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ARTICLES

In this article, the authors examine the existence and interpretation of any so-called mismatch effect in law school. After an introduction to affirmative action and its legality, the efficiency and meritocracy arguments used by opponents of affirmative action are briefly reviewed. The authors consider how the mismatch hypothesis fits into this context. Next, they examine the role of race in discussions of this hypothesis, and we describe how match effects can be modeled and analyzed. After linking academic mismatch to the more general research about the effects of learning environments that are diverse in terms of prior measured achievement, the authors reflect on the various perceptions and interpretations of mismatch and their potential policy and practice significance. Finally, they evaluate the conceptual implications of mismatch for debates on affirmative action and for instruction and academic supports in law school for entering students.

This article discusses the notion of collegiality and its role in employment decisions made in the field of higher education. The article defines collegiality, recounts a decade of collegiality decisions and notes where and how collegiality has played a role in shaping college and university policies. The authors consider arguments both for and against the use of collegiality in employment decisions, and conclude that its use as a factor in such decisions is likely to continue.

NOTES

The Ailing Student Exception: Medical Residents and the Federal Insurance Contributions Act

Erin Rogozinski

This note discusses whether medical residents should be categorized as employees or students for the purpose of the student exception in the Internal Revenue Code, and therefore, whether they and the hospitals in which they learn and work must contribute to Social Security through the Federal Insurance Contribution Act. Although medical residents are still in the process of learning about their profession, they have obtained advanced degrees, provide valuable services to hospitals and medical centers, often in excess of forty hours per week, and are paid wages for these services. When a person dedicates such a significant portion of his or her time to providing a service for which he or she is paid, effectively creating an employee–employer relationship, both the employee and the employer should contribute to the Social Security system envisioned by Congress.

IS THERE A MISMATCH EFFECT IN LAW SCHOOL, WHY MIGHT IT ARISE, AND WHAT WOULD IT MEAN?

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INTRODUCTION

A "mismatch" in law school has been defined as the gap between the strength of a student's entering credentials at a particular school and those of the modal student at that school. Accordingly, the mismatch hypothesis concerns a student whose level of entering credentials in a law school falls substantially below the school's average. In particular, the hypothesis stipulates that more learning occurs when a student attends a school where any credentials gap is small, or correspondingly, that less learning occurs when the gap is large.

The credentials upon which the mismatch hypothesis has been framed include undergraduate grade point average as well as the applicant's score on the Law School Admissions Test (LSAT). These presumptively fair and objective criteria are typically implemented in research studies as a weighted combination, and it is often assumed that merit and success in law

school and the legal field are strongly associated with entering credentials.[1] Whether or not this is true, an initial credentials gap is generally created when individuals are admitted to law schools on the basis of preferences outside of those criteria (grades plus scores)—whether due to race, legacy,[2] or some other basis. Proponents of the mismatch hypothesis argue that such students subsequently learn less and consequently have a lower likelihood of becoming practicing attorneys than if they had attended a better-matching school. This hypothesis has gained vocal adherents and detractors since it was first investigated in law school admissions in 2004.[3] The ensuing debate has primarily centered on the role of the mismatch hypothesis in challenging the effectiveness of race-based affirmative action policies. As we discuss below, this is the case even though students' race plays no direct role in this hypothesis; rather, the gap can and does exist for students of all races, and any learning effects likewise exist independently of race.

In this article, we re-examine the existence and nature of the mismatch effect in law school, asking several key questions about this potential effect: its size and direction, its source, and its significance. We begin with a brief history of affirmative action and its legality, followed by a discussion of the efficiency and meritocracy arguments used by opponents of affirmative action. We then place the mismatch hypothesis within that context, considering how and whether it fits as part of those attacks. Next, we examine how race is, and is not, a reasonable part of the mismatch hypothesis discussion, and we describe how match effects can be modeled

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1. We use the term *credentials* throughout, to mean an attempt to attach an objective measurement to a student based on undergraduate grades and LSAT score.

2. In a recent study of legacy admissions at thirty highly selective colleges and universities, Michael Hurwitz found that legacy status increases the odds of admission by a factor of 3.13. *See* Michael Hurwitz, *The impact of legacy status on undergraduate admissions at elite colleges and universities*, 30 ECON. OF EDUC. REV. 480 (2011), *available at* http://www.sciencedirect.com/. *See also* John Brittain and Eric L. Bloom, *Admitting the Truth: The Effect of Affirmative Action, Legacy Preferences, and the Meritocratic Ideal on Students of Color in College Admissions*, *in* AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS (Richard Kahlenberg ed., 2010). These authors chronicle the enormous advantage of legatees in the admissions process. For example, the number of legacy admits at elite schools is usually 3–4 times the entire number of Black students at the school. *Id.* at 127. They note Justice Ginsburg's point, "The rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to 'merit.'" Grutter v. Bollinger, 539 U.S. 306, 367–68 (2003) (Ginsburg, J., concurring).

3. The original article was R. H. Sander, *Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367(2004) [hereinafter *Systemic Analysis*]. A second article central to the present research is R. H. Sander, *Reply: A Reply to Critics*, 57 STAN. L. REV. 1963 (2005) [hereinafter *Reply to Critics*].

and analyzed. Before looking at research concerning those effects, however, we examine the causal assumptions among mismatch hypothesis supporters, and we present research about the effects of heterogeneous (diverse in terms of prior measured achievement) learning environments in related contexts. That is, the hypothesis also raises issues regarding postsecondary and post-baccalaureate/graduate school admissions, and those other levels of education help to contextualize the research in law school admissions. We conclude with some reflections on the policy and practice significance of any mismatch effects, again questioning the linking of these questions to affirmative action debates and suggesting instead that the major implications concern law school instruction and academic supports for entering students.

I. THE CONTEXT: A SHORT HISTORY OF AFFIRMATIVE ACTION POLICY AND LAW

The legality of affirmative action policies has been litigated; as discussed below, the *Grutter* decision from 2003 is the law of the land.[4] Yet future litigation is nonetheless likely, spurred in part by Justice O'Connor's comment in *Grutter*:

> The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable. The Court expects that twenty-five years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[5]

Thus, this issue will probably be re-litigated, in 2028 if not before. In part, then, this article places the mismatch hypothesis within a framework of plausible future litigation. The past history of affirmative action policies and jurisprudence is also instructive merely to increase understanding of the current policy arguments.

Many excellent histories of affirmative action have been written.[6] Here, we present only a short overview. Affirmative action began in earnest during the years immediately following the 1968 assassination of Dr. Martin Luther King. By the 1990s, these programs had become firmly established,[7] and—partly as a result—as of 2005 there were approximately 40,000 Black[8] lawyers in the U.S.[9] But this recent progress stands in stark

4. Grutter v. Bollinger, 539 U.S. 306 (2003).

5. *Id.* at 309-10.

6. *See, e.g.*, CHRISTOPHER EDLEY, NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES (1996); IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE (2005).

7. Henry Ramsey, Jr., *Historical Introduction*, *in* Linda F. Wightman, *LSAC National Longitudinal Bar Passage Study*, *infra* note 64, *available at* http://www.sac.org/LSACResources/Research/RR/Wightman-LSAC-98.pdf.

8. A majority, but not all, Black law students are African American, so the

contrast with a long history of exclusion. Prior to the Reconstruction Era, Blacks were not allowed to receive a legal education, and no Black person was admitted to the American Bar Association prior to 1911.[10] There were approximately 1,300 Black lawyers in 1930; this number had increased to just 2,000 by 1960,[11] and few potential Black lawyers were forthcoming. As noted by Richard Sander, "In 1964, there were only about 300 first-year black law students in the United States, and one-third of these were attending the nation's half dozen black law schools."[12] Few students of color were enrolled in historically White law schools prior to the establishment of affirmative action programs.

The Supreme Court has considered affirmative action plans in each of its main contexts: contracting,[13] hiring,[14] and higher education admissions.[15] As a rule, the Court has applied strict scrutiny to any policy that classifies individuals based on their race, meaning that the policy will be found to violate the equal protection clause of the Fourteenth Amendment unless it serves a compelling purpose and is narrowly tailored to achieve that purpose. Early affirmative action plans were defended as serving a remedial (and compelling) purpose—addressing past discrimination—and

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former term is used herein.

9. David B. Wilkins, *A systematic response to systemic disadvantage: A response to Sander*, 57 STAN. L. REV. 1915 (2005).

10. Three African Americans were admitted to the ABA in 1911 (William Henry Lewis, Butler Roland Wilson, and William R. Morris). J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944, 541-42(1993). However, according to Smith, "In 1912, word spread across the ABA that it had admitted three black lawyers. Predictably opposition to their membership was strongly voiced by southerners. . . .[a]sserting that the ABA was a social organization." *Id.* at 542. All three men were pressured to resign, but Wilson and Lewis refused. *Id.* At the ABA's annual convention in 1912, a resolution was adopted requiring that the race of Blacks recommended as members be identified. *Id.* at 543. On the basis of this resolution, it was understood that Lewis and Wilson would retain membership, but that future recommendations of African Americans could be vetoed by ABA board members. *Id.* A third African American lawyer, T. Gillis Nutter, was admitted to the ABA in 1929, but the ABA remained White with few exceptions until 1943 when the ABA amended its by-laws to require four, instead of two, negative votes to deny membership. *Id.* at 544-45. Southern voting strength was accordingly diluted. *Id. See also* Robert V. Ward, *From the Slave Quarters to the Courtroom: The Story of the First African American Attorney in the United States*, BLACKPAST.ORG, http://www.blackpast.org/?q=perspectives/william-henry-squire-johnson-slave-quarters-courtroom.

11. J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944, 565 (1993).

12. *Systemic Analysis*, *supra* note 3, at 375.

13. City of Richmond v. J.A. Cronson Co., 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Peña, 513 U.S. 1012 (1994).

14. United Steel Workers of Am. v. Weber, 444 U.S. 889 (1979); Wygant v. Jackson Bd. of Educ., 478 U.S. 1014 (1986); Johnson v. Santa Clara Cnty. Transp. Agency, 480 U.S. 616 (1987); Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990).

15. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 912 (1978); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

were generally upheld if they were of limited scope.[16]

The Supreme Court has also endorsed "diversity" as a compelling governmental interest in higher education.[17] Current jurisprudence on affirmative action in higher education admission is based on twin cases concerning the University of Michigan. In *Gratz v. Bollinger*, the Court found the University's undergraduate admissions program to be in violation of the Equal Protection Clause because, as Justice O'Connor explained in the *Grutter* case (decided concurrently with *Gratz*), it implemented rigid, "mechanical, predetermined diversity 'bonuses' based on race or ethnicity."[18] This rule consisted of simply adding points for applicants based on race or ethnicity. While other point increases were also included in the system, racial classification is expressly addressed in the Fourteenth Amendment, so only those elements were subject to the challenge and to strict scrutiny.

In contrast, the Court in *Grutter v. Bollinger* upheld the University of Michigan law school's affirmative action policy, which used race merely as a "potential 'plus' factor" and as part of a larger, comprehensive review of applicants' files.[19] The Court reaffirmed (five to four) that diversity is a compelling state interest and can be tailored to have multiple sources, including "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against."[20]

Where the mismatch hypothesis would fit within the Court's legal framework, should the hypothesis find sufficient empirical support, is not clear. Most likely, a plaintiff challenging an affirmative action policy at a law school would argue on the basis of a mismatch effect that the policy is not narrowly tailored. Even given a compelling interest in diversity, using race to place applicants in an environment where they would be less likely to succeed is a poor approach for pursuing that goal. Secondarily, a plaintiff might use the mismatch effect to reargue the basic idea that diversity in higher education is indeed a compelling state interest.[21]

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16. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980).

17. Regents of the University of California v. Bakke, 438 U.S. 912 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003).

18. Grutter v. Bollinger, 539 U.S. 306 337(2003).

19. Grutter, 539 U.S. at 307 (2003).

20. *Id.* at 316.

21. Note that a potential empirical demonstration of a mismatch effect for students of color would be primarily evidence that mismatch effects exist for students of *any* race or ethnicity. This is because, as discussed later in this article, the causal assumptions underlying the mismatch hypothesis have nothing to do with race. Thus, the approach would be to show the effect and then only indirectly show that mismatch harms Black students through the correlation of race with admission preference. We should note, however, that using such empirical evidence to implement policy changes solely for Black students would be an arbitrary use of correlative evidence. It would not eliminate mismatch (as defined to date) from the population of law school students.

More remotely, plaintiffs might attempt to use "undue harm" language, such as that set forth in Justice O'Connor's opinion in *Grutter*:

> We acknowledge that "there are serious problems of justice connected with the idea of preference itself." Narrow tailoring, therefore, requires that a race-conscious admissions program *not unduly harm members of any racial group*. Even remedial race-based governmental action generally "remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit."[22]

While Justice O'Connor's concern about "undue harm" was focused on those who were not admitted to the elite law school, this language might be extended—if the mismatch hypothesis were to prove empirically grounded—to intended beneficiaries of the policy. Those admitted might be argued to suffer undue harm if they are being provided with an education that undermines their future success.[23] This is, in fact, the apparent thinking behind the policy push surrounding the mismatch hypothesis.

II. MISMATCH, EFFICIENCY, AND MERITOCRACY

The most common argument against affirmative action in law school admission is not the mismatch hypothesis, but rather the efficiency

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22. Grutter, 539 U.S. at 341 (emphasis added; internal citations omitted).

23. To be clear, we see no merit in this legal contention. In part, the lack of merit is due to evidentiary weakness as outlined later in this article (i.e., the hypothesis has little evidence behind it). But any "undue burden" argument will likely go nowhere as a legal matter because the state action is only acceptance of the applicant—not forcible conscription into law school. Moreover, the benefits of attending an elite law school go beyond bar-exam preparation.

It should also be noted that arguments against affirmative action include a progressive critique pointing to the limited capacity of the approach to address broader structural inequalities in U.S. educational opportunity. Another critique is grounded in the contention that the idea of "diversity" is too general to support the requirements of narrow tailoring and that admissions officers engage in insufficient individual evaluation. Justice Rehnquist's dissent in Grutter mocks the idea that the law school was truly trying to obtain a critical mass of students in different minority groups.

At the state level, a challenge to affirmative action has arisen in the form of referenda prohibiting racial preferences in state hiring and higher education admissions. A number of successful state initiatives have prohibited "discrimination or preferential treatment in public employment, public education, and public contracting," effectively ending affirmative action (such as California's Proposition 209 in 1996; Washington's Initiative 200 in 1998; Michigan's Proposal 2 in 2006; and Nebraska's Initiative 424 in 2008). A similar proposal, Amendment 46, failed to pass in Colorado in 2008. *See* Michele S. Moses, Amy N. Farley, Matthew Gaertner, Christina Paguyo, Darrell D. Jackson, & Kenneth R. Howe (2010). *Investigating the Defeat of Amendment 46 in Colorado: An Analysis of the Trends and Principal Factors Influencing Voter Behaviors*, *available at* http://www.colorado.edu/education/faculty/michelemoses/docs/finalmosesamendment46.pdf.

proposition that performance in law school is mainly based on incoming credentials. This argument, influenced by beliefs in meritocracy and in fixed ability, holds that individual "merit" is the only justifiable selection procedure for two reasons.[24] First, group-based admission criteria are based on the unconstitutional premise that group distinctions can countermand individual suitability, especially with regard to the equal protection clause of the Fourteenth Amendment. Second, scarce resources should be allocated to the most talented applicants, who then return the highest level of benefit to society. This latter approach to selection maximizes utility.[25] Anything else, so the argument goes, should be denounced as a quota system.[26] Students who are given preferential treatment in the admission process are typically less academically prepared than other students, and such differential credentials are asserted to predictably translate into eventual achievement differences.

The traditional argument against affirmative action requires nothing further, despite the presumed equivalence of academic credentials and merit—for which we provide a fuller discussion below. In contrast, this is only the departure point for the mismatch hypothesis. For students entering law school with substantially lower levels of credentials than the average student at a school, the hypothesized mismatch effect is properly understood as a negative net effect beyond an outcome predicted by those credentials. That is, the student is hypothesized to learn less than would be predicted on the basis of credentials. Conceptually, there are two distinct effects—predicted achievement based on entering credentials and the presumed mismatch phenomenon. Interestingly, they tend to be conflated, or possibly simultaneously presented even when one argument might undermine the other. For instance, the quotation below about the purported mismatch effect is from Gail Heriot,[27] a University of San Diego law professor who co-chaired the committee for Yes on Proposition 209 (banning affirmative action in California):

> African-American students attending law schools failed or dropped out at much higher rates than white students (19.3% vs. 8.2%). Overwhelmingly, this phenomenon was associated with

24. *See* ARTHUR R. JENSEN, BIAS IN MENTAL TESTING (1980).

25. Gregory Camilli, *Test Fairness*, in EDUCATIONAL MEASUREMENT (Robert L. Brennan ed., 2006).

26. *See* Jensen, *supra* note 24.

27. Heriot was also appointed by Congress in 2007 to a 6-year term to the U.S. Commission on Civil Rights. Her role in Proposition 209 is described in *California's Proposition 209 and the United States Constitution*, 43 LOYOLA L. REV. 613 (1998). She is also a member of the board of the National Association of Scholars, whose mission is described as follows: "We uphold the principle of individual merit and oppose racial, gender, and other group preferences. And we regard the Western intellectual heritage as the indispensable foundation of American higher education." *Who We Are*, NAT'L ASSOC. OF SCHOLARS, http://www.nas.org/who.cfm (last visited May 24, 2011).

> poor performance and not financial hardship. Since many of these students who left law school would likely have performed better at a less competitive law school they were, in a very real sense, victims of race-based admissions.[28]

This counterfactual proposition ("would likely have performed better") is, as discussed later in this article, at the center of arguments put forward by Richard Sander in the article that initially set forth the mismatch hypothesis, *Systemic Analysis of Affirmative Action in American Law Schools*, as well as in his later response article called *A Reply to Critics*.[29]

But Heriot has also made the efficiency argument, which is the more standard argument against affirmative action in law school admissions. Even if it were shown that Black students performed as well in an elite school as they would have in a non-elite school, she would still oppose affirmative action based solely on the credentials gap:

> Students who attend schools where their academic credentials are substantially below their fellow students' tend to perform poorly. The reason is simple: While some students will outperform their entering academic credentials, just as some students will underperform theirs, most students will perform in the range that their academic credentials predict.[30]

Heriot's argument against affirmative action as *argument in the alternative* might be described as Boolean logic,[31] because it is true if either the mismatch is true *or* if poor performance is due to a relatively lower level of qualification. But if it is true that "most students will perform in the range that their academic credentials predict," as Heriot surmises, then it follows that any mismatch effect will only be at the margins—that it will not change learning or outcomes to any substantial degree.[32]

For this reason, the real importance of any mismatch effect ought not to lie with those opposed to affirmative action. Even if there is an effect, it must be small according to Heriot's logic as well as actual empirical analyses, as discussed below. Rather, the importance of any mismatch effect lies with those concerned about improving the success of those admitted with lower credentials. If there is a mismatch effect, it suggests

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28. *See* Gail Heriot, *How Mismatches Devastate Minority Students*, MINDING THE CAMPUS, http://www.mindingthecampus.com/originals/2008/03/by_gail_heriot_i_have.html (last visited Oct. 1, 2008).

29. *Systemic Analysis* and *Reply to Critics*, *supra* note 3.

30. Heriot, *supra* note 8.

31. With the "or" operator, a statement is true as a whole if either of the two components are true. While argument in the alternative is a recognized legal strategy, it is sometimes disingenuous as a policy argument.

32. Sander seems to share Heriot's Boolean view of affirmative action. *See Systemic Analysis*, *supra* note 3.

that elite law schools are not doing enough to support such admittees. This argument, as we discuss next, employs a different logic than does the efficiency argument.

III. RACE, ETHNICITY, AND MISMATCH

As noted above, the conjectured harm resulting from mismatch is not limited to students admitted through an affirmative action policy; rather, it would apply to any student who is mismatched for any reason. The mismatch hypothesis is not fundamentally about race or ethnicity, nor is it a hypothesis that requires explicit preferential selection.[33] Rather, it is most accurately described as an intuitive scenario about the prerequisites for and contexts of student achievement. This hypothesis is not bound by race despite the pervasive use of racial and ethnic adjectives such as Asian, Black, Hispanic, and White in the existing literature to describe outcomes of mismatched students.

The question of how race and ethnicity should (or should not) be incorporated into an investigation of the mismatch hypothesis is complex. The current effort to understand the effects of preferential admission is being vigorously pursued, if not led, by Project SEAPHE (Scale and Effects of Admission Preferences in Higher Education), a group of scholars, including Richard Sander, whose goal is to "ground the public's understanding of affirmative action in rigorous, data-driven studies."[34] In particular, these researchers are "seeking [California state] bar records wish to use them to test whether individuals who benefit from admissions preferences perform worse on the bar exam than they would have if they had attended a less elite law school."[35] One activity of the project has been to file suit against the State Bar of California to obtain bar examination data for the purpose of analyzing the effects of admission preferences.[36] The State Bar has refused the SEAPHE request to provide data, based on the argument that the data were not collected from law school applicants for use by third parties or for the purpose of studying the effects of affirmative action.[37] An appeal by SEAPHE was, at the time of this writing, before the California Second District Court of Appeal.[38]

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33. Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 NW. U. L. REV. 1759, 1808 (2007).

34. *About*, PROJECT SEAPHE, http://www.seaphe.org/about.php (last visited May 24, 2011).

35. *Project SEAPHE Press Kit*, PROJECT SEAPHE, http://www.seaphe.org/pdf/presskit-section1.pdf at 1.

36. Sander v. State Bar of California, S165765 LEXIS 11271 (Cal. 2008).

37. Letter from Gayle E. Murphy, Senior Executive, Office of Admissions, Committee of Bar Examiners of the State Bar of California, TITLE, to Richard Sander, Ph.D., and William Henderson, Professors (July 31, 2007), *available at* http://www.seaphe.org/pdf/bar-proposal/letter_from_murphy.pdf.

38. *See* Sharon L. Browne, *Records on bar exam pass rates aren't exempt from public disclosure*, *available at* http://www.pacificlegal.org/page.aspx?pid=1422. The

Better data would undoubtedly permit more relevant and convincing analyses of the effects of mismatch and would especially help to identify any threshold below which potential mismatch effects become more probable.[39] Actual bar examination scores might resolve effects masked by simple pass-fail measurements on bar performance.[40] Obtaining such data presents problems of anonymity and confidentiality, but there are several convincing arguments that those concerns can be addressed, especially since technical solutions exist for anonymizing sensitive data.[41] However,

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Court of Appeal is considering arguments based in part on the contention that the Superior Court decision was based on an overly narrow interpretation of California's Proposition 59.

Sander and Joe Hicks, Vice President of Community Advocates, Inc., and the California First Amendment Coalition, originally petitioned the Supreme Court of the State of California to force the State Bar to comply with the data request. Mike McKee, *Calif. Supreme Court Rejects Professor's Bar Data Research Effort*, THE RECORDER, Sept. 23, 2008, http://www.law.com/jsp/ca/PubArticleFriendlyCA.jsp?id=1202424720703. Notwithstanding the concerns of anonymity expressed above, the legal argument for denying access to the data by the State Bar was that the Bar was not legally obligated to do so under either California common law or the more recent Proposition 59, which protects the "public's right to attend open court proceedings and to review documents that reflect those proceedings and adjudications made therein." *Id.* This petition was denied on September 17, 2008, without prejudice to re-filing in an appropriate court. *Id.*

A petition was then submitted to the Superior Court, and it was denied on March 29, 2010. Sander v. State Bar of California, CPF 08-508880, Proposed Statement of Decision (Mar. 24, 2010), *viewable at* http://www.box.net/shared/gf9laj5f20. The Court held that the purpose for the request, i.e., to examine the mismatch hypothesis, was irrelevant to the request for the data. *Id.* Rather, the crux of the matter was whether state common law and Proposition 59 could be applied. Here, the Court explained that Sander had not provided a principled argument for obtaining the data, and that such a request, if granted, would imply that all information held by a public agency should be made available upon request. *Id.* The Court concluded that "The law applicable to the courts before Proposition 59 was not that broad; and there is no evidence that the proposition was intended to work such a radical change." *Id.* Sander and his colleagues filed an objection to this decision on April 7, 2010, arguing, among other things, that "Proposition 59 creates a qualified right of access to records not expressly exempt from disclosure under California constitutional or statutory provisions, and that disclosure is required if there is no compelling justification for secrecy." Sander v. State Bar of California, CPF 08-508880, Petitioner's Objections to Proposed Statement of Decision (Apr. 7, 2010), *available at* (http://www.seaphe.org/pdf/petitionersobjections.pdf).

39. The discussion later in this article of existing research highlights the salience of this threshold issue.

40. Other interesting research, such as estimating mismatch effects, might be carried out by law schools themselves. The effects of changes in admissions policies on law school outcomes could also be investigated.

41. If anonymity were the central issue, there is a technical solution for disguising bar passage rates for both individual students and law schools. The randomized response method was devised precisely for such a purpose. For example, suppose the goal is to disguise a response for a particular person regarding whether she or he passed the bar exam. The response can be disguised by a data collection agency as follows. For each person in a data set, a (virtual) coin is flipped. The response is coded to "yes"

it seems unlikely that the State Bar of California would willingly provide randomly disguised data (for bar outcome and race/ethnicity), and it also seems unlikely that researchers from Project SEAPHE would be satisfied by a data file with racial and ethnic identifiers scrubbed.

To flesh out issues of why racial data and analyses may or may not be important, we consider in more detail two very different motivations for further research in this area. First, if the primary goal is to investigate mismatch, then disaggregation of the results by racial and ethnic status is not required. In fact, it is a harmful distraction. Clearly, no one has contended that the effects of mismatch are attributable to race or ethnicity in and of themselves. Rather, mismatch purportedly results from any admission preference that is inconsistent with a student's level of credentialing, e.g., a legacy admission in law school, or an athletic admission in undergraduate school. Second, even if race and ethnicity are taken as rough proxies for mismatch, it is nonetheless mismatch that is being investigated, rather than affirmative action. Yet this proxy approach is problematic since race and ethnicity are flawed indicators of (or instruments[42] for) affirmative action admission, and statistical comparisons between racial and ethnic categories do not produce a definitive evaluation of affirmative action—even though reasonable guesses might be made regarding the effects of measurement error.[43] Moreover, as we show below it is unlikely that simple regression modeling can compensate for this error in a uniform manner across racial and ethnic classifications. (And it is

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if the coin comes up tails, and the actual response, if the coin comes up heads. Only the data agency knows whether the answer of an individual reflects the toss of the coin or actual outcome, and responses aggregated to a school level likewise contain some degree of distortion. Suppose the overall proportion passing the bar examination is *p*. The coin flip divides the passers into two randomly equivalent groups (heads and tails). Thus, for the group that flipped tails and responses truthfully, the expected value of the proportion of passers is *p*/2. Doubling the observed proportion then gives the desired proportion passing. It should be added that randomized responses can be included as outcomes in statistical models, but the technique so far has been primarily used to estimate incidence for dichotomous variables, such as a graduation or pass rate. *See* ARIJIT CHAUDHURI & RAHUL MUKERJEE, RANDOMIZED RESPONSE: THEORY AND TECHNIQUES (PIN) (2008). In practice, however, technical solutions are highly challenging given the limitations of the data available. For example, data from bar exam applicants often exclude students who did not graduate; attrition rates vary greatly by school, and school sample size often includes a very small number of affirmative action admits. This creates significant problems if the unit of analysis is at the school level.

42. Some researchers have used a Black-White indicator variable as an instrument in the estimation approach known as *instrumental variables* for obtaining the effect of affirmative action. *See, e.g.*, Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649 [hereinafter "*Affirmative Action"*].

43. *See* Jesse Rothstein & Albert H. Yoon, *Mismatch in Law School* (Nat'l Bureau of Econ. Research, Working Paper No. 14275, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=881110 [hereinafter "*Mismatch in Law School*"].

worth stressing that in no argument we have encountered has anyone attributed the mismatch effect to actual racial or ethnic characteristics.) The potential outcomes model, discussed in the next section, provides a better methodological framework.

A distinction here should be drawn between policy making and research. Evaluators and researchers may be willing to disaggregate (rather than to compare) any "mismatch effects" by race and ethnicity for the purpose of investigating the general effects of affirmative action. Yet as noted above, the use of racial and ethnic identifiers as proxies most appropriately serves to identify mismatch effects rather than racial effects, regardless of whether mismatch effects are suspected *a priori* to be larger in some groups than others. For the purpose of policy making, there is no reason why particular demographic categories should be singled out. It could certainly be argued that research should use this proxy strategy, especially because race and ethnicity are generally available as variables in student databases whereas the degree of individual mismatch is not. But policy makers can be easily confused into thinking that the results contain direct lessons about affirmative action. So while researchers may sensibly continue to use the race and ethnicity fields in databases to explore possible mismatch effects, a more principled course of action would be to ignore race and ethnicity in the search for match effects—a course of action dependent on obtaining more direct measures of mismatch.

Finally, if the intention is to argue against admission preferences on the basis of negative match effects, then the symmetric position is to argue in favor of admission preferences in particular cases where positive match effects are encountered. If, for instance, researchers find that lower-credentialed students gain a relative advantage when admitted into elite law schools,[44] would professor Heriot and other proponents of meritocracy in law school admissions welcome this symmetry into the logic of their arguments? If not, this suggests a fundamental incompatibility between affirmative action perspectives based on efficiency or meritocracy and those based on mismatch.

IV. METHODOLOGICAL CONSIDERATIONS

At the center of the mismatch hypothesis is a counterfactual: students admitted to institutions where their academic credentials are below the average *would have learned more at a less elite law school*. Consequently, such students are placed at risk for graduation, bar passage, and ultimately joining the ranks of the profession as practicing lawyers. This phenomenon, if it is in fact happening, would certainly be troubling as a matter of policy and perhaps also as a matter of law. This core counterfactual helps to frame the literature synthesis and the statistical

44. The research discussed later in this article concerning K–12 grouping practices would suggest that this might very well be the case.

methods section of this article. Specifically, the counterfactual approach has been formalized in the potential outcomes model,[45] which has been adopted by most of researchers in the social sciences (e.g., economics, medicine, and education) who investigate match effects in both law school and undergraduate admissions.[46]

Richard Sander has explicitly and implicitly framed the mismatch hypothesis counterfactual is several related ways. In *Systemic Analysis*, he asked, "What would have happened to minorities receiving preferences had the preferences not existed?"[47] Other variations, in turn, have different implications for admission practices. For example, "If one is at risk of not doing well academically at a particular school, one is better off attending a less elite school and getting decent grades."[48] Another variation is found in his *Reply to Critics*:

> A large number of those receiving large preferences will struggle academically, receive low grades, and actually learn less in some important sense than they would have at another school where their credentials were closer to the school median. The low grades will lower their graduation rates, bar passage rates, and prospects in the job market.[49]

These questions (and assertions) are all directly or implicitly counterfactuals, and they exemplify the historical development of counterfactual reasoning as an important framework for understanding causation in the empirical social sciences, especially with respect to controversial issues.[50]

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45. For an introduction, see Paul W. Holland, *Statistics and Causal Inference*, 81 J. AM. STAT. ASSOC., 945 (1986).

46. A number of recent papers use the potential outcomes models, albeit differently, to examine mismatch in law school and undergraduate education. *See, e.g.*, Sigal Alon & Marta Tienda, *Assessing the "Mismatch" Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 Soc. Educ. 294 (2005); *Mismatch in Law School*, *supra* note 43.

47. *Systemic Analysis*, *supra* note 3, at 368.

48. *Id.* at 445. Three additional variations on the counterfactual in that article are as follows: "The principal question of interest is whether affirmative action in law school generates benefits to blacks that substantially exceeds the cost to blacks." *Id.* at 369; "The principal 'cost' I focus on is the lower performance that usually results from preferential admissions . . . If the struggling leads to lower grades and less learning, then a variety of bad outcomes may result. . . ." *Id.* at 370. "In a less competitive school, the same student might well thrive because the pace would be slower, the theoretical nuances would be a little less involved, and the student would stay on top of the material. The student would thus perform better in an absolute as well as a relative sense." *Id.* at 450.

49. *Reply to Critics*, *supra* note 3, at 1966.

50. Holland attributed this approach to Donald Rubin. Holland, *supra* note 45, at 946. *See also* Donald B. Rubin, *Estimating Causal Effects of Treatments in Randomized and Non-randomized Studies*, 66 J. OF EDUC. PSYCHOL., 688 (PIN) (1974). Others have traced aspects of this model to R.A. Fisher, J. Neyman, A.D. Roy, and L.L. Thurstone. *See* Jerzy Splawa-Neyman, *On the Application of Probability Theory to*

The usefulness of counterfactual modeling has been debated by historians but has become broadly accepted in the social sciences.[51] It has a particularly appealing (methodologically speaking) application in studying law school admissions. This is in part because of the strong parallel between Sander's formulation of the mismatch as a hypothetical question and the formal logic of the counterfactual model. Once a student enters law school, the proposed match effect is the net gain or loss relative to her hypothetical performance had she attended a less elite institution—which is similar in interpretation to a value-added effect. A simple (or naïve, as statisticians say) comparison of average outcomes across elite and non-elite schools is distorted by differences in incoming credentials. More formally stated, the naïve comparison is subject to selection bias resulting from the fact that students at more elite schools generally have higher incoming credentials. This, in turn, creates a tougher pool within which to compete for grades but also creates a pool more likely to achieve success

Agricultural Experiments. Essay on Principles, Section 9, 5 STAT. SCI. 465 (Dorota M. Dabrowska & Terence P. Speed trans.) (1990); A.D. Roy, *Some Thoughts on the Distribution of Earnings*, 3 OXFORD ECON. PAPERS, 135 (1951); L.L. Thurstone, *A Law of Comparative Judgement*, 34 PSYCHOL. REV., 278 (1927). The introductory material provided in this article is not intended to be taken as a comprehensive treatment. A well-known use of the counterfactual method in historical research methods is the 1964 work *Railroads and American Economic Growth* by Robert Fogel, in which he invented the counterfactual method to understanding the economic impact of railroads on the U.S. economy. *See* ROBERT W. FOGEL, RAILROADS AND AMERICAN ECONOMIC GROWTH: ESSAYS IN ECONOMETRIC HISTORY (1964). The Royal Swedish Academy cited this study in awarding Fogel the Nobel Prize for economics in 1993. *The Prize in Economics 1993 - Presentation Speech*, NOBELPRIZE.ORG, http://nobelprize.org/nobel_prizes/economics/laureates/1993/presentation-speech.html (last visited May 24, 2011). Prior to this development, the dramatic U.S. economic growth from about 1865 to 1890 had been popularly attributed to the expansion of the railroad system. The book details Fogel's approach to use quantitative methods to create a counterfactual world in which the U.S. canal and road systems were developed as alternatives to rail transportation. Based on this quantitative construction, he determined the level of per capita income achieved at the beginning of 1890 would have been achieved only three months later had railroads not been built.

51. Counterfactual reasoning in history has been disparaged by historian E. H. Carr as a "parlor game." EDWARD HALLETT CARR, WHAT IS HISTORY? 127 (1961). Others have advanced a more nuanced opinion. For example, M. Bunzl characterized counterfactual reasoning as coming in "two varieties—good and bad. The bad reasoning is bad because it has no grounding; it is merely an act of imagination, and unconstrained imagination at that. The good reasoning is good because it can be grounded." Martin Bunzl, Counterfactual History: A User's Guide, 109 Am. Hist. Rev., 845 (2004). About the time of Fogel's work, simultaneous developments of the counterfactual approach to determining causality were also occurring in a wide variety of disciplines including philosophy, economics, and statistics. *See*, *e.g.*, DAVID K. LEWIS, COUNTERFACTUALS (2001); James Heckman, *Shadow Prices, Market Wages, and Labor Supply*, 42 ECONOMETRICA, 679; Richard E. Quandt, *The Estimation of the Parameters of a Linear Regression System Obeying Two Separate Regimes*, 53 J. AM. STAT. ASSOC., 873; Richard E. Quandt, *A New Approach to Estimating Switching Regressions*, 67 J. AM. STAT. ASSOC., 306.

on the bar exam and in employment.[52]

In the statistical sciences, the counterfactual framework is known as the "potential outcomes model." Briefly, in any situation where there is a focus or treatment group (T) and a reference or control group (C), there are two potentially different outcomes for each individual depending on whether she receives the treatment or is part of the control group. Here, attending an elite law school is akin to the treatment condition, and attending a non- or less-elite school is akin to the control condition. Let the outcomes for these two cases be denoted as Y^T for T and Y^C for C, so the treatment effect can be expressed as

$$\text{Equation (1): } \Delta = Y^T - Y^C$$

The effect of interest, if the counterfactual is premised on preferential admissions, is then defined as the average Δ for students given preferential admission to elite law schools. The fundamental problem with estimating this average effect is that for any individual, it is only possible to measure the effect under one condition—*either* the treatment (an elite law school) *or* the control condition (a non-elite law school), but not both. The basic idea of a matching analysis is that for each individual in group *T* a similar individual from group *C* is found based on a particular set of background factors denoted as *X*. A treatment effect for an individual *i* from group *T* *controlling* for *X* (which is abbreviated to $| X$) is then

$$\text{Equation (2): } \Delta_i = (Y^T_i - Y^C_i) \mid X$$
$$\approx (Y^T_i \mid X) - (Y^C_j \mid X)$$

Here the outcome for individual *j* matched on *X* is the counterfactual or *what if* outcome for individual *i* had she or he attended a non-elite school (note the change from *i* to *j* from the first line of Equation (2) to the expanded second line). The average of the difference Δ_i[53] is then taken over all *n* students attending elite law schools ($i = 1, 2, \ldots, n$), in order to arrive at the desired effect. In statistical literature, this effect is usually dubbed the *average treatment effect for the treated*, or *ATT*.[54]

52. The elite–non-elite distinction has limited precision. It is a practical rather than an ideal way of describing the effect of attending a school with more as opposed to less stringent admissions criteria.

