court applied the remedial standard set forth in *Bazemore* and *ASTA*, instead of the more expansive, affirmative duty set forth by the Sixth Circuit in *Geier*, which was rooted in *Green*. Freedom-of-choice in higher education, as opposed to compulsory schooling at the elementary/secondary level, was the element that seems to have undergirded the rationale of the district court’s opinion.

The plaintiffs appealed.<sup>152</sup> A divided panel of the Fifth Circuit reversed and remanded, adopting the Sixth Circuit’s rationale in *Geier* that “a state has an affirmative duty to eliminate all of the ‘vestiges’ of de jure segregation, root and branch, in a university setting.”<sup>153</sup> Writing for the panel majority, Judge Goldberg criticized the district court for finding the searching inquiry of *Green* applicable only if attendance at a particular school is compelled by law. “[T]he lesson of *Brown* is that the malignancy of apartheid does not vanish in state-sponsored forums simply because attendance is voluntary and admittance race-neutral.”<sup>154</sup>

Following the Fifth Circuit panel’s holding that defendants had not satisfied their affirmative duty under *Green* to desegregate, the court granted rehearing en banc,<sup>155</sup> vacated the panel’s decision and affirmed the district court, concluding that Mississippi had adopted and implemented

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147. *Id.*

148. *Id.* at 1564.

149. *Id.* at 1555.

150. *Id.* at 1563.

151. *Id.* at 1561.

152. *Ayers v. Allain*, 893 F.2d 732 (5th Cir. 1990) (*Ayers II*).

153. *Id.* at 756.

154. *Id.*

155. *Ayers v. Allain*, 898 F.2d 1014 (5th Cir. 1990).

race-neutral policies and that students had real freedom of choice to attend the college or university they wish.<sup>156</sup> The en banc majority concluded that, because of the freedom of choice at the higher education level, *Bazemore*, not *Green*, provided the appropriate standard for desegregation of public higher education institutions and that Mississippi had met that standard.<sup>157</sup> Appeal to the Supreme Court was ripe. Before addressing Mississippi's appeal to the Supreme Court, however, attention should be drawn to the litigation across the Mississippi River in the State of Louisiana running parallel to the Mississippi case.

## 2. *United States v. Louisiana* (1969)

As a result of the *Adams* litigation, HEW asked the State of Louisiana in 1969 to submit a desegregation plan for its higher education institutions.<sup>158</sup> Louisiana refused to do so, maintaining that it did not operate a dual system of higher education based on race.<sup>159</sup> Disagreeing, the Attorney General of the United States filed suit in 1974, alleging that the State and its various public higher education governing boards maintained and perpetuated a segregated system of higher education in violation of the Fourteenth Amendment and Title VI.<sup>160</sup>

After seven years of protracted discovery and pretrial conferences, the parties entered into a Consent Decree, which was accepted by the district court in 1981.<sup>161</sup> The Consent Decree had three goals: (i) to reshape the process of admissions and recruitment to attract other-race students, (ii) to address problems that had arisen from Louisiana's "proximate college dilemma," and (iii) to remedy the financial disadvantages historically suffered by the historically black institutions.<sup>162</sup> The defendants agreed to increase other-race representation on its governing boards, to retain the State's open admission policy, to actively recruit and provide scholarships for other-race students, to employ greater numbers of black faculty, administrators and staff, to provide \$300,000 a year for faculty at Louisiana State University (LSU), an HWI, and Grambling State University, an HBI, to obtain terminal degrees, to increase appropriation for all of the State's historically black institutions, to assure parity in funding for Southern University Law School, an HBI, with that of the LSU Law School, an

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156. *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990) (*Ayers III*).

157. *Id.* at 687.

158. *United States v. Louisiana*, 527 F. Supp. 509, 511 (E.D. La. 1981).

159. *Id.* at 512-13.

160. *Id.* For thorough and thoughtful recountings of the Louisiana desegregation litigation, see generally Scott B. Arceneaux, *Chasing the Dream: Higher Education Desegregation in Louisiana*, 69 TUL. L. REV. 1281 (1995); Darrell K. Hickman, *Realizing the Dream: United States v. State of Louisiana*, 50 LA. L. REV. 583 (1990).

161. *Louisiana*, 527 F. Supp. at 515.

162. Arceneaux, *supra* note 160, at 1288.

HWI, and to eliminate program duplications.<sup>163</sup>

In 1987, the United States asked for a hearing to measure the state's compliance with the terms of the 1981 Consent Decree. The three-judge district court determined that the State had not met its responsibilities under the Decree and still maintained a dual system of higher education in violation of Title VI.<sup>164</sup> Even though the State had adopted open and non-discriminatory admissions policies, the racial identifiability<sup>165</sup> of Louisiana's public colleges and universities was even more pronounced than it had been before the Consent Decree.<sup>166</sup>

Writing for the panel,<sup>167</sup> Judge Swartz entered the fray of the hotly debated *Green/Bazemore* constitutional question, concluding that the standard established by *Green* was the appropriate standard to apply in measuring *Brown I* compliance.<sup>168</sup> Under this standard, the State of Louisiana was required to do more than merely stop its discriminatory practices.<sup>169</sup> It had to take affirmative steps to dismantle the lingering effects of its prior de jure segregated system.<sup>170</sup> "When open admissions alone fail to disestablish a segregated school system, be it primary/secondary school system or a college system, then something more is required . . ."<sup>171</sup> Further noting that the State had spent more than \$200 million toward achieving the goals of the Consent Decree to little avail, the court found that the problem lay not in the fact that the State had not spent enough money, but in the way the money was spent – spending to enhance the state's black schools as black schools rather than towards "convert[ing] its white colleges and black colleges to just colleges."<sup>172</sup>

Having determined the state's liability, the district court appointed a Special Master to assist the court in fashioning appropriate remedies.<sup>173</sup> The court adopted in its remedial Order the following recommendations of the Special Master: organization of the state's higher education system under one governing board, reclassifying universities according to mission designation, ending open admissions to all state universities and

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163. *Louisiana*, 527 F. Supp. at 515.

164. *United States v. Louisiana*, 692 F. Supp. 642, 644 (E.D. La. 1988).

165. For years, progress toward desegregation had been measured principally by "racial identifiability." Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1784 (2004).

166. *Louisiana*, 692 F. Supp at 647.

167. The panel consisted of Circuit Judge John Minor Wisdom and District Judges Charles Schwartz, Jr. and Veronica D. Wicker. *Id.*

168. *Id.* at 655.

169. *Id.*

170. *Id.* at 653.

171. *Id.* at 656.

172. *Id.* at 658.

173. *United States v. Louisiana*, 718 F. Supp. 499, 507 (E.D. La. 1989).

implementation of selective admission criteria to certain institutions, development of a community college system, reduction of unnecessary program duplication, and merger of Southern University Law Center with the LSU Law Center.<sup>174</sup> The two most controversial pieces of the remedial Order, which required a single educational governing board and the merger of the two Law Centers, destined the case for a return visit to the appellate court.<sup>175</sup>

Defendants appealed to the Fifth Circuit.<sup>176</sup> While the case was pending on appeal, the Fifth Circuit, sitting upon rehearing en banc, decided the Mississippi case (*Ayers III*) and determined that *Brown I* compliance could be satisfied when a former de jure state abandoned its segregative practices and replaced them with race-neutral ones.<sup>177</sup> Judge Swartz, disagreeing with the appeals court but finding “that *Ayers* is both binding and controlling,” vacated the three-judge court’s earlier order reorganizing the Louisiana higher education system.<sup>178</sup> By October 30, 1990, the Fifth Circuit had established the *Bazemore* standard as the measuring rod in both the Mississippi and Louisiana cases.<sup>179</sup> The split in the decisions of the circuit courts of appeal was dramatic. It was time for the Supreme Court to declare the standard to apply when measuring a former de jure state’s compliance with the mandates of the Equal Protection Clause and Title VI.

#### VII. THE SUPREME COURT FINALLY SPEAKS: *UNITED STATES V. FORDICE* (1992)

The Supreme Court granted certiorari in the Mississippi case<sup>180</sup> and held on June 26, 1992, that the State of Mississippi’s efforts to desegregate were insufficient to fulfill its obligations under the Equal Protection Clause and Title VI.<sup>181</sup> The Court found by an 8-1 vote<sup>182</sup> that Mississippi continued to maintain a system of public higher education with remaining “constitutionally suspect” vestiges of past discrimination in four policies: admission standards, program duplication, institutional mission

174. *Id.* at 515–21.

175. Alfreda A. Sellers Diamond, *Black, White, Brown, Green, and Fordice: The Flavor of Higher Education in Louisiana and Mississippi*, 5 HASTINGS RACE & POVERTY L. J. 57, 80 (2008).

176. *United States v. Louisiana*, 751 F. Supp. 606, 608 (E.D. La. 1990).

177. *Ayers v. Allain*, 914 F.2d 676, 687 (5th Cir. 1990) (holding that “to fulfill its affirmative duty to disestablish its prior system of de jure segregation in higher education, the state of Mississippi satisfied its constitutional obligation by discontinuing prior discriminatory practices and adopting and implementing good-faith, race neutral policies and procedures”).

178. *United States v. Louisiana*, 751 F. Supp. 606, 608 (E.D. La. 1990).

179. *Ayers*, 914 F.2d at 687.

180. *Ayers v. Mabus*, 499 U.S. 959 (1991).

181. *United States v. Fordice*, 505 U.S. 717, 743 (1992).

182. The lone dissenter was Justice Scalia. *Id.* at 749–62.

assignments, and continued operation of all eight public universities.<sup>183</sup> The Court determined that the en banc Fifth Circuit had erred in affirming the district court's judgment, vacated the circuit court's decision, and remanded the case for further proceedings consistent with its opinion.<sup>184</sup>

In so doing, the Court settled the disagreement among the circuits as to the standard to be applied in measuring a former de jure state's higher education system's compliance with the Equal Protection Clause and Title VI when segregative effects and racial identifiability remain after de jure segregation has been eliminated.<sup>185</sup> Writing for the majority, Justice White applied the affirmative duty standard from *Green* and rejected the lower court's use of the race-neutral standard of *Bazemore*:

We do not agree with the Court of Appeals or the District Court, however, that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system. That college attendance is by choice and not by assignment does not mean that a race-neutral admissions policy cures the constitutional violation of a dual system.<sup>186</sup>

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If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.<sup>187</sup>

The Court tasked the district court upon remand to examine the “constitutionally suspect” policies and to place the burden on Mississippi to “justify these policies or eliminate them.”<sup>188</sup> The Court acknowledged that the fact that “an institution is predominantly white or black does not in itself make out a constitutional violation.”<sup>189</sup> It emphasized, however, that “the State may not leave in place policies rooted in its prior officially segregated system that serve to maintain the racial identifiability of its universities if those policies can practicably be eliminated without eroding sound educational policies.”<sup>190</sup>

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183. *Id.* at 733.