53. Statisticians call this the *expected value* as opposed to the average effect.

54. Consider an example of the *ATT*. Students at parochial schools often appear to outperform students at public school. Using the counterfactual method, the question becomes "How would a parochial school student have performed had he or she attended a public school" (or vice versa). Some studies have shown that the apparent advantage is negligible from the standpoint of the *ATT* when family and other

This *ATT* appears to be closely related to the mismatch hypothesis as formulated in *Systemic Analysis*.[55] However, it is also the case that a counterfactual difference (in the potential outcomes model) according to the mismatch hypothesis should vary by the degree of mismatch. That is, a larger negative effect should be evident for students who are relatively less credentialed than their peers. A number of researchers have formulated models with this feature.[56] It is important to add that comparisons between members of different racial or ethnic groups, made using the potential outcomes model, cannot provide an estimate of a causal effect of being a member of such a group. This is because a student cannot be randomly assigned to such categories. As explained by measurement expert Paul Holland, formerly of the Educational Testing Service, "For causal inference, it is critical that each unit be potentially exposable to any one of the causes. As an example, the schooling a student receives can be a cause, in our sense, of the student's performance on a test, whereas the student's race or gender cannot."[57] This is important because the gap in outcomes

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background factors are controlled. In fact, it has been shown that the achievement of students who attended parochial schools might have been higher had they attended public schools. *See*, *e.g.*, STEPHEN L. MORGAN & CHRISTOPHER WINSHIP, COUNTERFACTUALS AND CAUSAL INFERENCE: METHODS AND PRINCIPLES FOR SOCIAL RESEARCH (2007) (providing more detail on the effectiveness of parochial schools); Sarah Theule Lubienski & Christopher Lubienski, *School Sector and Academic Achievement: A Multi-Level Analysis of NAEP Mathematics Data*, 43 AM. EDUC. RES. J. 651 (2006). *See also* Stephen L. Morgan, Counterfactuals, Causal Effect Heterogeneity, and the Catholic School Effect on Learning, 74 SOC. EDUC., 341 (2001).

55. *Systemic Analysis*, *supra* note 3, at 429. Yet two versions of Sander's work display the same conflation as Heriot's reasoning. Accordingly, the mismatch hypothesis is stated both as a counterfactual and as a purely descriptive statement about the effect of student qualification on law school outcomes:

> "In other words, the collectively poor performance of black students at elite schools does not seem to be due to their being 'black' (or any other individual characteristic, like weaker educational background, that might be correlated with race). The poor performance seems to be simply a function of disparate entering credentials, which in turn is primarily a function of the law schools' use of heavy racial preferences."

As noted above, both versions cannot be simultaneously true. Sander provides an anecdote supposedly clarifying the mismatch hypothesis in which he recalls having performed poorly in an elementary language class at Harvard and speculated that he would have performed better in a class with less talented (in language capacity) peers. *Id.* at 449–50. However, if the course material were the same and were tested similarly, there is no reason to believe that Sander's counterfactual performance would have been better. Given these assumptions, one could as easily speculate that less talented peers might have reduced his expectations for achievement. *Id.*

56. *See*, *e.g.*, Rothstein & Yoon *supra* note 42, at 659-60; Douglas Williams, *A Review of the Econometric Literature on Law School Mismatch*, Paper Presented at the Annual Meeting of the Law and Society Association (May 25, 2009) (unpublished; abstract at http://www.allacademic.com/meta/p304241_index.html.

57. Paul W. Holland, *Statistics and Causal Inference*, 81 J. AM. STAT. ASSOC., 945, 946. Holland and Rubin invented the phrase "No causation without manipulation." PAUL W. HOLLAND, EDUCATIONAL TESTING SERVICE, CAUSATION AND

between Black and White students is central to some past analyses of the mismatch hypothesis. For instance, while one could ask whether the Black-White gap is more likely to be larger at elite than at non-elite schools,[58] Holland would argue that this is not a sensible *causal* question because it subsumes a racial comparison that cannot be manipulated.[59]

V. HETEROGENEOUS LEARNING ENVIRONMENTS

To date, the focus of the mismatch literature has been on the *effect* of mismatch on student outcomes (intermediate and longer-term) rather than the precipitating cognitive or social mechanisms. That is, a quantitative estimate can be obtained and might be thought of as an estimate of a *causal effect* in the potential outcomes framework, but this offers little illumination of the *mechanism leading to* any such effect.[60] As originally presented by Sander, the starting point for a causal mechanism was conceptualized in terms of a norm-referenced measure such as class rank, which embodies a kind of relative competitive pressure for grades.[61] This approach is flawed, however, because by definition there will always be a lower tail of the grade distribution. If there is substantial variation, as one would expect with any larger educational institution, then whoever is at the bottom will be mismatched and will learn less. In any classroom or law school with considerable heterogeneity, there will always be a group of students on the left tail of the distribution, whose "preparation and cognitive skills" are "substantially less developed" than most of their peers.[62] This approach makes the idea of a "mismatch" relatively meaningless.

RACE RESEARCH REPORT 03-03 (2003), *available at* http://www.ets.org/Media/Research/pdf/RR-03-03-Holland.pdf [hereinafter EDUCATIONAL TESTING]. In other words, "causes are experiences that units undergo and not attributes that they possess . . . ." *Id.* at 8. Holland argued that "[t]he useful role of RACE is its ability to reveal varying effects of interventions on different parts of a diverse population . . . ." *Id.* at 19.

58. EDUCATIONAL TESTING, *supra* note 57, at 3.

59. *Id.* Some economists nonetheless use the Black–White comparison as a key element of some statistical models. For example, see Rothstein & Yoon, *supra* note 42.

60. Of course, the lack of precision (or correctness) in the description of the mechanism does not invalidate the observation of a negative match effect. As noted by Paul W. Holland, "The description of a causal mechanism (How?) can be completely wrong while at the same time the effect of the cause (What if?) is clear and replicable." EDUCATIONAL TESTING, *supra* note 57, at 7.

61. Sander seems to support the use of class rank for such a purpose. "In other words, it was not the absolute ability of a student that determined staying power in the traditionally more difficult natural science majors, but rather the student's ability relative to his or her peers." *Systemic Analysis*, *supra* note 3, at 452.

62. *See* THE SCALE AND EFFECTS OF ADMISSIONS PREFERENCES IN HIGHER EDUCATION (PROJECT SEAPHE), THE EFFECT OF LAW SCHOOL RACIAL PREFERENCES ON MINORITY BAR PERFORMANCE, B-2 (2007), http://www.seaphe.org/pdf/bar-proposal/project_description_revised_proposal.pdf [hereinafter SCALE AND EFFECTS].

Moreover, this phenomenon is independent of affirmative action—or any admission policy that does not somehow ensure homogeneity on whichever characteristics result in mismatch. Based on the dataset that has been used for most existing studies of the mismatch hypothesis, only about fifty percent of students within any racial or ethnic category who are most likely to attend elite schools based on background features (credentials) actually attend elite schools. Conversely, about fifty percent of students who are least likely to attend elite schools do in fact attend elite schools.[63] Thus, there is a substantial amount of mixing in student credentials and backgrounds, even for White students within elite schools—mixing that would *not* diminish if affirmative action were discontinued.[64] Finally, it should be recognized that the homogeneity of entering credentials would have to remain fairly static during the students' three years at the law school; if students start growing or declining relative to one another, the mismatch will reappear. In short, if the problem is posed in normative terms, any solution linked to admissions will be very hard to carry out.

A number of scenarios have been offered about how mismatch in cognitive skills might translate into diminished student outcomes. Rothstein and Yoon provided one scenario about a Black student admitted to highly selective School X under affirmative action:

> There, she is a small fish in a big pond: Nearly all of her white classmates enter law school with stronger academic credentials, more experience with legal concepts, and stronger writing skills than she has. She works hard, but the academic demands at School X are much higher than at School Y, and by the end of the first year she finds herself near the bottom of her class. She does not make law review, and will graduate—if she does—without academic distinction.[65]

Another plausible explanation of the mismatch mechanism was given by Williams:

> The mismatch hypothesis begins with the assumption that classroom instruction is pitched to the median student. If this is the case, students too far below the median may struggle to

63. *See* Gregory Camilli & Darrell D. Jackson with Chia-Yi Chiu & Ann Gallagher, *The Mismatch Hypothesis in Law School Admissions*, 2 WIDENER J. LAW, ECON. & RACE 165, 204 (2011).

64. To some degree, this results from the variability of schools within tiers in the database and is a weakness of the crude classification of law schools into six categories (as discussed later in this article). However, it seems unlikely that the preponderance of this mixing is wholly due to measurement error inherent in the classification scheme, because the clustering procedure used to create that dataset shows a substantial degree of separation between elite and non-elite schools. *See* LINDA F. WIGHTMAN, LAW SCHOOL ADMISSIONS COUNSEL, CLUSTERING U.S. LAW SCHOOLS USING VARIABLES THAT DESCRIBE SIZE, COST, SELECTIVITY, AND STUDENT BODY CHARACTERISTICS, Research Report 93-04 (1993).

65. *Affirmative Action*, *supra* note 42, at 659-70.

> understand class discussions and to keep up with the pace of instruction. Consequently, mismatched students learn less and may even reduce their effort if they become discouraged, leading to even less human capital accumulation.[66]

A third account is from Sander, who proposes a cognitive mechanism to go along with his relative (norm-based) explanation:

> Teachers may pitch their instruction at a level too difficult for the mismatched student to fully absorb; difficulty keeping up becomes more of a concern as the semester wears on, and a student will ultimately learn less and perform badly. The effect is similar to college freshmen trying to skip first-year physics to go straight into advanced classes: some students may learn faster, but many may crash and burn.[67]

Setting aside problems with the physics analogy (the content of first-year courses is pretty standard across law schools), this story-telling by various authors seems somewhat plausible. Yet there is virtually no evidence available that such processes are actually happening or are grounded in learning theory. Moreover, even if some students do suffer learning detriments, others may respond differently and benefit. A good hunch is no substitute for empirical evidence, and there are three useful sources of information—in the research literature concerning how students perform in heterogeneous learning environments—that do shed light on the causal mechanism. The first concerns studies of promotion and tracking in the literature in K–12 education, the second concerns student-school match in undergraduate education, and the third concerns the effect of admission preferences in law school.

A. K–12 Studies

"Mismatch" ideas have been explored for students as early as kindergarten, focused at that age on the idea of "readiness." This issue sometimes is framed as the idea of parental redshirting—waiting until children are six years old to enroll them in kindergarten—and is also sometimes framed around the possibility of grade retention between kindergarten and first grade.[68] The focus of this research is generally whether a younger student benefits from waiting and becoming an older

66. Williams, *supra* note 56, at 9.

67. SCALE AND EFFECTS, *supra* note 62, at B-2.

68. *See, e.g.*, Guanglei Hong & Stephen W. Raudenbush, *Effects of Kindergarten Retention Policy on Children's Cognitive Growth in Reading and Mathematics*, 27 EDUC. EVALUATION & POL'Y ANALYSIS 205 (2005); Guanglei Hong & Bing Yu, *Effects of Kindergarten Retention on Children's Social-Emotional Development: An Application of Propensity Score Method to Multivariate Multi-Level Data*, 44 DEVELOPMENTAL PSYCHIATRY 407 (2008); Lorrie A. Shepard & Mary Lee Smith, *Synthesis of research on school readiness and kindergarten retention*, 44 EDUC. LEADERSHIP, 78 (1986).

first-grade student, and whether an underperforming student benefits from retention that results in an additional year in kindergarten.[69] Focusing just on this latter issue, here is how the question can be asked in the counterfactual sense: "Would a retained student have performed lower in first or ensuing grades had that student been promoted?" For those who support such retention policies, a lower level of preparation in kindergarten means that a student will have an academic or behavioral mismatch to her first-grade peers. However, in a review by Lorrie Shepard of sixteen controlled studies on kindergarten retention, she found no academic or social benefits for students who had spent an extra year in kindergarten.[70] She also reported that "schools that do not practice kindergarten retention have just as high average achievement as those that do but tend to provide more individualized instruction within normal grade placements."[71]

The mismatch idea has also been explored for later grades, in the context of ability grouping, or 'tracking,' a practice that has been authoritatively denounced as harming students placed in lower tracks.[72] A National Research Council report recently recommended "that both formal and informal tracking by ability be eliminated. Alternative strategies should be used to ensure appropriately challenging instruction for students who vary widely in their skill levels."[73] Such detracking at the K–12 level has been shown to have great potential to increase both equity and overall outcomes.[74] The learning experiences underlying these results—harms of tracking and benefits of detracking—have been extensively researched, and three primary causal explanations have emerged: (a) stratified distribution of resources, including the most effective teachers; (b) peer effects; and (c) expectations effects.[75]

The issue of academic expectations seems particularly salient here, since it challenges the basic presumption of the mismatch hypothesis. That is, the research on tracking and expectations supports the conclusion that a

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69. *Id.*

70. See Lorrie A. Shepard, *Negative policies for dealing with diversity: When does assessment and diagnosis turn into sorting and segregation?*, in LITERACY FOR A DIVERSE SOCIETY: PERSPECTIVES, PRACTICES, AND POLICIES, 279 (Elfrieda H. Hiebert ed., 1991).

71. *Id.* at 287.

72. *See* HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION (Jay Philip Heubert & Robert Mason Hauser eds., 1999).

73. NAT'L RESEARCH COUNCIL, ENGAGING SCHOOLS: FOSTERING HIGH SCHOOL STUDENTS' MOTIVATION TO LEARN 219 (2004).

74. *See* CAROL CORBETT BURRIS & DELIA T. GARRITY, DETRACKING FOR EXCELLENCE AND EQUITY (2008).

75. *See, e.g.*, JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY (2d ed. 2005); KEVIN GRANT WELNER, LEGAL RIGHTS, LOCAL WRONGS: WHEN COMMUNITY CONTROL COLLIDES WITH EDUCATIONAL EQUITY (2001); Carol Corbett Burris, Edward W. Wiley, Kevin G. Welner, & John Murphy, *Accountability, Rigor, and Detracking: Achievement Effects of Embracing a Challenging Curriculum as a Universal Good for All Students*, 110 TEACHERS COLL. RECORD 571 (2005).

more homogeneous, non-"mismatched" educational setting backfires; in lower-tracked classes, it results in what former President Bush has called the "soft bigotry of low expectations."[76] Students are insufficiently challenged and set on a path of academic failure.[77] The apparent assumption underlying the mismatch hypothesis—that a more homogeneous setting will result in greater learning for those who would otherwise be among the less qualified in the more elite learning environment—has also long been proposed by those supporting K–12 tracking systems, but the empirical results consistently show otherwise.[78] Accordingly, any finding of mismatch effects in law school (of "lower achievers" suffering a detriment as a result of being placed with a "higher achieving" group) would be inconsistent with research from grades one through twelve.[79]

B. Undergraduate Studies

Empirical research has also explored issues of mismatch in undergraduate education. Using regression analysis, Fischer and Massey[80] focused on Black and Hispanic undergraduates in a sample of students attending elite colleges and universities, and they examined three outcomes: GPA, leaving school, and perception of college and university success. They found small *positive* student-school match effects (representing student-school as the difference between a student's SAT score and the average SAT at a college or university). That is, a "mismatch" was associated with higher, not lower, performance.

Using the same data set with a broader sample of students, however, Massey and Mooney[81] found no student-school match effects for retention (staying in college or university) or hours studied. For a group of legacy-admitted students, and looking at *GPA* outcomes, they found a small negative effect in which mismatch in the group of legacy students was

76. George W. Bush, President of the United States, President's remarks in Minneapolis, Minnesota (October 30, 2004), http://georgewbush-whitehouse.archives.gov/news/releases/2004/10/20041030-8.html (last visited May 20, 2011).

77. *See* OAKES, *supra* note 72.

78. *See also* Carol Corbett Burris, Kevin G. Welner, & Jennifer W. Bezoza, Educ. and the Pub. Interest. Ctr. & Educ. Policy Research Unit, *Legislation Policy Brief: Universal Access to a Quality Education: Research and Recommendations for the Elimination of Curricular Stratification* (2009) http://nepc.colorado.edu/publication/universal-access (last visited May 20, 2011).

79. *See* Burris, Wiley, Welner, & Murphy, *supra* note 72.

80. Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education*, 38 SOC. SCI. RES. 531 (2007). Ordinary least squares was used for quantitative outcomes, and logistic regression for binary outcomes.

81. Douglas S. Massey & Margarita Mooney, *The Effects of America's Three Affirmative Action Programs on Academic Performance*, 54 SOC. PROBS. 99 (2007).

associated with lower performance for this group.[82] However, this result is greatly obscured by the lack of equivalence in *GPA* across schools.

Brand and Halaby[83] examined the effect of elite college or university attendance (i.e., the treatment in the counterfactual model) for mismatched students and for all students. They found that attending an elite school yielded occupational status benefits for the former group, but not for the latter group.[84] That is, they found no mismatch effect.

Alon and Tienda[85] estimated the elite–non-elite effect for Asian, Black, Hispanic and White students on a six-year graduation rate. Using an econometric modeling approach, they found that all students tended to benefit from attending elite schools.[86] Specifically, most estimated match effects were significantly positive with a few near zero, depending on grouping and modeling variations.[87] In sum, no support for the mismatch hypothesis was found.[88]

In a widely cited and influential study, Dale and Krueger compared life outcomes for students who were accepted and rejected by comparable schools. That is, they had identical admission decisions across sets of schools.[89] Because some of these students eventually attended more (and some less) elite schools, the researchers argued that this methodology controls for variables that may be observable to admission committees but not statisticians.[90] Though not the equivalent of random assignment, since unobserved variables likely played a role in the students' subsequent decisions to accept or reject an elite school's offer, the data allow nonetheless for a nice quasi-experiment.[91] Looking first at the general population of students, the researchers found no effect on life outcomes for increasing eliteness.[92] Of particular importance to those considering the mismatch hypothesis, Dale and Krueger also concluded "there is no

82. *Id.* at 113.

83. Jennie E. Brand & Charles N. Halaby, *Regression and Matching Estimates of the Effects of Elite College Attendance on Educational and Career Achievement*, 35 SOC. SCI. RES. 749 (2006).

84. *Id.* at 753. The average treatment effect or ATE combines two counterfactuals: elite-school students who might have attended non-elite schools (the ATT), and non-elite-school students who might have attended elite schools (the ATC, or average treatment effect for the untreated). Brand and Halaby's results suggest that a benefit would be obtained if students who attended non-elite schools had instead attended elite schools. This is the meaning of the ATC.

85. Alon & Tienda, *supra* note 46, at 302.

86. *Id.* at 306.

87. *Id.* at 307.

88. *Id.* at 306.

89. *See, e.g.*, Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, 117 Q. J. ECON. 1491 (2002).

90. *Id.* at 1492–93.

91. *Id.* at 1493.

92. *Id.* at 1492.

evidence in these data that students who score relatively low on the SAT exam do worse in the labor market by attending schools with a relatively high average SAT."[93] Looking specifically at the small sample of Black students in the dataset, they also concluded that Black students benefited (in the counterfactual sense) from attending elite schools just as much as other students in terms of subsequent earnings.[94]

C. Law School Studies

Sander's *Systemic Analysis* was based in large part on data from the *Bar Passage Study*[95] and, as of the time of its publication in 2004, constituted the most extensive investigation of the mismatch hypothesis in law school. Using a weighted index of LSAT and undergraduate GPA (UGPA),[96] Sander found that Black applicants to law school had the same probability of admission as White applicants with substantially higher academic index values.[97] He argued that LSAT and UGPA are the strongest predictors of

93. Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, National Bureau Of Economic Research Working Paper 7322, 23, http://www.nber.org/papers/w7322. *See also College Selectivity*, PROJECT SEAPHE, http://www.seaphe.org/topic-pages/college-selectivity.php (last visited May 24, 2011).

94. Dale & Kruger, *supra* note 85, at 1493. Dale and Krueger reported a small negative match effect for GPA, but they noted that GPA is not comparable across schools (in fact, a comparable problem exists regarding grades when studying law schools).

95. WIGHTMAN, *supra* note 64. To preserve the confidentiality of the data in the Bar Passage Study, the identity of individual law schools was omitted in the public-use data set. Instead, to allow other researchers to study the relationship between school characteristics and student outcomes, the law schools were empirically clustered into six groups based on median Law School Admission Test (LSAT) score, median undergraduate grade point average (UGPA), tuition and fees, enrollment, selectivity, percent minority and faculty/student ratio. The six clusters were described as follows: 1) Elite, 2) Public Ivy, 3) Second tier public, 4) Second tier private, 5) Third tier, and 6) Historically Black (note that these categories, particularly the Historically Black category, are not set forth as an ordinal ranking). According to Wightman, 24,814 (about 60% of the entering cohort) consented to the release of their law school bar exam performance record, and 93% of these students had graduated and taken the bar exam during the course of the 6-year study. Evidence-based arguments regarding the mismatch hypothesis and affirmative action in law school admissions continue to be driven by data that are now over one decade old.

96. *Systemic Analysis*, *supra* note 3, at 381. Sander used the formula for academic index (*AI*): $AI = 0.6 * LSAT + 0.4 * UGPA$ linearly rescaled to the range 0–1000. Using a weighted combination of LSAT and UGPA scaled to the interval [0, 1000], Sander found that that Black applicants to law school had the same probability of admission as White students with academic index values of about 140 points higher. *Id.*

97. *Id.* at 431, tbl. 5.3. Note that it is the absolute amount of achievement (knowledge and skill tested), perhaps compared to others in a given state, not relative achievement within a given law school, that should affect performance on the bar examination. Accordingly, relative standing in a law school class in terms of LGPA does not equate to the amount of learning, achievement, or (directly) bar exam success. Indeed, even students in the lowest decile have most likely learned a great deal upon

first-year Law School GPA (LGPA)—much stronger than law school eliteness or race/ethnicity.[98] Because law school grades (or at least relative grades within any given law school) showed the strongest relationship to bar passage, he argued that the strong downward pressure on Black students' grades due to preferential admission at more elite schools eventually translates into lower bar passage rates.[99]

The model implicit in the original version of the negative match hypothesis offered in *Systemic Analysis* thus takes a rudimentary form that does not directly include bar passage rates as a measured outcome. Rather, the argument was that achievement (as measured by law school grades[100]) has a stronger effect on bar passage than the combination of incoming credentials and increased academic proficiency resulting from elite school attendance. Consequently, any factor that lowers LGPA is presumed to lower the probability of passing the bar examination.[101]

Yet, as Ho pointed out,[102] researchers interested in investigating the mismatch hypothesis should be engaging with a more complete question. Even assuming a tightly linked relationship between LGPA and bar passage rates, the direct learning benefits of attendance at higher-tier schools may compensate, to some degree, for any negative effect on bar passage due to the downward pressure (in elite schools) on LGPA resulting from mismatch. Just looking at those two factors (which is still a simplified model), the total effect of admission preference is then conceptualized as the sum of the two causal chains.[103] In any event, the methodological sophistication of mismatch studies has evolved substantially from this modest beginning, and a range of statistical models and nonparametric[104] matching techniques have been used more recently by both proponents and skeptics of the mismatch hypothesis.[105] A number of these are discussed briefly below; however, these approaches tend to be mathematically complex, and detailed descriptions are outside the scope of this article.

Ayres and Brooks, also looking at law schools, used a strategy roughly

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graduation.

98. *Id.* at 439, Tbl 5.6. *See also id.* at 444, tbl. 6.1.

99. *Id.* at 479.

100. *Id.* at 411. It is not clear whether achievement is taken to mean the absolute or relative level of skill and ability.

101. *Id*. at 422–23.

102. Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997 (2005). *See also* Daniel E. Ho, *Affirmative Action's Affirmative Actions: A Response to Sander*, 114 YALE L.J. 2011 (2005).

103. Rothstein & Yoon in *Affirmative Action*, *supra* note 42, at 3-4 (formalizing this argument).

104. In nonparametric techniques, weaker assumptions are made about the relationship between analytic variables. For example, linearity is not assumed.

105. Sander has more recently proposed a "case control" methodology that bears a strong resemblance to propensity score matching. SCALE AND EFFECTS, *supra* note 62, at B-1, B-10.

similar to that which Dale and Krueger used for undergraduate education.[106] They found mixed support for the negative match (mismatch) hypothesis. Two groups of students were identified: those who attended their first-choice school and those who were accepted at their first choice school but chose to attend a presumably lower-tier school.[107] Because both groups of students were selected by their first-choice schools, this helps to control for unobserved variables that contribute to student success, and thus to decrease selection bias. Based on the comparison between first-choicers and alternative-choicers, they concluded that first-year grades[108] and first-attempt bar passage outcomes appeared to lend marginal support for the mismatch hypothesis.[109] However, they observed non-significant differences when examining outcomes having farther reaching significance[110] (e.g., graduation rates and ultimate bar passage).[111]

Rothstein and Yoon proposed a methodology in which parameters for estimating match effects are constructed with two different statistical models.[112] In the first, Black students at elite and non-elite schools are compared, and in the second, Black students are compared to White students—assuming race is a proxy for affirmative action preference.[113] The models were chosen to roughly provide upper and lower bounds for the match effect.[114] In other words, the two statistical procedures were chosen in order to sandwich an unbiased statistical estimate.[115] Both

106. Ian Ayres & Richard R. W. Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005). Ayres and Brooks also carried out an analysis to determine the effects of eliminating affirmative action on the flow of Black lawyers into the profession, so-called stereotype threat as a possible explanation of Black underperformance in law school, and the potential policy of advising candidates more fully based on their probability of success in law school. We do not address this question herein though we are in full agreement that these are important topics.

107. *Id.* at 1832.

108. *Id.* That is, comparable students tended to get higher grades at non-elite schools.

109. *Id.* at 1835.

110. *Id.* at 1838. That is, comparable students tended to graduate at similar rates, whether they attended elite or non-elite schools.

111. In *Reply to Critics*, *supra* note 3, Sander appeared to have embraced the methodology of Ayres and Brooks. Upon comparing first-choice Black students with Black students who passed up their first-choice school, he estimated the mismatch effect to be -14.9% for first bar examination and -3.6% for ultimate bar passage. *Id.* at 1994, tbl. 7. Sander reported that he was not able to replicate the results of Ayres and Brooks. *See* Rothstein and Yoon, *supra* note 42, at 681-82 (further critique of the Ayres and Brooks methodology).

112. *See* Mismatch in Law School, supra note 43.

113. *Id*, at 2.

114. *Id.*

115. *Id.* In particular, Rothstein and Yoon used two types of models: ordinary least squares (OLS) and instrumental variables (IV). The IV approach is popular among econometricians, but in the current context requires the identification of a variable that is correlated with an outcome variable (e.g., bar passage) only through its effect on

models obtained match estimates for graduation and bar passage that were not significantly different from zero.[116] But with both models the effects for post-graduation employment outcomes were positive.[117] That is, mismatched students in elite schools had better employment outcomes than had they been "matched" to non-elite schools.[118]

Rothstein and Yoon contend that their sandwich strategy increased confidence in the disconfirmation of the mismatch hypothesis.[119] However, their results hinged on a significant methodological choice: the lowest quintile of all students on the academic index (composed of LSAT and UGPA) was eliminated from the analysis, which in turn eliminated most (about seventy-five percent) of all Black students in the sample from their data analysis.[120] The researchers did not include these students because, they argued, the majority of White students with low levels of qualification are normally excluded even from the least selective law schools.[121] That is, even the least selective schools would normally not admit a particularly low-scoring White student, so those White students who are in fact admitted are likely higher on unobserved variables than other White students with the same qualification; thus, any Black–White comparison would be biased in favor of White students.[122]

Williams provided a "distance" framework for understanding mismatch similar to the approach used by Fischer and Massey, and by Massey and Mooney.[123] He reviewed the methodology of Rothstein and Yoon, of

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selection to elite versus non-elite schools. Rothstein and Yoon in a technical argument showed how race could be used as an instrument with resulting statistical bias in one direction, while the statistical bias for their OLS estimate of the match effect would be in the other direction.

116. *Id.* at 19.

117. *Id.*

118. *Id.* at 22.

119. *Id.*

120. *Id.* at 17–18.

121. *Id.* at 18.

122. Rothstein and Yoon argue that "even if black and white applicants would have achieved similar average outcomes, there is reason to expect that those white students who actually matriculated would have outperformed the average black applicant even in the absence of affirmative action." *See Affirmative Action*, *supra* 42 at 696. Note that a White student with similar credentials at a non-elite school is used here as the counterfactual for a Black student attending an elite school. While we recognize that some economists have proposed the use of such counterfactuals within the context of a thoughtful model, the comparison is tantamount to making the case that a Black student is the same as a White student for the purpose of estimating an outcome, given that suitable control variables can be identified—or that the direction of the bias created by unobservable variables can be guessed. We think it will be difficult to establish a broadly appealing argument with this strategy.

123. Williams, *supra* note 56. In brief, "distance" for an individual is based on the difference between that individual's academic index and the average or median index at a particular school. Distance then serves as an independent variable in evaluating outcomes.

Barnes, and of Ayres and Brooks, which were all conducted with the *Bar Passage Study* dataset.[124] Williams then carried out analyses roughly similar to those of Rothstein and Yoon for law school graduation and ultimate bar passage, but he also constructed a new outcome measure for bar passage that gave greater weight in the analysis to students who passed the bar with fewer attempts.[125] The argument was that such a measure is more closely aligned to learning.[126] A number of statistically significant and negative match effects were found, though only after omitting students from the middle two tiers of law schools (second-tier public and second-tier private) from the analysis.[127] That is, the counterfactual to elite law school attendance was that the student would attend a very non-elite school. Williams argued that eliminating the middle tiers would reduce measurement error in the classification of law schools.[128]

Even more so than with the Rothstein and Yoon study, however, this approach places clear emphasis on a methodological choice that may affect external validity. Eliminating those "second-tier" categories removes from the analysis the most convincing counterfactual students, and thus decreases the quality of the ATT estimator. It also raises the question of whether this comparison has many real-world (as opposed to modeled) examples. Students attending UCLA tend to be substantially different from those attending Podunk State. The comparison only to lower-tier law schools also raises a related methodological question: whether the study is comparing applicants so substantially different that it is beyond the capacity of parametric regression models to control for those differences. Though the intent of Williams' analysis is clear, elimination of a substantial proportion of a sample in order to produce an effect is clearly open to further discussion. Indeed, Sander criticized Rothstein and Yoon[129] using exactly this argument.[130]

In any case, the study's model yielded estimates suggesting that Black students at elite law schools pass the bar at a rate of eight to twelve percentage points lower than similar students at non-elite schools on their first attempt, and a rate of five to ten percentage points lower on their final attempt.[131] Analyses similar to that of Ayres and Brooks were also carried out, with the result being no effect for ultimate (as opposed to first attempt)

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124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Affirmative Action*, *supra* note 42.
130. *See* Richard H. Sander, *Are Black/White Disparities in Graduation and the Bar Getting Better, or Worse?*, EMPIRICAL LEGAL STUDIES BLOG (Sept. 19, 2006, 8:28 AM), http://www.elsblog.org/the_empirical_legal_studi/2006/09/page/3/.
131. *Id.* Williams also controlled for regional difference in bar exam difficulty.

bar passage.[132] Williams concluded that there is substantial reason to believe that evidence exists in the *Bar Passage Study* data to support the negative mismatch hypothesis.[133]

A study by Camilli and his colleagues is a more recent examination of the mismatch hypothesis.[134] Like the others, they used the *Bar Passage Study* data.[135] They carried out separate analyses for all racial and ethnic groups, using bar passage rates as the outcome of interest.[136] Students with the same *a priori* chances of being admitted to an elite school (based on twelve admission qualifications and background factors) were considered to be comparable.[137] For any group of students with similar chances within a racial or ethnic category, the researchers were able to identify some

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132. *Id.*

133. *Id.*

134. *See* Camilli et al., *supra* note 63.

135. *Id.*

136. *Id.*

137. *Id.* After controlling for these twelve variables, a sensitivity analysis suggested the estimate was robust with respect to other variables available in the *Bar Passage* data. Specifically, neither SES nor geographic region (in which the bar examination was taken) had a notable effect on match estimates.

It should be noted that Camilli and his colleagues imputed missing data, while in the Williams study no mention is made of how missing data were treated. *See* Camilli et. al., *supra* note 63. *See also* Williams, *supra* note 56. This is a key concern—how researchers using the *Bar Passage Study* have compensated for missing information in the dataset. Missing data were explicitly taken into account in the Camilli et al. study, in contrast to virtually all previous studies in which missing data procedures were not mentioned. The improper practice of deleting cases with missing values may potentially bias both model coefficients and their standard errors. The problems with missing data are 1) loss of efficiency, 2) complication in data handling and analysis, and 3) bias due to unknown systemic trends in the unobserved data. It is well known that mean substitution or pairwise deletion does not account for the variation that would be present if the variables are observed, resulting in downward bias in the estimation of variances and standard errors. *See also* RODERICK J. A. LITTLE & DONALD B. RUBIN, STATISTICAL ANALYSIS WITH MISSING DATA (2d ed. 2002); Phillip L. Roth, *Introduction to the Feature on Problematic Data*, 6 ORG. RES. METHODS 279 (2003). Mean substitution and pairwise deletion methods "provide problematic estimates in almost all instances." As implemented multivariable normality is assumed, this method has been widely used for imputing missing values for binary variables such as bar passage, but this procedure does not compensate for 3) above. *See also Therese* D. Pigott, *A Review of Methods for Missing Data*, 7 EDUC. RES. AND EVAL. 353 (2001). Because binary variables are treated like normal variables in the imputation steps, imputed values may typically be fractional.

One strategy for imputing the binary data is to round up or down the imputed fraction to 1 or 0. However, it has been shown that such rounding can produce substantial bias, and it is generally recommended to use the unrounded imputed values for analysis. *See also* Nicholas J. Horton, Stuart R. Lipsitz, & Michael Parzen, *A Potential for Bias When Rounding in Multiple Imputation*, 57 AM. STAT. 229 (2003). *See also* Christopher F. Ake, *Rounding After Multiple Imputation With Non-binary Categorical Covariates*, SUGI 30 PROCEEDINGS, (2005) http://www2.sas.com/proceedings/sugi30/112-30.pdf.

students who attended elite schools and some students who attended less elite schools.[138] The latter were used as counterfactuals for the former.[139] When controlling for the propensity to attend an elite school, Camilli and colleagues found non-significant but negative effects of -5% and -1.4% for the first and ultimate bar passage rates (respectively) for Black students who attempted the bar examination.[140] In contrast, Sander in his *Reply to Critics* reported estimates of difference in bar passage rate of -14.9% and -3.6%, respectively.

In a finer-grain breakdown of match effects, Camilli and colleagues also subdivided each racial and ethnic group into two data sets: one with higher *a priori* chances of attending law school (i.e., higher propensities) and one with lower chances.[141] Roughly speaking, this provides one solution to Williams' concern that match effects have a bias toward zero resulting from the imprecise classification of schools into tiers. Lower-chance students are much more likely to have attended a lower-tier school, but they can be matched to elite-schools students of the same racial or ethnic group. It could be expected that the elite–non-elite comparison for lower-chance students would magnify negative effects, due to a greater degree of mismatch. The results did in fact suggest a possible negative match effect for lower-chance Black students; the match effects were insignificant but negative: -7.7% and -5.6% for first and ultimate bar passage, respectively.[142] For higher-chance Black students, the corresponding effects were again insignificant but the magnitudes were mixed: -2.9% and +3.4%, respectively.[143] These findings, though not statistically significant, might be suggestive of negative match effects for some students with low *a priori* probabilities of being admitted to an elite school, although not for Black students with stronger credentials. The estimates of -7.7% and -5.6% would probably apply to at most about forty percent of Black student applicants, and this figure may be even lower.[144] Rothstein and Yoon similarly showed that bar passage rates fell sharply only for Black students in the lowest twenty percent of the Black distribution on the admissions index who attended elite schools.[145] These results suggest that those concerned about negative match effects should be focusing only on least-

138. *Id.*

139. This is known as propensity score matching. *See* Daniel E. Ho, Kosuke Imai, Gary King, & Elizabeth A. Stuart, *MatchIt: Nonparametric Preprocessing for Parametric Causal Inference*, 42 J. STAT'AL SOFTWARE 481 (2011). *See also* Jasjeet S. Sekhon, *Multivariate and Propensity Score Matching Software with Automated Balance Optimization: The Matching Package for R*, 42 J. STAT'AL SOFTWARE 1 (2011).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Affirmative Action*, *supra* note 42, at 691.

credentialed applicants.

Camilli and colleagues also found some (statistically insignificant) evidence in support of the mismatch hypothesis for Asian law school students, although not for Latino students, in the lower-chance range.[146] *Negative* match effects were obtained for White students in the lower-chance range; though these were small, they were statistically significant.[147] Yet when looking at higher-chance students (who generally have higher levels of qualification) in all racial/ethnic categories, the match effects for bar passage were generally close to zero or positive—though none approached statistical significance at $\alpha = .05$. When breaking down results by gender, only two notable effects were observed. A positive, but non-significant match effect of 7.5 percentage points was found for Black women on first-time bar passage (adjusted for number of attempts).[148] And a strong positive match effect of thirteen percentage points was found for lower-chance Hispanic men on adjusted first-time bar passage; this effect was statistically significant at $\alpha = .05$.[149]

Given that these relatively low-credentialed Hispanic males are clearly among the intended beneficiaries of affirmative action policies, this last finding seems particularly important. We are not arguing that this finding should be used to support affirmative action policies aimed at such students. Rather, this finding suggests the weakness of global arguments against affirmative action based on the *Bar Passage* data. At most, such findings may provide signals of cultural differences, which in turn may provide clues for enhancing student learning. As Roxana Moreno put it:

> Expert teachers never assume that a particular student will think or behave in a manner that is expected for his/her gender, culture, or SES but rather view each student as a unique individual and use what they know about group differences to help explain why students learn differently in school.[150]

D. Summary

We began this discussion of evidence regarding heterogeneity and learning by suggesting the research literature might shed light on the causal mechanism driving any mismatch effects. However, there is no compelling case of the existence of such a mechanism prior to law school. In fact, the literature suggests a reverse mechanism, with greater challenge leading to an increase in achievement—a positive "mismatch" effect. But there may be no mystery here. As the above discussion of mismatch research regarding law schools shows, the existing research base fails to document a

146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. Roxana Moreno, EDUCATIONAL PSYCHOLOGY 27 (2010).

consistent and substantial negative mismatch effect at that level either. Some studies suggest positive effects, some suggest negative effects, and some suggest no significant effects. If enough snark hunters return empty handed, there is not much reason to examine or explain the nature of snarks.[151] Though there is a suggestion of negative effects for some Black students, these effects do not consistently rise to the level of statistical significance; indeed, the significance levels *within* Williams' study vary according to methodological choices.

Nonetheless, it is worth exploring interpretations and implications of any negative match effects. The research from K–12 and undergraduate college and university education suggests, as we discuss in the conclusions below, that any negative match effects observed in law school are more likely due to the practices of law schools or unobserved (unmeasured) characteristics of students rather than the credentials. If this is the case, then the phrase "mismatch hypothesis" embodies a misspecification of the causal mechanism. Any effect might better go by the humdrum label "inadequate support hypothesis." Research exploring effective learning environments and successful practice would then follow. Other research might examine how success in law school should be measured in terms of the intended curriculum. For example, it might be useful to investigate empirically the claim that elite law schools tend to focus more on esoteric and national issues, while less elite schools tend to focus more on the content of the state bar examination. While the research conducted to date does suggest the possibility of a small to moderate negative match effect for some (e.g., relatively low-credentialed) students, it should be recognized (a) that methodological choices might account for whether a given match effect is or is not statistically significant,[152] and (b) that a significant match effect signals, but does not identify, a causal mechanism.