184. *Id.* at 743.

185. Diamond, *supra* note 175, at 81.

186. *Fordice*, 505 U.S. at 729.

187. *Id.* at 731.

188. *Id.* at 733.

189. *Id.* at 743.

190. *Id.*

VIII. POST-*FORDICE* LITIGATION AND FINAL RESOLUTIONS

Reaction to the Court's opinion was mixed. Federal judges charged with applying the Court's opinion voiced concern over its lack of guidance.<sup>191</sup> Legal scholars lamented the absence of direction from the Court on major issues.<sup>192</sup> Justice Scalia criticized the lack of good guidance in the majority and stated this as the key reason for his dissent.<sup>193</sup> However lacking the *Fordice* opinion may have been in providing guidance in details, it did settle the major question regarding the correct legal standard to apply when establishing the duty of a former de jure state to desegregate. There was no more doubt that the affirmative standard set forth in *Green* was the measuring rod by which a state's compliance with Equal Protection and Title VI would be assessed.<sup>194</sup>

## A. The Mississippi Litigation (1995–2004)

Upon remand, Judge Biggers conducted a two-month trial in 1994 and examined each of the policies declared "constitutionally suspect" by the *Fordice* court.<sup>195</sup> He issued an eighty-three page opinion and subsequent remedial decree in 1995 requiring the State to, among other things, eradicate the use of the ACT score as the sole criterion for admission, review the assigned missions and possible program duplication of the state universities, design programmatic enhancements for the historically black institutions, create an endowment trust to fund other-race recruitment and scholarships for the HBIs, and establish a Monitoring Committee to oversee terms of the remedial decree.<sup>196</sup>

On appeal, the Fifth Circuit in 1997 upheld the district court's decree regarding uniform admission standards, reversed the district court's

191. For example, Judge Harold Murphy, sitting by designation in the *Alabama* litigation, expressed frustration at the task of fashioning a post-*Fordice* remedy: "If this case should again be appealed, and the higher courts again return the case to this Court, the Court earnestly seeks guidance. This Court will enforce whatever remedy the higher courts think appropriate. This Court has done all it can do." *Knight v. Alabama*, 900 F. Supp. 272, 280–81 (N.D. Ala. 1995).

192. KAPLIN & LEE, *supra* note 79, at 1451 ("The *Fordice* opinion has been criticized by individuals of all races and political affiliations as insufficiently clear to provide appropriate guidance to states as they attempt to apply its outcome to desegregation of the still racially identifiable public institutions in many states.").

193. *Fordice*, 505 U.S. at 750–53 (Scalia, J., dissenting).

194. For an excellent discussion of the *Fordice* opinion and the post-*Fordice* litigation, see 90 Md. Op. Atty. Gen. 153 (2005) (advising Maryland Higher Education Commission how to use the *Fordice* factors in assessing the State of Maryland's compliance with its constitutional and statutory obligations to dismantle any lingering effects of its former de jure segregated higher education programs).

195. *Ayers v. Fordice*, 879 F. Supp. 1419 (N.D. Miss. 1995).

196. *Id.* For a good discussion of the case upon remand and the district court's remedial decree, see Scott L. Sroka, *Discrimination Against Students in Higher Education: A Review of the 1995 Judicial Decisions*, 23 J.C.& U.L. 431 (1997).



approval of the use of ACT cutoffs for scholarship awards, and remanded for reconsideration on the scholarship issue, on disparities in equipment funding between the HWIs and the HBIs, on monitoring the summer remedial program, and on further evaluation of the IHL Board's position on the possibility of a merger between Mississippi Valley State University, an HBI, with Delta State University, an HWI.<sup>197</sup> In 1998, the district court ruled that it would no longer consider the consolidation of Mississippi Valley State and Delta State, since the IHL Board had concluded that the merger was not practicable.<sup>198</sup>

In 1999, Judge Biggers ruled that the Board had fully complied with several of its obligations concerning Jackson State (implemented academic programs in allied health, social work (Ph.D.), and business (Ph.D.), and was prepared to establish an engineering school there).<sup>199</sup> In 2000, he approved the Legislature's appropriation of funds to construct a facility to house the court-ordered MBA program at Alcorn State's Natchez campus.<sup>200</sup> In January 2001, the district court, finding no unmet demand for legal or pharmacy education, concluded that the IHL Board did not need to create either a law or pharmacy school at Jackson State and that all elements of the Ayers Remedial Decree having to do with Jackson State University and significant expenditure of funds had been completed.<sup>201</sup>

After lengthy negotiations, in March 2001, some of the private plaintiffs, the United States and the State of Mississippi reached a settlement agreement that required the State to provide \$500,000 annually from 2002 to 2006 and \$750,000 from 2007 to 2011 to supplement the need-based summer program participants, enhance academic programs at Alcorn State, Jackson State, and Mississippi Valley State, all HBIs, with annual appropriations for seventeen years in the total amount of \$245,880,000, create a \$77M publicly funded endowment for the benefit of the HBIs, authorize capital improvements at a total cost of up to \$75M for the HBIs, and recognize Jackson State as a comprehensive university.<sup>202</sup> Before approving the parties' agreement, Judge Biggers required that the Legislature pass a concurrent resolution stating its support for the costly (\$503M) settlement proposal.<sup>203</sup> The Legislature agreed to fund the

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197. *Ayers v. Fordice*, 111 F.3d 1183, 1209, 1225, 1228 (5th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998).

198. *Ayers v. Thompson*, 358 F.3d 356, 362–63 (5th Cir. 2004) (relating actions of district court following 5<sup>th</sup> Circuit's 1997 decision).

199. *Ayers v. Fordice*, 40 F. Supp. 2d 382, 385 (N.D. Miss. 1999).

200. *Ayers v. Fordice*, No. 4:75CV009-B-D, 2000 WL 1015839, at \*2 (N.D. Miss. July 6, 2000).

201. *Thompson*, 358 F.3d at 364 (relating actions of district court since 5<sup>th</sup> Circuit's 1997 decision).

202. *See* Settlement Agreement, *United States v. Louisiana*, No. 80-CV-3300 (E.D. La. Nov. 4, 1994) [hereinafter Settlement Agreement].

203. *Ayers v. Musgrove*, No. 4:75CV009-B-D, 2002 WL 91895 at \*5 (N.D. Miss.,

settlement over a period of seventeen years.<sup>204</sup> Despite having concerns about the proposed settlement, including its high cost and long duration,<sup>205</sup> Judge Biggers entered a final judgment on February 15, 2002, dismissing the case with prejudice.<sup>206</sup> Certain of the private plaintiffs objected to the settlement and moved to opt-out. After Judge Biggers denied the opt-out plea, the Fifth Circuit affirmed his decision,<sup>207</sup> and the Supreme Court denied certiorari.<sup>208</sup> In 2004, after nearly thirty years of litigation, Mississippi's massive desegregation case came to an end.<sup>209</sup>

#### B. The Tennessee Litigation (2001–2006)

After thirty-eight years, the parties to the Tennessee litigation reached settlement that culminated in the 2001 Geier Consent Decree.<sup>210</sup> The Consent Decree required the State to enhance the effectiveness and outreach of the admissions, financial aid, and registrar's offices at TSU, to increase recruitment of other-race and nontraditional students,<sup>211</sup> to engage in a public relations campaign to emphasize programs for adult learners and financial aid available at the downtown Avon Williams campus of TSU, to create a College of Public Service and Urban Affairs at TSU, to create an Endowment for Academic Excellence at TSU, to conduct a facilities review to ensure that all vestiges of prior segregation in facilities have been removed on TSU's main campus,<sup>212</sup> to raise admission standards at TSU, to revitalize the downtown Avon Williams campus (now part of HBI TSU), to create a new five-year \$750,000 a year scholarship program exclusively for Nashville residents who enroll in TSU's evening and weekend classes, to

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Jan. 2, 2002).

204. H. Con. Res. 28, 2002 Leg., Reg. Sess. (Miss. 2002).

205. Judge Biggers noted that larger states had settled their higher education disputes for much less amounts—Tennessee for \$75 million over seven years and Virginia for \$69.9 million over six years. *Ayers v. Musgrove*, 2002 WL 91895 at \*3, n.6.

206. *Id.*

207. *Ayers v. Thompson*, 358 F.3d 356 (5th Cir. 2004).

208. *Ayers v. Thompson*, 543 U.S. 951 (2004).

209. For good summaries of the Mississippi post-*Fordice* litigation, see KAPLIN & LEE, *supra* note 79, at 1460 & n. 59; Diamond, *supra* note 175, at 82–83.

210. *Geier v. Sundquist*, 128 F. Supp. 2d 519 (M.D. Tenn. 2001). For a good discussion of *Geier* and the 2001 settlement, see generally Deon D. Owensby, *Affirmative Action and Desegregating Tennessee's Higher-Education System: The Geier Case in Perspective*, 69 TENN. L. REV. 701 (2002).

211. The term "other-race" refers to white persons at TSU and black persons at the predominantly white institutions. The term "nontraditional students" means working adults generally over the age of 25. *Geier*, 128 F. Supp. 2d at 523 n.2.

212. From the mid-1980s until the time of the Joint Motion for Final Dismissal in 2006, the State of Tennessee spent \$220M on the physical plant at TSU as a direct result of the *Geier* litigation. Joint Statement in Support of the Parties' Motion for the Entry of a Final Order of Dismissal at 13, n. 4, *Geier v. Bredesen*, 453 F. Supp. 2d 1017 (M.D. Tenn. 2006) (No. 5077) [hereinafter Joint Statement].

limit for five years the number of Ph.D. programs at Middle Tennessee State University to the number of such programs at TSU, to enhance and further the recruitment, hiring, and retention of other-race faculty and students within both the University of Tennessee and Tennessee Board of Regents systems, and to provide significant funding for TSU over the five years of the Consent Decree.<sup>213</sup>

On September 7, 2006, the parties filed a Joint Statement in Support of the Parties' Motion for the Entry of a Final Order of Dismissal agreeing that the parties had adhered to the requirements of the Consent Decree and that Tennessee had at long last met its legal obligations to operate and support a unitary system of public higher education.<sup>214</sup> The plaintiff and the plaintiff-intervenors agreed that the Defendants had satisfied their legal burden and had met the constitutional requirements set forth in *Fordice*.<sup>215</sup> They acknowledged that all funding required by the Consent Decree had been provided and that Tennessee had eliminated the vestiges of segregation from its system of public higher education.<sup>216</sup> In supporting their Motion for a Final Order of Dismissal, the parties noted that they were bringing to a close a significant chapter in the history of public higher education in Tennessee, but they were not ending the State's efforts to "ensure and promote the unitary system of public higher education it has now achieved. In the years and decades to follow, the Tennessee Board of Regents, and the University of Tennessee are committed to building upon the efforts and progress of the last 38 years."<sup>217</sup>

On September 21, 2006, Judge Wiseman held that the parties had fully complied with the requirements of the 2001 Consent Decree, were now operating a unitary system of public higher education, and entered a Final Order of Dismissal.<sup>218</sup> With that, the Tennessee litigation, that had spanned the terms of seven Tennessee governors and ten attorneys general, came to an end.<sup>219</sup>

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213. *Geier*, 128 F. Supp. 2d at 522–49.

214. Joint Statement, *supra* note 212.

215. *Id.*

216. *Id.*

217. *Id.* at 20.

218. *Geier v. Bredesen*, 453 F. Supp.2d 1017 (M.D. Tenn. 2006). Judge Wiseman acknowledged with appreciation that the single most significant factor in bringing the successful resolution of this litigation was the tremendously important contribution of the court appointed mediator, Carlos Gonzalez. His integrity, neutrality, understanding, and sensitivity to the respective positions of the parties caused them to fully accept and trust him as an honest broker. "He finishes this job with my great respect and gratitude for a job well done." *Id.* at 1019.

219. Rita Sanders Geier, the named plaintiff in the Sanders (later Geier) litigation, is now a senior fellow at the Howard H. Baker, Jr. Center for Public Policy and associate to the Chancellor at the University of Tennessee – Knoxville. See Howard Baker Jr. Center for Public Policy, <http://bakercenter.utk.edu/main/directory.php> (last visited Jan. 29, 2010).

C. The *Louisiana* Litigation (1992–2005)

Shortly after the Court's *Fordice* decision, Judge Schwartz reinstated the 1988 and 1989 liability and remedial orders in *United States v. Louisiana* and granted summary judgment to the plaintiff.<sup>220</sup> The only change to the remedial order was the removal of the requirement to merge the LSU Law Center with the Southern University Law Center.<sup>221</sup> On appeal, the Fifth Circuit determined that the grant of summary judgment was improvident because questions of fact remained as to whether unnecessary program duplication existed in Louisiana's colleges and universities and whether the open admissions policies fostered segregation.<sup>222</sup> Reluctantly, the Fifth Circuit reversed the summary judgment ruling, vacating the remedial order, and remanded for resolution of the issues of fact.<sup>223</sup>

Shortly thereafter, settlement negotiations in Louisiana resumed, culminating in a new Settlement Agreement in November of 1994.<sup>224</sup> The Settlement Agreement's main purpose was to create some measure of fiscal equality between the State's HBIs and HWIs. It took significant steps in two areas addressed in the 1981 Consent Decree. First, the Settlement Agreement pledged that \$65M in deferred capital improvements be spent on the campuses of the HBIs.<sup>225</sup> Second, the Agreement addressed the problem of program duplication and lack of programs at the HBIs.<sup>226</sup> It created a number of new programs at Southern and Grambling, included an appropriation of \$48M for them, and forbade their creation at any proximate institutions.<sup>227</sup> In addition, the Settlement Agreement altered admission criteria and focused on the financial aspect of recruiting and retaining other-race students, established a new community college in Baton Rouge to be jointly operated by LSU's and Southern's Boards, and made a commitment to encourage employment of other-race faculty.<sup>228</sup>

The Louisiana Settlement Agreement did not contain numerical goals for proportional enrollment of other-race students. It did provide for supervision of a Monitoring Committee and annual reports by the

220. *United States v. Louisiana*, 811 F. Supp. 1151, 1160 (E.D. La. 1992).

221. *Id.* at 1160 n. 54.

222. *United States v. Louisiana*, 9 F.3d 1159, 1162 (5th Cir. 1993).

223. *Id.* at 1169–70 (“We greatly respect the district court’s diligence in attempting to resolve this protracted litigation expeditiously. We also commend the trial judge for his obvious familiarity with the massive record in this case and his circumspection in attempting to frame remedial measures. In such an old case, where the state’s colleges and universities remain starkly racially identifiable, we remand for continued litigation with great reluctance.”). *Id.* at 1170.

224. Settlement Agreement, *supra* note 202.

225. *Id.* at 10–14

226. *Id.*

227. *Id.*

228. *Id.* at 4, 8, 20–24.

Committee.<sup>229</sup> In 2005, at the end of the tenth year of the Agreement, it expired under its own terms. The Tenth Annual Report revealed that despite the expenditure of millions of dollars, movement toward increasing the diversity of employees remained minimal.<sup>230</sup>

#### D. The Alabama Litigation (1981–2006)

##### 1. *United States v. Alabama I* (1985)

As in the Tennessee and Mississippi desegregation cases, the Alabama case involved both private parties, John F. Knight, Jr.<sup>231</sup> and a class certified as all black citizens of the State of Alabama, as well as the United States, suing the State in 1982, claiming that its university system had not fulfilled its obligation to eradicate the remnants of its de jure past because it, among other things, funded its HWIs (the University of Alabama and Auburn University) in much greater amounts than it afforded its HBIs (Alabama State University and Alabama A&M University). Furthermore, plaintiffs contended that former de jure policies and practices continued to have segregative effects as reflected in the make-up of the student bodies, faculties, staffs, and governing boards.<sup>232</sup>

After extensive discovery and numerous pre-trial motions, a month-long trial was held before Judge U. W. Clemon in July 1985.<sup>233</sup> The district court found that Alabama had historically provided far less funding to black schools than to white, had taken various actions that stymied the growth and development of the HBIs, such as permitting HWIs to establish branch campuses in areas where HBIs offered the same programs, had maintained colleges and universities easily identifiable by race, and continued to operate a system with surviving vestiges of prior segregation, as readily seen in unequal physical facilities and program duplication.<sup>234</sup>

Auburn University moved to disqualify Judge Clemon.<sup>235</sup> The Eleventh Circuit upheld the motion, holding that Judge Clemon's involvement both as a state senator in disputed factual issues surrounding the composition of defendants' governing boards and in legislative efforts to improve A & M's physical plant, as well as his involvement as a private attorney in civil rights cases involving Alabama's junior colleges and trade schools,

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229. *Id.* at 2.

230. Diamond, *supra* note 175, at 117 & n. 326.

231. Mr. Knight is presently a state senator and chair of the appropriations committee of the Alabama State Senate.

232. *United States v. Alabama*, 628 F. Supp. 1137 (N.D. Ala. 1985).

233. *Id.*

234. *United States v. Alabama*, 628 F. Supp. 1137 (N.D. Ala. 1985). For a good commentary on *Alabama I*, see generally John C. Walden, *Desegregation of Higher Education in Alabama Unresolved*, 42 EDUC. L. REP. 505 (1988).

235. *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987).

mandated his disqualification.<sup>236</sup> The Eleventh Circuit disqualified Judge Clemon and remanded for a new trial.<sup>237</sup>

## 2. *United States v. Alabama II* (1991)

After six Alabama district court judges were recused on their own motion or by order of the Eleventh Circuit, Judge Harold L. Murphy, District Judge for the Northern District of Georgia, was designated to perform all judicial duties arising from the case.<sup>238</sup> Under Judge Murphy, trial was held for six months in Birmingham in 1991.<sup>239</sup> Approximately 200 witnesses testified and hundreds of thousands of pages of exhibits were received, which resulted in a transcript of 22,000 pages.<sup>240</sup>

Unlike the defendants in the Mississippi and Louisiana cases, the various *Alabama* defendants, including all the public universities in the State, raised separate defenses and were represented by numerous different attorneys. The basic contentions of the defendants were that race-neutral admission and employment policies were all that were required by Title VI and the Constitution, that the fact that the HBIs remain almost entirely black is the result of free choice, that racial imbalance does not violate the Constitution, and that the standard for determining whether an institution has dismantled a racially dual school system differs at the higher education level from the elementary-secondary level.<sup>241</sup>

In his 300-page opinion, Judge Murphy traced the historical development of higher education in the State of Alabama, recounted attempts made by whites first to prevent and then to control education of blacks, related efforts of blacks to establish and operate public higher education institutions for black students, emphasized the role of these institutions in the civil rights movement, recounted the development of HWI branch campuses in areas where HBIs already existed, and the massive resistance in Alabama after *Brown* to avoid desegregation.<sup>242</sup> He then turned to a detailed assessment of the present racial composition of the faculties, student bodies and administrative staff on the respective campuses, adequacy of campus facilities, funding and mission assignment, and recruitment and retention efforts made by the HWIs toward black students.<sup>243</sup> He concluded that vestiges of de jure segregation remained and that the scope of the duty of the State to remove those lingering

236. *Id.* at 1536.

237. *United States v. Alabama*, 828 F.2d 1532, 1536 (11th Cir. 1987) *cert. denied*, 487 U.S. 1210 (1988).

238. *Knight v. Alabama*, 787 F. Supp. 1030, 1050 (N.D. Ala. 1991).

239. *Id.*

240. *Id.* at 1051.

241. *Id.* at 1353–54.

242. *Id.* at 1061–153.