VI. RETHINKING BENEFITS, OUTCOMES, MEASURES, AND IMPLICATIONS

The benefits of attending an elite law school are not easily captured. Chief Justice Vinson explained this more than sixty years ago in *Sweatt v. Painter*, a case finding that separate law school for Black applicants was not "equal" to the law school at the University of Texas:

> What is more important, the University of Texas Law School

151. The origin of snark hunting is found in LEWIS CARROLL, THE HUNTING OF THE SNARK: AN AGONY IN EIGHT FITS (1876). The creature in Carroll's story may not in fact exist. *See also* Medellín v. Texas, 552 U.S. 491, 549 (2008) (Breyer, J. dissenting, finding the majority's insistence on finding some indication of self-executing intent in a treaty's text to be akin to "hunting the snark").

152. Ayres and Brooks made a similar point: "What are the underlying institutional factors that undermine black law students' chances of becoming lawyers, as compared to white law students with the same entering credentials attending the same tier schools? No responsible educator can ignore this question or fail to take action." Ayres & Brooks, *supra* note 97, at 1854.

> possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.[153]

Correspondingly, it is difficult to capture the benefits of diversity on the law schools themselves. As the Supreme Court articulated in *Grutter*, a diverse student body "promotes learning outcomes and better prepares students for an increasingly diverse workforce, for society, and for the legal profession."[154]

Whereas the individual merit model implies a few narrow criteria (such as law schools' grades or graduation rates) in operationalizing "greater benefit to society," the reasoning in *Grutter* implies that characteristics of a student body are intrinsic to high-quality legal education. Chief Justice Vinson's opinion in *Sweatt* touches on this as well:

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.[155]

Similarly, the individual merit model fails to capture everything about future lawyers that might be of importance. A recent report of prediction of effectiveness by Shultz and Zedeck attempted to identify non-cognitive factors relevant to the practice of law, such as situational judgment or past attitudes and experiences.[156] They constructed new non-cognitive predictors based on biographical information and social judgment as well as ratings of lawyering effectiveness on twenty-six different dimensions (e.g., research and information gathering; conflict resolution; and entrepreneurship).[157] They found low to moderate correlations between these new predictors and most of the effectiveness scales. Based on these results, they observed:

> The impressive aspect of these results was (1) the large number of Effectiveness Factors that were predicted by the [biographical

153. Sweatt v. Painter, 339 U.S. 629, 634 (1950).

154. *Grutter*, 539 U.S. at 308.

155. *Painter*, 339 U.S. at 634.

156. MARJORIE M. SHULTZ & SHELDON ZEDECK, FINAL REPORT: IDENTIFICATION, DEVELOPMENT AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING (2008), *available at* http://ssrn.com/abstract=1353554.

157. *Id.* at 4.

> information] and the [social judgment] tests, and (2) that the correlations were generally higher, though moderately so, than those between the LSAT and the small subset of Effectiveness Factors that overlap with the LSAT and with which it had an expected relationship (e.g. Analysis and Reasoning, Researching the Law, Writing).[158]

A reasonable conclusion from this and similar work is that no single predictor or measurement instrument will come close to capturing everything important about a future lawyer. As noted by Sackett and Lievens, "With cognitively loaded predictors as generally the strongest correlates of task performance and noncognitive predictors as generally the best predictors in the citizenship and counterproductive behavior domain, careful attention to the criterion of interest to the organization is a critical determinant of the eventual makeup and success of a selection system."[159] While it is not clear that non-cognitive factors can currently be incorporated into admission criteria, development of tools in this area is ongoing.[160]

From this perspective, the fundamental issue is that narrow admissions criteria are at best loosely coupled with an array of unobserved non-cognitive factors that lead to effective lawyering. In fact, one benefit of attending a more elite school consists of access to professional networks and organizations, within which these non-cognitive qualities are important determinants of success. The potential for public leadership and private practice is partially determined by academic preparation, but whether this is the lion's share of success is an open question. Relatively exclusive reliance on standard admission criteria is more a function of their measurability; this is more a pragmatic choice than a utility or merit maximizing argument.

The key measure used in mismatch hypothesis research—bar passage rates—is also somewhat problematic. While passing a state bar exam is a very important outcome, it does not necessarily map equally well onto the curriculum of different law schools. If it is true that less elite law schools teach relatively more state bar content while more elite schools teach relatively more national law and abstract theory, then the bar examination does not accurately measure the different learning of students in the different types of schools. If an applicant opts for a more elite law school, she may be sacrificing bar preparation instruction for other instruction of value. According, the lesser-qualified student who attends an elite school might have done better at a different institution not because he or she learned more, but rather because the other institution taught more of the bar

158. *Id.* at 80.

159. Paul R. Sackett & Filip Lievens, *Personnel Selection*, *in* 59 ANN. REV. PSYCHOL. 419, 422 (Susan T. Fiske et al. eds., 2008).

160. *Id.*

material. Measurement expert Al Beaton once remarked, "If you want to measure change, don't change the measure."[161] In the context of this paragraph, we would offer the alternative, "If you want to measure game, don't game the measure."

Finally, as noted earlier in this article, the existing mismatch hypothesis research is troublingly tied to the debate about affirmative action and therefore troublingly assumed to have primary policy implications related to law school admissions policies. But a clear finding of the research about K–12 ability grouping is that heterogeneous learning environments are most successful when supports are provided for teachers and students. Even setting aside that research, it stands to reason that if incoming credentials are highly correlated to first-year success in law schools, then students preferentially admitted will need additional supports. To the extent that we do find a mismatch effect for the lowest-credential students, a reasonable conclusion is that law schools need to do a better job in providing such learning supports. Any healthy discussion of a mismatch effect should involve programmatic interventions by which negative match effects can be addressed. No one, after all, has claimed that the unobserved characteristics to which mismatch effects might be attributed are endowed or unalterable—or that the unobservables relate in any way to merit.

VII. CONCLUSION

As a policy matter, the primary push behind the mismatch hypothesis is to question the benefits of affirmative-action admissions policies. A key issue, therefore, is whether current support for the mismatch hypothesis is strong enough to support a change in admission policies, and there are several important considerations. First, research regarding mismatch in law school is mixed: some positive estimates and some negative estimates have been obtained, and results vary by methods of statistical design and analysis, outcome analyzed, race, and gender. A reasonable conclusion is that current data do not support a robust finding of statistically significant mismatch effects. The most pointed conclusion that current analyses would support is only that there appear to be some mismatch effects when looking at first-time bar passage rates for the least credentialed applicants, although even those effects are small to moderate and are inconsistent.

Even if one were to conclude that negative match effects exist for, e.g., the least credentialed Black students, the mismatch hypotheses put forward informally by economists and others are logically suspect. No causal

161. *See* George W. Bohrnstedt, *U.S. Mathematics and Science Achievement: How Are We Doing?*, 99 TCHRS C. REC. 19, 22 (1997). Similarly, a quantitative comparison cannot be validly made if the measure changed. This is known as the instrumentation threat to internal validity. *See also* WILLIAM R. SHADISH, THOMAS D. COOK, & DONALD T. CAMPBELL, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR GENERALIZED CAUSAL INFERENCE (2002).

mechanism has been offered to explain the phenomenon with roots either in cognitive theory or the extant empirical research on heterogeneous learning environments. In contrast to mere intuitive hunches about how student-school mismatch hinders learning, hard evidence is available that a greater degree of challenge in heterogeneous learning environments benefits students. Moreover, if the mismatch mechanism is unrelated to race or ethnicity, then observed mismatch effects *must* be due to unobserved background characteristics that are correlated with race or ethnicity and not controlled by LSAT or GPA. From this perspective, match effects, to the degree they exist, eventually arise from an unobserved capacity for development that is present at the moment of enrollment. Moreover, proponents of the mismatch hypothesis appear to be arguing that, independently of observed qualifications, admission under an affirmative action policy is a proxy for these unobserved variables—with race then being a proxy for such affirmative action admission. However, we know of no empirical work identifying the cognitive mechanisms. Neither competitive pressure as indicated by class rank nor intuitive notions self-evaluation (possibly including discrimination or stereotype threat) are compelling explanations. To the contrary, the broader research literature on heterogeneous learning environments suggests that higher expectations may result in *positive* effects for mismatched students.

In any case, the conceptualization of a match effect as due to unobserved student characteristics may lead to a more fruitful search of influences on student learning. For example, in one scenario, a match effect arises indirectly as an interaction between what is *not* taught and the experience of incoming students; that is, some students may not have been previously (prior to admission) exposed to material in the *intended* curriculum through their college or university preparation, extra-curricular activities, or informal learning. This lack of pre-exposure could lead to learning difficulties which could manifest as a negative match effect relative to students with sufficient exposure, given a substantial gap between the intended curriculum and what is actually taught, i.e., the *received* curriculum. Also consider the scenario in which two students, who are indistinguishable in terms of measured credentials, are offered admission to the same schools (of which some are more and some less elite). These students would appear to be highly comparable in terms of academic potential, given that admission committees considered both observed characteristics of those students as well as other qualities ascertained from their applications. (Note that the latter qualities, perhaps set forth in their admissions essays, are typically not available to secondary analysts and in this sense are unobserved). Now suppose one student chooses an elite school based on a preference for status and the other student chooses a less elite school after conducting financial projections and evaluating social supports. This latter student has planned in a mature, thoughtful way, which may indicate qualities leading to more successful law school

outcomes, and could lead to relatively higher performance at the less elite school. This phenomenon could also manifest as a negative match effect. In both of these scenarios, identification of the unobserved variables might have useful implications for pre-law guidance, or academic preparation or support in law school.

Despite these methodological concerns, the technical evaluation of the mismatch hypothesis is just one framing issue. Even if match effects were estimated with a much higher degree of precision, there is only a tenuous connection between match effects and the logic in *Grutter v. Bollinger* concerning the broad educational benefits of diversity. Empirical match effects have no bearing on the intangible benefits of attending and graduating from an elite law school, nor do they have bearing on the "merit" argument against affirmative action. In the end, the two issues—match and affirmative action—may inform one another, but they are truly separate conversations. Evidence of mismatch ultimately has nothing to do with race or ethnicity, and explanatory support for the hypothesis should be examined with regard to students substantially less credentialed, whatever the basis of their admission. Focusing on race, and thereby on affirmative action, sorts out one group and thus creates the perception of a political motivation to change admission policies. This may further encourage the incorrect assumption that without affirmative action, there would be little diversity in pre-law credentials at elite schools. Most unfortunately, the affirmative action focus of the extant mismatch hypothesis discussion implies an admissions-based solution to any performance concern, rather than a solution grounded in academic and social supports for lower-achieving students.

COLLEGIALITY IN HIGHER EDUCATION EMPLOYMENT DECISIONS: THE EVOLVING LAW

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INTRODUCTION

The appropriate use of collegiality in employment decisions is an issue at the forefront of policy discussion in higher education.[1] Despite the fact that the courts have affirmed at every turn the use of collegiality as a factor in higher education tenure, promotion, and termination decisions, the academic community, particularly the faculty, continues to remain divided over the wisdom of incorporating collegiality into faculty employment decisions.

Those who support the consideration of collegiality in faculty evaluations point out that colleges and universities have long recognized the importance of cooperation and collegial interaction among faculty in advancing the missions of their institution. Supporters of the use of collegiality also emphasize that most courts that have addressed the use of a faculty member's working relationship with his or her colleagues in tenure, promotion, or termination decisions have upheld the consideration of collegiality and have even urged its consideration. For example, the Seventh Circuit Court of Appeals in *Adelman-Reyes v. Saint Xavier University*[2] affirmed the district court's grant of summary judgment to the University, noting that "winning the esteem of one's colleagues is just an essential part of securing tenure."[3] Similarly, the district court in *Bresnick v. Manhattanville College*[4] stated in deciding for the college in a tenure

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1. This article focuses on the term "collegiality" as it pertains to a person's ability to work well with others and not on the concept of collegial or shared governance within the academic community. "The term *collegiality*, as it is used in academia, has two meanings. The first refers to the well-defined principle of collegial, or shared, governance. The second refers to faculty interactions with colleagues and administrators." FRANKLIN SILVERMAN, COLLEGIALITY AND SERVICE FOR TENURE AND BEYOND 7 (2004).

2. Adelman-Reyes v. Saint Xavier Univ., 500 F.3d 662 (7th Cir. 2007).

3. *Id*. at 668 (quoting Namenwirth v. Bd. of Regents of Univ. of Wis. Sys., 769 F.2d 1235, 1243 (7th Cir. 1985)).

4. Bresnick v. Manhattanville Coll., 864 F. Supp. 327 (S.D.N.Y. 1994).

denial case: "It is predictable and appropriate that in evaluating service to an institution, ability to cooperate would be deemed particularly relevant where a permanent difficult-to-revoke long-term job commitment is being made to the applicant for tenure."[5] Likewise, the Supreme Court of Connecticut in *Craine v. Trinity College*[6] noted:

> A multitude of factors go into a tenure decision including the quality of a candidate's work, the departmental need for a specialist, the number of tenure positions available, the mix of well-known scholars and up-and-coming faculty, the collegiality of the candidate, and the quality of relations with peers and the administration.[7]

Faculty who oppose the use of collegiality in employment decisions raise several arguments. The most frequent argument is breach of contract when collegiality is not defined specifically as a separate and distinct criterion in the employment contract or institutional tenure policy. Faculty denied tenure or terminated for lack of collegiality have also asserted that collegiality is a vague and amorphous term that can easily be used as a mask for discrimination on the basis of race, gender, age, religion, national origin, or disability. Finally, while the American Association of University Professors (AAUP) and others have recognized that collegiality is an important aspect of a faculty member's overall performance, they have argued that its use as a separate factor in higher education employment decisions poses a threat to academic freedom and free speech.[8]

The *Journal of College and University Law* published an article in 2001 on the role of collegiality in higher education employment decisions.[9] Despite some opposition, but with strong affirmation by the courts, colleges and universities since 2001 have increasingly used collegiality in making tenure and promotion decisions.[10] In interesting new trends, higher

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5. *Id*. at 329.

6. Craine v. Trinity Coll., 791 A.2d 518 (Conn. 2002).

7. *Id*. at 537 (citing Zahorik v. Cornell Univ., 729 F.2d 85, 92-93 (2d Cir. 1984)).

8. *See* Mary Ann Connell & Frederick G. Savage, *The Role of Collegiality in Higher Education Tenure, Promotion, and Termination Decisions*, 27 J.C. & U.L. 833, 858 (2001). For articles criticizing the use of collegiality in making academic employment decisions, *see* Gregory M. Heiser, *"Because the Stakes Are So Small": Collegiality, Polemic, and Professionalism in Academic Employment Decisions*, 52 U. KAN. L. REV. 385, 388–89 (2004) (discussing criticisms of the use of collegiality); Edgar Dyer, *Collegiality's Potential Chill Over Faculty Speech: Demonstrating the Need for a Refined Version of* Pickering *and* Connick *for Public Higher Education*, 119 EDUC. L. REP. 309 (1997) (arguing that use of collegiality in academic employment decisions threatens academic freedom); Perry A. Zirkel, *Personality as a Criterion for Faculty Tenure: The Enemy It Is Us*, 33 CLEV. ST. L. REV. 223, 224 (1984–85) (equating collegiality with personality and asserting that use of collegiality threatens individual academic freedom).

9. *See* Connell & Savage, *supra* note 8.

10. WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 537 (4th ed.) ("Collegiality, or institutional 'citizenship,' is increasingly being used, either

education institutions are incorporating collegiality in their initial hiring decisions[11] and in school and departmental policies.[12] The present article seeks to update the research published in 2001 by discussing cases, law review articles, and other sources published over the last ten years. In addition, this article will focus on the tenure and promotion policies of a number of colleges and universities in the United States to see if and how collegiality is being addressed in institutional policies.

I. DEFINING COLLEGIALITY

Courts have long recognized the right and even the responsibility of a college or university to consider a faculty member's working relationship with his or her colleagues in making hiring, tenure, promotion, and termination decisions.[13] Nevertheless, the word "collegiality" was not the focus of court decisions until 1981 when the Court of Appeals for the Fourth Circuit in *Mayberry v. Dees*[14] introduced into higher education case law, seemingly with approval, the defined concept of "collegiality" as a distinct criterion upon which to base higher education employment decisions. The *Mayberry* court defined "collegiality" as "the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests."[15]

What does "collegiality" mean?[16] How is "collegiality" defined?[17] More specifically, what is its meaning within the context of the academic community?[18] It seems to be a "term that [has] taken on new meanings

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overtly or covertly, to make tenure decisions.").

11. Leonard Pertnoy, *The "C" Word: Collegiality Real or Imaginary, and Should It Matter in a Tenure Process*, 17 ST. THOMAS L. REV. 201, 206, 213 (2004).

12. *See infra* Part IV.

13. *See, e.g.*, Mabey v. Reagan, 537 F.2d 1036, 1044 (9th Cir. 1976) (holding that an essential although subjective element of professor's performance is "ability and willingness to work effectively with his colleagues."); Watts v. Bd. of Curators, Univ. of Mo., 495 F.2d 384, 389 (8th Cir. 1974) ("A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the administration."); Chitwood v. Feaster, 468 F.2d 359, 361 (4th Cir. 1972) (upholding nonrenewal of several nontenured faculty who engaged in pattern of bickering and running disputes with department heads, saying: "A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the head of the department."); McCauley v. S.D. Sch. of Mines & Tech., 488 N.W.2d 53, 59 (S.D. 1992) (affirming that college has right to expect teacher to follow instructions and to work cooperatively and harmoniously with administration).

14. Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981), *cert. denied*, 459 U.S. 830 (1982).

15. *Mayberry*, 663 F.2d at 514.

16. Dyer, *supra* note 8, at 309 (contending that the term is ambiguous, "could use refinement," and may, "like obscenity, [be] easier to comprehend by observation than with words").

17. *See id*. at 309–10 (stating that the term is "not easily defined" and that existing definitions "do[] little to provide any semblance of specific guidelines for behavior").

18. *See* Pertnoy, *supra* note 11, at 208 (asserting that "confusion abounds" over

over time."[19]

Within the academic community, collegiality has been defined variously as the ability to "get along," "work well with colleagues," "demonstrate good academic citizenship," or "contribute to a collegial atmosphere."[20] Academics often use phrases such as "being a team player," "being a good citizen," "fitting in," and "collegiality to describe the values and benefits of involvement and participation in the life of the community."[21] These terms expand into the expectation faculty have that their colleagues share the load and contribute fairly to teaching, committee assignments, admission processes, and other academic responsibilities.[22] According to one commentator, collegiality includes advising, mentoring, and recruiting students; fulfilling committee responsibilities; meeting departmental administrative responsibilities; participating in the governance of professional associations; enhancing the reputation of the department and the institution; securing extramural funding; meeting departmental and institutional community responsibilities; and maintaining harmonious relations with colleagues.[23] Indeed, as another commentator puts it, collegiality is about harmony and cooperation.[24] Karl Hostetler describes collegiality as "being a good colleague, being decent and civil to other people."[25]

Although few other courts have attempted to formally "define" collegiality, many have described what they consider to be collegial behavior. For example, the court in *Watts v. Board of Curators* observed that a "college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the administration."[26] Another federal judge, Deanell Reece Tacha of the Tenth Circuit Court of Appeals,

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the definition of collegiality and arguing that it should be more objectively defined).

19. Michael L. Siegel, *On Collegiality*, 54 J. LEGAL EDUC. 406, 408 (2004).

20. *See* Mary Ann Connell & Frederick G. Savage, *Does Collegiality Count?*, 87 Academe 37–40 (2001), *available at* http://www.aaup.org/AAUP/pubsres/academe/2001/ND/Feat/Conn.htm.

21. Phyllis Bronstein & Judith A. Ramaley, *Making the Persuasive Tenure Case: Pitfalls and Possibilities*, *in* TENURE IN THE SACRED GROVE: ISSUES AND STRATEGIES FOR WOMEN AND MINORITY FACULTY 38 (Joanne E. Cooper & Dannelle D. Stevens eds., 2002).

22. *Id*. at 138–39.

23. Silverman, *supra* note 1, at 14–20.

24. Pertnoy, *supra* note 11, at 207 ("[C]ollegiality is about the harmonious co-existence of colleagues joined in a common enterprise.").

25. Karl. D. Hostetler, *Ethics of the Profession: Complexities of Collegiality, Professionalism, Morality, and Virtue*, *in* THE ART AND POLITICS OF COLLEGE TEACHING 324 (Karl D. Hostetler et al. eds., 2d ed. 2001). For other books addressing issues of politics and conflict in the academic setting, see, for example CYNTHIA BERRYMAN-FINK, *Can We Agree to Disagree? Faculty-Faculty Conflict*, *in* MENDING THE CRACKS IN THE IVORY TOWER 141 (Susan A. Holton ed. 1998); RAYMOND R. LEAL, *From Collegiality to Confrontation: Faculty to Faculty Conflicts*, *in* CONFLICT MANAGEMENT IN HIGHER EDUCATION 19 (Susan A. Holton ed. 1995).

26. Watts v. Bd. of Curators, Univ. of Mo., 495 F.2d 384, 389 (8th Cir. 1974).

defined collegiality in a thoughtful article questioning whether expanding the number of federal court judges would contribute to a lessening of collegial relations among the federal judiciary.[27] Writing from her academic background, Judge Tacha said:

> Before describing the impact of collegiality on an appellate court, I must somehow define it. I come from an academic background, where collegiality was at least a professed (if not practiced) value. Like Justice Stewart's experience with obscenity, I know collegiality when I see it, and I have experienced its failures where it was important in supporting professional relationships. Most succinctly stated, collegiality on an appellate court is knowing my fellow judges so well, and respecting their intellects and work patterns so much, that I am willing to listen and consider carefully their perspectives on each legal issue that we confront. It is a personal understanding that transcends political backgrounds, personal idiosyncrasies, and the natural tendency to adhere unyieldingly to one's personal opinions.
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> . . . Collegiality is lively, tolerant, thoughtful debate; it is the open and frank exchange of opinions; it is comfortable controversy; it is mutual respect earned through vigorous exchange.[28]

There is also a shared vision of what collegiality is not: it is not congeniality[29] or just being pleasant with everyone; it is not "going along with the crowd" or automatically deferring to administrators.[30] While few courts have explicitly stated their definition of what collegiality is, a number have taken note of what they define as uncollegial behavior.[31]

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27. Deanell Reece Tacha, *The "C" Word: On Collegiality*, 56 OHIO ST. L.J. 585 (1995).

28. *Id.* at 587.

29. Congeniality is behaving in a manner conducive to friendliness or pleasant social relations. *See* Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 82 (2006). It is also defined as "[h]aving the same tastes, habits, or temperament; sympathetic; [o]f a pleasant disposition; friendly and sociable; a congenial host." *Id.* In contrast, collegial is defined as "[c]haracterized by or having power and authority vested equally among colleagues." *Id.* Yet, people often confuse the two. *Id.*

30. Silverman, *supra* note 1, at 7.

31. *See, e.g.*, Ward v. Midwestern State Univ., 217 F. App'x 325 (5th Cir. 2007) (demonstrating a lack of interpersonal skills evidenced by shouting at other faculty during faculty meetings, chastising fellow faculty members, and missing faculty meetings); Cuenca v. Univ. of Kansas, 101 F. App'x 782 (10th Cir. 2004) (demonstrating unprofessional behavior and engaging in unwarranted personal attacks on students and colleagues); Sawicki v. Morgan State Univ., No. WMN-03-1600, 2005 WL 5351448 (D. Md. Aug. 2, 2005) (having strained relationships with colleagues and students); Slatkin v. Univ. of Redlands, 106 Cal. Rptr. 2d 480 (Cal. Ct. App. 2001) (demonstrating inability to interact harmoniously with others); Mbarika v. Bd. of Supervisors of LSU, 992 So. 2d 551 (La. Ct. App. 2008) (showing disregard for

They have variously described lack of collegiality as "unwillingness to cooperate . . . ," "divisive . . . presence within the department," "inability to get along," and "deficiency in ability to work with other faculty members in an atmosphere of cooperation and collegiality . . . [!]."[32]

Despite varied definitions, there is a remarkable consistency of opinion in the higher education community about the meaning of collegiality. This consistency is seen in court decisions, the AAUP's Statement on Collegiality, colleges and university policies on appointments, promotion, and tenure, and in scholars' discussions of the meaning and use of collegiality in faculty employment decisions. There are certain concepts emerging from the case law and other materials reviewed in this manuscript that appear to be central to the idea of collegiality: civility and respect for others, particularly those with whom one may disagree, the ability to work well with colleagues, and a willingness to share in the institutional obligations of faculty, such as to develop curricula and evaluate others.

In addition to the courts, the AAUP has long recognized the importance of collegiality to the well-being of academic institutions.[33] The Association contends that collegiality, in the sense of collaboration and constructive cooperation, identifies important aspects of a faculty member's overall performance. The AAUP further asserts that a faculty member may legitimately be called upon to participate in the development of curricula and standards for the evaluation of teaching, as well as in peer review of the teaching of colleagues. It has also made the point that much research, depending on the nature of the particular discipline, is by its nature collaborative and requires teamwork as well as the ability to engage in independent investigation.[34]

Scholarly commentators have described collegiality in similar terms and with approval. In *The Quest for Tenure: Job Security and Academic Freedom*, Mark L. Adams defines collegiality as the legitimate expectation of fellow faculty members and colleges and universities that a faculty member will cooperate and work in an effective and positive manner to further the best interests of the institution.[35] He believes that a well-defined and consistently applied standard of collegiality is a necessary element of the tenure process.[36] Most other authors who have written on the topic and attempted to define collegiality and its role in faculty employment

behaviors normally associated with being a good colleague).

32. *See* Pertnoy, *supra* note 11, at 204.

33. The AAUP is sometimes viewed as being against collegiality because it has opposed the consideration of collegiality as a separate criterion in tenure and promotion decisions. This perception is incorrect. The AAUP views collegiality as important as it is a part of the three primary factors in evaluation for tenure—teaching, research, and service. *See* Committee A, report attached, as Appendix A.

34. *See id.*

35. Adams, *supra* note 29, at 85.

36. *Id.*

decisions have supported its use.[37]

Other commentators have criticized existing definitions of collegiality as being so vague and ambiguous that they provide little guidance for faculty behavior, but most of those authors have wanted a clearer definition because they support its use.[38] Further, they believe faculty will be more collegial if they are given clearer guidance on what is expected of them.[39] Only a few authors have appeared to reject the concept of civility as a criterion in employment decisions, usually arguing that the concept of collegiality and civility are used as masks for discrimination.[40]

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37. *See* Seigel, *supra* note 19, at 409. Seigel discusses common definitions of collegiality and offers three of his own. *Id.* at 410. The first is "baseline collegiality," the standard to which all faculty should comply, which consists of "conducting oneself in a manner that does not impinge upon the ability of one's colleagues to do their jobs or on the capacity of one's institution to fulfill its mission." *Id.* at 411. These fundamental requirements of collegiality emphasize the personal responsibility of every faculty member to perform teaching, scholarship, and service at an acceptable level; advocate, when addressing issues of school policy, positions that are good for the college or university, not just in one's own self interest; demand fiscal responsibility in expenditure of college or university funds; treat others with patience, courtesy and respect; interact with colleagues assuming they are acting in good faith; recognize that administrators have difficult jobs and, if necessary, disagree with them with civility. *Id*. at 429–30. Affirmative collegiality exists when faculty go beyond the call of duty and, for example, take on additional teaching assignments to help a colleague take a sabbatical or cover his or her classes when the colleague is ill. *Id*. at 414. Affirmative uncollegiality is "conduct that interferes with the ability of one's colleagues to do their jobs or with the capacity of one's institution to fulfill its mission." *Id.* at 415. Affirmative uncollegiality can take on many forms, such as denigrating colleagues behind their backs, making false accusations about colleagues, and criticizing colleagues to outsiders. *Id*. at 415 & nn.29–31; *see also* Pertnoy, *supra* note 11, at 204, 210–12 (discussing as within the definition of collegiality having cooperative interactions with colleagues, showing civility and respect to others with whom one works and interacts, showing respect for the opinion of others in the exchange of ideas, and demonstrating a willingness to follow appropriate directives from superiors); Robert D. Hatfield, *Collegiality in Higher Education: Toward an Understanding of the Factors Involved in Collegiality*, 10 J. ORG'L CULTURE, COMMC'NS, & CONFLICT 11, 13–15 (2006) (identifying three dimensions in which collegiality is inherent and important to the functioning of higher education academic departments: conflict management dimension (collegiality is important to shared power and collective decision-making), social behavior dimension (collegiality is important to workplace culture), and organization citizenship dimension (collegiality is important to being a good citizen of an organization)). *See generally* Adams, *supra* note 29 (examining the role of collegiality in both granting of tenure and in post-tenure evaluations and distinguishing collegiality from congeniality).

38. Dyer, *supra* note 8, at 309–10.

39. *Id.*

40. *See, e.g.*, Melissa H. Weresh, *Form and Substance: Standards for Promotion & Retention of Legal Writing Faculty on Clinical Tenure Track*, 37 GOLDEN GATE U. L. REV. 281, 312 (2007); Adele M. Morrison, *Straightening Up: Black Women Law Professors, Interracial Relationships, and Academic Fit(ting) In*, 33 HARV. J.L. & GENDER 85, 93–98 (2010) (discussing the role that race and gender, specifically being an African-American female, plays in the evaluation of collegiality in tenure decisions and opposing its use).

Scholars differ in their interpretations of collegiality. Courts have also not expressed a uniform definition, but have interpreted the concept broadly across various circumstances, as evidenced by the following cases.

II. THE COURTS SPEAK: 2000–2010

A. Denial of Tenure

The most heavily litigated area in collegiality cases is that involving the denial of tenure and subsequent non-reappointment of a non-tenured faculty member. During the past ten years, a number of federal and state appellate and trial courts have addressed the issue, deciding in favor of the college or university in the great majority of the cases.[41]

In 2007, the Court of Appeals for the Seventh Circuit affirmed summary judgment for the University in *Adelman-Reyes v. Saint Xavier University*[42] against the plaintiff professor's religious discrimination and tortuous interference claims. Professor Adelman-Reyes began working in Saint Xavier's School of Education in 1998.[43] In 2001, the University placed her in a tenure-track position, promoted her to Associate Professor in 2002, but did not grant her tenure.[44] Adelman-Reyes applied for tenure in 2003.[45] Dean Gulley, the person who had originally hired, supervised, and recommended her for promotion, gave her a negative recommendation based on concerns about the professor's collegiality, contributions to committees, failure to contribute to the University's intellectual life, and declining enrollment in her program.[46] Eventually, the University Rank and Tenure Committee recommended against tenure, a decision with which the Vice President for Academic Affairs and the President agreed.[47] Adelman-Reyes unsuccessfully grieved the denial and subsequently filed suit.[48]

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41. *See, e.g.*, Ward v. Midwestern State Univ., 217 F. App'x 325 (5th Cir. 2007); Cuenca v. Univ. of Kan., 101 F. App'x 782 (10th Cir. 2004); Kirk v. Hitchcock Clinic, No. 98-700-M, 2000 U.S. Dist. LEXIS 16458 (1st Cir. Sept. 29, 2000); Sawicki v. Morgan State Univ., No. WMN-03-1600, 2005 WL 5351448 (D. Md. Aug. 2, 2005); Zhou v. Pittsburg State Univ., 252 F. Supp. 2d 1194 (D. Kan. 2003); Slatkin v. Univ. of Redlands, 106 Cal. Rptr. 2d 480 (Cal. Ct. App. 2001); Mbarika v. Bd. of Supervisors of LSU, 992 So. 2d 551 (La. Ct. App. 2008). *But cf.* Cox v. Shelby State Cmty. Coll., 194 F. App'x 267 (6th Cir. 2006) (holding that a reasonable jury could conclude that the college's assertion that it terminated a tenured professor because of his "allegedly unprofessional conduct and lack of civility" was pretextual); Nanda v. Bd. of Trs. of the Univ. of Ill., No. 00 C 4757, 2004 U.S. Dist. LEXIS 2214 (N.D. Ill. Feb. 17, 2004).

42. 500 F.3d 662 (7th Cir. 2007).

43. *Id.* at 663.

44. *Id.*

45. *Id.*

46. *Id.* at 664.

47. *Id.*

48. Adelman-Reyes v. Saint Xavier Univ., 500 F.3d 662, 664 (7th Cir. 2007).

In affirming the district court's grant of summary judgment to the University, the Seventh Circuit held that the plaintiff failed to produce evidence sufficient to create a factual dispute on whether the University's stated reasons for denying her tenure were pretextual and a cover for discrimination against her because of her Jewish faith.[49] Particularly relevant to this article is the court's observation that "winning the esteem of one's colleagues is just an essential part of securing tenure."[50]

The Fifth Circuit held likewise in *Ward v. Midwestern State University*,[51] upholding the University's nonrenewal and tenure-denial decisions and finding that the plaintiff lacked the interpersonal skills necessary for a professor and coordinator of the Masters in Public Administration program. The University removed Ward from the coordinator position and declined to renew his contract because of several incidents of him shouting at other MPA faculty members during a faculty meeting, sending an email to all faculty chastising a fellow faculty member, and failing to attend faculty meetings.[52]

Ward claimed that the University denied him tenure and failed to renew his contract because of his race.[53] The court disagreed, holding instead that Ward did not produce specific facts to rebut the University's legitimate, nondiscriminatory reasons for its actions toward him—his lack of interpersonal skills necessary to serve as Coordinator or associate professor.[54] His "[c]onclus[ory] allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial."[55]

The Tenth Circuit in 2004 joined the federal appellate courts confirming the legitimacy of considering collegiality in a tenure denial situation.[56] In *Cuenca*, a *pro se* plaintiff sued the University of Kansas, claiming that the University denied him tenure in its Journalism School because of his race and his opposition to discrimination in the workplace.[57] He based his claims on both a remark by an external reviewer about his bringing up a "minority issue" in his statement of teaching philosophy and the warning of a fellow faculty member that "playing the race card in this workplace

49. *Id.* at 668–69.

50. *Id*. at 668 (quoting Namenwirth v. Bd. of Regents of Univ. of Wis. Sys., 769 F.2d 1235, 1243 (7th Cir. 1985)).

51. 217 F. App'x 325 (5th Cir. 2007).

52. *Id*. at 328.

53. *Id.* at 326.

54. *Id.* at 328.

55. *Id*. (quoting TIG Ins. Co. v. Sedgwick James of Wash., 276 F.3d 754, 759 (5th Cir. 2002)).

56. Cuenca v. Univ. of Kan., 101 F. App'x 782 (10th Cir. 2004).

57. *Id.* at 785.

would cost me."[58] The Tenth Circuit affirmed the district court's ruling that these were stray remarks by non-decision-makers that were unrelated to the tenure denial decision.[59]

Of more importance to this article, however, is the appeals court ruling on Cuenca's retaliation claim arising from the University's brief in opposition to summary judgment. In the brief, the University argued that at worst Cuenca had shown that his supervisors were often frustrated by his "lack of collegiality, unprofessional behavior, and unwarranted personal attacks on students, colleagues, the Journalism School, the University of Kansas or others."[60] The evidence showed that Cuenca's letters and emails to his supervisors contained a large amount of vituperation, impertinence, and criticism of both the University administration and colleagues.[61] Ruling against the plaintiff, the Tenth Circuit stated: "The discrimination statutes do not confer a license to present grievances in an arrogant and uncivil manner."[62]

The plaintiff in *Kirk v. Hitchcock Clinic*[63] addressed a denial of tenure due to lack of collegiality in an academic medical setting. Hitchcock hired Kirk in 1992 to work as a doctor in the Obstetrics and Gynecology Department, with an accompanying appointment to the medical staff of Mary Hitchcock Memorial Hospital and Dartmouth Medical School.[64] After five years, she was eligible for "voting membership," a status akin to tenure in an academic institution.[65] She received positive reviews and recommendations for three years.[66] After expressing concerns over the quality of care in the labor and delivery ward, plaintiff experienced a strained relationship with some of the nurses and the nursing leadership.[67]

In 1997, the Clinic's Board of Governors voted 23–0 to deny Kirk tenure and terminate her employment.[68] The stated reason was lack of collegiality.[69] After failing to have the tenure denial decision overturned through an internal appeals process and losing her claim under New Hampshire's "Whistleblower Act," Kirk brought her suit in federal court.[70]

The district court dismissed Kirk's Title VII sex discrimination claim

58. *Id*. at 788–89.
59. *Id*. at 789.
60. *Id*. at 790.
61. *Id.*
62. *Id.* at 790.
63. 261 F.3d 75 (1st Cir. 2001).
64. *Id*. at 77; Kirk v. Hitchcock Clinic, CIV. 98-700-M WL 1513715, at *1 (D.N.H. Sept. 29, 2000).
65. Kirk v. Hitchcock Clinic, 261 F.3d 75, 77 (1st Cir. 2001).
66. *Id.*
67. *Id*.
68. Kirk v. Hitchcock Clinic, CIV. 98-700-M WL 1513715, at *1 (D.N.H. Sept. 29, 2000).
69. *Id*. at *3.
70. *Id*. Kirk v. Hitchcock Clinic, 261 F.3d 75, 77 (1st Cir. 2001).

because the charge was not raised with the Equal Employment Opportunity Commission (EEOC) in a timely manner.[71] The court also dismissed Kirk's retaliation claim, holding that Kirk did not present evidence sufficient to establish a genuine issue of material fact that Hitchcock's proffered reason for its negative actions toward her (that Kirk did not practice medicine in a sufficiently collegial manner and created difficulties among her colleagues by her unprofessional approach to resolving issues) was pretextual.[72] The First Circuit adopted the district court's conclusion that Kirk's claim failed at the pretext third stage of the analysis and affirmed Hitchcock's denying Kirk tenure and ending her employment because of her lack of collegiality.[73]

A Maryland district court upheld a university's decision to deny a professor tenure on the grounds of non-collegiality and difficulty with interpersonal relationships with colleagues and students in *Sawicki v. Morgan State University*.[74] MSU hired Plaintiff Marianne Sawicki under a three-year contract as an Associate Professor in its Department of Philosophy and Religious Studies in March 2000.[75] MSU denied her tenure in June 2002.[76] Her terminal contract ended in June 2003.[77]

Sawicki sued MSU, contending that the University and various academic administrators all worked to undermine her advancement because she is a white female, at the same time providing more favorable treatment to black male instructors and students.[78] Defendants asserted, instead, that they denied tenure and ended Sawicki's employment because of concerns about her teaching, her strained relationships with colleagues in her department, and her fractured relationships with many of her students.[79]

Sawicki had several arguments with her department chair, a white male who had enthusiastically requested that she be hired as a full professor.[80] A white female departmental colleague stated that Sawicki "was the most

71. Kirk v. Hitchcock Clinic, CIV. 98-700-M WL 1513715, at *3.

72. Hitchcock Clinic, 261 F.3d 75, 77–78 (1st Cir. 2001).

73. *Id.* at 78–79.