243. *Id.* at 1153–348.

vestiges of de jure segregation was the affirmative obligation set forth in *Green*.<sup>244</sup> He further found the principles of *Green* to apply at the higher education level as well as elementary-secondary, stating: “A college student is no less entitled to attend a non-racially segregated state institution than is a secondary school student.”<sup>245</sup>

The court fashioned a comprehensive remedial decree (“the 1991 Decree”), which required the HWIs to achieve improvement in the employment of black faculty and staff, instructed Alabama State University to develop a plan for improving recruitment and enrollment of white students, ordered increased funding for the HBIs, required elimination of program duplication, mandated creation of new high demand programs for the HBIs, and ordered the creation of a statewide Monitoring Committee to make reports to the court concerning efforts being made to achieve a greater level of desegregation in higher education in Alabama.<sup>246</sup>

### 3. *United States v. Alabama III* (1995)

The case moved up and down twice between the district and appeals courts.<sup>247</sup> Finally, upon remand, the district court, relying on the standards set forth in *Fordice* and the Eleventh Circuit’s interpretation thereof, ruled that where plaintiffs show that a current policy is traceable to past de jure segregation, has a continuing segregative effect, and the State has not adopted less segregative remedies that are practicable and educationally sound, the State is in violation of the Fourteenth Amendment.<sup>248</sup>

In *Alabama III*, Judge Murphy made over six hundred findings of fact and ordered in his second comprehensive remedial decree that the State of Alabama provide scholarship money for ASU and A&M to attract other-race students, placed restrictions on the expansion of two-year and technical colleges in Montgomery and Huntsville to help ASU and A&M in their efforts to attract more non-minority students to their programs, and implemented a unified land grant system which would unify Auburn University and A&M into the Alabama Cooperative Extension System.<sup>249</sup> The court ordered the creation of several new high demand programs for

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244. *Id.* at 1357.

245. *Id.*

246. *Id.* at 1377–82. For a good overview and analysis of the *Alabama I and II* litigation, see generally Phillip Scott Arnston, *Thirty Years Later, Is the Schoolhouse Door Still Closed? Segregation in the Higher Education System of Alabama*, 45 ALA. L. REV. 585 (1994).

247. See *United States v. Alabama*, 628 F. Supp. 1137 (N.D. Ala. 1985), *rev’d and remanded*, 828 F.2d 1532 (11th Cir. 1987), *cert denied*, 487 U.S. 1210, (1988), *on remand sub nom*, *Knight v. Alabama*, 787 F. Supp. 1030 (N.D. Ala. 1991), *aff’d in part, rev’d in part, vacated in part and remanded*, 14 F.3d 1534 (11th Cir. 1994), *on remand*, 900 F. Supp. 272 (N.D. Ala. 1995).

248. *United States v. Alabama*, 900 F. Supp. 272, 282 (N.D. Ala. 1995).

249. *Id.* at 356.

ASU and A&M, including a program of Allied Health Sciences and the development of up to two new Ph.D. or Ed.D. programs at ASU.<sup>250</sup> The court further directed that ASU should be the only institution in the Montgomery area to offer a Master's Degree in Accounting for a period of five years, and authorized A&M to establish an undergraduate mechanical and electrical engineering program.<sup>251</sup> Finally, the district court created a long-term planning and oversight committee to help implement the court's decree and retained jurisdiction over the case for ten years (until 2005) to ensure compliance with the decree.<sup>252</sup>

As the date for a hearing on the ending of the court's jurisdiction approached in 2005, settlement negotiations intensified. Substantial consensus was reached first between the Knight Plaintiffs and the University of Alabama System ("UAS"). This document was shared with the other HWIs, who thereafter reached their own settlement agreements.<sup>253</sup> The UAS agreement called for each of the three campuses within that system to develop a strategic diversity plan reiterating its commitment to diversity in its student body and among its faculty and upper-level administrators.<sup>254</sup>

On December 5, 2006, the court held a final fairness hearing regarding the proposed Settlement Agreements and concluded that the Agreements were designed to serve the purposes of the court's 1991 and 1995 Remedial Decrees, as well as the ultimate goal of this litigation: to remove, to the extent practicable and educationally sound, the remaining vestiges of de jure segregation.<sup>255</sup> The court approved the ten Settlement Agreements as being "fair, reasonable, and consistent with the requirements of the Constitution and laws of the United States."<sup>256</sup> Two of the non-named plaintiff class members objected to the district court's approval of the Settlement Agreements and appealed.<sup>257</sup> The Eleventh Circuit affirmed, thereby ending the last of the massive higher education desegregation lawsuits.<sup>258</sup>

250. *Id.* at 370.

251. *Id.* at 371.

252. *Id.* at 374.

253. A unique governance system existed in Alabama (unlike Tennessee, Louisiana, and Mississippi), where each of the State's public institutions had its own distinct governing board.

254. *Knight v. Alabama*, 469 F. Supp. 2d 1016, 1029 (N.D. Ala. 2006).

255. *Id.* at 1030. Judge Murphy, as had Judge Wiseman in the Tennessee litigation, expressed his appreciation for the highly experienced and skilled talents of Carlos Gonzalez as a mediator. "[T]he Court is well aware that the parties would not have been able to resolve the issues in this litigation without Mr. Gonzalez's efforts." *Id.* at 1039.

256. *Id.* at 1037.

257. *United States v. Alabama*, 271 F. App'x 896, 2008 WL 834130 (11th Cir. March 28, 2008).

258. *Id.*



## VIII. WHERE WE ARE TODAY

While the massive higher education desegregation cases are ended, desegregation is still “unfinished business.”<sup>259</sup> Numerous colleges and universities continue to exist with racially identifiable faculties, staffs, and student bodies, despite hundreds of millions of dollars of expenditures designed to eradicate segregation. Related issues of affirmative action, the future of HBIs, and state funding of HBIs, without a parallel expectation that the funding will be used to achieve desegregation, remain unresolved.

As discussion continues to focus on desegregation, the underlying question remains as to whether the affirmative duty to desegregate applies to HBIs as it does to HWIs. And, should “racial identifiability” or percentage of other-race students, faculty, and staff even be the measuring rod of achieving equal educational opportunity for all and be the defining test of desegregation? Many of these issues will be addressed in other articles in this commemorative edition.

## IX. PERSONAL REFLECTIONS

When I was asked to write an article on the changes in higher education law as they involve race for this 50<sup>th</sup> year commemorative edition, I at first declined. I did not think I had sufficient scholarly experience to undertake the challenge. Also, I wear the “burden of Mississippi” when matters of race are discussed and was concerned that what I had to say on this subject would be discounted because of my place of origin. While both are true, I finally realized after a second invitation that the perspective of a 72-year-old white woman from Mississippi, who has lived through the dark days of total de jure segregation, the massive resistance to desegregation in the Deep South, the turmoil surrounding the integration of my own university, and the dramatic changes that have taken place since those days, should be heard.

During my lifetime, a legal and moral societal revolution in the area of both desegregation and race relations has occurred. Throughout my elementary, high school, and college days, I never attended school with an African-American. The law would not have permitted that. You may rightfully ask, “But what did you do about it?” Regretfully, I have to say, “Not enough.” By the time I entered college, I had begun to lose my naiveté and to question the legal and moral grounds for racial segregation, but I and many of the “silent generation” of the 1950s in the Deep South did not do much more than that. The political maelstrom silenced most of us.

When the 1960s arrived and the Civil Rights Movement was reaching the Deep South in full force, I was early married and absorbed in raising

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259. See KAPLIN & LEE, *supra* note 79, at 1462.

four little girls. I watched in horror as the news unfolded of the rioting and death that accompanied the integration of the University of Mississippi, my alma mater, but I did little more than to speak out on a local level about the legal and moral injustice taking place around me.

Through the years, I have tried in both my role as a university attorney and as a teacher, to make students aware of the tremendous price their parents, grandparents, and great-grandparents – both black and white – paid so that current and future generations can enjoy the opportunities they have today. While it is painful to go back in time and talk about the terrible resistance to desegregation in my part of the country in 1940s, 1950s, and 1960s, I think it is important for us to do so “lest we forget.”

While memory of the past will always be with us, we must take great pride in where we are today. Perfect, no. But, we have come a long way. For example, Rose Flenorl, an African-American woman, is president of the University of Mississippi Alumni Association. Her daughter is a recent graduate of this University. In 2002, James Meredith attended a forty-year commemorative event celebrating his enrollment at the University of Mississippi. He donated his personal papers to the University on that occasion. Mr. Meredith’s son recently received his Ph.D. from the University of Mississippi. A beautiful statue of Mr. Meredith is placed in a prominent site on the campus of the University of Mississippi. This past year, two great-nieces of slain civil rights leader Medgar Evers graduated from the University of Mississippi law school.

Wonderful, positive changes have been acknowledged by both African-Americans and whites in many other of the Deep South states. For example, in the Statement in Support of the Parties’ Motion for the Entry of a Final Order of Dismissal in Tennessee’s *Geier* case, the parties said: “During the period of this case profound progress in official policies, individual attitudes, institutional structures, and educational programs has been achieved.”<sup>260</sup> In a complete reversal of spirit from the days when it fought her admission, the University of Alabama named an endowed scholarship in Autherine Lucy Foster’s honor and unveiled a portrait of her in the student union building. The inscription reads: “Her initiative and courage won the right for students of all races to attend the University.”<sup>261</sup>

In the Fall of 2008, the University of Mississippi hosted the first of the Presidential Debates between now President Barack Obama and Senator John McCain. CBS newsman Bob Schieffer was on campus to cover the event. This was his first return trip to Oxford and the University of Mississippi since 1962 when he reported on the admission of James Meredith as the University’s first black student. During the “Face the

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260. Joint Statement, *supra* note 212, at 3.

261. E. CULPEPPER CLARK, *THE SCHOOLHOUSE DOOR: SEGREGATION’S LAST STAND AT THE UNIVERSITY OF ALABAMA* 260 (1993).

Nation” broadcast the Sunday following the debate, Schieffer praised the University’s progress in racial reconciliation over the past forty years. “Being there for the debate made me understand how far the country has come. It was one of the most wonderful moments in the history of the country, and I was so happy to be there.”<sup>262</sup>

My life would have been enriched had I had the opportunity to attend school with African-Americans, who comprise over 37% of the people living in and around me. My four daughters had this opportunity. They were all educated in a public school system that was fully integrated. They are all, I am proud to say, people without racial prejudice, who treasure their other-race experiences in life and learning. I noted with pride during my research for this paper that my daughter Stella had written a fine paper on the civil rights litigation in Mississippi from the integration of the University of Mississippi by James Meredith to the *Ayers* case as part of her Masters degree in American Studies at the University of Alabama.<sup>263</sup> She is part of the book-publishing world today so I asked her to review this paper and give me her comments. She said to me: “You may not have been as actively involved in the Civil Rights Movement of the 1950s and 1960s as you wish you had been, but you got a lot of it right. You knew that what was going on in the Deep South was terribly wrong. You cared. And, you instilled in your four daughters a strong sense of conscience and of social justice.” Perhaps that affirmation from a daughter, along with the NAACP Freedom Award and the Chancellor’s Award for Diversity at my institution, help to assuage my guilt. I know, however, how wonderful it would have been to have grown up in an open, inclusive society that we are becoming instead of the closed society of yesteryear.<sup>264</sup>

This commemorative issue of the *Journal of College and University Law* is focused on change in higher education law over the past fifty years. More than in any other area, change has taken place with regard to race and higher education – and it has all been for the good.

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262. Mitchell Diggs, *CBS Newsmen Bob Schieffer to Deliver UM Commencement Address*, University of Mississippi Newsdesk (April 23, 2009) <http://130.74.79.130/index.php/Ole-Miss-News/News-Releases/Commencement-advance09.html> (last visited January 29, 2010).

263. See Stella G. Connell, *From Meredith to Ayers: A Retrospective View of Civil Rights Litigation in Higher Education in Mississippi, 1962–1990*. A paper submitted in partial fulfillment of the Master of American Studies, AMS 525, University of Alabama (1990). (Copy on file with the author.)

264. See generally JAMES SILVER, *MISSISSIPPI: THE CLOSED SOCIETY* (1964) (discussing the history of Mississippi’s closed doors involving segregation and race relations).

# FROM DESEGREGATION TO DIVERSITY AND BEYOND: OUR EVOLVING LEGAL CONVERSATION ON RACE AND HIGHER EDUCATION

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## I. INTRODUCTION

At the dawn of the twentieth century, civil rights leader W.E.B. Du Bois famously declared that “the problem of the Twentieth Century is the problem of the color-line.”<sup>1</sup> He was speaking at a time when slavery had been abolished but when “separate but equal” segregation was nevertheless recognized and reinforced by the law of the land,<sup>2</sup> and when true equality of opportunity was far from a reality. His prediction foreshadowed a century of conflict and change in race relations, which was perhaps nowhere more prominent than in the field of education. By 1960, when the National Association of College and University Attorneys (NACUA) was founded, the law in a formal sense had already begun to shift significantly away from formal, legally sanctioned segregation at all levels of education. However, true functional integration of most institutions of higher

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1. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* xxxi (A.C. McClurg & Co., 1903).

2. *See Plessy v. Ferguson*, 163 U.S. 537 (1896).

education was barely beginning. Over the next half-century, the law with regard to the role of race in higher education would continue to evolve as decision-makers in all branches of government coped with continuing challenges to equal opportunity on the basis of race. The legal debate during this period has reflected an ongoing societal debate about the role and relevance of race in our history and development.

A key set of questions throughout this evolving national dialogue has been whether, to what extent, and under what circumstances race should be considered as a factor in making decisions in the context of education. These questions have been especially prominent in the context of access and admissions for students, although they have also been the source of heated debate and litigation in employment and other contexts within higher education.<sup>3</sup> While the conversation at the beginning of NACUA's history was focused on remedying a long history of discrimination against specific groups (particularly African-Americans) in higher education, the basis for the consideration of race at colleges and universities gradually shifted toward a different sort of rationale focused on the educational benefits of diversity for all students. The Supreme Court has made clear that the legal argument must start with the identification of a "compelling interest" that could justify the consideration of race in a particular context,<sup>4</sup> and for legal purposes the Court has considered the remedial/social justice rationale and diversity/educational rationale as quite distinct. In reality, however, these rationales are related—they both reflect stages in the gradual evolution of our nation's long history and social development in dealing with issues related to race.

As we look toward the future, the arguments with regard to race and education are continuing to evolve. In an age of increased global competition and financial instability and uncertainty, an economic rationale is emerging focused on the need for the full development of human capital as an important strategic asset. Issues of access to education are now linked explicitly to economic development and competitiveness. At the same time, some opponents of race-conscious<sup>5</sup> measures argue that the 2008 election of a mixed-race President with stellar academic credentials demonstrates that the nation no longer needs to consider race as a factor in providing access to higher education.<sup>6</sup>

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3. This essay will focus on the legal rationales related to the consideration of race in the context of student access and admissions.

4. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that any governmental action that is explicitly race-based—even if intended for "benign" or positive purposes—must be "necessary" to achieve a "compelling" governmental interest).

5. For the purposes of this essay, the phrase "race-conscious" will be used to refer to decisions, policies, and programs in which race, color, or national origin is an explicit consideration.

6. See, e.g., Joan Indiana Rigdon, *The Future of Affirmative Action*, THE

This essay will briefly explore this evolution of the legal rationales related to the use of race-conscious measures in higher education, with an eye toward lessons learned from this ongoing national dialogue and its implications for the future of higher education law.<sup>7</sup>

## II. STRICT SCRUTINY

During the civil rights era that marked the first stage of NACUA's existence, institutions began to adopt race-conscious policies and programs that utilized race in ways that did not necessarily disadvantage "discrete and insular minorities"<sup>8</sup>—but that instead were intended to help such minorities. The Supreme Court eventually made clear that the legal standard applied to all intentional racial classifications used by both public and private institutions is one of strict scrutiny—requiring that any such classifications (even if intended for positive purposes) be narrowly tailored to further compelling interests.<sup>9</sup> As Justice Powell stated in the 1978 *Bakke* decision, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."<sup>10</sup>

However, when the Court revisited Justice Powell's opinion in *Bakke* a generation later in *Grutter v. Bollinger*, Justice O'Connor made clear that strict scrutiny does not mean that all such classifications automatically violate the constitutional guarantee of equal protection.<sup>11</sup> As O'Connor noted, "[c]ontext matters when reviewing race-based governmental action under the equal protection clause."<sup>12</sup> The special nature of the context and mission of higher education must therefore be taken into account when analyzing whether a particular purpose constitutes a "compelling interest" within this context.

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WASHINGTON LAWYER, Dec. 2009, at 21 (referring to Roger Clegg, president and general counsel of the Center for Equal Opportunity).

7. This essay is by no means intended to be a comprehensive history of this complex legal topic, about which entire books have been and will continue to be written.

8. See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that classifications that disadvantage "discrete and insular minorities" must be subject to strict scrutiny).

9. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); see also *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003); *Guardians Ass'n v. Civil Serv. Comm'n of the City of New York*, 463 U.S. 582 (1983) (Title VI prohibits intentional classifications based on race for the purpose of affirmative action to the same extent and under the same standards as the equal protection clause); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

10. *Bakke*, 438 U.S. at 289–90.

11. *Grutter*, 539 U.S. at 326 ("Strict scrutiny is not 'strict in theory, but fatal in fact.'" (citation omitted)).

12. *Id.* (emphasis in original removed).

Of course, the underlying reason that the equal protection clause came into being in the first place—and the reason for the origin of the strict scrutiny standard—was to deal with the nation’s tortuous history of slavery, race discrimination and segregation.<sup>13</sup> Without that difficult history, racial classifications would perhaps be subject to a much lesser standard of scrutiny. It may be hard to imagine (in light of our history) a society in which racial classifications would matter so little that they could be subjected to a much lesser standard of review—and yet in some respects that is the long-term vision contemplated by the dream of a truly color-blind society in which one’s race has essentially no impact on one’s opportunities in life. It is precisely because race has mattered so much in our history and development that legal structures have been put in place to provide the highest possible level of scrutiny for any classifications based on race.

### III. A HISTORY OF DISCRIMINATION AND THE REMEDIAL RATIONALE

While each nation has its own unique history with regard to issues of race and ethnicity, these are issues that have created significant tensions within many societies since Biblical times. As Justice Ginsburg noted in the oral argument in *Gratz v. Bollinger*, “other countries operating under the same equality norm have confronted” similar issues and have approved race-conscious measures to address their histories.<sup>14</sup> Groups of human beings have always found it convenient to differentiate themselves from people who look different from themselves or who come from different backgrounds, often with tragic consequences.<sup>15</sup> Racial integration has never been easy or quick, and significant steps of legal and social progress have predictably (and seemingly almost inevitably) faced a serious backlash from forces within society.

In 1960, as NACUA came into being and the field of higher education law was in many respects in its infancy, institutions of higher education were largely segregated by race. The Supreme Court had issued its landmark opinion in *Brown v. Board of Education*<sup>16</sup> just six years earlier, holding that segregation deprives students of minority groups equal education—even where public schools have equal physical facilities and resources—and therefore reversing the doctrine of “separate but equal” facilities that had been embraced by the Court in the now-infamous *Plessy v. Ferguson* decision of 1896.<sup>17</sup>

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13. See generally *Bakke*, 438 U.S. at 289–300.

14. *Gratz v. Bollinger*, 539 U.S. 244 (2003), oral argument, [http://www.oyez.org/cases/2000-2009/2002/2002\\_02\\_516/argument/](http://www.oyez.org/cases/2000-2009/2002/2002_02_516/argument/).