74. Sawicki v. Morgan State Univ., CIV. WMN-03-1600, 2005 WL 5351448 (D. Md. Aug. 2, 2005), aff'd, 170 F. App'x. 271 (4th Cir. 2006).

75. *Id.* at *1.

76. *Id.*

77. *Id*.

78. *Id*.

79. *Id*. at *1–2. Sawicki encountered substantial problems with many of her students shortly after she arrived. *Id.* She applied strict rules restricting food or drink in the classroom and prompt attendance policies. *Id.* Students objected, and a major confrontation between Sawicki and her students ensued. *Id.* Sawicki instituted formal disciplinary proceedings against five of her students. *Id.* Fourteen of her students formally requested an investigation of her by the Chair for perpetuating "an inhospitable academic environment." *Id*.

80. *Sawicki*, CIV. WMN-03-1600, at *2.

difficult colleague I have ever had."[81] Another departmental colleague, also a white female, stated that Sawicki was "the most troublesome faculty member I have ever had to deal with in 20 years of employment in higher education."[82]

The district court found that Sawicki did not provide any evidence to refute the fact that she had a student rebellion in one of her classes, did not get along with her department colleagues, irrespective of race and gender, and did not have a single reviewer recommend her for tenure.[83] The court held that no reasonable juror could find that the circumstances surrounding Sawicki's tenure denial amount to unlawful discrimination.[84]

A Kansas district court addressed the subject of collegiality directly in *Zhou v. Pittsburg State University*.[85] The *pro se* plaintiff sued his former employer for breach of contract, national origin discrimination, and retaliation arising from the University's decision to deny him tenure.[86] Plaintiff based his claim of discrimination in large part on the second-year tenure review letter written by the Interim Chair of the Department of Music, Gene E. Vollen.[87] In this letter, the Interim Chair wrote positive comments as to plaintiff's teaching, scholarly activity, creative endeavor, and service.[88] As to his collegiality, however, Vollen wrote: "The Tenured Faculty do have serious concerns which need to be addressed and, while I am listing them under this heading [collegiality], they overlap with other areas, especially Teaching and Service."[89] He further noted that "[t]he Tenured Faculty feel that you need to agree to participate with a positive collegial attitude and professional behavior in order to become tenured at Pittsburg State University."[90]

Disagreements between the plaintiff and the new department chair, Dr. Anne Patterson, continued.[91] Patterson recommended that the University issue plaintiff a terminal contract for the 2000–01 academic year, saying: "I believe that retaining Wei-Kang Zhou is not in the best interest of the Department of Music. In a department that places high value upon collegiality and mutual effort toward common goals, Dr. Zhou is not a

81. *Id*. (noting that she was not receptive to her advice on effective class management and was generally unpleasant and difficult in departmental meetings).

82. *Id*.

83. *Id.* at *11.

84. *Id*. at *9. In so doing, the court also noted the Fourth Circuit's repeated reluctance to second-guess the inherently subjective tenure decisions of academic institutions. *Id.* at *8–9.

85. 252 F. Supp. 2d 1194 (D. Kan. 2003), *aff'd sub nom.* Wei-Kang Zhou v. Pittsburg State Univ., 03-3273, 2004 WL 1529252 (10th Cir. July 8, 2004).

86. *Id.* at 1215.

87. *Id.* at 1210.

88. *Id.*

89. *Id*.

90. *Id*.

91. *Id.* at 1210–11.

good match. His time here has been marked by discord and controversy."[92]

The University's President notified Plaintiff that the University would not continue his employment beyond the 2000–01 academic year.[93] Plaintiff sued.[94] The University moved for summary judgment and stated in its brief that it did not renew plaintiff's contract because of "his attitude, his failure to fulfill his job responsibilities and lying to the Music Chairperson about his involvement in the recruitment of a student."[95] The district court found that Plaintiff did not offer sufficient evidence that the University's stated reason for his nonrenewal for lack of collegiality was pretextual.[96] It granted the University's summary judgment motion in part and denied in part.[97]

In another national origin discrimination case, *Kalia v. City University of New York*,[98] the plaintiff claimed that Defendant CUNY failed to grant him early tenure and did not renew his employment because of his national origin. The University's stated reason for tenure denial was "plaintiff's pattern of untrustworthy behavior" and lack of collegiality as evidenced in his filing false observation reports for two adjunct professors.[99]

Much of the case centered around the strained relationship between Plaintiff and his Dean, who testified that his efforts against Plaintiff were based on his misconduct concerning the observation reports, his inability to admit fault regarding them, his negative attitude, his inability to work well with students, his mediocre scholarship and teaching evaluations, and his lack of collegiality.[100]

There is no question that the dean played an influential role in the negative tenure decision; however, the court ruling in favor of the University said that even if Plaintiff could establish that Defendant denied him tenure based on the personal enmity of his dean and colleagues,

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92. *Id*. at 1213.

93. *Id.* at 1214.

94. *Id.* at 1215.

95. *Id*. at 1220.

96. *Id.* at 1221.

97. *Zhou*, 252 F. Supp. 2d at 1221. The court denied Defendant's motion as to Plaintiff's claim that Defendant assigned him a heavy workload without additional pay because of his national origin, and as to Plaintiff's claim of a breach of the implied covenant of good faith and fair dealing. *Id.* at 1225. The court sustained Defendant's motion as to all of the Plaintiff's remaining claims. *Id.* The importance of this case lies in the fact that collegiality was one of the primary reasons the plaintiff was denied tenure. The court addressed the topic directly and seemingly with approval.

98. Kalia v. City Univ. of New York, 98 Civ. 441 (JSM), 2000 WL 1262905 (S.D.N.Y. Sept. 5, 2000), *aff'd sub nom.* Kalia v. City Coll. of City Univ., 10 F. App'x. 22 (2d Cir. 2001).

99. *Id*. at *3. In one case, Plaintiff filed a report after visiting only part of one class; for the other, he filed a report without ever having attended a class. *Id.* at *1. Plaintiff then asked the two adjuncts not to tell anyone about these lapses and to lie if asked. *Id*.

100. *Id*. at *4.

Plaintiff failed to connect this enmity to discrimination based on Plaintiff's national origin.[101]

In *Slatkin v. University of Redlands*,[102] an art-history professor denied tenure sued the University for religious discrimination under the California Fair Employment Act.[103] The University responded that it denied tenure because of deficiencies in the professor's teaching and/or her uncooperative actions as a colleague.[104]

The Chair of the Art Department expressed "reservations about [Plaintiff's] ability to interact harmoniously with others, accept criticism, and achieve goals of excellence in her teaching by modifying her teaching methods to increase the interest of her students."[105] Other colleagues asserted that Professor Slatkin is "volatile, does not listen well to differing opinions, undermines the authority of the chair, and has not been dependable in contributing her fair share to the resolution of departmental business."[106]

The appeals court characterized the question on appeal as: "Academic catfighting or anti-Semitism?"[107] While the evidence showed that several of the people involved in the tenure decision were prejudiced against Plaintiff, the same evidence showed that they were prejudiced against her as a matter of academic politics, rather than anti-Semitism.[108]

Relying heavily on the court's opinion in *Slatkin*, the California Court of Appeal affirmed summary judgment for the defendant in *Washington v. Trustees of the California State University and Colleges*.[109] Plaintiff, Dr. Pat Washington, was hired as the first African-American tenure-track faculty member of the Department of Women's Studies at San Diego State University.[110] She claimed that the University denied her tenure on the basis of her race and retaliated against her for complaining about racial discrimination at SDSU by criticizing her as being "uncollegial."[111]

The Trustees asserted, on the other hand, that SDSU denied Dr. Washington tenure because of her deficient scholarship about which she had been repeatedly warned.[112] They further asserted that there was no

101. *Id.* at *14.
102. 106 Cal. Rptr. 2d 480 (Cal. Ct. App. 2001).
103. *Id.* at 486.
104. *Id*. at 486–87.
105. *Id*. at 483.
106. *Id*. at 485.
107. *Id*. at 482.
108. *Slatkin*, 106 Cal. Rptr. 2d at 482. It is interesting to note the court's finding that the prejudice against Plaintiff by the academic decision-makers for personal reasons was not evidence of unlawful discrimination. *Id*. at 488–89.
109. 2006 Cal. App. Unpub. LEXIS 3111 (Cal. Ct. App. Apr. 14, 2006).
110. *Id.* at *2.
111. *Id*. at *1, *3. SDSU is operated by the Trustees of the California State University and Colleges system's governing board. *Id.* at *1 n.1.
112. *Id.* at *32–33.

evidence in the record that SDSU retaliated against her because of her complaints about possible race discrimination.[113]

Permeating the record were descriptions of Plaintiff's strained relationships with her colleagues. The Department Chair accused Washington of trying to sabotage a conference sponsored by the Department.[114] Three faculty members in the Department stated that they would no longer be willing to sit on Plaintiff's tenure review committee.[115] Another faculty member said she would retire if required to do so.[116] The Dean wrote Plaintiff a letter in which he summarized some of her colleagues' concerns about her, including their belief that she "acted in a rude, selfish, and insensitive manner . . . ."[117] The Dean further stated: "It is my observation that these faculty have legitimate concerns, and I urge you to alter your behavior."[118]

The California Court of Appeal agreed with the trial court that Plaintiff did not provide sufficient evidence that Defendant's stated reason for her tenure denial, i.e., deficient scholarship, was pretextual or that criticisms of Plaintiff's lack of collegiality were based on her complaints about race discrimination.[119]

B. Termination of Tenure

There have been a number of cases since 2001 involving the termination of tenured faculty in part because of a lack of collegiality. In many of these cases, the aggrieved faculty member has challenged the termination on the basis of race, gender, or national origin discrimination, or claims of denial of free speech rights. In all of the cases, the courts have upheld the consideration of collegiality as a legitimate factor in evaluating a tenured faculty member. In the majority of the cases, the courts have rejected the faculty member's claims and upheld termination by the university based on lack of collegiality.[120] In a few cases, the court has said that it was for the jury to decide if they believe the university was genuine in its concern about collegiality or whether it was used as a pretext for discrimination.

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113. *Id*.
114. *Washington*, 2006 Cal. App. Unpub. LEXIS 3111, at *4.
115. *Id.* at *5.
116. *Id.*
117. *Id*.
118. *Id*.
119. *Id*. at *31–33, 38, 46.
120. *See, e.g.*, Cox v. Shelby State Cmty. Coll., 194 F. App'x. 267 (6th Cir. 2006); Llano v. Berglund, 282 F.3d 1031 (8th Cir. 2002); Finch v. Xavier Univ., 689 F. Supp. 2d 955 (S.D. Ohio 2010); Frierson-Harris v. Hough, 2007 WL 2428483 (S.D.N.Y. Aug. 24, 2007); Sengupta v. Univ. of Alaska, 21 P.3d 1240 (Alaska 2001); Bernold v. Bd. of Governors of Univ. of N.C., 683 S.E.2d 428 (N.C. Ct. App. 2009); Mega v. Whitworth Coll., 158 P.3d 1211 (Wash. Ct. App. 2007); Marder v. Bd. of Regents of Univ. of Wis. Sys., 706 N.W.2d 110 (Wis. 2005).

1. Cases Supporting the College's or University's Decision to Terminate a Tenured Faculty Member for Lack of Collegiality

In *Sengupta v. University of Alaska*,[121] the Alaska Supreme Court held that a tenured professor's lack of collegiality, evidenced by his unprofessional and disruptive conduct, might, along with other factors, constitute sufficient "cause" for termination by a public university.[122] In so holding, the Court rejected claims that the termination was motivated by national origin and color discrimination.[123]

Dr. Mritunjoy Sengupta, an Indian by birth and descent, was a tenured professor of engineering at the University of Alaska-Fairbanks.[124] Two years into his tenure, Sengupta filed several grievances against the University, alleging in part that he, and not his colleague, should have been appointed head of the engineering department and director of a University research institute.[125]

Sengupta's claims were denied by the University in part because the grievance proceedings demonstrated his lack of collegiality.[126] Specifically, it was found that he had "demeaned, degraded, and abused his colleagues" and "repeatedly dealt with his colleagues and the University in a dishonest manner."[127] The record also showed that Sengupta had "testified falsely under oath multiple times during the hearing[,] created and introduced false documents," "committed plagiarism by copying material from another University professor without proper credit," and "intentionally misrepresented his academic degrees."[128] Based on these findings, University administration sent Sengupta a notice stating its intention to discharge him for "cause," pursuant to University policy, and initiate termination proceedings.[129] "Cause" was defined as "some substantial shortcoming, [including unprofessional conduct,] which render[ed] continuance in employment detrimental to appropriate discipline and efficiency of service."[130] At each stage of the termination proceedings, the decision-making committee or individual found that Sengupta should be terminated. For example, the pre-termination hearing officer concluded that Sengupta's "propensity for dishonest, unprofessional and disruptive behavior" rendered his continued employment at the University

121. 21 P.3d 1240 (Alaska 2001).
122. *Id.*
123. *Id.* at 1258.
124. *Id.* at 1245.
125. *Id.*
126. *Id.* at 1246.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 1246 n.1.

"detrimental to appropriate discipline and efficiency of service."[131] On Sengupta's administrative appeal, the superior court found "substantial evidence to support" the University's termination decision.[132]

Following his termination, Sengupta filed several claims against the University and others, alleging that his termination was motivated in part by discrimination against his national origin and color.[133] The superior court granted the University summary judgment on Sengupta's § 1981 mixed motive discrimination claim, which was affirmed by the Supreme Court of Alaska. The supreme court, on viewing the evidence in the light most favorable to Sengupta, found that he did not meet his burden of producing evidence of conduct or statements by persons involved in the decision-making process that was directly tied to the alleged discrimination in his termination.[134] For example, Sengupta provided no evidence of "racial or national origin animus such as derogatory remarks about employees from India" and his evidence "consist[ed] largely of his own conclusory affidavit testimony."[135] Sengupta thus failed to show that the University's termination decision, which was based in part on his lack of collegiality, was motivated by national origin or color discrimination.

A year after the Alaska Supreme Court decided *Sengupta*, the Eighth Circuit Court of Appeals, in *de Llano v. Berglund*, addressed a public university's use of collegiality as a factor in firing a tenured professor.[136] Manuel de Llano, a professor of physics, was fired by North Dakota State University approximately six years after he was granted tenure, in part because of his "complete and utter lack of collegiality and cooperation with peers . . . [which made his] continued effectiveness in the department impossible."[137] Other contributing factors included the "harassed" staff in de Llano's department, his "excessive filing of frivolous grievances with the intent to harass" coworkers, and his failure to "correct deficient behavior even after receiving two letters of reprimand."[138]

De Llano's lack of collegiality was further evidenced by his "acrimonious relations" with University administration and department colleagues, his removal as department chair "to improve the morale of the department and to strengthen the program in physics," his authorship of a "series of derogatory letters" concerning several faculty members, his receipt of "several letters" from administration regarding his "disruptive conduct," his letters to a local newspaper regarding a "variety of ongoing [departmental] conflicts," department censure for "verbally harassing" the

131. *Id.* at 1246.
132. *Id.* at 1247.
133. *Id.*
134. *Id.* at 1258–59.
135. *Id.* at 1258.
136. 282 F.3d 1031 (8th Cir. 2002).
137. *Id.* at 1034.
138. *Id.*

department secretary and for "failing to attend faculty meetings," and the transferring out of over "ninety percent" of his introductory physics class.[139]

After his termination, de Llano sued the University, claiming in part that he was denied procedural due process because he was accused of "general violations of university policy and not specific acts."[140] Contrary to de Llano's assertion, the court found that the University's notice of dismissal to de Llano did not contain "vague accusations" but "specifically outlined" the reasons for de Llano's dismissal, including, the "lack of collegiality, harassment of department personnel, refusal to heed prior warnings regarding his conduct, and the excessive filing of grievances."[141]

De Llano also claimed that the University, in firing him, violated his First Amendment right to write letters publicly criticizing the University.[142] The court found that although these letters contained "occasional" comments that may be "properly characterized as issues of public concern" and thus protected by the First Amendment, there was no evidence that these "few" comments were a "substantial or motivating factor" in his termination.[143] The University was thus able to sustain the termination of a tenured faculty member on grounds of his lack of collegiality.

In another example of a public university considering collegiality in its decision to terminate a tenured professor, the North Carolina Court of Appeals in 2009 decided *Bernold v. Board of Governors of the University of North Carolina*,[144] a case in which a tenured professor was fired for his "incompetence of service," which was evidenced by his lack of collegiality.[145] During his tenure, Leonard Bernold, a professor of engineering at North Carolina State University, received three consecutive annual post-tenure review findings of "does not meet expectations."[146] These reviews constituted evidence of Bernold's "professional incompetence," pursuant to the University's post-tenure regulations.[147]

In keeping with its regulations and based on these reviews, the University initiated discharge proceedings against Bernold, whose discharge was affirmed by the University's Board of Governors.[148] After his discharge, Bernold filed suit against the University, alleging that the University had violated his substantive and procedural due process rights, and that no substantial evidence supported his discharge. In his appeal,

139. *Id.* at 1033.
140. *Id.* at 1034.
141. *Id.* at 1035.
142. *Id.* at 1036.
143. *Id.* at 1037.
144. 683 S.E.2d 428 (N.C. Ct. App. 2009).
145. *Id.* at 431.
146. *Id.* at 429.
147. *Id.* at 429–30.
148. *Id.* at 430.

Bernold contended that the lower court erred in upholding his discharge on "grounds of lack of collegiality."[149]

The Court of Appeals affirmed the lower court's decision, finding that the University had complied with state law and its own procedures in discharging Bernold. State law permitted Bernold's discharge for "incompetence," which was evidenced by his "interactions with colleagues [that] had been so disruptive that the effective and efficient operation of his department was impaired."[150] Further, Bernold was aware that "collegiality or lack thereof was one possible focus of evaluation during his post-tenure reviews" as the college of engineering regulations provided that "each faculty member is expected to work in a collegial manner."[151] The court disagreed with Bernold that a "lack of collegiality cannot constitute incompetence" and found that the record contained "ample evidence that [Bernold] was disruptive to the point that his department's function and operation were impaired."[152] The court also noted that Bernold failed to cite authority that "disruptive behavior cannot constitute incompetence."[153] The University thus prevailed in using Bernold's lack of collegiality and disruptive behavior as evidence of his incompetent service to the University and as grounds for his termination.

The issue of collegiality among faculty has also been addressed in the private school context. The case of *Frierson-Harris v. Hough*, for example, also involved the dismissal of a tenured professor based on, among other factors, his "lack of collegiality."[154] This lack of collegiality was evident, for example, in Michael Wesley Frierson-Harris's "refusal to cooperate" in the resolution of Union Theological Seminary's financial problems.[155] Due to these financial problems, the Seminary decided to lease certain of its housing space to third parties and asked the professors in this building to relocate.[156] Relocation assistance and new housing were provided by the Seminary. Harris was the only faculty member who did not cooperate with this process and created numerous difficulties for the seminary, including forcing it to engage in eviction proceedings against him, refusing to move to the assigned alternate housing, refusing to move his property from the hallway of his new residence, forcing the university to pay for offsite storage facilities for his belongings, and rejecting the president's attempt to gain his cooperation.[157] Based on his "refusal to cooperate" with the relocation process and his "lack of collegiality," the

149. *Id.* at 430.
150. *Id.* at 431.
151. *Id.*
152. *Id.* at 432.
153. *Id.*
154. 2007 WL 2428483, at *5 (S.D.N.Y. Aug. 24, 2007).
155. *Id.*
156. *Id.* at *3.
157. *Id.* at *4–*5.

Seminary instituted dismissal proceedings against Harris.[158]

A dispute resolution committee examined Harris's record and found that his "withholding of cooperation and threats of litigation against fellow faculty members . . . impeded debate and created an atmosphere of fear and apprehension on the part of his faculty colleagues that impact[ed], in a very real and negative way, [the Seminary's] small community of scholars."[159] Based on this record, the Board of Trustees voted unanimously to fire Harris and revoke his tenure.[160]

Harris brought suit against the Board of Trustees, the president, certain faculty members and other persons on several counts, including a § 1981 claim that his dismissal was racially motivated.[161] As proof of racial discrimination, Harris cited to only one racially discriminatory remark by a university official who was not involved in the termination process and was not a defendant.[162]

The court granted the Seminary and other defendants summary judgment on Harris' discrimination claim because he failed to make a prima facie showing that his termination occurred under circumstances giving rise to an inference of racial discrimination.[163] The Seminary thus prevailed in firing a tenured professor for, among other reasons, a lack of collegiality, and overcame a claim that the firing was racially motivated.

2. Cases in Which the Court Did Not Affirm the Decision to Terminate, Even Though Affirming the Legitimacy of a College or University Considering Collegiality

There are several cases in which the courts, for a variety of reasons, have refused to uphold the college or university decision to terminate a tenured faculty member for lack of collegiality. Those reasons include the college or university failing to follow its own policies and procedures in terminating a faculty member, a violation of procedural due process, or because the court believed there was contradictory evidence about the university's motive that presented a jury question.

In 2005, the Wisconsin Supreme Court decided *Marder v. Board of Regents of the University of Wisconsin System*,[164] a case that involved the termination of a tenured faculty member by a public university's board of regents, based on behavior that "contributed to the breakdown of collegiality" within the faculty member's department.[165] John Marder was

158. *Id.* at *5.
159. *Id.* at *6.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at *7.
164. 706 N.W.2d 110 (Wis. 2005).
165. *Id.* at 116.

a tenured faculty member in the communicating arts department at the University of Wisconsin Superior.[166] The University initiated termination proceedings against Marder based on eighteen separate charges.[167] The University believed that these charges evinced "a pattern of behavior" that was inconsistent with its expectations of its tenured faculty members and that violated "standards of professional conduct," thus constituting "just cause" for Marder's termination.[168]

During Marder's termination proceedings, the faculty terminations committee found that Marder had "engaged in a course of conduct" that was "simply unacceptable" at the University.[169] This included inappropriate conduct with female students and "harassing and disruptive behavior toward . . . faculty colleagues and departmental staff," which required the University to move his office to another building and reduce his workload.[170] Despite findings of Marder's non-collegial behavior, faculty and board review committees did not recommend his termination.[171] The chancellor, however, pursued termination because it was "necessary to maintain faculty morale and [University] integrity."[172] The Board of Regents subsequently found just cause for dismissal and affirmed Marder's termination.[173]

While Marder did not contend that there was insufficient evidence to terminate him for "just cause," he filed suit against the University claiming in part that ex-parte communications between the chancellor and the Board of Regents, before the board meeting to vote on his termination, violated his procedural due process rights under state statutory law.[174] The court found that Marder's rights under state law were not violated, but that his constitutional due process rights required his presence at any hearing in which new facts were presented and on which his termination was based.[175] The court thus remanded Marder's case to the circuit court to determine whether such facts were presented.[176]

While this case does not turn on the sufficiency of evidence upon which the University's termination decision was based, it is interesting that Marder does not even contend that there was insufficient evidence of his lack of collegiality or that it was an inappropriate basis for his

166. *Id.* at 113.
167. *Id.*
168. *Id.*
169. *Id.* at 114.
170. *Id.* at 114.
171. *Id.*
172. *Id.* at 115.
173. *Id.* at 116.
174. *Id.*
175. *Id.* at 116–17.
176. *Id.* at 117.

termination.[177] The case also depicts the detail in which universities must keep records of alleged non-collegial behavior for it to constitute "just cause" for the termination of a tenured faculty member.

Lastly, this case is telling for the resistance and difficulty that university administration typically faces in firing a tenured faculty member, as even with eighteen charges of misconduct that amounted to a "near total breakdown in collegiality" in Marder's department, the faculty and board review committees recommended against termination.[178] Despite these hurdles, the University was able to garner enough evidence of Marder's non-collegial behavior for a Board vote of eleven to three in favor of terminating Marder.

The following year, the Sixth Circuit Court of Appeals heard *Cox v. Shelby State Community College*, a case in which a male, African-American, tenured professor of psychology was fired by a community college.[179] During his twenty-five years at Shelby State Community College, Robert Cox filed numerous complaints alleging gender and racial discrimination with the College's affirmative action officer and with the Equal Employment Opportunity Commission.[180] Cox filed these complaints at various stages in his career and in response to different circumstances; for example, when he received negative feedback from his students and colleagues regarding a course, when he was denied travel reimbursement by the president, and when faculty members critiqued his class syllabus.[181]

Allegedly based on his performance and student complaints, the College took several adverse employment actions against Cox, which included suspending his teaching schedule, formally relieving him of his teaching duties due to "unsatisfactory performance" and "student complaints," and requiring his participation in an "action plan" "designed to increase his pedagogical skills and to improve his attitude."[182] The plan called for Cox to be assigned a supervisor with whom he would meet weekly and to whom he would send monthly reports.[183] Three months into the action plan, however, an administrative officer decided that the college should initiate termination proceedings, despite Cox's compliance with the program and the College's promise that he would have the entire fall to improve before re-evaluation.[184]

During the termination proceedings, Cox's internal discrimination complaints were introduced at the termination hearing along with the

177. *Id.* at 113.
178. *Id.* at 114.
179. 194 F. App'x 267 (6th Cir. 2006).
180. *Id.* at 268.
181. *Id.* at 268–70.
182. *Id.* at 269–70.
183. *Id.* at 269.
184. *Id.* at 269–70.

testimony of the College's affirmative action officer, notwithstanding Cox's attorney's objections.[185] The College contended that this evidence was introduced "solely to demonstrate Cox's lack of collegiality and unprofessional conduct toward his colleagues and the administration."[186]

After his termination, Cox sued the College and the Tennessee Board of Regents on a number of claims, including that the affirmative action officer's testimony regarding his racial discrimination complaints constituted unlawful retaliation under Title VII of the Civil Rights Act of 1964.[187] Following a jury verdict in favor of Cox on this claim, the College appealed.[188] In denying this appeal for judgment as a matter of law, the Sixth Circuit found that Cox presented "sufficient evidence for a reasonable jury to have found that [the College] unlawfully retaliated against . . . Cox, thus violating Title VII of the Civil Rights Act of 1964," and that his "allegedly unprofessional conduct and lack of civility" was a pretext for discrimination.[189] The court noted that it was an "inescapable fact" that Cox's complaints were used in some manner during every adverse employment action that he suffered.[190] For example, the administrative memorandum suspending Cox's teaching duties stated that through

> memos and actions you have a long history of filing racial and gender discrimination lawsuits that are not in the vein of problem solving for a better College; but are deemed baseless by the civil rights commission that takes up many hours of administrative time, distracts from student success, and adds little to the espirit de corps of the college.[191]

It was thus "entirely possible that a reasonable jury could have found [the College's] explanation to lack credibility."[192] The college thus failed to prove that it was Cox's lack of collegiality and poor performance that motivated his termination, as opposed to retaliation for his filing of gender and racial discrimination complaints.

For different reasons than those presented in *Cox*, the Washington Court of Appeals, in *Mega v. Whitworth College*, also refused to uphold the College's decision to terminate a tenured professor for lack of collegiality.[193] Dr. Tony Mega, a chemistry professor at Whitworth College, was granted tenure against the recommendation of his evaluation

185. *Id.* at 270–71.
186. *Id.* at 271.
187. *Id.*
188. *Id.*
189. *Id.* at 273, 275.
190. *Id.* at 275.
191. *Id.* at 269.
192. *Id.* at 275.
193. 158 P.3d 1211 (Wash. Ct. App. 2007).

committee, which had "lost confidence in [Mega's] collegiality."[194] Despite this negative vote, the College's president recommended Mega for tenure in exchange for his agreement to treat "his colleagues and others collegially, with courtesy and thoughtfulness."[195] Mega also agreed "that a breach of these professional responsibilities may be construed by the administration as an act of insubordination and could result in the action to terminate a tenured appointment."[196] Based on the president's recommendation and Mega's "interim collegiality," the Board of Trustees granted Mega tenure.[197]

The College soon began receiving complaints about Mega's behavior, but still entered into three subsequent tenure contracts with Mega, the last of which made the offer of appointment subject to the College's faculty handbook dismissal procedures.[198] The College eventually initiated dismissal proceedings against Mega, whose dismissal was affirmed by the trustees.[199]

Upon his dismissal, Mega sued the College alleging in part that the College had breached its contract with him.[200] While the jury found for the College, it was allowed by the trial court to consider the terms contained in the president's letter to Mega, including the requirements of collegiality, a part of Mega's contract. The trial court determined that it had erred in doing so and granted Mega a new trial on several breach of contract issues.[201] This decision was upheld by the Court of Appeals. Based on his last employment agreement, the court found that Mega's termination was controlled by the contract provisions in the faculty handbook, and the president's letter, which was fully performed, was limited to the College's initial decision to grant tenure. There was thus a "tenable basis" for the trial court's new trial order.[202]

While the college failed to incorporate the collegiality requirements from Mega's first employment contract into his final one, this case shows that educational institutions have used collegiality as an explicit contractual requirement for tenured professors and consider a lack of collegiality to be grounds for dismissal.

In another decision in which the court held that a jury determination was in order, *Finch v. Xavier University*[203] involved the termination of Miriam Finch and Tara Michels, two tenured female professors over the age of

194. *Id.* at 1213.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 1213–14.
199. *Id.* at 1214.
200. *Id.*
201. *Id.* at 1216–17.
202. *Id.* at 1217.
203. 689 F. Supp. 2d 955 (S.D. Ohio 2010).

forty, by Xavier University because they were "jointly responsible for the dysfunctional atmosphere" in its Communication Arts Department.[204] The professors' "lack of collegiality" was a central issue in their termination and ensuing suit against the University, as their termination proceedings arose in the midst of their "continuing conflict" with the Communications Arts Department.[205]

The record reflects that the department was "factionalized and beset by in-fighting among its faculty" and that there were a "myriad of incidents and disputes" between the professors and the department chair, pertaining to "departmental policy, teaching assignments, a new faculty search, and . . . performance reviews."[206] The professors also filed formal discrimination complaints against the department chair.[207] An ad-hoc committee, allegedly constituted to investigate the inner workings of the department, recommended instituting formal termination proceedings against the professors for "gross dereliction in carrying out their ethical responsibilities" to the University and because they, along with a male professor, "combined to create a hostile and non-collegial work environment" with no evidence that they might change their behavior without a removal of the department chair.[208] Thereafter, a five-member faculty committee unanimously recommended that the professors be terminated, and that recommendation was subsequently adopted by the president.[209] As a result, the professors were given a one year terminal contract, with notice that they would be dismissed at the end of that year.[210]

The professors filed suit against the university alleging in part that the University was guilty of gender and age discrimination, retaliation, and breach of contract.[211] The professors introduced evidence that the male professor in their department, who was also accused of non-collegial behavior by the ad-hoc committee, was treated more favorably than they were and was not terminated.[212] Based on the evidence, the court denied the University's motion for summary judgment on the professors' discrimination claim, because while the professors' "alleged obstreperous conduct provide[d] [the University with] a legitimate, non-discriminatory reason for their discharge," the professors produced sufficient evidence that their alleged uncollegiality may have been a pretext for gender and age discrimination by the University.[213]

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204. *Id.* at 959–60.
205. *Id.* at 960.
206. *Id.*
207. *Id.*
208. *Id.* at 960, 964.
209. *Id.* at 960.
210. *Id.*
211. *Id.* at 961.
212. *Id.* at 963.
213. *Id.* at 964.

Similarly, the court denied the University's motion for summary judgment on the professors' retaliation claim because while their "alleged misconduct" provided the University with a "legitimate, non-retaliatory reason for their discharge," they introduced evidence that the third professor who did not file discrimination complaints was not recommended for termination proceedings.[214] Further, evidence showed that the University viewed the "lodging [of the] discrimination complaints" against it and other faculty members as "arrogant," "uncivil," and "uncollegial."[215] The court noted, however, that viewing the evidence in the light most favorable to the University, it was possible for a reasonable jury to conclude that the professors "were the major source of discord" within the department and that their conduct violated University standards and policy, thus providing a "substantial basis" for the conclusion that the University acted in good faith and not in a discriminatory or retaliatory manner.[216]

Lastly, in light of the conflicting evidence, the court denied the parties cross-motions for summary judgment on the professors' breach of contract claim, in which they alleged that the University breached its employment contract with them by discharging them for less than "serious cause."[217] The University contended, however, that the faculty handbook provisions on a "Climate of Respect" were breached when professors made "false accusations of discrimination and improper conduct against other faculty members and . . . discriminat[ed] against co-workers and job applicants based on national origin and race."[218] Thus, while the University failed to produce evidence sufficient to warrant summary judgment in its favor, the court noted that a jury may reasonably find that the University's termination of the professors was based on their lack of collegiality and disruptive behavior.

In conclusion, these cases all support the consideration of collegiality as a factor in termination of tenured faculty, but the courts also do not necessarily accept the University's determination without going through the analysis that is called for in employment discrimination or constitutional law cases, and they sometimes prefer leaving it to a jury to decide whom they believe.

C. Refusal to Hire, Termination during Probationary Period, and Contract Non-Renewal

Although previous studies have focused on the use of collegiality in tenure, promotion, and termination decisions, the review of case law since 2000 indicates an interesting new trend. In numerous cases, colleges and

214. *Id.* at 966.
215. *Id.*
216. *Id.* at 967.
217. *Id.* at 968–69.
218. *Id.* at 969.

universities have embraced collegiality as a standard by which they have denied employment to adjunct faculty members who applied for tenure-track faculty positions, issued terminal contracts to tenure-track faculty members during their probationary period, or declined to renew contracts because of performance concerns including collegiality. As in other cases, plaintiffs in these circumstances have argued that adverse employment decisions were the result of retaliation or age, race, national origin, or gender discrimination. This section outlines cases in which courts have addressed a variety of such issues and regularly found the university's rationale for the decision, including collegiality considerations, controlling.

1. Adjunct Faculty Not Hired for Tenure-Track Positions

The case of *Gronowicz v. Bronx Community College*[219] presented the issue of an age discrimination claim that ultimately turned on poor performance and lack of collegiality on the part of the faculty member, an adjunct history professor at a community college, who filed suit arguing that he was not hired for a tenure-track position because of age discrimination.[220] The professor, Anthony Gronowicz, could not rebut the College's legitimate, non-discriminatory rationale for declining to hire him, arising from poor performance in the required faculty presentation and subsequent interview.[221] The court noted that the College had introduced evidence showing that "faculty members who made the hiring decisions had concerns over Gronowicz's interpersonal skills."[222] Further, "[m]ultiple faculty members stated that they felt that [Gronowicz] did not possess the requisite level of collegiality. A former colleague of Gronowicz's explained, 'I thought, and still believe, that Dr. Gronowicz was unreliable, difficult, and would give the department a bad name wherever he was involved.'"[223] The court ultimately held that the "belief among faculty members making the hiring decisions that Gronowicz was insufficiently collegial . . . constitute[d] a legitimate non-discriminatory reason, rebutting [his] prima facie case."[224]

Another example of a situation where an adjunct professor was not hired for a tenure-track position is *Alvarez-Diemer v. University of Texas-El Paso*, which was decided by the Fifth Circuit Court of Appeals in 2007.[225] Rossana Alvarez-Diemer, the plaintiff, was hired as a visiting faculty member in the business school in 1999 and applied for a tenure-track

219. 2007 U.S. Dist. LEXIS 74917 (S.D.N.Y. 2007).

220. *Id.*

221. *Id.* at *3.

222. *Id.* at *6. At least one member of the faculty hiring committee had worked with the plaintiff previously and was familiar with his performance as an adjunct faculty member.

223. *Id.* at *6–*7.

224. *Id.* at *7.

225. 258 F. App'x 689 (5th Cir. 2007).

position in 2000.[226] The University offered her only a non-tenure track visiting position in May 2001, which she accepted.[227] She again applied for the tenure-track position in 2002; however, the interview did not go well, she was not hired, and she appealed to the provost, who upheld the decision not to hire.[228] She filed an Equal Employment Opportunity Commission (EEOC) complaint in 2004 alleging gender and race discrimination.[229] The district court granted summary judgment to the University because, although the professor established a prima facie case, she could not overcome the University's legitimate, non-discriminatory rationale for the decision.[230] The Fifth Circuit subsequently affirmed, relying on a six to two faculty vote against hiring her because of "lack of experience[,] . . . her potential for publishing on strategic management, and her collegiality with UTEP faculty during her employment as a visiting professor."[231]

While *Gronowicz* and *Alvarez-Diemer* took place in the public university context, the case of *Panter v. California Institute of the Arts* involved a faculty member at a private university who sought to change her employment status from adjunct to regular faculty.[232] During the process, however, another colleague alleged that she was having an extra-marital affair.[233] The professor filed a complaint in which she alleged that her colleague's accusations constituted "uncollegial behavior" and sexual harassment.[234] The grievance committee concluded that his behavior was not sexual harassment, but "violated faculty collegiality and professionalism rules. [He] was censured, denied any pay raise for one year, and the committee's report was made part of his personnel record."[235] Thus, the collegiality issue in this case did not involve the plaintiff's campaign to pursue a regular faculty position, but it is interesting to note that the private institution disciplined the other faculty member for violating collegiality by suggesting that the plaintiff was having an affair. It is interesting to note that in two of the failure to hire cases, the fact that the applicants had taught as adjunct faculty members was actually a detriment to success at being hired in permanent positions. Equally non-collegial applicants with no "history" with the department may have been more favorably received.

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226. *Id.* at 690.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 691.
232. No. B167686, 2004 Cal. App. Unpub. LEXIS 7179, at *6 (Cal. Ct. App. July 30, 2004).
233. *Id.* at *7.
234. *Id.* at *9.
235. *Id.* at *10.

2. Terminal Contracts or Contracts Not Renewed

In *Miller v. University of South Alabama*,[236] a tenure-track professor in the English department filed suit when she was issued a terminal contract, arguing that she was dismissed in retaliation for her opposition to alleged discriminatory hiring practices in violation of Title VII and the First Amendment.[237] The chair of the department wrote a memorandum to the dean stating:

> After careful consideration and consulting with a number of colleagues, I regrettably feel that it is in the best interest of the English Department that [plaintiff] be non-reappointed. *There are serious problems regarding her collegiality*. In addition, [she] has a weak scholarly record and only 'favorable,' rather than good or excellence [sic] reviews in the area of teaching. She does not appear to be a good fit for our department.[238]

A federal district court found that she had not engaged in statutorily protected speech under Title VII,[239] nor had she engaged in protected speech for First Amendment purposes,[240] and granted summary judgment to the University and individual defendants.