15. See, e.g., ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (Ballantine Books ed., Ballantine Books 1992).

16. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

17. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the “separate but equal”

Several cases involving equal access to higher education had actually preceded *Brown*.<sup>18</sup> In each of these cases, African-American plaintiffs sought admission to traditionally white (and segregated) institutions. Although the Supreme Court had yet to go so far as to overturn the fundamental reasoning of *Plessy v. Ferguson* in any of these higher education cases, it did find violations of equal protection based on actual inequalities of facilities and opportunities available to their plaintiffs. For example, in *Sweatt v. Painter* the Court compared the facilities and resources of law schools (e.g., the number and quality of faculty members, financial resources, alumni networks, institutional reputations, etc.) that were open to white and black students, respectively, and found that the schools were not in fact equal.<sup>19</sup> In a finding that foreshadowed subsequent arguments about the need for law school graduates to interact with people of diverse backgrounds,<sup>20</sup> the Court noted that students who were forced to attend an all-black school would be disadvantaged because they would not have access to 85 percent of the state's population with whom they would be expected to deal as lawyers.<sup>21</sup>

In light of the nation's long history with slavery and its aftermath, the legal argument in these initial landmark cases was understandably focused on the need to remedy discrimination within the major institutions of society—including educational institutions at all levels. The problem was seen primarily through a “black and white” lens because of this history, even though other racial and ethnic groups had also suffered from discrimination in American society and demographic trends would continue to reflect increases in the population of at least some of these other groups (such as Latinos). The arguments about the need for integration to provide true equality of opportunity were based in part on how people interact with and learn from each other through face-to-face contact—themes that were reiterated from an educational perspective in later cases focused on the educational benefits of diversity.<sup>22</sup>

The early desegregation cases were followed by the civil rights

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doctrine).

18. See *Sweatt v. Painter*, 339 U.S. 629 (1950) (plaintiff sought admission to University of Texas Law School even though the state opened a law school specifically for black students); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950) (plaintiff was admitted to Ph.D. in education program at the University of Oklahoma, but challenged the institution's practice of forcing him to sit separately from other students in the classroom, reading room, and cafeteria); *Gaines v. Canada*, 305 U.S. 337 (1938) (plaintiff sought admission to University of Missouri School of Law because Missouri had no law schools that black students could attend, even though state law permitted black students to qualify for admission to universities in adjacent states).

19. *Sweatt*, 339 U.S. at 633–34.

20. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

21. *Sweatt*, 339 U.S. at 634.

22. See, e.g., *Grutter*, 539 U.S. 306 (2003).



movement of the 1960s and legal developments in the other branches of government. The executive branch got into the act with executive orders focused on federal contracts,<sup>23</sup> and Title VI of the Civil Rights Act of 1964 provided a federal statutory basis requiring non-discrimination in educational programs—including those at public and private colleges and universities that receive federal financial assistance.<sup>24</sup>

With these legal frameworks in place, colleges and universities slowly began to take steps to desegregate—often with considerable resistance from within or outside the institutions.

#### IV. THE FIRST COUNTER-REACTION

As traditionally white institutions of higher education began to admit black students, it did not take long for a backlash to develop. The counter-reaction took various forms at campuses across the country. Resentment began to build among people who thought that opportunities for white (or in some cases Asian-American) students were being displaced by students from other racial and ethnic backgrounds, particularly at selective institutions where the perception was that progress for one group came at the expense of another.<sup>25</sup> This resentment can be particularly acute with regard to admissions at selective institutions that have not significantly increased the size of their entering classes over time—or at least not in a manner proportionate to the growth of the college-bound population. When people view college admissions as a zero-sum game, they are more likely to resent any perceived edge given to members of other groups.

The *Bakke* case in 1978<sup>26</sup> represented the culmination of this first counter-reaction, testing the limits of how far institutions of higher education could go in remedying discrimination and challenging the rationales for the consideration of race as a factor in admissions—particularly in states that had not implemented formally, *de jure* segregated systems of higher education. *Bakke* was the first high-profile “reverse discrimination” case in higher education to reach the Supreme Court—i.e., a case in which a white plaintiff (namely University of California at Davis Medical School applicant Allan Bakke) alleged that he had been discriminated against in the admissions process because of the consideration of race in favor of members of historically underrepresented

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23. See Exec. Order No. 11,609, 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C.A. 2000e, *as amended in* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967) (adding sex to the list of prohibited forms of discrimination), which prohibits race and other forms of discrimination by contractors and subcontractors (including colleges and universities) who receive \$10,000 or more in federal government contracts.

24. 42 U.S.C. § 2000d *et seq.* (2006).

25. See generally HACKER, *supra* note 15.

26. *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

groups.<sup>27</sup> Unlike the Michigan cases that followed a generation later,<sup>28</sup> *Bakke* involved the explicit set-aside of a certain number of seats in the entering class for members of certain historically underrepresented groups.<sup>29</sup> The Court rejected the argument that a single institution of higher education could make findings of societal discrimination on which it could base a remedial program in which race was taken into account.<sup>30</sup>

In his seminal opinion, Justice Powell also rejected the medical school's argument that the consideration of race in admissions was necessary to improve the delivery of health-care services to communities that were currently underserved—citing a lack in the record of evidence to justify such a conclusion.<sup>31</sup> Powell expressed a reluctance to assume that individuals from particular racial groups would necessarily be more likely to practice in disadvantaged communities.<sup>32</sup> He similarly rejected the notion that the medical school's program would increase representation of blacks in the medical profession, citing the small size of the national pool of qualified black applicants.<sup>33</sup> Justice Powell's reaction to these arguments underscored the Court's unwillingness to accept rationales that seemed to rest on stereotypical assumptions about individuals' choices or priorities based on their race, or on broad societal needs that cannot be met by any single institution.

Instead, under the broad umbrella of academic freedom, Justice Powell embraced a positive educational argument—namely that a diverse student body has educational benefits for all students, majority and minority alike—and held that this goal can justify the consideration of race as one of many factors in admissions.<sup>34</sup> In doing so, Justice Powell relied upon earlier landmark cases that discussed the academic mission of institutions of higher education and that established the principle that courts should defer to the educational judgments of institutions with regard to how students are best selected and taught.<sup>35</sup>

At the time *Bakke* was decided, institutions of higher education were far from being fully integrated. Coupled with the Court's refusal to endorse a remedial rationale that contemplated individual institutional action to remedy societal discrimination, Justice Powell's decision to embrace the educational benefits of diversity as a compelling interest shifted the legal

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27. *See id.*

28. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (challenge to consideration of race in law school admissions policy); and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (challenge to consideration of race in undergraduate admissions policy).

29. *Bakke*, 438 U.S. 265.

30. *Id.* at 307–10.

31. *Id.* at 310–11.

32. *Id.*

33. *Id.* at 311 n.47.

34. *Id.* at 311–19.

35. *Bakke*, 438 U.S. at 311–14.

conversation away from the social justice rationale and toward an argument based on educational mission and need. This shift had the political and rhetorical advantage of changing the focus from a zero-sum game pitting various racial groups against one another (in which there were inevitably winners and losers) to a broader perspective on the benefits to all students of diverse educational environments in which all groups, majority and minority alike, had something to gain. Indeed, some critics argue that the diversity rationale shifted the national focus in a way that primarily benefited white students and simply reinforced the status quo at elite institutions, as students from historically underrepresented groups had long had to navigate institutions and social circumstances in which they dealt with people from different backgrounds.<sup>36</sup> The shift to the diversity rationale lessened the focus on the moral imperative of social justice and the continuing impact of the nation's painful history of discrimination, which many members of new generations of Americans were anxious to put behind them.

#### V. THE DIVERSITY RATIONALE TAKES HOLD AND THE NEXT BACKLASH BEGINS

Although the Court's guidance in *Bakke* was a bit difficult to decipher due to the Court's splintered opinion in that case, colleges and universities relied upon the diversity rationale articulated by Justice Powell as the basis for ongoing race-conscious efforts in admissions and other programs.<sup>37</sup> In the quarter-century between the *Bakke* decision and the Michigan decisions, several successive presidential administrations (Republicans and Democrats alike) also embraced the diversity rationale as articulated by Justice Powell through guidance provided by the U.S. Department of Education in the contexts of admissions and financial aid.<sup>38</sup>

Within a fairly short time, however, another backlash ensued against the diversity rationale as a justification for race-conscious actions—this time in part taking the form of arguments about “political correctness” in higher education. Critics of the diversity rationale argued that it was simply a way to legitimate discrimination in another form and that it treated people as group members rather than as individuals as required by the Constitution.<sup>39</sup>

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36. See *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (J. Thomas, dissenting) (arguing that “blacks can achieve in every avenue of American life without the meddling of university administrators,” and that the University of Michigan Law School made choices to be elitist and exclusionary).

37. See *id.* at 325.

38. See Jonathan Alger & Marvin Krislov, *You've Got to Have Friends: Lessons Learned from the Role of Amici in the University of Michigan Cases*, 30 J.C. & U.L. 503, 509 (2004).

39. See, e.g., PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, *THE NEW COLOR LINE: HOW QUOTAS AND PRIVILEGE DESTROY DEMOCRACY* (Regnery Publishing, Inc., 1995).

Having learned lessons about language and messaging from the civil rights organizations and movement from previous decades, opponents of race-conscious actions formed groups such as the Center for Equal Opportunity and the Center for Individual Rights with the goal of ending race-conscious decisions.<sup>40</sup> In the decade preceding the Michigan cases, these groups enjoyed some significant successes in the court of law<sup>41</sup> as well as in the court of public opinion.<sup>42</sup> When the Michigan cases were filed in 1997, these opponents of race-conscious action asserted that the Michigan cases would be “the Alamo” of race-conscious affirmative action.<sup>43</sup>

Like the proponents of race-conscious policies, the opponents of race-conscious measures have made moral and pragmatic arguments as well as legal arguments in support of their position. For example, some have argued that race-conscious measures of any sort, even if well-intended, are contrary to the basic principle of non-discrimination and to the letter and spirit of the equal protection clause.<sup>44</sup> Critics also argue that students from traditionally underrepresented groups with lesser academic qualifications end up displacing majority students at selective institutions.<sup>45</sup> They also express the concern that these students from traditionally underrepresented groups would be more likely to lack the academic preparation necessary to succeed at such institutions, and that they would in fact be better off at other institutions more well-suited to their level of preparation<sup>46</sup>—an argument that was debated at length by the former presidents of Harvard and Princeton in their landmark study of student success at elite institutions, *The Shape of the River*.<sup>47</sup>

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40. For a detailed description of the history and interrelationships of these organizations, see LEE COKORINOS, *THE ASSAULT ON DIVERSITY: AN ORGANIZED CHALLENGE TO RACIAL AND GENDER JUSTICE* (Rowman & Littlefield Publishers, Inc., 2003).

41. See, e.g., *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (rejecting Justice Powell’s reasoning in *Bakke* and finding that diversity is not a compelling interest that would justify the consideration of race in higher education admissions), *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003).

42. See, e.g., CAL. CONST. art. I, § 31 (California’s “Proposition 209,” passed by the state’s voters, which bans the consideration of race and gender in public higher education as well as in other public programs).

43. See, e.g., Jack E. White, *Affirmative Action’s Alamo*, TIME, Aug. 23, 1999, available at <http://www.time.com/time/magazine/article/0,9171,991820,00.html>.

44. See, e.g., CARL COHEN & JAMES P. STERBA, *AFFIRMATIVE ACTION AND RACIAL PREFERENCE: A DEBATE* (Oxford University Press 2003) (Cohen sets forth the moral and pragmatic arguments against race-conscious programs).

45. See *id.*

46. See *id.*

47. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (Princeton University Press 1998) (major study of the academic, employment, and personal histories of thousands of students of all races who attended selective colleges and universities between the 1970s and early 1990s).

## VI. THE ESTABLISHMENT REACTS TO DEFEND DIVERSITY

By the time the Michigan cases were in front of the Supreme Court, the ground had shifted dramatically in higher education and in society more generally.<sup>48</sup> Public and private institutions alike had come to rely upon the diversity framework from *Bakke* as a means to diversify their student bodies. At least some research had been done analyzing the educational benefits of diversity,<sup>49</sup> although it was certainly not enough to appease the critics of race-conscious policies. Employers and professional organizations relied upon colleges and universities to produce a diverse workforce that could compete in a global economy,<sup>50</sup> and even the military relied upon colleges and universities to help produce a diverse officer corps to promote racial harmony and unit cohesion.<sup>51</sup> In her opinion, Justice O'Connor took note of this broad, deep coalition of institutions across American society.<sup>52</sup> She went even further than Justice Powell's opinion in *Bakke* by highlighting the importance of diversity in organizations and institutions beyond higher education, for which colleges and universities served as the gateway to opportunity:

Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

. . . .

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.<sup>53</sup>

This language referring to "effective participation" and "the path to leadership" hints at a separate interest in access to education at all levels, although the Court has yet to fully flesh out that concept.

48. See Alger & Krislov, *supra* note 38.

49. See, e.g., Brief for the American Educational Research Ass'n et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516). See also CIVIL RIGHTS PROJECT (HARVARD UNIVERSITY), *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* (Gary Orfield & Michal Kurlaender eds., Harvard Educational Publishing 2001).

50. See, e.g., Brief for General Motors Corp. as Amicus Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) and *Gratz*, 539 U.S. 244 (No. 02-516); Brief for Amici Curiae 65 Leading American Businesses Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) and *Gratz*, 539 U.S. 244 (No. 02-516).

51. See Consolidated Brief for Lt. Gen. Julius W. Becton et al. as Amici Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) and *Gratz*, 539 U.S. 244 (No. 02-516).

52. *Grutter*, 539 U.S. at 330-31.

53. *Id.* at 332.

At the end of her opinion, however, Justice O'Connor sent a cautionary signal in dicta addressing the continuing need for race-conscious programs in a rapidly changing society.

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.<sup>54</sup>

It was apparent that Justice O'Connor wanted to make a point about the need for such programs not to endure indefinitely. Her emphasis on a 25-year period—a sort of generational notion—was especially striking in light of the nation's much longer history with race discrimination and continuing challenges to equal opportunity.

#### VII. WHERE IS THE LEGAL DIALOGUE GOING NEXT?

After the Michigan cases, the opponents of race-conscious measures in higher education shifted their attention in large part to the political realm, pursuing state ballot initiatives modeled after California's Proposition 209.<sup>55</sup> At the same time, the great coalition that came together to support the University of Michigan has looked for ways outside of the litigation context to foster programs across traditional institutional lines and to foster pipelines of diverse students in a variety of fields.<sup>56</sup>

As NACUA and its members prepare for the next half-century of higher education law, the questions about race and higher education have not disappeared. Where might the national legal conversation go next? Are we really in a position at this point to expect that race will no longer need to be a factor in admissions programs anywhere by the year 2028? While much progress has been made with regard to reducing racial disparities in education, there are continuing barriers to equal opportunity in higher education that must be addressed. In the meantime, the world is changing rapidly around us, and the American educational system must keep pace with these changes if the nation is to remain competitive and prosperous.

Given its inability to predict the future, the Supreme Court has wisely resisted the temptation to shut the door altogether on the possibility of future rationales for race-conscious programs and policies. In her opinion in *Grutter*, Justice O'Connor explicitly rejected the notion that the remedial

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54. *Id.* at 343.

55. *See, e.g.*, MICH. CONST. art. I, § 26; NEB. CONST. art 1, § 30.

56. *See, e.g.*, Future Diversity 2008, <http://www.groundshift.org/events/future-diversity-2008> (summarizing national conference sponsored by the Center for Institutional and Social Change at Columbia Law School, Rutgers, The State University of New Jersey, Columbia University, and The College Board— and focusing on innovative initiatives to increase diversity in higher education that cross traditional institutional lines).

rationale was the only permissible basis for race-conscious actions, instead declaring that “we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.”<sup>57</sup>

So what might we expect in terms of the next generation of arguments related to race-conscious policies and procedures? From *Bakke* through *Grutter*, the diversity rationale was premised first and foremost on an argument about the nature and experience of higher education.<sup>58</sup> The coalition that supported the University of Michigan broadened the argument, however, by shining a light on the importance of, and need for, diversity in other contexts beyond education. These interests are not unrelated, as the learning experiences stemming from the interactions contemplated in *Bakke* and *Grutter* are replicated to some extent in contexts beyond higher education. In other words, this latest shift in the argument highlights the fact that colleges and universities have goals with regard to what happens to students (both in and outside the classroom) while they are enrolled at these institutions, and with regard to how students use what they have learned once they graduate. The mission of institutions of higher education, therefore, can have both internal (with regard to what happens within their walls) and external (with regard to what their graduates do with their education) components.<sup>59</sup> After all, it is through their graduates that institutions of higher education can ultimately have an impact on their society.

Once students graduate from a college or university and enter the workforce or are otherwise engaged in institutions and organizations in an increasingly diverse democracy, they continue to interact with (and learn from) people from diverse backgrounds. In the face of economic pressures related to globalization,<sup>60</sup> concerns about the nation’s continuing competitiveness may press public officials to focus more on an economic (rather than purely educational) rationale related to the full development of human capital as a strategic asset.

The economic argument can be expressed in several ways. A starting point for this argument is that the nation’s human capital is its most important single natural resource, and that we cannot afford to allow

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57. *Grutter*, 539 U.S. at 328.

58. *Id.* at 330.

59. Note, however, that courts may be less likely to defer to judgments made by institutions about what happens to their students after they leave the institutions—because such judgments are not premised solely on the pedagogical benefits of diversity within the academic setting about which educators are expected to have special expertise. *See generally* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 726 (2007) (discussing need for schools to establish pedagogic basis for level of diversity needed to obtain asserted educational benefits).

60. *See, e.g.*, FAREED ZAKARIA, *THE POST-AMERICAN WORLD* (W.W. Norton & Company, Inc., 2008); THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (Farrar, Straus & Giroux 2005).

barriers related to race, ethnicity, or related factors to prevent individuals from achieving their full potential because it results in inefficiency and lost opportunity. In the Michigan cases, over eighty major corporations joined one of several amicus briefs supporting the importance of training students in diverse environments, linking this preparation to increased productivity and global competitiveness, and reduced discrimination and stereotyping in the workplace.<sup>61</sup> As these corporations pointed out, higher education is critical to economic competitiveness. Fareed Zakaria observed, in reflecting upon America's place in the global economy of the 21<sup>st</sup> Century, that "[h]igher education is America's best industry. . . . In no other field is America's advantage so overwhelming."<sup>62</sup> The economic consequences of a robust system of higher education can also be seen indirectly in a host of other areas, whether in improved crime statistics, reduction of welfare costs, or in health outcomes for citizens, to name but a few.

Another perspective, articulated and analyzed by Scott Page in his path-breaking work, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies*,<sup>63</sup> is that individuals work together in teams in the workplace to solve complex problems—and that teams that are more diverse with regard to backgrounds and perspectives will produce better, more creative results. While it may have its faults with regard to access and equal opportunity, the American educational system may be particularly well suited to prepare students to take advantage of diversity in this way because of the system's relative strength in interactive learning that teaches students how to think and be creative (rather than simply how to memorize facts or how to take certain kinds of tests).<sup>64</sup> The nation's demographic vibrancy further enhances this strategic advantage.<sup>65</sup> Taken together, if properly understood and utilized, these arguments collectively lead to the conclusion that our nation's diversity may be its greatest economic asset—and therefore worthy of significant attention and investment.

Yet another argument that played a significant role in *Grutter* was the importance of diversity in the military and its relationship to national security. In an influential amicus brief, former military leaders described

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61. See Brief for General Motors Corporation as Amicus Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516); Brief for Amici Curiae 65 Leading American Businesses Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) and *Gratz*, 539 U.S. 244 (No. 02-516); and Brief for Amici Curiae Massachusetts Institute of Technology et al. Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) and *Gratz*, 539 U.S. 244 (No. 02-516) (joined by IBM and DuPont among others).

62. ZAKARIA, *supra* note 60, at 190.

63. SCOTT PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (Princeton University Press 2007).

64. ZAKARIA, *supra* note 60, at 193.

65. *Id.* at 196.



the importance of racial and ethnic diversity in ensuring troop cohesion, and described how leadership in the military is provided by the military academies and Reserve Officers' Training Corps programs on college and university campuses.<sup>66</sup> The timing of the brief and the oral argument in the Supreme Court in 2003 coincided with the start of the Iraq War, not long after 9/11 when issues of national security were foremost on many people's minds.