Whereas *Miller* dealt with a retaliation claim, *Mbarika v. Board of Supervisors of LSU* involved direct claims of race discrimination and defamation.[241] Dr. Victor Mbarika, a tenure-track professor in the business school at Louisiana State University, filed suit when he was issued a terminal contract because of poor teaching and sub-par publication evaluations.[242] The Louisiana Court of Appeals affirmed the grant of summary judgment to Defendants, concluding that Mbarika did not show that he was replaced by someone outside of a protected class or that the University's rationale was a pretext for discrimination.[243] Moreover, the court resoundingly found that Mbarika "did not meet the standards for teaching, publishing and collegiality that would have permitted his reappointment."[244] The court further noted:

In making a recommendation regarding Dr. Mbarika's reappointment to another term, the tenured faculty considered, *in addition to his teaching, scholarship, and service, his collegiality and his role in the department*. They stated that Dr. Mbarika showed a disregard for behaviors normally

236. No. 09-0146-KD-B, 2010 U.S. Dist. LEXIS 48643 (S.D. Ala. May 14, 2010).
237. *Id.* at *3–*4.
238. *Id.* at *16 (emphasis added).
239. *Id.* at *28.
240. *Id.* at *35.
241. Mbarika v. Bd. of Supervisors of LSU, 992 So. 2d 551, 554, 556–57 (La. Ct. App. 2008).
242. *Id.* at 554, 556–57.
243. *Id.* at 562.
244. *Id.*

associated with being a good colleague; for example, [he] missed classes, regularly came late to class, treated students in a disrespectful and unacceptable manner, and failed to show up to lecture for another professor's class after agreeing to do so.[245]

The faculty ultimately declined to recommend Mbarika for reappointment because his record in scholarship and instruction did not suggest the promise of a successful tenure review, nor was "his collegial behavior acceptable."[246] The department chair agreed and declined to recommend renewal of Mbarika's appointment because his "non-cooperative, disruptive, and combative behavior demonstrated a lack of collegiality and significantly interfered with the mission of the department."[247]

In yet another example of a suit alleging race discrimination, *Truong v. Regents of the University of California* involved a medical professor who was issued a terminal contract.[248] The University, in a report resulting from his internal grievance, stated: "It does appear that [the professor] may have experienced some relatively subtle discrimination based on differences in cultural behaviors ('team' issues) and his national origin (accent)."[249] The report concluded, however, that "there is no probable cause to believe [he] was the victim of malicious or purposeful discrimination. Instead, there appears to have been a series of administrative bungles exacerbated by an obvious lack of collegiality."[250] A California appellate court, finding that the professor produced no evidence to support his discrimination complaint,[251] affirmed the lower court's decision and concluded that the professor was properly dismissed.

Moving away from the race-based discrimination context, the Eighth Circuit Court of Appeals in *Carleton College v. National Labor Relations Board*[252] addressed a dispute concerning faculty speech and behavior considered unacceptable by the institution. An adjunct faculty member in the College's music department was denied a subsequent contract because of his rude behavior and poor attitude in a meeting with the College's dean.[253] An administrative law judge concluded that the professor's termination was improper, and the National Labor Relations Board

245. *Id*. at 557 (emphasis added).

246. *Id*.

247. *Mbarika*, 992 So. 2d at 558. The department chair testified that in twenty years he had never "had another professor do the things that Dr. Mbarika did in his three years at LSU." *Id*. at 559. He gave as examples of unprofessional [uncollegial] behavior Mbarika's appearing in an MBA class with a baseball cap on backwards after the director of the MBA program had counseled him to dress more professionally. *Id*.

248 No. G028520, 2002 Cal. App. Unpub. LEXIS 9355 (Cal. Ct. App. Oct. 7, 2002).

249 *Id.* at *11.

250 *Id.*

251 *Id.* at *18.

252 230 F.3d 1075 (8th Cir. 2000).

253 *Id.* at 1077.

(NLRB) adopted those findings.[254] On appeal, however, the Eighth Circuit Court of Appeals concluded that the decision not to renew his contract was based on his behavior at the meeting, not on any protected activity.[255] The appellate court, relying on the Supreme Court's recognition of "the importance of collegiality to academic institutions,"[256] found that the NLRB's decision did not consider "[the College's] interest in fostering and maintaining mutual respect among faculty, which is, as all witnesses recognized, not only a legitimate academic interest but a necessary one."[257] The appellate court also found that:

> The Board [NLRB] believed that [the professor's] language at the meeting was merely the "salty language" that an employer must tolerate in labor matters. Perhaps, such language might be excused in a different setting. However, in the context of a meeting with the dean of the college which was called to discuss professional expectations for the future, [the professor's] use of vulgarities and description of the music department as a "laughingstock" and a "pig" evidenced his disrespect of the music department and unwillingness to commit to act in a professional manner.[258]

Finally, the Eighth Circuit concluded that ultimately it was the professor's unwillingness to comport himself in a professional fashion that led to his dismissal, not the content of his speech.[259]

The non-reappointment of a tenure-track faculty member before he stood for tenure review gave rise to litigation in *Stanton v. Tulane University*.[260] Tulane hired Stanton as a probationary, tenure-track faculty member in its School of Architecture.[261] During his third-year review, the Promotions and Tenure Committee voiced concerns about Stanton's teaching, research, and service/collegiality.[262] The Committee noted that Stanton's "attitude toward the rest of the faculty has created too many problems. If a tenure vote were to be taken today, it is doubtful that he would receive any significant support."[263] In order to receive tenure, Stanton before would need to overcome personality traits and a history of misjudgments.[264] He would have to undergo a fourth-year review to determine whether his

254 *Id.* at 1077–78.

255 *Id.* at 1078–79.

256. *Id*. (citing NLRB v. Yeshiva Univ., 444 U.S. 672, 680 (1980)).

257. *Id.* at 1081.

258. *Id.* at 1081.

259. *Id.* at 1082.

260. 777 So. 2d 1242 (La. Ct. App. 2001).

261. *Id.* at 1244.

262. *Id*.

263. *Id*. at 1246.

264. *Id.*

shortcomings had been addressed.[265] The Dean of the School of Architecture expressed her doubts as to Stanton's suitability for tenure, noting her concern over his hostile interactions with faculty that created "deep pockets of enmity" at Tulane.[266]

Following the fourth-year review, the Dean notified Stanton that the upcoming academic year would be his last year of employment.[267] Stanton sued on breach of contract and intentional infliction of emotional distress theories. The appellate court decided these issues in favor of Tulane by focusing on the relevant contract law pertaining to faculty handbooks and the lack of evidence to support a claim for emotional distress in a workplace environment.[268] It is worth noting, however, that the court made special mention as to the matter of collegiality and its role in the University's employment decision.

Gender and national origin discrimination were the bases for the claims asserted in *Nanda v. Board of Trustees of the University of Illinois*,[269] in which a tenure-track professor of microbiology filed suit against the University and five officials after receiving a terminal contract that ended her employment in 2000.[270] Dr. Navreet Nanda, a woman of Asian and Indian descent,[271] claimed that the department chair made discriminatory statements toward her[272] and treated other similarly situated faculty members—namely four men—better than her.[273] The department chair denied making any discriminatory statements and insisted that he had "numerous reasons" for recommending her discharge, including "complaints from students and technicians that [the professor] had been abusive and treated them improperly; 15 or 16 grant application rejections; [the professor's] lack of collegiality; and his belief that [the professor's] research was not 'programmatic' or consistent with the direction . . . of the Department."[274] Nevertheless, a federal district court concluded that the professor raised issues of material fact as to whether another employee was similarly situated, and denied summary judgment to the University on those grounds.[275] This is the only case in this group of cases in which the court did not affirm the university's decision, but it is important to point out that all the trial court did was to decide the plaintiff had raised material issues of fact that required a trial, and the court did not in any way suggest that

265. *Id*. at 1247.
266. *Id.* at 1246.
267. *Id*. at 1247.
268. *Id.* at 1249–52.
269. 2004 WL 432472 (N.D. Ill. 2004).
270. *Id.* at *1.
271. *Id.*
272. *Id.* at *4.
273. *Id.* at *18.
274. *Id.* at *5.
275. *Id*. at *32.

collegiality was an inappropriate factor for the college to consider.

As with other cases involving collegiality, the case law involving refusals to hire, terminations during the probationary period, or contract non-renewals, tend overwhelmingly to favor the institution, reaffirming the notion that courts regularly uphold faculty employment decisions that involve collegiality as at least one basis for an adverse employment decision. As noted, it is interesting that during the past decade institutions have increasingly embraced collegiality as a cause of action beyond the traditional arenas of tenure decisions and terminations. Given the volume of cases that are abandoned or settled before reaching the courts, the number of decisions in this area suggests that collegiality may enjoy increased embrace as a rationale for discipline or termination of employees outside of the traditional tenure concerns in the future.

III. REVIEW OF COLLEGE AND UNIVERSITY POLICIES ADDRESSING COLLEGIALITY

As noted by Cathy Trower, collegiality is "often a factor, sometimes unmentioned"[276] in employment decisions. At some colleges and universities, however, collegiality is explicitly mentioned in the context of various institutional policies, including those related to tenure, promotion, and beyond. This section reviews tenure, promotion, and other institutional policies referencing collegiality.[277] This review yielded twenty-five institutions, or institutional units, that embrace policies referencing collegiality in various fashions, including as a separate university policy; a separate criterion for tenure; a component of teaching, research, or service for purposes of tenure review; a general reference in faculty handbooks; or a reference in a policy separate from the tenure and promotion process.[278]

It is interesting to note that use of collegiality in institutional policies extends beyond the broader university level to college[279] and

276. CATHY A. TROWER, THE QUESTIONS OF TENURE 40 (Richard Chait ed., 2002).

277. An online review of policies using free form search terms such as "collegiality" and "tenure," "tenure policy," "handbook," or "faculty" was conducted, and links returned were then narrowed to those referring to an institution's faculty handbook or tenure and promotion policy, rather than an article or other entry referring to tenure or collegiality. Additional institutional policies referencing collegiality were identified through a review of literature. Finally, the policies of the thirty institutions identified by *The Chronicle of Higher Education* as "2010 Great Colleges to Work For" in the "Tenure Clarity and Process" category were analyzed for references to collegiality, yielding four institutions (Gettysburg College, Hardin-Simmons University, Oklahoma City University, and University of Notre Dame, Department of Economics and Econometrics). *See Great Colleges to Work For*, CHRON. HIGHER EDUC., July 25, 2010, *available at* http://chronicle.com/article/Great-Colleges-to-Work-For/65724/.

278. Text of the various policies can be found in Appendix B.

279. *See, e.g.*, Drexel University, College of Medicine, Tenure and Promotion to Tenure Policy, *infra* text accompanying note 320; Iowa State University, College of Liberal Arts, College Policy on Collegiality and Citizenship, *infra* text accompanying

departmental[280] sub-levels in some circumstances. This suggests that the use of collegiality as a criterion in the decision process has become a priority of members of individual college or departmental areas within specific disciplines. The policies identified on the various levels range in scope from detailed articulations of the role of collegiality in the tenure and promotion process, including extensive definitions of the concept,[281] to broad references to the concept within the context of tenure or beyond. As noted by Mark Adams, institutions that include such statements in faculty handbooks create

> enforceable contract provisions in the faculty member's employment relationship with the university. The employment relationship will be governed not only by the letter of appointment, but also by professional and institutional policies. In addition, courts may look to institutional practices and customs, as well as oral, written, and implied assurances of key administrators that relate to the rights and responsibilities of the parties.[282]

A. Collegiality as College and University Policy

In a step beyond the AAUP's concern about collegiality as a separate criterion for tenure review purposes,[283] Northern Illinois University (NIU) and the Iowa State University College of Liberal Arts and Sciences (ISU-LAS) have crafted separate unit-wide policies focused solely on collegiality. NIU's policy is the more elaborate of the two.[284] The policy

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note 288; New Mexico State University, College of Engineering, Promotion and Tenure Policies and Procedures, *infra* text accompanying note 309; New Mexico State University, College of Health Science, Policies, Standards, and Procedures for: Annual Performance Review, Third-Year Mid-Probationary Review Tenure & Promotion, and Post-Tenure Review, *infra* text accompanying note 312; North Carolina State University, College of Education, Reappointment, Promotion, and Tenure Standards and Procedures, *infra* text accompanying note 313; University of Mississippi, School of Pharmacy, Vision Statement, *infra* text accompanying note 324; University of South Alabama, College of Arts and Sciences, Promotion and Tenure Policy, *infra* text accompanying note 297; University of Washington, College of Engineering, Promotion and Tenure Criteria, *infra* text accompanying note 306; Western Kentucky University, Potter College, Promotion and Tenure Policies, *infra* text accompanying note 319.

280. *See, e.g.*, Central Washington University, Department of History Personnel Procedures, *infra* text accompanying note 305; New Mexico State University, College of Education, HPDR Promotion and Tenure Policy, *infra* text accompanying note 301; University of Notre Dame, Department of Economics and Econometrics, Organization Plan and General Procedures for the Committee on Appointments and Promotions and the Full Professor Committee on Promotions and Operating Procedures, *infra* text accompanying note 318.

281. See text accompanying *supra* notes 13–40 for a discussion of definitions of collegiality offered by scholars, the AAUP, and the courts.

282. Adams, *supra* note 29, at 73–74.

283. *See* text accompanying *supra* notes 33–34.

284. Northern Illinois University, Statement on Professional Behavior of

is extensive, and contains a preamble that outlines the importance of collegiality to the institution, as well as a rationale for the importance of such a policy, which references the AAUP's position and underscores the importance of collegiality to the maintenance of a positive work environment and the protection of academic freedom.[285] It is particularly important to note that this policy is not merely a position statement, but can be violated by "a documented pattern of frequent and pervasive uncollegial activity, or a severe uncollegial act."[286] Moreover, a process for dispatching complaints filed under the policy is also outlined.[287] In the policy, collegiality is defined as follows:

> Collegiality represents an expectation of a professional relationship among colleagues with a commitment to sustaining a positive and productive environment as critical for the progress and success of the university community. It consists of collaboration and a shared decision-making process that incorporates mutual respect for similarities and for differences - in background, expertise, judgments, and points of views, in addition to mutual trust. Central to collegiality is the expectation that members of the university community will be individually accountable to conduct themselves in a manner that contributes to the university's academic mission and high reputation. Collegiality among associates involves a similar professional expectation concerning constructive cooperation, civility in discourse, and engagement in academic and administrative tasks within the respective units and in relation to the institutional life of the university as a whole.[288]

The policy also distinguishes collegiality from congeniality, directing that the concept is not to be equated with "conformity or excessive deference to the judgments of colleagues, supervisors and administrators; these are flatly oppositional to the free and open development of ideas."[289] Under the policy, collegiality is evidenced by "the protection of academic freedom, the capacity of colleagues to carry out their professional functions without obstruction, and the ability of a community of scholars to thrive in a vigorous and collaborative intellectual climate."[290]

The College of Liberal Arts and Sciences at Iowa State University

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Employees, University Collegiality Policy (2011), *available at* http://www.niu.edu/provost/policies/appm/II21.shtml.

285. *Id.* § 1.1.

286. *Id.* § 1.13.

287. *Id.* § 1.2. The process for dispatching complaints was drawn from the institution's faculty and staff grievance procedures. *Id.*

288. *Id.* § 1.12.

289. *Id.*

290. *Id.*

adopted a "Policy on Collegiality and Citizenship" in November 2010.[291] While more concise than the NIU policy, the ISU-LAS policy defines a collegial environment as one in which members "can thrive through openness and collaboration."[292] The policy also addresses discrimination, harassment, and the protection of academic freedom and discourse:

> Civility in all interactions is required. Faculty members do not exploit, intimidate, harass, or discriminate against others. They respect and defend the free inquiry of associates. In the exchange of criticism and ideas, faculty members show due respect for the opinions of others. They strive to be objective in their professional judgment of colleagues. Faculty members accept their share of responsibilities for fulfilling the teaching, research, and service missions of the unit, the college, and the university.[293]

B. Collegiality as a Separate Criterion in Tenure and Promotion Reviews

1. Collegiality as a Separate Criterion

In their monograph on the broader subject of academic tenure, Ryan Amacher and Roger Meiners noted that some institutions reference collegiality in their tenure policies, "which means that the other faculty find the person to be a tolerable colleague."[294] This review found that Auburn University, the University of South Alabama's College of Arts and Sciences, Saint Louis University, New Mexico State University's Department of Human Performance, Dance, and Recreation, and Saint Norbert College consider collegiality as a separate criterion to be evaluated for faculty tenure or promotion, but these policies appear to require more than just tolerability. As previously noted, the AAUP actively resists the use of collegiality as a separate criterion for evaluation of tenure or promotion,[295] but these few policies clearly articulate the necessity for

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291. Iowa State University, College of Liberal Arts and Sciences, College Policy on Collegiality and Citizenship (2010), *available at* http://www.las.iastate.edu/faculty_staff/forms/_documents/Collegiality%20and%20Citizenship%20Statement%2011-3-10.pdf.

292. *Id.*

293. *Id.* Much of the language in this policy statement is paraphrased from the AAUP Statement on Professional Ethics. It is also possible that, even if the Statement is not explicitly incorporated in university policy, academic custom and usage would support its use as a standard to measure faculty behavior. *See* American Association of University Professors, Statement on Professional Ethics, http://www.aaup.org/AAUP/pubsres/policydocs/contents/statementonprofessionalethics.htm.

294. RYAN AMACHER & ROGER MEINERS, FAULTY TOWERS: TENURE AND THE STRUCTURE OF HIGHER EDUCATION 8 (2004).

295. *See supra* text accompanying notes 33–34.

demonstrating a collegial philosophy in order to successfully stand for tenure or promotion.

The Auburn University tenure and promotion policy directs that the standards for tenure are more exacting than those for promotion, and require that in addition to the assessment of teaching, research, and service required for promotion, candidates standing for tenure must also demonstrate collegiality.[296] Auburn's tenure and promotion policy cautions faculty evaluators that granting tenure is tantamount to a thirty-year relationship and distinguishes collegiality from sociability or likability: "Collegiality is a professional, not personal, criterion relating to the performance of a faculty member's duties within a department."[297]

Auburn's policy also holds that any perceived deficiencies with regard to collegiality should be expressed to a faculty member as soon as possible, and certainly during annual reviews and during the third year review prior to tenure.[298] The policy clearly directs faculty tenure evaluators to be mindful that their assessment of a candidate's collegiality "will carry weight with the Promotion and Tenure Committee."[299]

Likewise, the tenure and promotion policy adopted by the University of South Alabama's College of Arts and Sciences holds that candidates standing for tenure must demonstrate collegiality in addition to providing evidence of strong teaching, research, and service: "The criteria for tenure are the same as promotion plus the additional important consideration of collegiality of the candidate with her/his department."[300] The policy also reminds faculty members evaluating tenure dossiers to consider collegiality as the fourth criterion.[301]

The Saint Louis University policy represents the inverse with regard to demonstration of collegiality: rather than include collegiality as an additional factor for tenure, it is necessary to demonstrate collegiality in order to achieve promotion from instructor to assistant professor.[302] No showing of collegiality is necessary for subsequent promotion to associate or full professor or for the award of tenure:

> Promotion to the rank of Assistant Professor requires, in addition, demonstration of effectiveness in [teaching, research, and

296. Auburn University, Faculty Personnel Policies and Procedures § 9, *available at* http://www.auburn.edu/academic/provost/handbook/policies.html#collegaility.

297. *Id.*

298. *Id.*

299. *Id.*

300. University of South Alabama, College of Arts and Sciences, Promotion and Tenure Policies 2 (2010), *available at* http://www.southalabama.edu/artsandsci/policiespt.html (follow link to "Promotion and Tenure Statement of Procedures and Criteria 2010-2011") (emphasis in original).

301. *Id.*

302. Saint Louis University, Faculty Manual 21 (2008), *available at* http://www.slu.edu/organizations/fs/fac_manual/faculty_manual_2008.pdf.

> service], as well as evidence of recognition by colleagues in the same Department and College, School, or Library that the candidate possesses qualities of collegiality, such as the ability to work cooperatively and professionally with others.[303]

The tenure and promotion policy in the Department of Human Performance, Dance, and Recreation at New Mexico State University considers collegiality as a separate criterion in the assessment of a tenure application, but does not differentiate between promotion and tenure, as do the previous policies: "Collegiality, implicit or explicit, remains an integral part of a faculty member's profession. Faculty members are expected to interact and cooperate in a positive manner with students, staff, faculty, administration and all others in which a person has contact within the context of his or her NMSU position."[304] The policy also provides examples of collegiality criteria, such as engaging in positive interactions with colleagues, completing work in a timely fashion, and sharing in unit responsibilities.[305]

At Saint Norbert College, a small private sectarian institution, faculty standing for tenure must demonstrate collegiality separately from academic preparation, effective teaching, student advising, and scholarship or professional service:

> The Faculty member shall provide evidence of effectiveness in meeting the collegial expectations of the College. Activities that demonstrate collegiality include active and productive participation in the functioning of one's discipline. Other collegial activities include those that improve the intellectual, cultural, and religious climate of the College. In addition, service to the College by participating in discipline, divisional, and Faculty meetings, and service on College committees provides other measures of collegiality. Finally, activities that promote or enhance the stature of the applicant and the College within the local community are still another measure of collegiality.[306]

2. Collegiality as an Express Component of Teaching, Research, and Service

Numerous institutions specifically consider the role of collegiality within the context of teaching, research, and service for tenure applications or

303. *Id.*

304. New Mexico State University, College of Education, HPDR Promotion and Tenure Policy 9 (Nov. 20, 2008), *available at* http://education.nmsu.edu/departments/academic/perd/documents/hpdr-pandt.pdf.

305. *Id.* at 10.

306. Saint Norbert College, Faculty Handbook, the Faculty Policy Statement 14 (Aug. 13, 2009), *available at* http://www.snc.edu/thefaculty/facultyhandbook/fhbsect2.pdf.

evaluations, and service to the institution or community is the most frequently cited category.[307] For example, the Department of History at Central Washington University considers "cooperativeness, courtesy, and exercise of professional ethics" within the context of service to the department and the university, and provides a detailed description of collegial behavior in an appendix to the policy.[308] In the University of Washington's College of Engineering, the tenure policy holds that "as part of their service to the university community, faculty must behave in a professional manner," and cautions that failure to do so can affect an applicant's evaluation of service.[309] Interestingly, this policy also calls for transparency, and allows the applicant for tenure to respond to any concerns about collegiality as a part of the record.[310] Academic librarians at Hardin-Simmons University are evaluated annually using collegiality as a component of the service criterion, but collegiality is not a part of the tenure process.[311]

Several policies identified in this review consider the role of collegiality in tenure applications beyond service to the institution, extending it to teaching and research as well. The tenure and promotion policy in the New Mexico State University's College of Engineering[312] is drafted in a fashion akin to the Auburn University policy and defines collegiality by referring to the Fourth Circuit's assessment of the concept in *Mayberry v. Dees.*[313] The policy extends the evaluation of collegiality across teaching, research, and service, and provides examples in an appendix.[314] Further, the tenure and promotion policy in the Department of Health Science at New Mexico State University extends consideration of collegiality beyond service to research and creative activity because it has the "potential to enhance

307. The AAUP discourages the use of collegiality as a separate criterion in tenure and promotion decisions. *See supra* text accompanying *supra* note 34; *see also* Hooker v. Tufts Univ., 581 F. Supp. 104, 107 (D. Mass. 1983) (noting that collegiality is used in the place of service in university tenure and promotion policy and concluding that denial of tenure to faculty member was due to failure to meet university standards under the policy and not because of gender discrimination).

308. Central Washington University, Department of History Personnel Procedures, *available at* http://www.cwu.edu/~history/personnelproc.html.

309. University of Washington, College of Engineering, Promotion, and Tenure Criteria, *available at* http://www.engr.washington.edu/mycoe/faculty/pt-toolkit.html#criteria.

310. *Id.*

311. Hardin-Simmons University, Faculty Handbook 111 (Aug. 2006), *available at* http://www.hsutx.edu/admin/hr/Employees/PHB_August2006Aug17.doc.

312. New Mexico State University, College of Engineering, Promotion and Tenure Policies and Procedures 4 (Jan. 2008), *available at* http://engr.nmsu.edu/pdfs/COE_PT_Policy_3-1b%20(final).pdf.

313. *Id.* at 4; *see also supra* note 15 and accompanying text (describing the *Mayberry* court's definition of collegiality).

314. New Mexico State University, *supra* note 309, at App. B.

performance in each of three areas."[315] The tenure and promotion policy in North Carolina State University's College of Education also extends assessment of collegiality across teaching, research, and service, and distinguishes collegiality from congeniality: "to be congenial is parallel with sociability and agreeableness, while collegiality is a positive and productive association with colleagues. A person need not be congenial to be collegial."[316] The Santa Clara University faculty handbook clearly states that collegiality is not a separate criterion, but must be blended among teaching, research, and service: "Collegiality is not a distinct capacity to be assessed independently of the traditional triumvirate of scholarship, teaching, and service. It is rather a quality whose value is expressed in the successful execution of these three functions."[317] However, among these policies, it is singular in that it only permits use of collegiality in tenure evaluations if there is a possible detrimental effect on administrative function: "In those rare instances in which lack of collegiality becomes an issue in the evaluation of faculty for promotion and tenure, it may be considered only insofar as it has a negative effect on the functioning of the department, college or school, or University."[318]

C. Policies Broadly Referencing Collegiality

Numerous institutions refer to collegiality briefly or broadly in tenure and promotion policies or faculty handbooks, but do not include it as a separate criterion for review. Several institutions make reference to collegiality in the service context. At Baylor University, tenure applications are evaluated on the basis of teaching, research, and collegial service,[319] and at Oklahoma City University, collegial relations with colleagues is considered part of university service.[320] In the Department of Economics and Econometrics at the University of Notre Dame, collegiality

315. New Mexico State University, Department of Health Science, Policies, Standards, and Procedures for: Annual Performance Review, Third-Year Mid-Probationary Review Tenure & Promotion, and Post-Tenure Review 6–7 (2009), *available at* http://www.nmsu.edu/~hlthdpt/documents/hlspt.pdf.

316. North Carolina State University, College of Education, Reappointment, Promotion, and Tenure Standards and Procedures § 3.2 (Sept. 22, 2008), *available at* http://www.ncsu.edu/policies/employment/rpt/RUL05.67.204.php.

317. Santa Clara University, Faculty Handbook 4 (Oct. 15, 2010), *available at* http://www.scu.edu/provost/policies/upload/3-4-Policies-and-Procedures-on-Promotion-and-Tenure-2.pdf.

318. *Id.*

319. Baylor University, Policy for Tenure and Promotion 1 (Feb. 26, 2010), *available at* http://www.baylor.edu/content/services/document.php/63933.pdf.

320. Oklahoma City University, Criteria for Renewal, Promotion, and Tenure of Probations and Tenured Faculty Members 55 (2008), *available at* http://www.okcu.edu/hr/ (follow link to "Faculty Handbook") (describing forms of collegiality in the context of contributions to the university and professional communities, and including it as one of three criteria for renewal, promotion, and tenure of faculty).

is considered a part of university service, and faculty members are expected to maintain at atmosphere of civility.[321] The tenure and promotion instructions for applicants at Western Kentucky University's Potter College direct that collegiality should be discussed in the context of service to the institution.[322]

Other institutions mention collegiality in a broader sense within their tenure and promotion policies. For example, the tenure policy at the Drexel University College of Medicine states that faculty members are expected to have conducted themselves in a collegial fashion during their time at the institution,[323] and Villanova University articulates the same expectation of collegial behavior.[324] Collegiality is not stated as a criterion for tenure review at Gettysburg College, but that policy does suggest that faculty members reviewing tenure applications "think collegially."[325]

In some circumstances, collegiality is mentioned in university materials outside of the tenure and promotion process. For example, Eastern Kentucky University mentions collegiality in its strategic plan,[326] while the School of Pharmacy at the University of Mississippi references the role of collegiality in its vision statement.[327] At the University of Missouri, collegiality is emphasized throughout the institution through an employment rule directed at maintaining a positive work environment and discouraging harassing or intimidating behavior,[328] while at Villanova University, applicants for department chair positions are required to demonstrate their collegiality in order to be eligible for the position.[329] In addition to other articulated duties, department chairs at Saint Louis University are responsible for "establishing a climate of collegiality."[330] At

321. University of Notre Dame, Department of Economics and Econometrics, Appointment and Promotion Procedures and Organization Plan 7 (2008), *available at* http://economics.nd.edu/assets/26517/economics_cap_document.pdf.

322. Western Kentucky University, Potter College, Promotion and Tenure Policies 11 (July 1, 2007), *available at* http://www.wku.edu/pcal/potter-college-tenure-and-promotion-policies (follow link to "Download the Potter College Promotion and Tenure Word document").

323. Drexel University, College of Medicine, Tenure and Promotion to Tenure Policy 1 (Nov. 29, 2007), *available at* http://www.drexelmed.edu/documents/facaffairs/tenure_policy_revised112907.pdf.

324. Villanova University, Full-time Faculty Handbook 15 (Aug. 1, 2004), *available at* http://www3.villanova.edu/facultycongress/cof/full-time-faculty-handbook.pdf.

325. Gettysburg College, Faculty Handbook 20 (Sept. 2010), *available at* http://www.gettysburg.edu/dotAsset/2794522.pdf.

326. Eastern Kentucky University, Strategic Plan, Description of the University, *available at* http://www.web.eku.edu/sp/description.php.

327. University of Mississippi, School of Pharmacy, Vision Statement, *available at* http://www.pharmacy.olemiss.edu/visionstatement.html.

328. University of Missouri, Collected Rules and Regulations § 330.080, *available at* http://www.umsystem.edu/ums/departments/gc/rules/personnel/330/080.

329. Villanova University, *supra* note 321, at 50.

330. Saint Louis University, *supra* note 299, at 7.

the College of the Atlantic, collegiality is mentioned as part of the search procedures for new faculty members: "The importance of collegiality and shared vision in contributing to good working relationships must be balanced by the long term interest of the College to maintain intellectual, social and cultural diversity as well as intellectual freedom."[331]

IV. CONCLUSION

As was true ten years ago,[332] the academic community continues to debate the use of collegiality in higher education employment decisions. Those who support its use argue that colleges and universities have long recognized the importance of cooperative and collegial interactions among faculty to advance the missions of their institutions. Others who support the use of collegiality argue that it should be identified as a separate, distinct criterion in tenure, promotion, hiring, and termination decisions, both to put faculty on notice of the criteria used to evaluate them and to encourage good collegial behavior.

Those who oppose the use of collegiality in employment decisions argue that it constitutes a breach of contract unless it has been identified as a separate, distinct criterion in tenure, promotion, hiring, and termination decisions. Others oppose its consideration arguing that it can be used as a mask for discrimination. Still others, including AAUP, recognize that collegiality is an important component of a faculty member's overall performance but oppose its use as a separate criterion for tenure out of concern that its isolation as a distinct criterion might intrude on professorial rights of academic freedom and free speech.

Courts, however, have given almost unanimous support for consideration of collegiality whether or not the term is identified as a criterion for consideration in tenure, promotion, or termination policies. Although opinions may remain divided about the precise definition of collegiality and the wisdom of its use as a separate criterion, courts have made clear that they are willing to embrace the concept and have regularly favored colleges and universities in defending litigation surrounding its use.

Perhaps as a result, colleges and universities are increasingly using collegiality in making important employment decisions. Moreover, an increasing number of departments, schools, and institutions have adopted statements embracing collegiality as a specific criterion in tenure and promotion decisions, or as a broadly referenced concept applicable across the institution. This development would appear to reflect a growing realization among both faculty and administrators that collegiality is an important factor to consider in making employment decisions, particularly

331. College of the Atlantic, Faculty Personnel Manual § 4.4, *available at* http://www.coa.edu/webpersonnel/frfacultyman.html.

332. *See* Connell & Savage, *supra* note 8.

expensive, long-term, binding decisions such as granting tenure. In addition, such policies indicate a desire to encourage a collegial atmosphere and to provide faculty members with formal notice of the criteria that will be used to evaluate their employment performance.

These trends—both court decisions favoring the use of collegiality and university policies addressing it directly—appear likely to continue. Members of the academic community should continue to feel confident in considering collegiality in faculty tenure and other employment decisions whether collegiality is or is not specified as a separate and distinct criterion.

APPENDIX A: AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS ON COLLEGIALITY AS A CRITERION FOR FACULTY EVALUATION[333]

(The statement that follows was approved by the Association's Committee A on Academic Freedom and Tenure and adopted by the Association's Council in November 1999.)

In evaluating faculty members for promotion, renewal, tenure, and other purposes, American colleges and universities have customarily examined faculty performance in the three areas of teaching, scholarship, and service, with service sometimes divided further into public service and service to the college or university. While the weight given to each of these three areas varies according to the mission and evolution of the institution, the terms are themselves generally understood to describe the key functions performed by faculty members.

In recent years, Committee A has become aware of an increasing tendency on the part not only of administrations and governing boards but also of faculty members serving in such roles as department chairs or as members of promotion and tenure committees to add a fourth criterion in faculty evaluation: "collegiality."[1] For the reasons set forth in this statement, we view this development as highly unfortunate, and we believe that it should be discouraged.

Few, if any, responsible faculty members would deny that collegiality, in the sense of collaboration and constructive cooperation, identifies important aspects of a faculty member's overall performance. A faculty member may legitimately be called upon to participate in the development of curricula and standards for the evaluation of teaching, as well as in peer review of the teaching of colleagues. Much research, depending on the nature of the particular discipline, is by its nature collaborative and requires teamwork as well as the ability to engage in independent investigation. And committee service of a more general description, relating to the life of the institution as a whole, is a logical outgrowth of the Association's view that a faculty member is an "officer" of the college or university in which he or she fulfills professional duties.[2]

Understood in this way, collegiality is not a distinct capacity to be assessed independently of the traditional triumvirate of teaching, scholarship, and service. It is rather a quality whose value is expressed in the successful execution of these three functions. Evaluation in these three areas will encompass the contributions that the virtue of collegiality may pertinently add to a faculty member's career. The current tendency to isolate collegiality as a distinct dimension of evaluation, however, poses

333. American Association of University Professors, On Collegiality as a Criterion for Faculty Evaluation, http://www.aaup.org/AAUP/pubsres/policydocs/contents/collegiality.htm.

several dangers. Historically, "collegiality" has not infrequently been associated with ensuring homogeneity, and hence with practices that exclude persons on the basis of their difference from a perceived norm. The invocation of "collegiality" may also threaten academic freedom. In the heat of important decisions regarding promotion or tenure, as well as other matters involving such traditional areas of faculty responsibility as curriculum or academic hiring, collegiality may be confused with the expectation that a faculty member display "enthusiasm" or "dedication," evince "a constructive attitude" that will "foster harmony," or display an excessive deference to administrative or faculty decisions where these may require reasoned discussion. Such expectations are flatly contrary to elementary principles of academic freedom, which protect a faculty member's right to dissent from the judgments of colleagues and administrators.

A distinct criterion of collegiality also holds the potential of chilling faculty debate and discussion. Criticism and opposition do not necessarily conflict with collegiality. Gadflies, critics of institutional practices or collegial norms, even the occasional malcontent, have all been known to play an invaluable and constructive role in the life of academic departments and institutions. They have sometimes proved collegial in the deepest and truest sense. Certainly a college or university replete with genial Babbitts is not the place to which society is likely to look for leadership. It is sometimes exceedingly difficult to distinguish the constructive engagement that characterizes true collegiality from an obstructiveness or truculence that inhibits collegiality. Yet the failure to do so may invite the suppression of dissent. The very real potential for a distinct criterion of "collegiality" to cast a pall of stale uniformity places it in direct tension with the value of faculty diversity in all its contemporary manifestations.

Relatively little is to be gained by establishing collegiality as a separate criterion of assessment. A fundamental absence of collegiality will no doubt manifest itself in the dimensions of teaching, scholarship, or, most probably, service, though here we would add that we all know colleagues whose distinctive contribution to their institution or their profession may not lie so much in service as in teaching and research. Professional misconduct or malfeasance should constitute an independently relevant matter for faculty evaluation. So, too, should efforts to obstruct the ability of colleagues to carry out their normal functions, to engage in personal attacks, or to violate ethical standards. The elevation of collegiality into a separate and discrete standard is not only inconsistent with the long-term vigor and health of academic institutions and dangerous to academic freedom, it is also unnecessary.

Committee A accordingly believes that the separate category of "collegiality" should not be added to the traditional three areas of faculty performance. Institutions of higher education should instead focus on developing clear definitions of teaching, scholarship, and service, in which

the virtues of collegiality are reflected. Certainly an absence of collegiality ought never, by itself, to constitute a basis for non-reappointment, denial of tenure, or dismissal for cause.

Notes

[1] At some institutions, the term "collegiality" or "citizenship" is employed in regulations or in discussions of institutional practice as a synonym for "service." Our objection is to the use of the term "collegiality" in its description of a separate and additional area of performance in which the faculty member is to be evaluated.

[2] The locus classicus for this term is the 1940 *Statement of Principles on Academic Freedom and Tenure*: "College and university teachers are citizens, members of a learned profession, and officers of an educational institution." (AAUP, *Policy Documents and Reports,* 10th ed. [Washington, D.C., 2006], 3.)

APPENDIX B: SELECTED COLLEGE AND UNIVERSITY POLICIES REFERENCING COLLEGIALITY

Auburn University

Auburn University includes specific reference to collegiality in its tenure and promotion criteria and considerations:

> In appraising a candidate's collegiality, department members should keep in mind that the successful candidate for tenure will assume what may be an appointment of 30 years or more in the department. Collegiality should not be confused with sociability or likability. Collegiality is a professional, not personal, criterion relating to the performance of a faculty member's duties within a department. The requirement that a candidate demonstrate collegiality does not license tenured faculty to expect conformity to their views. Concerns relevant to collegiality include the following: Are the candidate's professional abilities and relationships with colleagues compatible with the departmental mission and with its long-term goals? Has the candidate exhibited an ability and willingness to engage in shared academic and administrative tasks that a departmental group must often perform and to participate with some measure of reason and knowledge in discussions germane to departmental policies and programs? Does the candidate maintain high standards of professional integrity? Collegiality can best be evaluated at the departmental level. Concerns respecting collegiality should be shared with the candidate as soon as they arise; they should certainly be addressed in the yearly review and the third year review. Faculty members should recognize that their judgment of a candidate's collegiality will carry weight with the Promotion and Tenure Committee.[334]

Baylor University

Collegiality is mentioned, but not defined, in the university's tenure policy within the discussion of the purposes of tenure: "The system of academic ranks that is associated with the tenure system recognizes faculty members' achievement in the realms of teaching, scholarly and/or creative work, and collegial service to the University, the professional community, and other communities."[335]

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334. Auburn University, Faculty Personnel Policies and Procedures, *supra* note 293.

335. Baylor University, Policy for Tenure and Promotion, *supra* note 316.

Central Washington University, Department of History

History department tenure and promotion policies expressly define collegiality and its role in the tenure process: "The tenure committee reviews the file and meets with the chair, commenting on the candidate's collegiality (defined as cooperativeness, courtesy and exercise of professional ethics [or see Appendix II] and contributions particularly with regard to service to the department and the university."[336]

Appendix II of the policy provides further clarification of the definition of collegiality:

> *Pulling one's weight in the department*: assuming and carrying out a reasonable and appropriate share of department's business; reliably following through on departmental assignments; taking part in departmental governance and decision making; advising and providing support and assistance for students; *Fostering supportive and cooperative climate in department*: collective ethic rather than competitive—good of department along with good of self; willingness to compromise; constructive and positive attitude; flexibility and adaptability; treating colleagues, chair, and staff with civility and respect; assuming responsibility for one's own actions; holding appropriate expectations for others' contributions; *Relating primarily to department but including the university and the profession*; *Conducting oneself in a professionally ethical way when relating to colleagues and students*.[337]

College of the Atlantic

Collegiality is mentioned as part of search procedures for faculty members:

> In all cases, the college must seek candidates who are highly qualified academically, show exceptional promise as teachers and who fulfill the curricular need. The importance of collegiality and shared vision in contributing to good working relationships must be balanced by the long term interest of the College to maintain intellectual, social and cultural diversity as well as intellectual freedom.[338]

In addition, collegiality is assessed as part of faculty employment contract renewal evaluations in a sub-category called "Community Building," which is separate from university service: "These functions are those which advance the health of the College and make it a better and more effective institution. This could be development of new programs or

336. Central Washington University, Department of History Personnel Procedures, *supra* note 305.

337. *Id.*

338. College of the Atlantic, Faculty Personnel Manual, *supra* note 328.

it could take the form of leadership, collegiality or positive support of programs."[339]

Drexel University, College of Medicine

Medical school tenure and promotion policy states that collegiality is an expectation for faculty members: "In addition, it is expected that any faculty member seeking tenure will have demonstrated appropriate collegiality towards colleagues, students, staff and patients throughout their employment at the College."[340]

Eastern Kentucky University

Collegiality is broadly referenced in the university's strategic plan, but not tenure policy:

> The EKU university community accepts as true that leadership characterized by vision and embedded with participatory decision-making at all levels is the emblem of an effective organization. We are committed to providing an atmosphere in which we pursue our joint aspirations in the spirit and practice of collegiality and collaboration at all levels of our community.[341]

Gettysburg College

Tenure and promotion policy directs faculty members to evaluate tenure applications using only the stated criteria, but encourages them to "think collegially," but leaves the meaning of this directive unclear:

> [T]he Committee shall only use those standards and criteria cited in the Tenure and Promotion Policy statement under "Tenure Criteria for Individual Achievement" to evaluate the candidate's qualifications. Since the Faculty Personnel committee is elected by the faculty as a whole, the Committee is asked to think collegially, judging the individual in terms of her or his value in furthering the mission of the College.[342]

Hardin-Simmons University

Collegiality is considered part of service to the university and included in comprehensive evaluations of faculty librarians by chairs, deans, and peers, but not included in the language of the tenure policy:

> Peers will review the librarian's effectiveness in his/her primary

339. *Id.*

340. Drexel University, College of Medicine, Tenure and Promotion to Tenure Policy, *supra* note 320.

341. Eastern Kentucky University, Strategic Plan, Description of the University, *supra* note 323.

342. Gettysburg College, Faculty Handbook, *supra* note 322.

> area of responsibility along with their professional expertise and instructional delivery—either individuals or classes—will be assessed (service to the library); committee service, faculty/departmental leadership and service, recruitment, retention, and development, and departmental support and collegiality (service to the university); maintenance of professional knowledge (service to the profession); and membership and leadership in community organizations or activities, including church (service to the community).[343]

Iowa State University, College of Liberal Arts and Sciences

The college adopted a policy on collegiality in November 2010:

> The College of Liberal Arts and Sciences is committed to sustaining a positive and productive environment for scholarship, learning and service for each individual and for the collective benefit of all. Faculty are members of an interdependent community of scholars, and as such are expected to conduct themselves in a manner that contributes constructively to the College's mission and high reputation. A hallmark of collegiality is respect for shared governance and responsibility. The College is committed to ensuring a work environment where all individuals can thrive through openness and collaboration. All LAS faculty are expected to work to maintain a positive workplace that emphasizes respect for the opinions of others and is free of forms of misconduct, as enumerated in Section 7 of the Faculty Handbook. Faculty should recognize and refrain from the various forms of discrimination and harassment that may take written, verbal and physical forms, as well as attempts to influence others to engage in such acts. Employees are expected to respect the established rules of the unit, college and university that address collegiality and professional responsibility, conflicts of interest, computer ethics, deceptive practices, and interference with disciplinary procedures. All faculty members are expected to contribute to the mission of the unit, college, and university and are evaluated (see Section 5 of the Faculty Handbook) on their contributions and responsibilities as articulated in the individual position responsibility statement. In summary, all LAS faculty members have obligations that derive from common membership in the community of scholars. Civility in all interactions is required. Faculty members do not exploit, intimidate, harass, or discriminate against others. They respect and defend the free inquiry of associates. In the exchange of criticism and ideas, faculty members show due respect for the

343. Hardin-Simmons University, Faculty Handbook, *supra* note 308.

> opinions of others. They strive to be objective in their professional judgment of colleagues. Faculty members accept their share of responsibilities for fulfilling the teaching, research, and service missions of the unit, the college, and the university.[344]

New Mexico State University

College of Education, Department of Human Performance, Dance, and Recreation:

> Collegiality, implicit or explicit, remains an integral part of a faculty member's profession. Faculty members are expected to interact and cooperate in a positive manner with students, staff, faculty, administration and all others in which a person has contact within the context of his or her NMSU position. The means by which a Human Performance Dance and Recreation Promotion and/or Tenure Policy faculty member interacts with others affects workplace climate and should, in turn, play an intricate role in the Promotion and/or Tenure process. Criteria for evaluating collegiality may include but are not limited to: Interacting positively, treating colleagues with respect and resolving conflict in a timely-professional manner; Participating in the distribution of responsibility among members of the department; Participating in group decision making; Completing assigned tasks within the time frame provided; Using personal expertise to solve problems; Helping to create an open environment for the exchange of ideas; Avoiding expression of discrimination or character defamation.[345]

College of Engineering:

The tenure and promotion policies in the NMSU College of Engineering explicitly refer to collegiality, and rely on the Fourth Circuit's definition of faculty collegiality in *Mayberry v. Dees*.[346] Examples of collegial behavior are provided in an appendix to the policy:

> Collegiality is a consideration in promotion and tenure decisions. Academic Collegiality should not be confused with sociability or likability. Nor is Collegiality a requirement for conformity with tenured faculty and administrators views and opinions. Academic Collegiality is defined as "the capacity to relate well

344. Iowa State University, College of Liberal Arts and Sciences, College Policy on Collegiality and Citizenship, *supra* note 288.

345. New Mexico State University, College of Education, HPDR Promotion and Tenure Policy, *supra* note 301.

346. 633 F.2d 502, 514 (4th Cir. 1981). The Fourth Circuit defined collegiality as "the capacity to relate well and constructively to the comparatively small bank of scholars on whom the fate of the university rests."

> and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests." Academic Collegiality deals with the candidate's ability to extend their personal teaching, research, and service activities to support the department's mission in each of those areas as well as to support the common departmental operational needs of the department. Concerns relevant to collegiality include the following:
>
> • Are the candidate's professional abilities and relationships with colleagues compatible with the departmental mission and with its long-term goals? This includes a degree of civility with interpersonal relationships and building a positive esprit de corps among colleagues, staff, and students.
>
> • Has the candidate exhibited an ability and willingness to engage in shared academic and administrative tasks that a departmental group must often perform and to participate, with some measure of reason and knowledge, in discussions germane to departmental policies and programs?
>
> • Does the candidate maintain high standards of professional integrity?[347]

College of Health and Social Services, Department of Health Science:

> The Health Science Department faculty place a high value in collegiality when assessing faculty performance. Collegiality is defined as "Demonstrated willingness and ability to work effectively with colleagues to support the mission of the institution and the common goals both of the institution and academic organizational unit." While evidence relating to collegiality may be most evident in the category of service, collegiality can also affect performance in teaching as well as in scholarship and creative activity. Collegiality is not a separate concept but regarded as having the potential to enhance performance in each of three areas. Because the department values teamwork, evidence of collegiality plays a role in faculty evaluation. Taking into account the unique mission and demands of the Department of Health Science, consideration of collegiality shall be made under each of the categories of teaching, scholarship and creative activity, and service.[348]

North Carolina State University, College of Education

The policy on tenure and promotion states:

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347. New Mexico State University, College of Engineering, Promotion and Tenure Policies and Procedures, *supra* note 309.

348. New Mexico State University, Department of Health Science, Policies, Standards, and Procedures for: Annual Performance Review, Third-year Mid-Probationary Review, and Post-Tenure Review, *supra* note 312.

> Collegiality is also an expectation of all faculty. Collegiality represents a reciprocal relationship among colleagues and a value system that views diverse members of a university community as critical for the progress and success of its academic mission. The concept of collegiality, however, should be distinguished from congeniality; to be congenial is parallel with sociability and agreeableness, while collegiality is a positive and productive association with colleagues. A person need not be congenial to be collegial. Moreover, collegiality among associates involves appreciation of and respect for differences in expertise, ideas, and background, in addition to mutual trust. Evidence of collegiality is commensurate with broadly accepted disciplinary norms.[349]

Northern Illinois University

In 2011, the University Affairs Subcommittee finalized a university policy on collegiality that was subsequently adopted, which stated:

> Collegiality represents an expectation of a professional relationship among colleagues with a commitment to sustaining a positive and productive environment as critical for the progress and success of the university community. It consists of collaboration and a shared decision-making process that incorporates mutual respect for similarities and for differences—in background, expertise, judgments, and points of views, in addition to mutual trust. Central to collegiality is the expectation that members of the university community will be individually accountable to conduct themselves in a manner that contributes to the university's academic mission and high reputation. Collegiality among associates involves a similar professional expectation concerning constructive cooperation, civility in discourse, and engagement in academic and administrative tasks within the respective units and in relation to the institutional life of the university as a whole. Collegiality is not congeniality nor is it conformity or excessive deference to the judgments of colleagues, supervisors and administrators; these are flatly oppositional to the free and open development of ideas. Evidence of collegiality is demonstrated by the protection of academic freedom, the capacity of colleagues to carry out their professional functions without obstruction, and the ability of a community of scholars to thrive in a vigorous and collaborative intellectual climate.[350]

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349. North Carolina State University, College of Education, Reappointment, Promotion, and Tenure Standards and Procedures, *supra* note 313.

350. Northern Illinois University, Statement on Professional Behavior of Employees, University Collegiality Policy, *supra* note 281.

The policy further provides that

> [a]llegations or complaints of a documented pattern of frequent and pervasive activity that clearly interferes with the professional working environment, or a severe uncollegial act, if found to be supported, will constitute a violation of this policy. Such allegations will be examined in a reasonable, objective, and expedient manner, and in accordance with applicable federal and state employment laws.[351]

The policy also outlines procedures for dispositions of complaints.

Oklahoma City University

Collegiality is referenced as part of university and professional service in tenure and promotion evaluations:

> Valued contributions to the University may take many forms, including: (1) constructive participation in the University's governance, including faculty meetings, councils, and committees; (2) helpful and generally supportive relations with colleagues, so as to enhance the results achieved in department and other academic programs; (3) participation in various programs of college life outside the classroom, such as art, drama, music, recreation, athletics, lectures, convocations, and religious and social gatherings; and (4) service to the faculty member's professional community.[352]

Saint Louis University

The faculty handbook contains two major provisions concerning collegiality, a general statement regarding university citizenship and requirements for promotion. With regard to university citizenship:

> In their capacity as citizens of the University, faculty members are expected to participate in the functional and ceremonial life of the institution. This includes, but is not limited to, service on academic and non-academic University advisory and disciplinary boards and attendance at commencement events. Faculty members are also expected to demonstrate the qualities of collegiality, such as the ability to work cooperatively and professionally with others, in all aspects of academic life.

Additionally, SLU requires demonstration of collegiality in addition to evidence of teaching, research, and service for promotion from instructor to assistant professor. No further showing of collegiality is required for promotion or tenure:

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351. *Id.*

352. Oklahoma City University, Criteria for Renewal, Promotion, and Tenure of Probations and Tenured Faculty Members, *supra* note 317.

> Promotion to the rank of Assistant Professor requires, in addition, demonstration of effectiveness in [teaching, research, and service], as well as evidence of recognition by colleagues in the same Department and College, School, or Library that the candidate possesses qualities of collegiality, such as the ability to work cooperatively and professionally with others."[353]

Saint Norbert College

Collegiality is assessed as a separate criterion for tenure applications:

> Collegial Activities. The Faculty member shall provide evidence of effectiveness in meeting the collegial expectations of the College. Activities that demonstrate collegiality include active and productive participation in the functioning of one's discipline. Other collegial activities include those that improve the intellectual, cultural, and religious climate of the College. In addition, service to the College by participating in discipline, divisional, and Faculty meetings, and service on College committees provides other measures of collegiality. Finally, activities that promote or enhance the stature of the applicant and the College within the local community are still another measure of collegiality.[354]

Santa Clara University

Collegiality is blended among teaching, research, and service:

> Collegiality is not a distinct capacity to be assessed independently of the traditional triumvirate of scholarship, teaching, and service. It is rather a quality whose value is expressed in the successful execution of these three functions. Collegiality means that faculty members cooperate with one another in sharing the common burdens related to discharging their responsibilities of teaching, scholarship or creative work, and service, and do so in a conscientious and professional manner. Collegiality is not the same as conformity or intellectual agreement and may not be interpreted in a way that violates the principles of academic freedom. In those rare instances in which lack of collegiality becomes an issue in the evaluation of faculty for promotion and tenure, it may be considered only insofar as it has a negative effect on the functioning of the department, college or school, or University.[355]

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353. Saint Louis University, Faculty Manual, *supra* note 299.

354. Saint Norbert College, Faculty Handbook, The Faculty Policy Statement, *supra* note 303.

355. Santa Clara University, Faculty Handbook, *supra* note 314.

University of Mississippi, School of Pharmacy

The pharmacy school's mission statement mentions both civility and collegiality: "We will be efficient and highly productive, and our work will be performed in an environment characterized by civility, cooperation, diversity, mentoring, nurturing, professionalism, collegiality, and accountability."[356]

University of Missouri

While not specifically referencing collegiality, the university has an employment rule in place intended to maintain a positive working and learning environment:

> The University of Missouri is committed to providing a positive work and learning environment where all individuals are treated fairly and with respect, regardless of their status. Intimidation and harassment have no place in a university community. To honor the dignity and inherent worth of every individual—student, employee, or applicant for employment or admission—is a goal to which every member of the university community should aspire and to which officials of the university should direct attention and resources.[357]

University of Notre Dame, Department of Economics and Econometrics

Collegiality is referenced as part of service in departmental tenure and promotion policy. Faculty members seeking tenure or promotion "[a]re expected to perform reasonable service for the department when asked, to demonstrate a commitment to the construction of a healthy and vibrant department, and to maintain an appropriate level of civility and collegiality in their interactions with other faculty and staff."[358]

University of South Alabama, College of Arts and Sciences

Tenure and promotion policy directs that collegiality is a specific and necessary component of a successful tenure bid: "The criteria for tenure are the same as promotion plus the additional important consideration of collegiality of the candidate with her/his department. Absence of evidence and argument to the contrary will be considered evidence of the candidate's

356. University of Mississippi, School of Pharmacy, Vision Statement, *supra* note 324.

357. University of Missouri, Collected Rules and Regulations, Personnel, Chapter 330: Employee Conduct, *supra* note 325.

358. University of Notre Dame, Department of Economics and Econometrics, Organization Plan and General Procedures for the Committee on Appointments and Promotions and the Full Professor Committee On Promotions and Operating Procedures, *supra* note 318.

collegiality with the department."[359] The policy further directs that tenure and promotion committee recommendations "must communicate the sense of their deliberations and decisions and should address teaching, creative activity and/or research activity, service, and in the case of tenure, collegiality."[360]

University of Washington, College of Engineering

> Collegiality and good citizenship should not be primary components of the review. Within limits, faculty must be free to pursue their interests and career goals in the style they choose. On the other hand, as part of their service to the university community, faculty must behave in a professional manner. If a candidate has exhibited a pattern of behavior infringing on the rights of others or counterproductive to the goals of the department/COE/University, that behavior can be a factor in the evaluation of the quality and quantity of the candidate's record of service. However, in such cases, transparency is paramount. As with the items mentioned in the previous section, it is incumbent on the faculty to discuss such issues openly when considering the candidate's record, for the candidate to have the opportunity to respond, and for both parts of that exchange to be documented in the dossier.[361]

Villanova University

The faculty handbook makes two references to collegiality. The first, in the tenure and promotion section holds: "Villanova expects its faculty to adhere to University regulations and to practice the professionalism, mutual respect, and collegiality that allow and encourage faculty, students, and staff of diverse backgrounds and traditions to cooperate to achieve the community's goals."[362] The second reference to collegiality involves potential department chairs. In order to be eligible, a nominee must possess, among other requirements, ". . .a solid record of leadership, scholarship, and collegiality."[363]

Western Kentucky University, Potter College

Tenure policy holds that the tenure application dossier should include "a letter of application, a current curriculum vita, and sections on teaching

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359. University of South Alabama, College of Arts and Sciences, Promotion and Tenure Policies, *supra* note 297.

360. *Id.*

361. University of Washington, College of Engineering, Promotion, and Tenure Criteria, *supra* note 306.

362. Villanova University, Full-time Faculty Handbook, *supra* note 321.

363. *Id.*

effectiveness, research and scholarship, public/university service, and such related areas as collegiality."[364]

364. Western Kentucky University, Potter College, Promotion and Tenure Policies, *supra* note 319.

UNIVERSITY NANO LABS: ASSESSING AND MINIMIZING ENVIRONMENTAL, HEALTH, AND SAFETY RISKS

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INTRODUCTION

Nanotechnology is the science of the very small. As materials are reduced in size such that they reach nanometer[1] proportions, some begin to act and react in ways very different from their larger scale counterparts. Nanoscale silver has antimicrobial properties.[2] Gold changes color to red.[3]

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1. One nanometer equals one billionth of a meter.

2. Georgios A. Sotirou & Sotiris E. Pratsinis, *Antibacterial Activity of Nanosilver Ions and Particles*, 44 ENVTL. SCI. & TECH. 5649 (2010); Atousa Moazami et al., *Antibacterial Properties of Raw and Degummed Silk with Nanosilver in Various Conditions*, 111 J. APPLIED POLYMER SCI. 253 (2010).

3. Meggie Lu, *Nanogold Bio-Sensor May Allow People to Detect Cancer*

Alumina is highly explosive. Carbon can conduct heat and electricity as well as metals.[4] Most materials need to be reduced to 100 nanometers ("nm") or less for these unique properties to become evident.[5] To put this in perspective, the head of a pin is 1,000,000 nm across, a human hair is 50,000–100,000 nm in diameter, and a human red blood cell is about 6,000 nm.[6]

Looking for the next driver of economic growth, the federal government, along with many governments around the world, is investing heavily in the development of nanoscale technology.[7] Many of those dollars are being directed to colleges and universities,[8] which conduct most of the basic nanoscale research and make many of the discoveries about the way materials act at the nanoscale.[9] Along with basic research, applied research

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Through At-Home Test, TAIPEI TIMES, Feb. 17, 2009, at 2, *available at* http://www.taipeitimes.com/News/taiwan/archives/2009/02/17/2003436326.

4. Norihiro Kobayashi et al., *Risk Assessment of Manufactured Nanomaterials – Carbon Nanotubes (CNTs)*, Executive Summary, October 16, 2009, New Energy and Industrial Technology Development Organization (NEDO), Tokyo, Japan, http://goodnanoguide.org/tiki-download_wiki_attachment.php?attId=31. When formed into structures known as carbon nanotubes ("CNT") with diameters of 100 nm or less, CNT's have metal and semiconducting characteristics. They are being used in many electronic applications, such as wiring materials, lithium ion batteries, conductive resins and others. Richard Van Noorden, *The Trials of New Carbon*, 469 NATURE 14 (2011), *available at* http://www.nature.com/news/2011/110105/full/469014a.html.

5 John F. Sargent Jr., CRS Report RL34511, *Nanotechnology: A Policy Primer* (2010), *available at* http://www.fas.org/sgp/crs/misc/RL34511.pdf. While 999 nm is technically nano scale, most materials do not reveal unique physio-chemical properties until at least one dimension of the particle is 100 nm or less.

6. Andrew Maynard, *The Twinkie Guide to Nanotechnology*, Oct. 22, 2007, http://www.nanotechproject.org/news/archive/the_twinkie_guide_to_nanotechnology/ (last visited Jan. 24, 2011).

7. Lux Research, *U.S. Risks Losing Global Leadership in Nanotech, Says Lux Research*, TEKRATI.COM (Aug 18, 2010), http://semiconductors.tekrati.com/research/11202/#.

8. *See, e.g.*, Office of Science and Technology Policy, *NNI Strategic Plan 2010*; Request for Information, 75 Fed. Reg. 38,850 (July 6, 2010); Britt E. Erickson, *Nanotechnology Investment: U.S. Focuses on Commercialization and Strengthening Environmental, Health, and Safety Research*, CHEM. & ENG. NEWS, Apr. 12, 2010, *available at* http://pubs.acs.org/cen/government/88/8815gov1.html; Phil Harvey, *Why Small is the New Big*, D. MAG., Jan. – Feb. 2011, http://www.dmagazine.com/Home/D_CEO/2011/January_February/Technology_Issue/North_Texas_Research_Pushes_Future_of_Nanotechnology.aspx?p=1; Bruce P. Mehlman, Assistant Secretary for Technology Policy, U.S. Dept. Com., *Technology Administration - The Federal Government's Role in Nanotechnology Research, Development & Commercialization*, http://www.nist.gov/tpo/publications/speechtransfedgovroleinnano.cfm (last visited Jan. 24, 2011).

9. Chris Barncard, *Federal Investment in Basic Research Yields Outsized Dividends*, NANOTECH. NOW, May 14, 2010, *available at* http://www.nanotech-now.com/news.cgi?story_id=38220 (last visited Jan. 24, 2011); Yin Xia, *Productivity of Nanobiotechnology Research and Education in U.S. Universities*, Presentation to the 2009 Annual Meeting of the Agricultural and Applied Economics Association, July 26-

is increasingly important as colleges and universities more often become active participants in commercial development projects.[10]

Products containing nanoscale materials are used in a diverse collection of industries.[11] Stepping backward in the product development chain, this industrial diversity means that nanoscale research is being conducted in a wide variety of labs within a university or college, be it food science, material science, chemistry, textile science, aerospace, biomedics, electronics, or engineering, among others.

The very properties that entice researchers and scientists to nanoscale materials also give cause for concern. Regulators, legislators, and activists are increasingly questioning whether nanomaterials may present a risk to human and environmental health.[12] In Europe especially, many interest groups are calling for a complete ban on the use of nanomaterials, especially in foods and consumer products.[13] If small enough, some nanomaterials can penetrate the cell wall.[14] This is beneficial if the

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28, 2009, Milwaukee, WI, http://econpapers.repec.org/paper/agsaaea09/49442.htm.

10. *See, e.g.*, Jue Wang & Philip Shapira, *Partnering with Universities: A Good Choice for Nanotechnology Start-up Firms?*, SMALL BUS. ECON., Dec. 10, 2009; Gwyneth K. Shaw, *In Albany, A Public-Private Hybrid Aims To Bring Nano To The Marketplace*, NEW HAVEN INDEP., Jan. 11, 2011, *available at* http://www.newhavenindependent.org/index.php/archives/entry/ualbanys_public-private_hybrid_a_model_for_bringing_nano_to_the_marketplace/.

11. Nanoscale materials are making their way into the consumer marketplace at an increasing pace. The Woodrow Wilson Institute's Project on Emerging Nanotechnologies has listed over 1000 consumer products that contain nanomaterials. *See* Nanotechnology Project, http://www.nanotechproject.org/inventories/consumer/ (last visited Jan. 24, 2011). The number of consumer products that contain nanomaterials has grown at a sixty percent annual rate over the last five years. *See* Nanotechnology Project, http://www.nanotechproject.org/inventories/consumer/analysis_draft/ (last visited Jan. 24, 2011). A broad array of products are utilizing nanoscale materials to help make them lighter, stronger, corrosion resistant, more durable, more reactive, more bio-available, and more economical. These include sporting goods, athletic wear, textiles, automobile components, food packaging, cosmetics, personal care products, medicines and medical devices, electronics, solar cells, lubricants, building materials, basic materials, chemicals, paints and coatings and many others. *See* Nanotechnology Project, http://www.nanotechproject.org/inventories/consumer/browse/categories.

12. *See, e.g.*, Nanotechnology Safety Act of 2010, S. 2942, 111th Cong. (2010); Nat'l Inst. for Occup'l Safety & Health, *Current Intelligence Bulletin: Occupational Exposure to Carbon Nanotubes and Nanofibers* (2010), *available at* http://www.cdc.gov/niosh/docket/review/docket161A/pdfs/carbonNanotubeCIB_PublicReviewOfDraft.pdf; Friends of the Earth, *Nanosunscreens Threaten Your Health*, http://www.foe.org/healthy-people/nanosunscreens (last visited Jan. 24, 2011).

13. *See, e.g.*, Food & Water Watch, *Unseen Hazards: from Nanotechnology to Nanotoxicity*, at 11, http://documents.foodandwaterwatch.org/nanotech-unseen-hazards.pdf (last visited Jan. 24, 2011).

14. *See, e.g.*, Dmitry I. Kopelevich et al., *Potential Toxicity of Fullerenes and Molecular Modeling of their Transport across Lipid Membranes*, *in* NANOSCIENCE AND NANOTECHNOLOGY: ENVIRONMENTAL AND HEALTH IMPACTS, 235, 237 (V.H. Grassian ed., 2008).

material is delivering a pharmaceutical and potentially hazardous otherwise. It is not that nanomaterials are inherently dangerous; it is that the dangers are unknown.

The nature of this kind of research is iterative trial and error. First, lab personnel discover how to create a nanoscale version of a chemical or material; second, they discover what, if any, unique properties the nanoscale material exhibits; and third, they find practical applications for these unique properties. This process can present potential high levels of exposures to nanomaterials that have properties unknown to the researcher and laboratory workers. It may also inadvertently create materials that could be very dangerous. And, in almost all cases, the engineered nanoscale materials have never existed before and their properties and how the body and the environment will react to them are completely unknown.

Given the unique properties of nanomaterials, the safety protocols applied for more common laboratory research may not be sufficient when handling nanoscale materials. Additionally, because of the iterative nature of the research, repeated exposures to nanoscale materials with unknown properties may create a health issue for researchers, lab technicians and graduate or post-doctoral students who are working with these particles.

Research laboratories can take reasonable and sensible steps to reduce exposures to nanoscale materials while research is being conducted. The technology exists to characterize, study, and determine if a nanoscale material will adversely affect human or environmental health.

Recent incidents at college and university labs have heightened the awareness of safety issues and potential liability arising from activities at these labs. In January 2009, the Occupational Safety and Health Administration (OSHA) cited a university in New York for nine alleged serious safety violations and assessed a proposed penalty of $56,700.[15] OSHA's actions were in response to an August 6, 2008 incident at the university in which a lab employee was injured. The employee was servicing a pressurized diagnostic device when it exploded.[16] OSHA cited the university for deficiencies in equipment design, improper equipment installation, failure to have qualified personnel work on the equipment, failure to utilize personal protective equipment, and failure to evaluate the work area for hazards.[17]

In May 2009, a California university was fined $31,875 by the California Division of Occupational Safety and Health (Cal/OSHA) for

15. Press Release, Occupat'l Safety and Health Admin., *U.S. Department of Labor's OSHA issues 9 serious citations to University of Rochester laser lab following August 2008 accident that seriously injured worker* (Jan. 22, 2009), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id =17354.

16. *Id.*

17. *Id.*

alleged violations related to an incident on December 29, 2008, that resulted in the death of a laboratory assistant weeks after the incident.[18] Cal/OSHA cited the university for violations related to the school's hazardous chemicals training, its workplace safety procedures, and its laboratory recordkeeping.[19] Cal/OSHA has also initiated a criminal investigation regarding the incident,[20] and the case has drawn the attention of workplace accident and wrongful death attorneys.[21]

In January 2010, a student was seriously injured in an accident in a chemistry department laboratory at a university in Texas when a mixture of nickel hydrazine perchlorate exploded.[22] This incident is unique because it triggered not only an internal investigation, but also an investigation by the Chemical Safety Board (CSB).[23] The investigation represents the first time that the CSB has investigated an accident in an academic research lab.[24] CSB's chairman, John Bresland, stated that, in addition to conducting an investigation of the incident itself, CSB will collect information on other laboratory accidents.[25] Based on an analysis of this information, CSB will determine whether a more detailed study of academic lab safety is warranted.[26] CSB's investigation is ongoing.[27]

In July 2010, the Texas university released a report that set forth a series of recommendations to improve laboratory safety at the university.[28] The recommendations will be implemented by a new, university-wide Research Safety Committee.[29] The report recommended that an external peer review

18. Kim Christensen, *State Fines UCLA in Fatal Lab Fire*, L.A. TIMES, May 5, 2009, http://www.laimes.com/features/health/la-me-uclalab5-2009may05,0, 6665233.story.

19. *Id.*

20. Kim Christensen, *Cal/OSHA Chief to Oversee Criminal Investigation of Fatal UCLA Lab Fire*, L.A. TIMES, June 30, 2009, http://articles.latimes.com/2009/jun/30/local/me-ucla-burn30.

21. *See*, e.g., Fatal Explosion and Fire at UCLA Lab Results in Fine, LOS ANGELES INJURY LAWYER BLOG (May 12, 2009), http://www.los-angeles-injury-lawyer-blog.com/2009/05/fatal_explosion_and_fire_at_uc.html. In considering the potential for civil liability, a state college or university will need to consider the applicability of its state's sovereign immunity doctrine to its particular circumstances. This article does not address this issue.

22. Jeff Johnson, *University Lab Accident Under Investigation*, CHEM. & ENG. NEWS, (Jan. 20, 2010), *available at* http://pubs.acs.org/cen/news/88/i04/8804notw1.html.

23. *Id*.

24. *Id*.

25. *Id*.

26. *Id*.

27. *See* investigation status at http://www.csb.gov/investigations/detail.aspx?SID=90&Type=1&pg=1&F_All=y (last visited Apr. 4, 2011).

28. Jeff Johnson, *Texas Tech Overhauls Lab Safety*, CHEM. & ENG. NEWS, (July 23, 2010), http://pubs.acs.org/cen/news/88/i30/8830news7.html.

29. *Id*.

panel assess campus lab safety practices and advise the university on how these practices can be improved.[30]

While none of the incidents discussed above involved the manufacturing or use of nanomaterials in a college or university lab, the incidents do highlight the need for a college or university participating in nanomaterials research to evaluate its compliance with applicable state and federal occupational safety and health requirements.

I. POTENTIAL RISKS

Nanomaterials have unique characteristics and properties that distinguish them from materials produced or existing at the micro- or macro-scale. Examples of characteristics include greater catalytic efficiency, increased electrical conductivity, and improved hardness and strength.[31]

The same characteristics and properties that hold such promise for the future may also present environmental, health, and safety challenges. Because of their increased surface area and smaller dimensions,[32] nanomaterials present potential exposure issues to workers that must be addressed. Studies have shown that certain nanomaterials have the ability to pass through cell membranes or cross the blood-brain barrier in ways that larger scale materials cannot.[33] Inhaled nanoparticles may become lodged in the lung.[34] Studies have documented health impacts in rodents[35]

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30. *Id*.

31. *Research on Environmental and Safety Impacts of Nanotechnology Before the H. Subcomm. On Research and Science Education* 110th Cong. 47–62 (Oct. 31, 2007) (statement by E. Clayton Teague, Dir. Of Nat'l Nanotechnology Coordination Ofc.), *available at* http://commdocs.house.gov/committees/science/hsy24464.000/hsy24464_0.htm.

32. David Williams, *Health Benefits and Risks of Products of Nanotechnology*, Taiwan International Conference on Bionano Science, Dec. 5–7, 2007.

33. *See, e.g.*, Dmitry I. Kopelevich et al., *Potential Toxicity of Fullerenes and Molecular Modeling of Their Transport across Lipid Membranes*, *in* NANOSCIENCE AND NANOTECHNOLOGY: ENVIRONMENTAL AND HEALTH IMPACTS, (V.H. Grassian, ed., 2008); Press Release, Cedars-Sinai Medical Center, *Cedars-Sinai "Nano-Drug" Hits Brain Tumor Target Found in 2001*, (Nov. 4, 2010), *available at* http://www.cedars-sinai.edu/About-Us/News/News-Releases-2010/Cedars-Sinai-Nano-Drug-Hits-Brain-Tumor-Target-Found-in-2001.aspx; NanoTrust, Austrian Academy of Sciences, *Can Nanoparticles End Up in the Brain?*, NANOWERK, (Dec. 8, 2010), http://www.nanowerk.com/spotlight/spotid=19339.php.

34. *See, e.g.*, Jessica P. Ryman-Rasmussen et al., *Inhaled Carbon Nanotubes Reach the Subpleural Tissue in Mice*, 4 NATURE NANOTECH. 747, 747–51 (2009).

35. *Id. See also*, Jürgen Pauluhn, *Subchronic 13-Week Inhalation Exposure of Rats to Multiwalled Carbon Nanotubes: Toxic Effects are Determined by Density of Agglomerate Structures, Not Fibrillar Structures*, 113 TOXICOL. SCI. 226, 226–42 (2010); David B. Warheit et al., *Comparative Pulmonary Toxicity Assessment of Single-wall Carbon Nanotubes in Rats*, 77 TOXICOL. SCI. 117 (2004); Günter Oberdörster et al., *Translocation of Inhaled Ultrafine Particles to the Brain*, 16 INHALATION TOXICOLOGY 437, 437–45 (2004); Chiu-Wing Lam et al, *Pulmonary Toxicity of Single-Wall Carbon Nanotubes in Mice 7 and 90 Days after Intratracheal*

and fish.[36]

The health, safety, and environmental implications of nanomaterials must be addressed in order to achieve the promise of nanotechnology. Colleges and universities engaged in the research and development of nanomaterials or the production, processing, distribution and disposal of nanomaterials need to identify and address the potential risks of these operations.

Workplace exposures, if not mitigated, can occur at greater levels than that seen in the general environment due to higher concentrations and amounts of nanomaterials and higher exposure levels[37] and frequencies.[38] The need to assess and, where necessary, address these risks is an essential element of a college's or university's risk management program, but it is also required under federal and, in some cases, state law.

A college or university engaged in the research, development, manufacturing, processing, distribution or disposal of nanomaterials must ensure compliance with federal law and the associated regulations. Failure to do so can result in the imposition of administrative,[39] civil[40] or criminal penalties;[41] increased exposure to potential toxic tort liability;[42] and a potential threat to the viability of the college or university and the nanotechnology industry as a whole.[43]

II. REGULATIONS

Under the Occupational Safety and Health Act (the "Act"), "employers" must comply with the requirements of the Act and the regulations promulgated thereunder by OSHA.[44] An "employer" is defined as "a

Instillation, 77 TOXICOL. SCI. 126, 126–34 (2004).

36. Zheng-Jiang Zhu, *Surface Properties Dictate Uptake, Distribution, Excretion, and Toxicity of Nanoparticles in Fish*, 6 SMALL 2261, 2261–65 (2010); Eva Oberdörster, *Manufactured Nanomaterials (Fullerenes, C60) Induce Oxidative Stress in the Brain of Juvenile Largemouth Bass,* 112 ENVTL. HEALTH PERSP. 1058, 1062 (2004).

37. Envtl. Prot. Agency, Nanotechnology White Paper 43 (2007).

38. *Id.*

39. *See, e.g.*, 29 C.F.R. § 1903.15 (2010) (proposed administrative penalties for OSHA violations).

40. *See, e.g.*, 29 U.S.C. § 666(a)-(d), (i) (2006) (statutory civil penalties for OSHA violatons).

41. *See, e.g.*, 29 U.S.C. § 666(e)-(g) (2006), 18 U.S.C. § 3571 (2006) (statutory criminal penalties for OSHA violations).

42. *See* John C. Monica, Jr. et al., *Preparing for Future Health Litigation: The Application of Products Liability Law to Nanotechnology*, 3 NANOTECH. L. & BUS. 54–63 (2006); Ronald C. Wernette, *Nanoparticles: The New Frontier For Product Liability Mass Tort and Class Action Claims*, 25 TOXICS L. REP. 1196, 1196-1202 (2010).

43. *See* Kristen Kulinowski, *Nanotechnology: From "Wow" to "Yuck"?*, 24 BULL. OF SCI., TECH. & SOC'Y 13, 18 (2004).

44. 29 U.S.C. § 654(a) (2006); 29 C.F.R. § 1903.1 (2010).

person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State."[45] Given the broad definition of "commerce,"[46] private colleges and universities must comply with federal occupational safety and health requirements. The Act and OSHA's regulations impose general and specific requirements on colleges and universities.

A. The General Duty Clause

The General Duty Clause imposes on a college or university a duty to provide each of its employees "a place of employment . . . free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[47] Although courts have ruled that the Act and its accompanying regulations should be construed to afford the broadest possible protection to workers,[48] the purpose of the Act is to provide a satisfactory standard of safety, not to guarantee absolute safety.[49] Further, a college or university is entitled to fair notice of prohibited or required conduct.[50] The question of whether a hazard is recognized goes to the knowledge of the college or university, or in the absence of actual knowledge, to the standard of knowledge in the industry.[51] At the same time, a college or university cannot ignore the presence of an obviously hazardous condition by asserting that its industry is ignorant of such

45. 29 C.F.R. § 1910.2(c) (2010).

46. 29 U.S.C. § 652(3) (2006); 29 C.F.R. § 1910.2(e) (2010) ("Commerce means trade, traffic, commerce, transportation or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof").

47. 29 U.S.C. § 654(a)(1) (2006).

48. Universal Constr. Co. v. Occupat'l Safety and Health Review Comm'n, 182 F.3d 726, 729 (10th Cir. 1999); E & R Erectors, Inc. v. Sec'y of Labor, 107 F.3d 157, 160 (3d Cir. 1997).