While these economic and national security arguments are important, they are not the only reasons to embrace true integration of our nation's colleges and universities—or of society in general. A fully functioning and healthy democracy is premised on the assumption that all citizens can participate actively in government at all levels.<sup>67</sup> As Justice O'Connor stated eloquently in *Grutter*,

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to “sustaining our political and cultural heritage” with a fundamental role in maintaining the fabric of society. This Court has long recognized that “education . . . is the very foundation of good citizenship.” For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.<sup>68</sup>

The systematic exclusion of particular groups based on race or other factors from major institutions in society can foment distrust and cynicism, undermining faith in the democratic system itself. Of course, opponents of race-conscious measures counter that such measures fail to treat people as individuals and therefore pose an equally dangerous threat to democracy.

In light of these fundamental concerns about democratic participation and citizenship, do utilitarian arguments about diversity and its benefits for the educational environment, economic development, or even national security cause us to turn a blind eye to fundamental historical issues of social justice? Moreover, does a focus on these utilitarian arguments reduce the role of higher education to a strictly instrumental one that ignores more basic virtues of liberal learning and scholarship?<sup>69</sup>

These are important questions with which we must continue to grapple.

66. Consolidated Brief for Lt. Gen. Julius W. Becton et al. as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) and *Gratz*, 539 U.S. 244 (No. 02-516).

67. See, e.g., SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 258–59 (Random House 2003).

68. *Grutter v. Bollinger*, 539 U.S. 306, 331 (citations omitted).

69. See Drew Gilpin Faust, *The University's Crisis of Purpose*, N. Y. TIMES, Sept. 6, 2009, at BR19, available at <http://www.nytimes.com/2009/09/06/books/review/Faust-t.html>.

The diversity rationale has been treated as a voluntary choice that individual institutions can pursue (or not) based on their own sense of mission, whereas the remedial rationale involves a mandatory legal obligation. One could argue that the equal protection clause is about human dignity first and foremost; it was not adopted primarily to serve pragmatic educational, economic, or even national security aims. While these utilitarian rationales are extremely important to our nation and worthy of significant attention, questions of social justice stubbornly remain and should not be forgotten—even if the law has developed so as to make it much more difficult in practice for colleges and universities to rely upon moral, remedial arguments as a justification for their own race-conscious programs. Furthermore, as colleges and universities struggle to justify their immediate relevance in a time of economic turmoil, the broader ultimate mission of higher education in a democracy—and its underlying values of academic freedom and inquiry—must not be forgotten.

#### VIII. SOME REFLECTIONS ON THE DEBATE AND WHAT WE'VE LEARNED

The conversation about race and its role in higher education has never been easy or comfortable. The nation's historical baggage on this subject is heavy and real. As a microcosm of our society in which larger debates about race play out, higher education is hardly an isolated ivory tower that sits apart from the real world in this respect. The actions of colleges and universities—especially their decisions about whom they admit and educate in various fields and programs of study—have real and long-term consequences for the rest of society. Higher education at its best can be a great engine of opportunity, but if access is not open it can also serve as a barrier that reinforces and legitimates privilege and stratification. In a knowledge-based economy in which higher education is essential for success and participation in many different fields and careers, the role of higher education as a gateway to opportunity is more essential than ever.

When economic stratification is strongly correlated with a factor such as race over the long run, it can be a recipe for social unrest and instability. The recipe becomes even more toxic when racial disparities are persistently reflected over time in a myriad of other aspects of society such as the criminal justice system, health care, housing, etc. World history is replete with examples of societies that have been torn apart by racial and ethnic strife. As Justice O'Connor suggested in *Grutter*, public perceptions related to the fairness and openness of institutions such as colleges and universities matter.<sup>70</sup>

Theories and arguments related to race and education must be backed up with evidence and research to be sustained over time. The courts of law, as well as the court of public opinion, eventually lose patience with mere

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70. *Grutter*, 539 U.S. at 331–32.

theories and suppositions that are based solely on emotion or anecdote. The current focus on accountability in higher education—and the assessment of learning outcomes—is likely to have an impact on diversity-based efforts as well as other types of programs and policies in higher education.<sup>71</sup> Institutions must not be afraid to ask the hard questions of their own race-related policies and practices to determine whether they are in fact working as intended.

The debate about race and higher education is also directly related to deep moral questions on which there is still no clear societal consensus.<sup>72</sup> Is higher education (as related to individuals) primarily a public or a private good? Is the concept of merit in higher education primarily a function of an individual's achievements or potential in isolation, or does it have a community aspect to it that must be considered (e.g., when putting together an entering class of students at a college or university)? To what extent must merit be measured against available opportunities and the relative circumstances in which individuals have lived and studied?

The issues of race and higher education are also no longer simply black and white.<sup>73</sup> As our national dialogue has become more sophisticated and nuanced on issues related to race, so too has the discussion in higher education changed in ways that have implications for the development of the law. For example, how are issues of mixed race to be addressed? What are the justifications for treating members of various historically underrepresented groups the same or differently?

The very breadth of the definition of diversity can also obscure the significance of the role of race in higher education. How is race different from the many other factors that make up the whole person (socioeconomic status, family circumstances, geographic background, special skills and talents, life experiences, hardships overcome, gender, sexual orientation, age, religion, etc.) and that can contribute to a diverse learning environment? In her discussion of diversity, Justice O'Connor emphasized the importance of giving each individual an opportunity to demonstrate what he or she can contribute to a learning environment through a holistic, individualized review of many factors.<sup>74</sup> The debate about the importance

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71. See, e.g., STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 212 (American Bar Association Section of Legal Education and Admissions to the Bar, 2009-10) (articulating accreditation standard for law schools focused on demonstration of a commitment by concrete action to having a diverse student body).

72. For a discussion of current philosophical and legal arguments related to race-conscious policies and programs, see JAMES P. STERBA, *AFFIRMATIVE ACTION FOR THE FUTURE* (Cornell University Press 2009).

73. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (discussing the limitations of voluntary affirmative action plans in school districts that were based primarily on white/nonwhite or black/"other" distinctions, and contrasting them with the holistic review upheld in *Grutter*).

74. *Grutter v. Bollinger*, 539 U.S. 306, 337.

of racial diversity in higher education has spurred discussion of other factors on the basis of which individuals also have been subjected to stereotyping and discrimination (e.g., socioeconomic status, gender, religion, disabilities, sexual orientation, etc.).

Ironically, in the long run the forces on both sides of the debate about race-conscious policies and practices geared to improve diversity advocate for the same goal. In the Michigan cases, both sides claimed inspiration from Martin Luther King, Jr.'s dream of a color-blind society in which people are judged on the content of their character rather than the color of their skin.<sup>75</sup> The fundamental difference, therefore, was on how to get to this point. In 2007, four years after the Michigan cases were decided, Chief Justice Roberts wrote in a plurality opinion in a case involving voluntary efforts to integrate school districts that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>76</sup>

Is the “quitting cold turkey” approach to the consideration of race advocated by Chief Justice Roberts really possible in the midst of continuing racial disparities in educational opportunities, or is it too simplistic and idealistic? That is a central question in the ongoing debate about whether, and for how long, race-conscious policies and programs should be permitted in education if the ultimate goal is to get to the point where race no longer makes a difference in the opportunities available to students at all levels. Among other factors, socioeconomic status, or wealth, has been suggested as one alternative to race that may be a more palatable and legally sustainable criterion in admissions and other programs (not to mention that it is not subject to strict scrutiny)<sup>77</sup>—although such “race-neutral alternatives” have themselves been subject to criticism on moral and practical grounds.<sup>78</sup> Ongoing experiments in several states that have banned the use of most race-conscious measures (at least by public institutions) will continue to serve as a living laboratory of what can happen when race is removed altogether as an explicit factor in the decision-making equation, and will therefore be watched and studied carefully.<sup>79</sup>

As we approach the next half-century of higher education law, the clock seems to be ticking with regard to the ongoing viability of race-conscious measures. If the twenty-five year time frame set forth by Justice O’Connor is to have any real meaning, however, much more work clearly needs to be

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75. See MARTIN LUTHER KING, JR. & CORETTA SCOTT KING, *THE WORDS OF MARTIN LUTHER KING, JR.* 95 (Coretta Scott King ed., Newmarket Press 1987).

76. *Parents Involved in Cmty. Sch.*, 551 U.S. at 748.

77. See, e.g., RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (Basic Books 1996).

78. See Rigdon, *supra* note 6.

79. See *supra* text accompanying notes 42, 55; see also Rigdon, *supra* note 6.

done to provide true equality of opportunity. The interrelationship of opportunity in P-12 education, higher education, and society in general implies that meaningful progress can be achieved only with holistic efforts that look across traditional institutional lines.<sup>80</sup> The notion of lifelong learning has never been more relevant than in today's global, knowledge-based economy. For students growing up in this century, many of the jobs for which they will need to be prepared have probably not yet even been defined or invented. Accordingly, colleges and universities must not see themselves as isolated ivory towers, but rather as an engaged part of a lifelong educational system that extends far beyond formal classroom training.

Having elected its first non-white President, the nation must now confront these continuing challenges with a sense of moral, educational, and economic urgency in an era of unprecedented globalization. Will it be easier or harder to discuss and deal openly with vexing issues of race in light of the progress we have made? Our nation has had to rise to the occasion many times to confront significant challenges related to race and education, and the time may be ripe once again to take a hard look at how far we have come and how far we still need to go. We are in good company, as countries all over the world are having similar debates about equal opportunity and the role of race in their own systems of higher education.<sup>81</sup>

The conversation may be difficult, but in higher education we have to find constructive ways to approach these issues with thoughtful analysis and dialogue. We will not always agree on the exact nature of the problem, much less on the solutions, but the conversation must continue in ways that respect the dignity of all individuals. That imperative goes to the heart of our educational mission, and indeed to the bold vision of a democratic society set forth in the Constitution. Are we up to the task? I believe we are. After all, in the long run, the consequences are too great for failure to be an option.

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80. See, e.g., Rutgers Future Scholars, <http://em.rutgers.edu/programs/futurescholars/> (program that involves a collaboration among a university, school districts, corporations and others, and that is aimed at increasing the numbers of academically talented students from disadvantaged backgrounds who have meaningful access to higher education).

81. See, e.g., Aisha Labi, *Diversity with a British Accent*, THE CHRON. OF HIGHER EDUC., Oct. 11, 2009, at B14; Marion Lloyd, *Affirmative Action, Brazilian-Style*, THE CHRON. OF HIGHER EDUC., Oct. 11, 2009, at B8.

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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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