49. Irving v. United States, 162 F.3d 154, 168 (1st Cir. 1998).

50. Crown Pacific v. Occupat'l Safety and Health Review Comm'n, 197 F.3d 1036, 1040 (9th Cir. 1999), Fluor Constructors, Inc. v. Occupat'l Safety and Health Review Comm'n, 861 F.2d 936, 941–942 (6th Cir. 1988).

51. Fluor Constructors, 861 F.2d at 942; *see also* McKie Ford, Inc. v. Sec'y of Labor, 191 F.3d 853, 856 (8th Cir. 1999); Martin v. American Cyanamid Co., 5 F.3d 140, 146 (6th Cir. 1993); Corbesco, Inc. v. Dole, 926 F.2d 422, 427–428 (5th Cir. 1991). The industry standard raises an interesting issue in the context of nanotechnology, which currently does not technically fall within the scope of an "industry," as contemplated by the Standard Industrial Classification system. Nanotechnology is an approach to manufacturing which has applications across industries. This presents the possibility of different industry standards being applicable to the manufacture of products from the same nanomaterial. Given at least the possibility that two industries may face similar exposure issues but operate with different levels of sophistication with respect to the handling of the nanomaterials, such an outcome would be less than optimal.

hazards.[52]

An additional issue is whether there is a technologically and economically feasible method for correcting the hazard. The courts have addressed technological and economic feasibility in the context of the General Duty Clause to a limited degree, finding that an employer must take all feasible steps to abate or prevent a hazardous condition that those in its industry would recognize as being hazardous.[53]

Failure to comply with the General Duty Clause can result in significant consequences, including administrative, civil, or criminal penalties.[54] The failure can also expose an entity to liability for any personal injuries that may be attributable to the failure.

Given that the General Duty Clause is, at its heart, based on the actions that would be taken by a "reasonable college or university," a college or university lab manufacturing or utilizing nanomaterials would be well-served by conducting a survey of the applicable information that is available regarding the behavior of the particular nanomaterials in use at its laboratories, the toxicological effects associated with exposure to the materials, and any engineering controls, administrative controls, and personal protective equipment that can be utilized to address any hazards that the materials may present. Given the evolving nature of nanotechnology and our knowledge of its effects, this process will need to be implemented iteratively. A one-time assessment by a college or university of its nanomaterial labs will likely not be sufficient to meet the requirements of the General Duty Clause.

B. Special Duty Clause

In addition to the general duty placed on colleges and universities to provide a safe workplace, the Act imposes a specific obligation to comply with all occupational safety and health standards promulgated under the Act.[55] Under this provision, OSHA is not required to prove the existence of an actual hazard or an actual exposure to a hazard. Conversely, strict compliance with an occupational safety and health standard will not

52. *See* Safeway, Inc. v. Occupat'l Safety & Health Review Comm'n, 382 F.3d 1189, 1195 (10th Cir. 2004).

53. Banovetz v. King, 66 F. Supp. 2d 1076, 1084 (D. Minn. 1999). For a discussion of technological and economic feasibility in the context of standards promulgated through the rulemaking process, *see* Pub. Citizen Health Res. Grp. v. U.S. Dept. of Labor, 557 F.3d 165 (3d Cir. 2010); Kennecott Greens Creek Min. Co. v. Mine Safety and Health Admin., 476 F.3d 946 (D.C. Cir. 2007); Chao v. Gunite Corp., 442 F.3d 550 (7thCir. 2006); Color Pigments Mfrs. Ass'n, Inc. v. Occupat'l Safety and Health Admin., 16 F.3d 1157, 1161–64 (11th Cir. 1994); Am. Iron & Steel Inst. v. Occupat'l Safety and Health Admin., 939 F.2d 975 (D.C. Cir. 1991); Assoc. Builders and Contractors, Inc. v. Brock, 862 F.2d 63 (3d Cir. 1988); Nat'l Cottonseed Prods. Ass'n of Va. v. Brock, 825 F.2d 482 (D.C. Cir. 1987).

54. 29 U.S.C. § 666 (2006).

55. 29 U.S.C. § 654(a)(2) (2006).

insulate a college or university from liability for failing to comply with the General Duty Clause, where a recognized hazard has not been adequately addressed by the applicable specific standard.[56]

Although there are not occupational safety and health standards specifically designed to address potential risks from handling nanomaterials, colleges and universities should be aware of OSHA regulations that are generally applicable to research and development, manufacturing, processing, distribution or disposal operations which may have nano-specific implications. Regulations of particular interest include those that relate to hazard communication; engineering controls; administrative controls; and personal protective equipment.[57] These issues were central to the federal and state investigations that occurred following the lab incidents at the universities in New York and California.

C. Laboratory Requirements

OSHA has promulgated requirements specifically addressing occupational exposures to hazardous chemicals in laboratories.[58] With limited exceptions,[59] these requirements supersede all other OSHA health standards set forth in 29 C.F.R. Part 1910, Subpart Z.[60]

To establish the applicability of these provisions to a college's or university's operations, the institution must determine if its operations are conducted in a "laboratory" and if the operations involve the use of "hazardous chemicals." A "laboratory" is a "workplace where relatively small quantities of hazardous chemicals are used on a non-production basis."[61] A "hazardous chemical" is a "chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees."[62] In the context of nanomaterial operations, the hazardous chemicals could include the nanomaterial itself or the chemicals used to produce the nanomaterial.

"Laboratory use of hazardous chemicals" means the "handling or use of such chemicals in which all of the following conditions are met:

(i) Chemical manipulations are carried out on a 'laboratory scale';[63]

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56. 29 C.F.R. § 1910.5(f) (2010).

57. For an in-depth discussion of these requirements, *see* Paul C. Sarahan, *Nanotechnology Safety: A Framework for Identifying and Complying with Workplace Safety Requirements*, 5 NANOTECH. L. & BUS., 191, 191–205 (2008).

58. 29 C.F.R. § 1910.1450 (2010).

59. 29 C.F.R. § 1910.1450(a)(2), (3) (2010).

60. 29 C.F.R. § 1910.1450(a)(2) (2010).

61. 29 C.F.R. § 1910.1450(b) (2010).

62. *Id.*

63. *Id.* "Laboratory scale" is "work with substances in which the containers used for reactions, transfers, and other handling of substances are designed to be easily and

(ii) Multiple chemical procedures or chemicals are used;

(iii) The procedures involved are not part of a production process,[64] nor in any way simulate a production process; and

(iv) 'Protective laboratory practices and equipment'[65] are available and in common use to minimize the potential for employee exposure to hazardous chemicals."[66]

Colleges and universities conducting operations that fall within the "laboratory" provisions of 29 C.F.R. § 1910.1450 must comply with applicable permissible exposure limits (PELs); develop and implement a chemical hygiene plan; review and evaluate the effectiveness of the chemical hygiene plan at least annually, and update it as appropriate; provide information and training to its employees regarding the hazards of the chemicals present in their work area; and ensure that hazardous chemicals are properly labeled and that material safety data sheets are maintained and readily accessible, among other requirements.[67]

If the college's or university's lab operations are carried out at a commercial, rather than laboratory scale, the lab is subject to the broader OSHA health standards set forth in 29 C.F.R. Part 1910, Subpart Z, addressing toxic and hazardous substances. These include requirements applicable to specific chemical substances. In addition, these regulations establish permissible exposure limits, employee access to exposure and medical records, and comprehensive hazard communication and labeling requirements.

State colleges and universities, by definition, are established and operated by the state. Under section 652 of the Act, state colleges and universities are excluded from the definition of "employer." Under this provision, state colleges and universities are not subject to federal enforcement of standards[68] unless the state has obtained OSHA's approval

safely manipulated by one person." It excludes workplaces whose function is to produce commercial quantities of materials. *Id.*

64. *Id*. OSHA has issued interpretations regarding activities that are "part of a production process." The activities include most quality control/quality assurance activities and pilot plants. *See, e.g.*, Memorandum from Patricia K. Clark, Director of OSHA's Directorate of Compliance Programs, to John B. Miles, Jr., Regional Administrator regarding Requests for Interpretation of the Laboratory Standard, (Feb. 8, 1991, as corrected on Oct. 29, 2002), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20190 (last visited Jan. 24, 2011).

65. "Protective laboratory practices and equipment" are those procedures, practices, and equipment accepted by laboratory health and safety experts as effective, or that the employer can show are effective, in minimizing the potential for employee exposure to hazardous chemicals. *Id.*

66. *Id*.

67. 29 C.F.R. § 1910.1450(c)–(j) (2010).

68. Letter from Richard Fairfax, Director, Directorate of Enforcement Programs, OSHA, to Dick Bartosh, Environmental, Health and Safety Officer, University of

to assume enforcement of the federal standards.

Under the Act, to assume responsibility for the development and enforcement of occupational safety and health standards regarding an issue with respect to which a federal standard has been developed, the state must submit a state plan to OSHA for its review and approval.[69] The state's plan must "be at least as effective in providing safe and healthful employment and places of employment" as the standards established by OSHA.[70] To be approved, state plans must also include "an effective and comprehensive occupational safety and health program" applicable to all employees of the state's public agencies and its political subdivisions,[71] which is as effective as the standards contained in the approved plan. Twenty-one states[72] have submitted and received approval of state plans that address private and public sector occupational safety and health requirements.[73] Public colleges and universities located in states with OSHA-approved state plans are therefore subject to the State Occupational Safety Standards. A state's plan typically adopts all of OSHA's standards, with the exception of specific identified sections.[74] In these twenty-one states, the applicable requirements with which a state college or university must comply are substantially equivalent to the federal OSHA requirements.

Similarly, some states have adopted federally-approved programs covering solely its state and local employees. These states include New York, Connecticut, and New Jersey. Each of these states has adopted regulations that are consistent with those established by OSHA. Public colleges and universities in these states must comply with the applicable state requirements and are subject to inspection and enforcement by the state authorities. Because these states have adopted the federal requirements, as applied to its public sector employees, a public college's or university's analysis of its compliance requirements would follow the analysis for a private college or university set forth earlier in this article.

Twenty-nine states have not chosen to seek approval of a state plan to

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Wisconsin at Stevens Point (Oct. 11, 2006), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25536 (last visited Jan. 24, 2011). *See also* 29 C.F.R. § 1975.5(b)–(e) (setting forth tests and factors for determining whether an entity is a subdivision of the state, including State University Boards of Trustees as an example of a subdivision of the state).

69. 29 U.S.C. § 667(b) (2006).

70. 29 U.S.C. § 667(c)(2) (2006).

71. 29 U.S.C. § 667(c)(6) (2006); 29 C.F.R. § 1902.3(j) (2010).

72. These include Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington and Wyoming.

73. 29 C.F.R. § 1952 (2010).

74. *See, e.g.*, 29 C.F.R. § 1952.90 (2010) (South Carolina adopts OSHA's standards with the exception of 29 C.F.R. §§ 1910.13–1910.16).

address private sector occupational, safety, and health requirements.[75] OSHA is responsible for enforcing these requirements with respect to private colleges and universities in these states. Private colleges and universities within these states are subject to OSHA's jurisdiction, and the compliance requirements for these institutions would follow the analysis for a private college or university set forth earlier in this article. Because the Act specifically excludes coverage of public sector employees, public sector colleges and universities in these states are not subject to OSHA's jurisdiction.[76] However, some of these states have developed occupational safety standards that are applicable to their respective state colleges and universities.[77]

D. NIOSH's Recommended Exposure Limits

In April 2011, the National Institute for Occupational Safety and Health (NIOSH) issued recommended occupational exposure limits for fine and ultrafine, or nanoscale, titanium dioxide (TiO_2).[78] TiO_2 is a noncombustible, white, crystalline, solid, odorless powder, which is utilized in both fine and nanoscale forms in many products, including paints and varnishes, cosmetics, plastics, paper, and food as an anti-caking or whitening agent. Colleges or universities with fine and nanoscale[79] TiO_2 operations must consider the implications arising from this recent publication.

Based on its analysis, NIOSH has recommended airborne exposure limits of 2.4 mg/m^3 for fine TiO_2 and 0.3 mg/m^3 for nanoscale TiO_2, as time-weighted average (TWA) concentrations for up to 10 hr/day during a 40-hour work week. NIOSH's review of current scientific evidence led it to conclude that the surface area of the TiO_2 particles is a critical risk factor for occupational exposure to TiO_2. Nanoscale TiO_2 particles have a larger surface area and are thus of greater concern, according to NIOSH's review.

Unlike OSHA's PELs, this Recommended Exposure Limit (REL) is not a regulatory standard. NIOSH's publication of the REL, however, does carry significant weight and has implications for potential liability if the

75. 29 C.F.R. § 1952 (2010).

76. 29 U.S.C. § 652(5) (2006).

77. *See e.g.*, GA. CODE ANN. § 45-22-1 et seq. (West 2009); MASS. GEN. LAWS ANN. ch. 111F (West 2009); OHIO REV. CODE ANN. § 4167 (West 2009); OKLA. STAT. ANN. tit. 40 (West 2009); 35 PA. STAT. ANN. § 7302 et seq. (West 2009); TEX. HEALTH & SAFETY CODE ANN. §§ 502.001–502.020, 506.001–506.017 (Vernon 2007).

78. NAT'L INST. FOR OCCUP'L SAFETY & HEALTH, CURRENT INTELLIGENCE BULLETIN 63: OCCUPATIONAL EXPOSURE TO TITANIUM DIOXIDE (2011) http://www.cdc.gov/niosh/docs/2011-160/pdfs/2011-160.pdf (last visited June 1, 2011).

79. NIOSH has defined ultrafine TiO2 as having a primary particle diameter of <100 nanometers. *Id*. Ultrafine TiO2 fall within the definition of nanoscale materials.

limit is exceeded.

In addition, late last year, NIOSH initiated a public comment process on its draft Current Intelligence Bulletin Occupational Exposure to Carbon Nanotubes and Nanofibers.[80] Relying on several animal studies that "consistently show that relatively low mass doses of CNT are associated with early-stage adverse lung effects in rats and mice," including pulmonary inflammation and fibrosis, NIOSH has proposed a REL of 7 $\mu g/m^3$ elemental carbon as an eight-hour TWA respirable mass airborne concentration.[81]

Although the REL is proposed to be set at the lowest airborne CNT and carbon nanofiber (CNF) concentration that can be accurately measured by NIOSH procedures, this level is above that at which NIOSH suggests that an excess risk of adverse lung effects is predicted. Therefore, in addition to proposing an REL, NIOSH is suggesting recommended practices for employers and employees to further minimize exposure to airborne concentrations of CNT and CNF.[82]

Although NIOSH's RELs for CNTs, CNFs are in draft form at this time, it is likely that such recommended limits would have some persuasive weight in litigation arising from occupational exposure to such materials.

III. ASSESSMENTS

When a college or university decides to conduct an assessment, it is important to analyze the nature of its facility's operations to ensure that all applicable regulatory issues are considered. In doing so, the college or university should consider the appropriate scope of the assessment. A smaller operation may choose to assess all of its operations, particularly if an assessment has not been conducted previously. A college or university with larger operations, or one with operations that have been previously assessed, may consider assessing a particular aspect of its operations. The college or university may also conduct an assessment to determine its compliance with particular provisions of the applicable state and federal regulations. Additionally, the college or university should consider any points from which materials or pollutants could be released to the environment to assist in evaluating potential exposures to employees, facility visitors, and adjacent or nearby properties.

Once a college or university has analyzed the nature of the facility to be assessed, the points from which a release could occur, and the intended

80. NAT'L INST. FOR OCCUP'L SAFETY & HEALTH, CURRENT INTELLIGENCE BULLETIN: OCCUPATIONAL EXPOSURE TO CARBON NANOTUBES AND NANOFIBERS (Draft) (2010), http://www.cdc.gov/niosh/docket/review/docket161A/pdfs/carbonNanotubeCIB_PublicReviewOfDraft.pdf (last visited Jan. 24, 2011).

81. *Id*.

82. CURRENT INTELLIGENCE BULLETIN: OCCUPATIONAL EXPOSURE TO CARBON NANOTUBES AND NANOFIBERS, *supra* note 78.

scope of the assessment, the college or university and any consultant involved in the assessment should determine the potentially applicable requirements that fall within the scope of the assessment. In compiling the list of potentially applicable requirements, the assessment team should approach the task inclusively. The assessment team can always narrow the list based on a more in-depth analysis conducted as part of the assessment process. The assessment team is less likely to consider additional requirements to be added to the list as it goes through the assessment process. Being inclusive at the front-end of the project will provide greater certainty that all potential issues have been identified and evaluated.

The assessment should be developed and performed under an applicable audit act or policy, or under the attorney-client privilege. The assessment team must consider, prior to the initiation of the assessment, whether the assessment will be performed under an audit act or policy. This decision will allow the assessment team to ensure that it meets the applicable requirements of the act or policy to be used. Each act or policy is structured differently and has different advantages and disadvantages that must be considered in light of the college's or university's objectives.

If the applicable act provides an evidentiary privilege, or if the assessment is conducted under the attorney-client privilege, the assessment team should ensure that information created, gathered or obtained during the course of the assessment is not voluntarily disclosed to persons outside the scope of the applicable privilege, or the privilege can be waived. If disclosure is required, the college or university should do so under the terms of a confidentiality agreement, where appropriate.

Upon completion of the assessment, compliance issues should be identified and included in an assessment report. As part of this process, the college or university should consider and develop proposed corrective actions to address any issues identified in the assessment and a proposed timeframe for the completion of each corrective action. The efforts of the college or university to implement corrective actions in a timely manner will improve workplace conditions and further minimize its potential liability.

In the context of nanomaterial operations, a college or university should consider an iterative assessment process, with an assessment being conducted semi-annually or annually, on all or a portion of the college's or university's nanomaterial operations, depending on the extent of such operations. For institutions with numerous nanomaterials operations, the assessment team may consider using a risk analysis to identify a subset of operations that will be included in the assessment. One consideration in such a risk analysis may be the extent to which an operation selected to be included in the assessment is representative of other operations at the college or university, such that the results of the assessment can be applied more broadly.

An iterative assessment approach is appropriate because of the evolving

nature of the technology, the current knowledge of potential risks, and the availability of protective measures to address these potential risks. The performance of periodic assessments will improve the college's or university's ability to ensure that it is complying with the state and federal occupational safety and health requirements, and is aware of developments related to nanotechnology processes, risks and protective measures. Through such a process, the college or university can provide working conditions that meet its obligations to its employees and to state and federal regulatory authorities.

Such an approach is consistent with the standards of the American Society for Testing and Materials (ASTM). ASTM International published a *Standard Guide for Handling Unbound Engineered Nanoscale Particles in Occupational Settings* in October 2007.[83] This guidance is based on the principle that occupational exposures to unbound nanomaterials "should be minimized to levels that are as low as is reasonably practicable."[84] Through this guidance, ASTM International recommends the following:

• The development of a formal written management policy based on this "control principle";

• Formal designation of responsibilities within the organization for developing and implementing a risk assessment and minimization program; (the "Program");

• The development of training regarding the Program;

• The development of record keeping and record retention procedures to document the implementation of the Program; and

• A periodic review of the Program.[85]

A college or university manufacturing, processing, distributing, or disposing of nanomaterials can position itself to ensure workplace safety, and prevent or limit liability associated with such activities by taking the following steps:

(1) Determine what nanomaterials are used or are present at the facility. This step is particularly important for facilities that are utilizing nanomaterials that have been manufactured elsewhere.

(2) Determine the composition, characteristics, concentrations, volume, and properties[86] of the nanomaterials, and identify any exposure

83. ASTM Int'l, *Standard Guide for Handling Unbound Engineered Nanoscale Particles in Occupational Settings*, *in* ANNUAL BOOK OF ASTM STANDARDS Vol. 14.02 1109–1132 (2009).

84. *Id.* at 1111.

85. *Id.* at 1111–12.

86. Relevant properties include size and size distribution; shape; agglomeration state; biopersistence, durability and solubility; surface area; porosity; surface

pathways.[87] Research and testing by internal and external scientists may be necessary.[88]

(3) Review existing scientific studies relevant to the specific nanomaterials in use, as well as those that have similar compositions characteristics, properties, and exposure pathways. As part of this review, survey facilities engaged in similar operations to determine potential risks those facilities have identified.

(4) Determine the potential exposure risks associated with the nanomaterials that are being handled.

(5) Analyze the facility's processes to determine the potential points of releases, discharges, or emissions. The facility should consider material receipt and unpacking; manufacturing and finishing processes; lab operations; storage, packaging, and shipping; waste management; maintenance and housekeeping; and potential upset events.[89]

(6) Identify the local, state, and federal regulatory requirements applicable to the facility's operations.

(7) Identify and evaluate available engineering controls that can address potential releases of, or exposures to, the nanomaterials in use at the facility. As part of this process, survey facilities engaged in similar operations to identify any engineering controls in use.

(8) Identify and evaluate available administrative controls that can address potential releases of, or exposures to, the nanomaterials in use at the facility. As part of this process, survey facilities engaged in similar operations to identify any administrative controls in use.

(9) Identify and evaluate available personal protective equipment that can address potential releases of, or exposures to, the nanomaterials in use at the facility. As part of this process, survey facilities engaged in similar operations to identify any personal protective equipment in use.

(10) Identify and implement appropriate engineering controls, administrative controls, and personal protective equipment to be used at the facility.

(11) Establish standard procedures to prevent upset events and to respond to such events, should they occur.

(12) Establish standard operating procedures to ensure compliance with regulatory requirements and the appropriate and effective use of the engineering controls, administrative controls, and personal protective equipment.

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chemistry; trace impurities and contaminants; chemical composition; physical properties; and crystallinity. *Id*. at 1113.

87. Potential exposure pathways include inhalation, ingestion, and dermal contact, including eyes and mucus membranes. The most common exposure route is expected to be by inhalation. *Id*. at 1114.

88. Monica, *supra* note 42, at 63.

89. ASTM Int'l, *supra* note 83, at 1115.

(13) Communicate to the employees the results of the risk assessment and the standard operating procedures to be used to minimize the risks identified.

(14) Develop and provide training to the employees. Employees should be trained prior to their initial assignment to a nanomaterials work area. The training should be repeated on a periodic basis.

(15) Conduct periodic assessments of the facility's operations to test its regulatory compliance and the appropriate and effective use of the engineering controls, administrative controls, and personal protective equipment. The assessments should be performed under available state or federal audit programs and policies,[90] or under the attorney-client privilege.

(16) Establish or review the facility's records retention policy and system to ensure that appropriate documentation is maintained and to demonstrate that the facility has appropriately identified and addressed the potential risks from its nanomaterials operations. The facility's completion of each of the steps discussed above should be appropriately documented.

(17) Develop a system to periodically review the analysis set forth above to ensure that the information is current and that the decision-making is valid and appropriately documented. The rapidly-evolving development of nanotechnology and our knowledge of its potential effects necessitates an iterative process.

(18) Monitor any regulatory activities pending or under consideration at the local, state, and federal regulatory agencies.

IV. CONCLUSION

Nanotechnology's potential for incredible advances in a wide variety of industries is clear. Much of the groundwork for these advances is being conducted at colleges and universities across the United States. The success of these efforts is critical to the economic and technological success of the United States.

An increasing number of scientific studies are indicating that exposure to some nanomaterials under some conditions could pose human health risks. The first indication of the effects of such exposure will be seen in the workplace, where exposures, if not mitigated, can occur at greater levels than that seen in the general environment due to higher concentrations and amounts of nanomaterials and higher exposure levels and frequencies.

Because of the critical role being played by colleges and universities in the research and development of nanomaterials, college and university laboratories could be among the first workplaces in which the effects of

90. *See e.g.*, Final Policy Concerning the Occupational Safety and Health Administration's Treatment of Voluntary Employer Safety and Health Self-Audits, 65 Fed. Reg. 46,498 (July 28, 2010); Texas Environmental, Health and Safety Audit Privilege Act, TEX. REV. CIV. STAT. ANN. art. 4447cc (Vernon 2000); Oregon Occupational Safety Audit Act, OR. REV. STAT. § 654.101 (2009).

such exposure are identified. Colleges and universities should assess the nanomaterials operations ongoing on their campuses to ensure that appropriate protocols and procedures are in place to address the unique risks that can be posed by such materials. Through such an assessment, a college or university can ensure that it: (1) provides a safe workplace for its employees and students; (2) complies with applicable state and federal occupational safety and health requirements; and (3) minimizes potential workers compensation and toxic tort liability.

This article has provided a process that can be utilized to conduct such an assessment. Through the implementation of such a process, a college or university can document the nanomaterials in use in its laboratories, risk information applicable to such nanomaterials, and the protective measures implemented to address these risks. To increase the credibility of the assessment in the event of future litigation, it is recommended that the assessment team include third-party technical and legal consultants that have environmental, health, and safety expertise specific to nanomaterials. Finally, because of the rapidly-evolving development of both nanotechnology and the science regarding potential risks of nanomaterials, it is recommended that the assessments be conducted on a periodic basis to ensure that the information on which a college or university has designed its protocols and procedures is current and that its decision-making is valid and appropriately documented.

CONSTITUTIONAL ACADEMIC FREEDOM AND ANTI-AFFIRMATIVE ACTION LAWS

URI ABT*

INTRODUCTION

In the wake of the passage of state "anti-affirmative action" constitutional provisions, most recently in Michigan, some who wish affirmative action to continue have turned to the courts. The adoption of Proposal 2 in Michigan sparked litigation challenging the new state constitutional provisions on equal protection, Title VI, and Title IX grounds.[1] So far, the challenges have been unsuccessful.[2] After the adoption of Proposition 209—California's Proposal 2 counterpart—similar challenges were similarly unsuccessful.[3] The Michigan and California laws prohibit discrimination or preferential treatment on the basis of race, sex, color, ethnicity, or national origin in public employment, public

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1. Coal. to Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2006); Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 592 F. Supp. 2d 948 (E.D. Mich. 2008).

2. Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich. is, at the time of this article, on appeal awaiting a decision. A list of pending cases at the Sixth Circuit Court of Appeals can be found at http://www.ca6.uscourts.gov/case_reports/rptPendingDistrict_MIE.pdf.

3. Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997).

education, and public contracting. While the possible scope of the laws cut broadly, the flash point has been college and university admissions.[4]

In addition to the legal challenges, the wisdom of these laws has been questioned on more practical grounds. For instance, the plunging minority enrollment in the California school system since the passage of Proposition 209 in 1996 has been highlighted as an alarming yet inevitable result of the race-blind admissions process.[5] There has been a similar result in Michigan.[6] Also questioned is the appropriateness of the ballot initiative system, with its susceptibility to political whim and majority rule, as a tool to eliminate a method of minority protection.[7] Both California and Michigan have provisions in their state constitutions granting their institutions of higher education substantial autonomy from the state legislature.[8] The purpose behind these provisions is to provide colleges and universities some insulation from the political whims of state legislatures so that they can effectively serve their proper functions—teaching and research. But by enacting constitutional provisions though the use of ballot initiatives, proponents of the anti-affirmative action laws have effectively breached those political safeguards. If legislatures are considered improper forums for making delicate academic decisions, then the blunt tool of the electorate at large[9] would be an even less desirable decision maker. This article asks whether colleges and universities receive protection from the Federal Constitution; more specifically, whether academic freedom is a right protected by the First Amendment to the Federal Constitution and whether it protects the admissions processes of institutions of higher education.

After the passage of Proposal 2 in Michigan, several advocacy groups joined together in a lawsuit seeking a preliminary injunction preventing the

4. *See* BARBARA A. PERRY, THE MICHIGAN AFFIRMATIVE ACTION CASES 166–70 (2007) (describing how the Supreme Court's decisions in the well-publicized admissions policy cases Gratz v. Bollinger, 539 U.S. 244 (2003) and Grutter v. Bollinger, 539 U.S. 306 (2003) led to Proposal 2).

5. Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1133–43 (2009).

6. At University of Michigan Law School, the minority admittance rate has fallen from 39.6% before the adoption of Proposal 2, to 5.5%. JUDITH AREEN, HIGHER EDUCATION AND THE LAW 655 (2009), citing Elizabeth Reden, *Now and Then: Minorities and Michigan*, INSIDE HIGHER ED, June 25, 2007, *available at* http://insidehighered.com/news/2007/06/19/michigan.

7. Jodi Miller, *"Democracy in Free Fall": The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1 (1999). For a withering attack on direct democracy more generally see Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293 (2007).

8. Neal H. Hutchens, *Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities*, 35 J.C. & U.L. 271 (2009).

9. Aside from the unlikelihood that most voters are well informed in areas such as college and university admissions, ballot initiatives by their nature must boil the issue down to a yes or no question. Miller, *supra* note 7, at 31.

abandonment of the old admissions policies at Michigan's state universities.[10] The universities, defendants in the action, argued by way of a cross claim against the governor—also a defendant—that the anti-affirmative action law violated their academic freedom. In *Coalition to Defend Affirmative Action v. Granholm*, the Sixth Circuit Court of Appeals responded to the universities' argument this way:

> [I]t is one thing to defer to a state university's judgment in deciding who may attend that university—and to defer in the process to the university's academic freedom that "long has been viewed as a special concern of the First Amendment . . . " [and] quite another to say that the First Amendment in general and academic freedom in particular prohibit a State from eliminating racial preferences. . . . The Universities mistake interests grounded in the First Amendment—including their interest in selecting student bodies—with First Amendment rights.[11]

This assertion, however, begs the question. It is true that the phrase "academic freedom" appears nowhere in the text of the Constitution. It also would be hard to argue that academic freedom is "deeply rooted in this Nation's history and tradition."[12] (As public colleges and universities as we now know them did not materialize in the United States until after the Civil War, it is exceedingly unlikely that academic freedom was thought of or debated by the drafters or ratifiers of the Constitution.[13]) But the paucity of textual and historical support for a constitutional right of academic freedom has not stopped courts from recognizing that colleges and universities receive some type of special status under the Constitution. So the question remains whether academic freedom rises to the level of a constitutional right, or is it merely a deferential gloss used by courts to favor a particularly valuable First Amendment actor—a First Amendment "interest."

It has been said that academic freedom is "a law of concurrences and footnotes."[14] This statement captures well the secondary role academic freedom has played in many of the cases in which it has appeared. But it should not be taken to indicate that the line has limited precedential value. It is true that some of the seminal statements made by the Supreme Court

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10. The Michigan Constitution specifically incorporates three universities: University of Michigan, Michigan State University, and Wayne State University. *See* MICH. CONST. OF 1963 art VII, § 5. These three universities were defendants in the case.

11. Coal. to Defend Affirmative Action v. Granholm, 473 F.3d 237, 247 (6th Cir. 2006).

12. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

13. David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, LAW & CONTEMP. PROBS., 227, 237–38 (1990).

14. Jeff Todd, Note, *State Universities v. State Government: Applying Academic Freedom to Curriculum, Pedagogy, & Assessment*, 33 J.C. & U.L. 387, 389 (2007).

regarding academic freedom have appeared in concurring opinions, but they have been endorsed by subsequent majority opinions.[15] And the fact that a statement appears in a footnote does not necessarily indicate its importance.[16] Academic freedom's relegation to the periphery of the Court's opinions, however, *has* affected its precedential value in that it has prevented academic freedom from receiving a solid grounding in the First Amendment—one that distinguishes it from and likens it to other First Amendment rights.

When the courts have invoked academic freedom, it has usually been in one of two ways. The first way has been on behalf of professors when state statutes threaten their ability to execute their duties without fear of reprisal.[17] Because of the posture of these cases—an individual alleging state interference with their speech or expression—the courts' application of academic freedom can be seen as invoking a gloss on, or crafting a particular application of, individual First Amendment rights of speech or expression. But it can also be interpreted as an application of a distinct right, also grounded in the First Amendment, supported by particular First Amendment values.

The second way academic freedom comes up in opinions has been in controversies between students or potential students and the institutions themselves. In this category academic freedom is usually invoked on behalf of the college or university. This has led courts to balance the particular right invoked by the student (usually speech, expression, equal protection, or due process) with the interests of the college or university. This has often resulted in students' rights being subordinated to those of colleges and universities in the name of academic freedom.[18] In those opinions where academic freedom has been invoked to protect the decision of an academic institution, the particular court could merely be deferring to a decision-maker with greater expertise—as the Sixth Circuit seems to be suggesting in *Granholm*[19]—or recognizing a distinct constitutional right of the college or university grounded also in particular First Amendment values.

It is because the two areas where the courts have granted special

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15. The famous concurrences are Sweezy v. New Hampshire, 354 U.S. 234 (1957) and Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). They were incorporated into majority opinions in Keyishian v. Bd. of Regents of the State of New York, 385 U.S. 589 (1967) and Grutter v. Bollinger, 539 U.S. 306 (2003). *See infra* Part II.

16. *See, e.g.*, United States v. Caroline Prods. Co., 304 U.S. 144, n. 4 (1938) (articulating, in a footnote, the idea that different levels of review would be used for different types of constitutional claims).

17. *See, e.g.*, *Sweezy*, 354 U.S. at 234; *Keyishian*, 385 U.S. at 589.

18. *See, e.g.*, Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985); *Bakke*, 438 U.S. at 265; *Grutter*, 539 U.S. at 306.

19. *See Granholm*, 473 F.3d and accompanying text.

recognition to academic freedom don't necessarily intersect, and because the controversies tend to implicate other constitutional rights, that the contours of academic freedom have remained murky. But there certainly seems to be a constitutional enclave inhabited by colleges and universities *and* their faculty. The two areas of special First Amendment treatment can be thought of as particular manifestations of a constitutional value that might, in fact, have the force of a constitutional right.

Part I of this article looks at the values underpinning the First Amendment for evidence that it includes a constitutional right of academic freedom among its protections. Part II will analyze the Supreme Court's line of academic freedom cases with an eye towards whether the Court has recognized a constitutionally supported right of academic freedom. Finally, in order to discern whether constitutional academic freedom can protect college and university admissions policies—and thereby provide a shield against the anti-affirmative action laws—Part III addresses the question whether academic freedom protects the faculty, the students, the institution or whether academic freedom primarily protects the *academic endeavor itself* and therefore protects each higher education actor only insofar as they are furthering that endeavor.

I. THE UNIQUE FIRST AMENDMENT VALUE OF THE COLLEGE OR UNIVERSITY

As an initial matter, it is important to establish why a value analysis should be a compelling method of interpreting the First Amendment. The text of the First Amendment does not, without some supporting theory, provide meaningful guidance to those charged with applying it. For instance, it certainly is uncontroversial to state that the text of the Speech Clause—"Congress shall make no law . . . abridging the freedom of speech"[20]—is over-inclusive. Ever since the Supreme Court first began developing its First Amendment jurisprudence in 1919[21] it has been understood that it was not "intended to give immunity for every possible use of language."[22] Most would also agree that a strict reading is under-inclusive; it must protect more than merely the "interchange of thoughts in spoken words"[23]; it contemplates other manner of expression as well. Thus courts and scholars—when developing judicial constructs for applying the First Amendment—rely on the animating values behind the Amendment. And it is a commitment to the underlying values—which give meaning to the text—that has shaped the doctrine of the First Amendment. Amongst the most commonly cited values that the First Amendment protects are

20. U.S. CONST. amend. I.
21. Schenk v. United States, 249 U.S. 47 (1919).
22. Frohwerk v. United States, 249 U.S. 204, 206 (1919).
23. Webster's Collegiate Thesaurus 767 (1976).

truth-seeking and the democratic value of dissent.[24] The modern college or university plays a unique role under both these theories. To identify more clearly how a university specially serves these values, it is necessary to keep in mind the two major functions of the college or university—research and teaching. The way that a college or university promotes these First Amendment values differs depending on whether it is viewed in its teaching or research capacity.

A. Truth-Seeking Theory

This theory, most famously advanced by John Stuart Mill[25] and first noted in the Supreme Court through Justice Holmes' dissent in *Abrams v. United States*[26], begins with the presumption that nobody is infallible and no idea unchallengeable. It continues with the proposition that the veracity of an idea is best proved by whether it survives when tested. Thus the more ideas floating around testing each other, the better. This is the concept alluded to when the metaphor of "the marketplace of ideas" is used.

Colleges and universities, in their research capacities, are first and foremost truth-seeking institutions. There is a difference, though, between the truth-seeking nature of the college or university and that which is protected by the First Amendment when applied more broadly. The "marketplace of ideas" envisioned by Mill or Holmes encompasses society as a whole, a quasi-Darwinian bazaar where the profound, the absurd, and the mundane battle, with truth coming out on top. Anyone can participate; any idea must be heard. Whether such a chaotic market actual leads to truth may well be debated,[27] but it is in contrast to it that the unique truth-seeking value of the college or university becomes clear. As noted in the *AAUP 1915 Declaration of Principles on Academic Freedom and Academic Tenure*[28], the professors' value to their college or university—and by extension, the college or university's value to society—is realized when they "deal at first hand, after prolonged and specialized technical training, with the sources of knowledge; and [when they] impart the results

24. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRACTICE AND PRINCIPLES (3rd. ed. 2006).

25. JOHN STUART MILL, ON LIBERTY, *reprinted in* THE FIRST AMENDMENT: A READER 58–65 (John H. Garvey & Frederick Schauer eds., 1996). Holmes studied Mill as a young man and met him several times when he traveled to Europe in 1866. MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841–1870 226–29 (1957). For an interesting discussion of the effect of Mill's philosophy on Holmes see *id.* at 212–14.

26. 250 U.S. 616 (1919).

27. *See infra* note 30 and accompanying text.

28. 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE *reprinted in* AAUP POLICY DOCUMENTS & REPORTS 291–301 (10th ed. 2006) [hereinafter "1915 DECLARATION"]. For a discussion of this document and its surrounding circumstances see *infra* notes 133–35 and accompanying text.

of their own and of their fellow-specialists' investigations and reflection, both to students and to the general public, without fear or favor."[29]

The college or university can thus be seen as serving a special truth-seeking role—separate from that of free speech more generally—in two ways. First, in a world of enormous complexity and specialization, truth-seeking in many areas can be done only with a foundation of background knowledge. The college and university system provides society with such experts by vetting the professor at the tenure stage and by supporting the professor in his or her research. Second, the existence of a structured, self-policed truth-seeking regime cures some of the flaws in the marketplace of ideas analogy. For instance, it is not too hard to imagine that the idea that wins out is not the most truthful one, but instead is the most attractive one, or the one spoken the loudest.[30] The college or university, with its careful self-policing through peer review and professional standards, may well provide a better version of the marketplace of ideas than that provided by society overall. So, if the First Amendment's protections are to be applied in a way that fosters truth-seeking, the college or university should be at the center of that protection.

The truth-seeking value of the college or university in its teaching capacity is not as direct. The primary way that colleges and universities serve truth-seeking by teaching is by producing the next generation of truth-seekers. By training students in their respective disciplines, as well as in such general truth-seeking skills as critical thinking, the college or university is providing society with better equipped truth-seekers. Students also aid in assuring that the college or university is serving its research function well. As with any self-policing group, entrenchment and orthodoxy could hamper the proper truth-seeking function of the professoriate. The professors' contact with students—from deciding how best to teach basic level course to fielding an unexpected question—should force them to readdress the basics of their profession, those things that they may have otherwise taken for granted long ago. In doing so, the foundation of their discipline—that which they are teaching the students—is tested. It should be noted that a diverse student body, bringing as it would varied perspectives, background knowledge, and learning styles, would be more effective in this regard than a monolithic student body.

B. Democratic Theory

Democratic theory is rooted in the idea of self-governance and thus places the First Amendment in a structural posture within the Constitution. It has two related aspects. The first is that a government based on universal

29. 1915 DECLARATION, *supra* note 28, at 294.

30. For a fuller explanation of this theory see CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); Owen Fiss, *Why the State?* 100 HARV. L. REV. 781, 787–88 (1987).

suffrage presumes an informed electorate. The First Amendment, on this account, protects against those things that would stand in the way of the electorate becoming informed or capable. Some argue that a democratic theory of the First Amendment should protect only political discourse. [31] But, as Alexander Meiklejohn put it, "Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."[32] Meiklejohn's formulation includes something more than merely being informed about public issues. It goes further to stress that complete personal development is important for public decision-making. This understanding extends the ambit of First Amendment protection far beyond just the political.

A second aspect of democratic theory, closely related to the first, is that criticism of the government is an important check on abuse of power.[33] This has been recognized by the Supreme Court as "the central meaning of the First Amendment."[34] The theory is that when government oversteps its constitutionally prescribed bounds, public outcry will chase it back. This idea fits well with the structure that our Constitution created—one of checks and balances. The idea's potency is regularly reinforced by news of governments around the world suppressing dissident speech.[35]

The valuable role that the college or university plays under a democratic theory of the First Amendment is primarily rooted in its teaching function. That is, the role that education in general and higher education in particular play in developing "the intelligence, integrity, sensitivity, and generous devotion to the general welfare" that Meiklejohn argued was required of all voters.[36] The importance of schooling to the health of a democracy was well recognized by the Founding Fathers. Benjamin Franklin, in a proposal

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31. For an argument that *only* neutral principles and some political speech is protected by the First Amendment see Robert Bork, *Neutral Principles and Some First Amendment* P*roblems*, 47 IND. L.J. 1 (1971).

32. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

33. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523 (1977).

34. New York Times v. Sullivan, 376 U.S. 254, 273 (1964).

35. *See, e.g.*, *Egypt Severs Internet Connection Amid Growing Unrest*, BBC, Jan. 28, 2011, *available at* http://www.bbc.co.uk/news/technology-12306041 (describing Egypt's attempt to control mass protests by eliminating internet access); *Internet Censorship in China*, N.Y. TIMES, July 9, 2010, *available at* http://topics.nytimes.com/topics/news/international/countriesandterritories/china/internet_censorship/index.html (describing Chinese government control over internet in that country); Farnaz Fassihi, I*ranian Crackdown Goes Global*, WALL ST. J., Dec. 3, 2009, *available at* http://online.wsj.com/article/SB125978649644673331.html?mod=googlenews_wsj (last visited January 16, 2011) (Iranian authorities intimidating expatriates who are speaking out against the current government).

36. Meiklejohn, *supra* note 32, at 255.

to start an academy in Pennsylvania said this: "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 Commonwealths."[37] Benjamin Rush, in an effort to promote a national university said, "To conform the principles, morals, and manners of our citizens to our republican form of government, it is absolutely necessary that knowledge of every kind, should be disseminated through every part of the united states. [sic]"[38] As President, George Washington also supported a national university. In a speech to Congress, he said,

> Nor am I less persuaded that you will agree with me in opinion, that there is nothing which can better deserve your patronage than the promotion of Science and Literature. Knowledge is, in every country, the surest basis of public happiness. In one in which the measures of government receive their impression so immediately from the sense of the community as in ours, it is proportionably essential. To the security of a free constitution it contributes in various ways; by convincing those who are entrusted with the public administration, that every valuable end of government is best answered by the enlightened confidence of the people; and by teaching the people themselves to know and to value their rights; to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority; between burthens proceeding from a disregard to their convenience and those resulting from the inevitable exigencies of society; to discriminate the spirit of liberty from that of licentiousness—cherishing the first, avoiding the last, and uniting a speedy, but temperate vigilance against encroachments, with an inviolable respect to the laws.[39]

While the educational institutions envisioned by these founding fathers differ in important ways from those young people attend today, modern colleges and universities, by teaching young citizens, promote the same values they thought essential to a democracy.

Another way that colleges and universities provide First Amendment value under the democratic theory is that the institution—through its professors—can provide information on which voters have some reason to believe they can rely. Because of the increased complexity and specialization of almost everything, the average voter is unlikely to have the expertise in an area to make a truly informed opinion about an issue. The college or university—where a certain level of accomplishment is

37. BENJAMIN FRANKLIN, PROPOSAL RELATING TO THE EDUCATION OF YOUTH IN PENNSYLVANIA (1749), *reprinted in* AREEN, *supra* note 6, at 29.

38. BENJAMIN RUSH, ADDRESS TO THE PEOPLE OF THE UNITED STATES (1787), *reprinted in* AREEN, *supra* note 6, at 32.

39. George Washington, Message to Congress (1790), *reprinted in* AREEN, *supra* note 6, at 33.

required to become a professor and research is vetted through the peer-review process—there is a place to turn for reliable information. The college or university can also provide a powerful check on government. The sort of protection afforded tenured professors allows the professoriate to counter false claims without fear of reprisal and the prestige that accompanies professorship lends weight to the opinions of an educated dissenter.

Finally, student movements also have a rich history as democratic actors. From Kent State to Tienanmin Square to Tehran, university students have been at the forefront of many important political movements. Colleges and universities, by their very nature, create communities of young, energetic, and idealistic people. They provide a nexus for these students to meet and organize, develop ideas and advocate positions. The examples mentioned above clearly implicate the second form of democratic theory; the value of the college or university as a government check. It also serves the first democratic value; the value of disseminating ideas to help inform the electorate.

So it is that colleges and universities speccially serve the values supporting the First Amendment. The values promoted are familiar, but the ways in which the college or university serves those values are unique and uniquely valuable. We now turn to the courts to see if these special functions have been recognized and if so, whether they give rise to a constitutional right of academic freedom.

II. THE SUPREME COURT AND ACADEMIC FREEDOM

In 1957, a majority on the Supreme Court first took up the cause of academic freedom in *Sweezy v. State of New Hampshire*.[40] During a period when the cold war atmosphere gave rise to many constitutionally questionable laws, just such a law was passed by the New Hampshire legislature.[41] The statute was construed to allow the Attorney General of New Hampshire to call before him possible subversives for questioning, a power he exercised over Paul Sweezy, a visiting professor at the University of New Hampshire. Sweezy refused to answer questions about his lectures and was held in contempt.[42]

In a plurality decision, the Supreme Court overturned his conviction on the grounds that the procedure that was followed in his case violated the procedural component of the Due Process Clause of the Fourteenth Amendment. But Chief Justice Warren, writing for the plurality, devoted a substantial portion of his opinion to the importance of the substantive rights that were implicated. He wrote: "[w]e believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom

40. Sweezy v. New Hampshire, 354 U.S. 234, 234 (1957).
41. *Id.* at 236–37.
42. *Id.* at 235–45.

and political expression—areas in which government should be extremely reticent to tread[,] . . . rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment."[43] He went on to write "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."[44] Having decided the case on other grounds, Chief Justice Warren declined to define these rights beyond broad recognition.[45]

Justice Frankfurter wrote a separate opinion, concurring with Chief Justice Warren as to the result but basing his opinion not on procedural due process, but the substantive rights at issue.[46] He explained that academic freedom was indispensable in a free society and, addressing the State's argument that routing out subversive teaching justified the constitutional encroachment, Justice Frankfurter wrote: "When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate."[47] He went further and stated, "Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."[48] Finally, Justice Frankfurter spoke of 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."[49]

Chief Justice Warren had four votes and Justice Frankfurter had two. While they decided the case on different grounds, they both recognized something called academic freedom. Additionally, both Justices used language strongly suggesting that academic freedom might be a fundamental right. Chief Justice Warren invoked the Bill of Rights and the Fourteenth Amendment. Justice Frankfurter stated that governmental intrusion in this area could only be for reasons that are "exigent and obviously compelling."[50] However, by splitting the majority on the grounds of the holding—with the plurality opinion resting on procedural

43. *Id.*at 250.

44. *Id.*

45. *Id.* at 251. ("We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields. But we do not need to reach such fundamental question of state power to decide this case.").

46. *Id.* at 266–77 (1957) (Frankfurter, J., concurring).

47. *Id.*

48. *Id.* at 262.

49. *Id.* at 263.

50. *Id.* at 262.

due process grounds—the two justices reduced their strong language in favor of a constitutional right of academic freedom to dicta. Additionally, their opinions regarding academic freedom seem to diverge in a major respect. Chief Justice Warren conceived of the right of academic freedom as adhering in the professoriate, while Justice Frankfurter, by laying out the "four essential freedoms of a university," presented an academic freedom that seemed to adhere in the institution itself. This distinction is the source of much scholarly debate and will be taken up directly in Part III. For purposes of this part the distinction is of interest only to the extent that it casts light on whether academic freedom has the full force of a constitutional right.

Different inferences can be drawn from the Justices' separate treatments of academic freedom. Justice Frankfurter, by addressing the institution instead of the individual, created a separation between academic freedom and other First Amendment rights. By placing the right with the institution, Justice Frankfurter seems to be claiming a unique right on colleges' or universities' behalf. Additionally, the "four freedoms" Justice Frankfurter listed in his concurrence—"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"—are hard to square with other First Amendment rights, such as speech or association.[51] Finally, that Justice Frankfurter claimed the right of academic freedom on behalf of a state institution was—and is—exceptional.[52] Overall, the posture taken by Justice Frankfurter seems to indicate that academic freedom is not merely an extension or particular application of other First Amendment rights, but a unique right standing alone.

On the other hand, by referring directly to "the petitioner's liberties," Chief Justice Warren's interpretation of academic freedom fits more easily within freedom of speech doctrine. Because Chief Justice Warren—unlike Justice Frankfurter—declined to elaborate on the scope of academic freedom, his opinion may stand only for the proposition that a professor has the right to lecture without undue fear of state sanction. This certainly could be argued to be within the ambit of the Free Speech Clause of the First Amendment. Under this interpretation, the Court is recognizing that some previously acknowledged First Amendment rights, e.g. speech or expression, are of particular value in the college and university context; and thus receive greater protection from legislative encroachment when exercised there than in other contexts. It would follow that academic

51. *Id.* at 263. Granted, the list is easier to square with current expressive association doctrine, *see* Boy Scouts of America v. Dale, 530 U.S. 640 (2000), but the first case in that line was not decided for another year. NAACP v. Alabama, 357 U.S. 449 (1958) ("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.").

52. See *infra* note 79 and accompanying text.

freedom is just a way of describing a particular form of protected speech that is at the core of the values the First Amendment protects. Understood this way, academic freedom is not a constitutionally supported right in and of itself, but a reason to take special notice of previously established First Amendment rights when they are exercised in educational institutions.

It is notable, however, that by recognizing that the Constitution protects state-employed professors' speech, Chief Justice Warren set the professor apart from other state employees. In 1957, public employees were granted very little, if any, First Amendment protection. Until *Pickering v. Board of Education*,[53] decided in 1968, public-employee speech was subject to a right/privilege distinction. Justice Holmes, while sitting on the Supreme Judicial Court of Massachusetts, described the doctrine this way in *McAuliffe v. Mayor of New Bedford*: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman . . . The city may impose any reasonable condition upon holding offices within its control."[54]

Viewed with this background in mind, Chief Justice Warren's assertion "that there unquestionably was an invasion of petitioner's liberties" seems to recognize that the professor's right to academic freedom is different in kind from the citizen's right to speak. It could be deduced from this that academic freedom is supported by more compelling—or at least different—constitutional values than speech exercised in other contexts. Subsequent public-employee speech cases have acknowledged this likelihood. Most recently in *Garcetti v. Ceballos*[55] the Supreme Court carefully avoided academic freedom while retooling the public-employee speech doctrine. In response to Justice Souter's concern that the new rule may "imperil First Amendment protection of academic freedom in public colleges and universities,"[56] Justice Kennedy, writing for the court, admitted that "[t]here 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." The Court, therefore, declined to "decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[57] Thus, Chief Justice Warren's dicta illustrates how, even when overlapping with other

53. 391 U.S. 563 (1968).

54. 291 N.E. 517 (Mass. 1892). This case, although a state decision, represents the Supreme Court's position at the time. *See* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945 (2009).

55. 547 U.S. 410 (2006).

56. *Id.* at 438 (Souter, J., dissenting).

57. *Id.* at 425; *cf.* Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 J.C. & U.L. 145 (2009).

constitutionally protected rights, academic freedom can be seen as distinct from them.

Finally, even though neither justice invoked the First Amendment directly, both justices noted that institutions of higher learning serve a special truth-seeking role. Chief Justice Warren said, "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."[58] Justice Frankfurter echoed the sentiment: "For society's good . . . inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible."[59] Since public-employee speech did not yet receive the First Amendment protection that it does now, the justices seem to be recognizing that academic freedom is something distinct, compelling and rooted in traditional First Amendment values.

Several years after *Sweezy*, a majority of the Supreme Court signed onto a single opinion declaring "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[.]"[60] The case, *Keyishian v. Board of Regents of the University of the State of New York*, arose from another challenge to a state law intended to prevent "subversive" employees from obtaining state employment.[61] In a succinct pair of paragraphs the Court invoked the First Amendment, supported it with both the truth seeking theory[62] and the democratic theory,[63] and quoted a lengthy portion of Chief Justice Warren's decision in *Sweezy*, thereby elevating it from dicta in a plurality opinion to the grounds for decision in a majority opinion.[64]

It might be argued that the Court, by stating that academic freedom is a "special concern of the First Amendment" as opposed to something like "a right grounded in the First Amendment," hedged or sidestepped the issue whether academic freedom is a constitutional right. But the rest of the sentence belies this position. The full sentence—"That freedom [academic freedom] is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom[]"[65]—is more easily understood as giving more, not less, First

58. Hutchens, *supra* note 57, at 250.

59. *Id.* at 262.

60. Keyishian v. Bd. of Regents 385 U.S. 589, 603 (1967).

61. *Id.* at 591–93.

62. *Id.* at 603. ("The classroom is peculiarly 'the marketplace of ideas.'").

63. *Id.* ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas").

64. *Id.*

65. *Id.* Justice Powell, in his opinion in *Bakke*, quoted this passage but omitted the second clause in favor of material more relevant to that case.

Amendment protection to academic freedom.[66] If the First Amendment does not tolerate pall-casting laws in the classroom, then some form of academic freedom is certainly protected by the First Amendment. Justice Brennen's comment that academic freedom is a special concern of the First Amendment—far from hedging of the constitutional dimension of the right—positions the right closer to the core of First Amendment rights, like political speech. This position is in accord with the central First Amendment role that the Court claims for academic freedom under the truth-seeking and democratic theories.[67]

Ten years after *Keyishian*, Justice Frankfurter's more expansive description of academic freedom was taken up by Justice Powell in *Regents of the University of California v. Bakke*.[68] The Medical School of the University of California at Davis had an admissions policy of reserving 16 of its 100 positions in the class for "disadvantaged" minority students. Alan Bakke, a white male applicant, was rejected. He then challenged the admissions policy under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The Court splintered with Justice Powell casting the deciding vote. Four justices signed an opinion arguing that the admissions policy violated Title VI of the Civil Rights Act of 1964 and did not reach the constitutional question. Four more signed an opinion arguing that Title VI tracked the Equal Protection Clause and that the admissions program was permissible under both. Finally, Justice Powell wrote a separate opinion arguing that Title VI tracked the Equal Protection Clause, but that the program was in violation of both, thus tipping the scale against the admissions policy.

Justice Powell was careful to explain, however, that racial classifications were not *per se* unconstitutional when used in college or university admissions policies. He based his assertion on his understanding of academic freedom. He began by stating that "[a]cademic freedom, though not a specifically enumerated right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body."[69] After quoting Justice Frankfurt's "four essential freedoms" he said that the college or university is within its protected area of academic freedom when selecting a diverse student body. It is important to note, at this juncture, that the four freedoms of Justice Frankfurter were limited to decisions made "*on academic grounds*." It was therefore necessary for Justice Powell to establish legitimate academic grounds for making race-conscious

66. In fact, the Court's strong language—"does not tolerate laws"—seems to suggest that laws infringing academic freedom would not be subject to strict scrutiny like other fundamental rights, but *per se* unconstitutional. This article does not take that position.

67. *See supra* Part I.

68. 438 U.S. 265 (1978).

69. *Id.* at 312.

decisions. He did this by quoting the president of Princeton University[70] and by adding his own observation that "it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples."[71]

Having found race-conscious admissions to be within the scope of academic freedom, Justice Powell was faced with conflicting constitutional rights: Bakke's right to equal protection and the University of California's "countervailing constitutional interest, that of the First Amendment."[72] He split the baby by holding the University's admissions program unconstitutional but providing the example of Harvard's constitutionally sound race-conscious admissions program.[73]

Justice Powell's treatment of academic freedom certainly seems to give it the weight of a constitutional right, but he was the only member of the Court to discuss it, and in the end, he found it to be outweighed by the Equal Protection Clause in that case. In *Grutter v. Bollinger*, however, his construction was elevated to a holding in a majority opinion.[74] *Grutter* involved an equal protection challenge to the race-conscious admissions process at the University of Michigan Law School. The case is most often cited for the proposition that diversity in education is a compelling interest and an individualized applicant review is narrowly tailored toward that end, thus satisfying the strict scrutiny mandated by the Equal Protection Clause.[75] But a closer reading reveals an incorporation of Justice Powell's recognition of a constitutional right of academic freedom.

Justice O'Connor, writing for the Court, notes Justice Powell's reliance on the "constitutional dimension, grounded in the First Amendment, of educational autonomy" which includes "[t]he freedom of a university to make its own judgments as to . . . the selection of its student body."[76] She thereby comes to the same conflict of constitutional rights that Justice Powell identified. Grutter's right to equal protection is in conflict with the Law School's right to advance its educational mission through student body selection. Justice O'Connor continued quoting Justice Powell: "'the right to select those students who will contribute the most to the "robust exchange of ideas,"' a university 'seek[s] to achieve a goal that is of

70. *Id.* at 313, n. 48.
71. *Id.* at 313.
72. *Id.*
73. *Id.* at 316.
74. 539 U.S. 306 (2003).
75. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 722–25 (2007) (stating that *Grutter* stands for the proposition that diversity in higher education can be a compelling state interest when applying strict scrutiny to racial classifications but distinguishing the higher education from primary and secondary education).
76. *Grutter*, 539 U.S. at 329.

paramount importance in the fulfillment of its mission.'"[77] Justice Powell's point—and through adoption, Justice O'Connor's—can be understood to be that setting admissions policies that achieve diversity is within a college's or university's academic freedom right to choose "on academic grounds" who may be admitted. The question for Justice O'Connor, as it was for Justice Powell, was whether, *in light of the countervailing First Amendment interests involved*, the particular policy was narrowly tailored to achieve its legitimate goal.

Justice Powell's opinion in *Bakke* and Justice O'Connor's majority opinion in *Grutter* can thus be read as balancing a college's or university's constitutional right of academic freedom against an applicant's constitutional right of equal protection, not just a straight forward application of equal protection jurisprudence. It follows that absent the countervailing constitutional concern—i.e. equal protection—the college's or university's right to shape its admission policy is protected by the Federal Constitution. Therefore, state legislation—even a validly enacted state constitutional provision—that infringes on an educational institution's First Amendment right of academic freedom, is vulnerable to a Federal Constitutional challenge.[78] It is important to note that this interpretation of *Bakke* and *Grutter* does not require colleges and universities to employ race-conscious admissions policies. Quite the contrary, it recognizes that they have wide latitude in shaping their admissions policies toward the "fulfillment of [their] mission"—the pursuit of truth and the perfecting of democracy. It does, however, lead to the conclusion that federal and state legislatures cannot interfere with properly shaped admissions policies.

III. ACADEMIC FREEDOM PROTECTS THE ACADEMIC ENDEAVOR

So far, this note has treated academic freedom somewhat abstractly—exploring whether the values underpinning the First Amendment and the Supreme Court's academic freedom jurisprudence support a constitutional right of academic freedom without defining what academic freedom protects. The interpretation of *Bakke* and *Grutter* argued for in Part II certainly envisions admissions policies as being protected by constitutional academic freedom. So, for the purpose of using academic freedom as a sword against anti-affirmative action statutes, the argument could stop there. But other Supreme Court cases that have addressed academic freedom, such as *Sweezy* and *Keyishian*, as well as much of the academic community recognize academic freedom as right relating to the speech and research of professors, a very different concept of academic freedom. In order to posit a comprehensive, and hopefully persuasive, theory of constitutional academic freedom it becomes necessary to posit a theory of academic freedom that ties the many strands of academic freedom together.

77. *Id.*
78. *Id.* at 333.

The question whether academic freedom protects individuals or institutions has been the source of much scholarly debate[79] and has weighty implications on the scope and enforceability of a constitutional academic freedom. For instance, if academic freedom is a constitutional right enjoyed only by faculty (or perhaps by faculty and students), it may not include areas that are more easily understood as under institutional prerogative, such as admissions. If the right of academic freedom adheres in the institution, it could easily include all four of Justice Frankfurter's freedoms, which would include admissions. But it might reduce the freedom enjoyed by the professors. An institution that has a broad constitutional right to decide "on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted" seemingly has the power to control the pedagogical work of, or put pressure on, professors in a way that would undermine the particular First Amendment colleges and universities serve. Moreover, an institutionally enjoyed right of academic freedom raises difficult questions of enforcement in the public college or university context. As Walter Metzger has put it:

> The claim that public entities such as schools and colleges are protected by the noble bans of the first amendment contains the corollary that the agent state has constitutional rights enforceable against its creator and paymaster, the prime state—an idea that may appeal to legal sentimentalists but that is not an easy one for constitutional logicians to follow or swallow.[80]

The individual versus institutional academic freedom debate has been fueled by the separate histories of academic freedom as a professional standard and as legal concept. Academic freedom as a professional standard in American academia predates its recognition by the courts and differs significantly from academic freedom as understood by the courts.[81] Its animating force has been conflict between faculty and administration. The courts, by contrast, have had their jurisprudence regarding academic freedom shaped, as one would expect, by the nature of the controversies brought before them. The plaintiffs in cases implicating academic freedom have shifted over time from professors to students. Those cases initiated by professors usually have challenged state statutes infringing on academic freedom as it applies to them. The courts' discussions of academic freedom in these cases tend to address conflicts between legislatures and professors, in a sense by-passing the college or university. Applied in such

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79. *See, e.g.*, William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (1990); Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1318 (1988); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007).

80. Metzger, *supra* note 79, at 1318.

81. AREEN, *supra* note 6, at 67.

situations, academic freedom seems to be a right held by the individual professor and resembles the professional standard. But the cases initiated by students tend to challenge policies initiated by the college or university and the ensuing discussions of academic freedom tend to proceed from the prospective of the institution.

The impulse to combine these different lines of authority, an impulse indulged in this note, has led to a tangled and hazy doctrine. But individual and institutional academic freedom are not incapable of reconciliation. The debate presents a false choice; an understanding of constitutional academic freedom need not decide between professors and institutions; it can protect both in their proper spheres. The different strands of academic freedom theory and jurisprudence can be reconciled not by placing a right with any particular academic player, but by understanding academic freedom as a value of constitutional force alternatively favoring different players in the complicated higher education structure. It is best understood as adhering in the academic endeavor itself. This understanding can be teased out from both lines of constitutional academic freedom cases and from the version of it promoted by the AAUP.

A. Academic Freedom in the Courts: Faculty Suits

As noted above, there have been two lines of litigation where courts have addressed the issue of academic freedom. The first line is characterized by suits brought by professors challenging state laws or regulations.[82] The second line involves suits against the college or university itself, brought by students.[83] The phrase "academic freedom" received its Supreme Court debut in 1952 in Justice Douglas' dissent in *Adler v. Board of Education of City of New York*[84]—a case in the first line.[85] In that case, public school teachers in New York challenged the

82. Wieman v. Updegraff, 344 U.S. 183 (1952) (challenging loyalty oath required for public employment); Adler v. Bd. of Educ. of City of New York, 342 U.S. 485 (1952) (challenging New York Feinberg Law); Sweezy v. New Hampshire, 354 U.S. 234, 234 (1957) (challenging subversive activities investigation); Keyishian v. Bd. of Regents, 385 U.S. 589, 589 (1967) (challenging New York Feinberg Law).

83 Healy v. James, 408 U.S. 169 (1972) (student group challenges non-official status); Regents of the Univ. of Cal. V. Bakke, 438 U.S. 265 (1978) (applicant challenges race-conscious admissions policy); Widmar v. Vincent, 454 U.S. 263 (1981) (religious student group challenges non-official status); Univ. of Mich. v. Ewing, 474 U.S. 214 (1985) (student challenges dismissal); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995) (religious campus newsletter challenges non-reimbursement policy); Board of Regents of the Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217 (2000) (students challenge mandatory student activity fee); *Grutter*, 539 U.S. at 306 (applicant challenges race-conscious law school admissions policy); Gratz v. Bollinger, 539 U.S. 244 (2003) (applicant challenges race-conscious undergraduate admissions policy).

84. *Adler*, 342 U.S. at 509.

85. The two lines of academic freedom cases are separated chronologically with the professor/state cases coming first. *See supra* notes 82–83.

constitutionality of the Feinberg Law, which made ineligible for employment any person advocating, or belonging to, organizations advocating the overthrow of government by force, violence or unlawful means—the same law found unconstitutional several years later in *Keyishian*.[86] This case involved primary and secondary school teachers—not college or university professors—and the Court upheld the law, but Justice Douglas' dissent illustrates some of the early themes surrounding academic freedom in the courts.[87] First, the threat to the teachers' academic freedom ultimately comes from the state legislature, not the teacher's direct administrative superiors—an important factor when distinguishing academic freedom in the courts from the professional standard.[88] Second, Justice Douglas recognized the unique role education plays in our form of government: "The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher. . . . The public school is in most respects the cradle of our democracy."[89] It can be inferred from this quote that while a teacher has a right to free expression as a citizen, what Justice Douglas wished to protect was the pupils' education. He went on to say, "A school system producing students trained as robots threatens to rob a generation of the versatility that has been perhaps our greatest distinction."[90]

Later that year Justice Frankfurter took up the cause of academic freedom with his concurring opinion in *Wieman v. Updegraff*, a case appealed[91] by faculty from the Oklahoma Agricultural and Mechanical College challenging a law that required public employees to swear that they had not been affiliated with a subversive group.[92] The Court struck down the law on due process grounds because the oath made no distinction between innocent and knowing affiliation. Justice Frankfurter wrote separately to stress the particular danger the law posed when applied to teachers, as opposed to other public employees. After noting that "in considering the constitutionality of legislation like the statute before us it is necessary to keep steadfastly in mind what it is that is to be secured[,]" Justice Frankfurter proceeded to lay out the rationale for the unique

86. *See infra* notes 101–02 and accompanying text.

87. The courts have not been particularly careful to distinguish between the law in primary and secondary schools and that of colleges and universities. See generally Kelly Sarabyn, *The Twenty-Six Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27 (2008).

88. *See infra* notes 125–37 and accompanying text.

89. *Adler*, 342 U.S. at 508.

90. *Id.* at 511.

91. This case had an interesting posture. The action was originally brought by a citizen and tax payer against state officials to enjoin them from paying the salary of state employees who had not taken the oath. The faculty members intervened, lost, and appealed to the Supreme Court. Wieman v. Updegraff, 344 U.S. 183, 185 (1952).

92. *Id.* at 185–87.

importance of education in a democratic system:

> That our democracy ultimately rests on public opinion is a platitude of speech but not a commonplace in action. Public opinion is the ultimate reliance of our society only if it be disciplined and responsible. It can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.[93]

Like the teachers in *Adler*, the professors in *Wieman* were challenging the statute on the basis of the effect it had on their own alleged constitutional rights. Framed this way, the academic freedom written about by Justice Douglas and alluded to by Justice Frankfurter can look like a right belonging to the teachers. However, both justices took care to point out that they found the statutes to be unconstitutional not just because of the effect they had on the teachers' rights standing alone, but because of the statutes' interference with the educational process and by extension, the democratic system.

In *Sweezy*, the case that marked for the first time an endorsement of academic freedom by a majority of the Supreme Court, the separate opinions of Chief Justice Warren and Justice Frankfurter seemingly cast the right of academic freedom in different ways.[94] Chief Justice Warren wrote of the "invasion of [Sweezy's] liberties"[95] while Justice Frankfurter wrote of the "governmental intrusion into the intellectual life of a university."[96] But a closer look at the value each is protecting brings the reasoning of the two opinions together. Both Justices based their arguments on the value of a college or university to society. Justice Frankfurter supported academic freedom because of the "dependence of a free society on free universities."[97] Chief Justice Warren was concerned that an abrogation of academic freedom would "imperil the future of our Nation."[98] Both also saw this value as stemming from the college or university as a truth seeker. In the Chief Justice's words, "No field of education is so thoroughly comprehended by man that new discoveries cannot be made. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust."[99] Now Justice Frankfurter: "For society's good . . . inquires into these problems [certain areas of scholarship], speculations about them,

93. *Id.* at 195–96 (Frankfurter, J., concurring).

94. For a discussion of the facts of this case see *supra* notes 39–41 and accompanying text.

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

96. *Id.* at 261.

97. *Id.* at 262.

98. *Id.* at 250.

99. *Id.*

stimulation in others of reflection upon them, must be left as unfettered as possible."[100] So while Chief Justice Warren tailored his opinion more to the case at bar and Justice Frankfurter took a broader position, they both envisioned academic freedom as protecting the same thing—the academic endeavor that is at the value of the college or university, but not the institution or individual as an entity.

In *Keyishian v. Board of Regents of the University of the State of New York*,[101] the Supreme Court again spoke of academic freedom, this time placing it squarely in the First Amendment. The suit was a challenge to New York's Feinberg Law brought by faculty members of the University of New York. The law made a public employee's treasonable or seditious words or acts grounds for removal from the public school system or state employment. The court held that the administrative procedures implementing the statute were unconstitutionally vague and in violation of the First Amendment. Justice Brennan, writing for the Court, invoked academic freedom:

> 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.[102]

This opinion states clearly that academic freedom "is of transcendent value to all of us and not merely to the teachers concerned." The implication seems to be that even though the teacher is the direct recipient of the protection of academic freedom in this case, the right only adheres in him or her incidentally. Constitutional academic freedom primarily protects not individuals, but the academic marketplace of ideas and the training of our Nation's future leaders.

B. Academic Freedom in the Courts: Student Suits

Many of the cases used to support an institutional right of academic freedom come from the line of student suits.[103] The history of student suits

100. *Id.* at 262.
101. 385 U.S. 589 (1967).
102. *Id.* at 603 (quotations and citations omitted).
103. *See e.g.*, Univ. of Mich. v. Ewing, 474 U.S. 214 (1985); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003).

presents two interesting problems that do not arise in the faculty suits discussed in the previous section. First, courts often use cases addressing the rights of primary and secondary school students as precedent in similar higher education cases without addressing the possible distinctions between different levels of education.[104] Second, while faculty suits tend to present an academic freedom argument as part of, or in conjunction with, a First Amendment or due process claim,[105] in student suits the college or university is usually asserting academic freedom in response to the due process or equal protection claim of the student, thereby setting the two arguments in opposition to each other. This presents a situation where the court is forced to weigh the competing asserted rights; it is also why these suits tend to frame academic freedom institutionally.

The idea that students' rights—as against state operated schools—might be constitutionally protected can be traced to the 1960s.[106] While the demonstrations against the war in Vietnam on college and university campuses are well documented, it was an anti-war demonstration in a high school that produced the first Supreme Court decision recognizing First Amendment rights for students.[107] In *Tinker v. Des Moines*[108] the Supreme Court upheld the right of elementary and secondary public school students to wear armbands in protest of the war. Speaking for the Court, Justice Fortas wrote: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[109] This began a line of cases that balanced public school students' First Amendment rights against the schools' responsibility to educate and maintain order.[110] By taking this approach, the courts have carved out a wide margin of deference for public schools when their policies infringe the rights of students. The cases in this line deal with primary and secondary schools, but the justifications for allowing primary

104. *See infra* notes 112–19 and accompanying text.

105. For instance, in *Sweezy*, Justice Warren invoked academic freedom with regard to Paul Sweezy's First Amendment rights, which were infringed, but the state action in question also violated the due process requirements of the Fourteenth Amendment. Sweezy v. New Hampshire, 354 U.S. 234, 250, 254–55 (1957).

106. AREEN, *supra* note 6, at 108 (stating that the beginning of the "Free speech movement" can be traced back to Mario Savio at Berkeley in 1964). Actually the Flag Salute Cases in the 1940s were the first cases addressing the First Amendment rights of students, but these were compelled speech cases and not usually cited for what rights students have.

107. Tinker v. Des Moines, 393 U.S. 503 (1969).

108. *Id.*

109. *Id.* at 506.

110. Morse v. Frederick 551 U.S. 393 (2007) (suspension of student for waiving banner reading "Bong Hits 4 Jesus" does not violate First Amendment); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (sexually suggestive speech by student at school assembly not protected by First Amendment); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (censoring of articles about teenage pregnancy in high school newspaper does not violate First Amendment).

and secondary schools to curtail the constitutional rights of children—the need for discipline, the maturity level, the school's responsibility to educate—may not be as compelling when applied to young adults in the higher education context.[111]

The Supreme Court has, when directly faced with the question whether the same standards apply to both lower and higher education, declined to address the issue.[112] On other occasions, the Court has simply cited cases involving primary or secondary education without explanation when deciding issues involving higher education. *Healy v. James*[113]—a case about a student group at Central Connecticut State College—provides an illustrative example.

Healy involved a group of students who wanted to start a college-recognized Students for a Democratic Society (SDS) chapter. The administration was concerned that the student group would be affiliated with the national SDS, which was known for violence, and refused to recognize their chapter.[114] The student group challenged the college's refusal to recognize them on First Amendment associational grounds. The Court ruled in the students' favor.

Justice Powell, speaking for the Court, begins his analysis by stating that "colleges and universities are not enclaves immune from the sweep of the First Amendment."[115] He then quotes *Tinker*—a case about high school students—for the proposition that constitutional rights do not stop "at the school house gate." Continuing to quote *Tinker* he admits that the court must recognize the need for the schools to "prescribe and control conduct," but—in his own words now—"the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."[116] By stating this Justice Powell seems to be acknowledging the difference between the high school and the college, and establishing that First Amendment protections might be greater in the latter. However, the quote he uses to drive this point home—"[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"—is from *Shelton v. Tucker*.[117] That case was about the constitutionality of a state statute requiring public school

111. *See* Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Student's First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27 (2008).

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

113. Healy v. James, 408 U.S. 169 (1972).

114. *Id.*

115. *Id.* at 180.

116. *Id.*

117. 364 U.S. 479 (1960).

teachers to disclose their membership in groups as a prerequisite to employment. He concludes with: "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'" and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[118] To support this statement he cites *Keyishian*[119]—a case about state statutes punishing university professors for subversion—and *Sweezy*.

In addition to illustrating how lower and higher education cases have become interlaced, the opinion can be seen as consistent with a concept of academic freedom that protects the academic endeavor. By ruling in favor of the students, the Court was "safeguarding academic freedom" which includes the exercise of their First Amendment rights in the "college classroom [and its] surrounding environs [which are] peculiarly the "marketplace of ideas." But the Court also noted that "[a]ssociational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." By setting these limits on the scope of students' First Amendment rights, the Court seems to be recognizing that such rights must give way when they impede the academic endeavor.

Regents of the University of Michigan v. Ewing provides an example of how academic freedom can, in appropriate circumstances, protect administrative decisions by an institution of higher education.[120] Scott Ewing challenged his dismissal from a combined undergraduate/medical degree program at the University of Michigan as a deprivation of his property right in his education in violation of due process. The case was not a hard one for the Court.[121] Justice Stevens, writing for the Court, assumed *arguendo* that the claimed property right existed and held that the dismissal was made "conscientiously and with careful deliberation" and therefore violated no due process rights.[122] But he went further to note "a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom[.]"[123] This statement seems to indicate that the Court will generally defer to the institution on administrative decisions in the name of academic freedom. A footnote followed stating, "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on

118. *Healy*, 408 U.S. at 180–81.

119. 385 U.S. 598 (1967).

120. 474 U.S. 214 (1985).

121. *Id.* at 230 (Powell, J., concurring) ("In view of Ewing's academic record that the Court charitably characterizes as 'unfortunate,' this is a case that never should have been litigated.").

122. *Id.* at 225.

123. *Id.* at 226.

autonomous decision making by the academy itself[.]"[124] Far from being somewhat inconsistent, Justice Stevens' observation is wholly consistent with a First Amendment academic freedom that does not primarily protect the actors in higher education but instead protects the academic endeavor itself.

C. Academic Freedom as a Professional Standard

The initial concern of professional academic freedom—as distinct from constitutional academic freedom—was the protection of professors' employment.[125] The initial threat to professors was the administration of the college or university at which they worked.[126] American institutions of higher learning began to turn towards the German model of the research university in the last half of the 19th century.[127] This transformation of the university was accompanied (or perhaps driven) by a transformation of the professoriate from knuckle-rapping disciplinarians to respected experts in their respective fields, with responsibilities now bifurcated into teaching and research.[128] As professors' research led them to take controversial positions on hot-button topics, conflicts arose between the professors and the administrators of their institutions. The American Association of University Professors (AAUP) was formed in response to the dismissal of several tenured professors who advocated controversial ideas.[129] The AAUP first crystallized the concept of academic freedom in the United States with its *1915 Declaration of Principles on Academic Freedom and Academic Tenure*.[130] This document provides the first clear statement of academic freedom and continues to influence the academic community.[131]

The AAUP formulation of academic freedom certainly seems, at first, to involve a right held by professors, which is accord with how academic freedom as a professional norm has generally been understood.[132] And because the immediate threat to academic freedom addressed by the AAUP was not from government but from college and university administrators, academic freedom adhering in the institution itself would seem to exacerbate the problem. But a closer reading of the *1915 Declaration*

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124. *Id.* at 226 n. 12.

125. J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 267–70 (1989).

126. *Id.* at 273.

127. AREEN, *supra* note 6, at 53.

128. Metzger, *supra* note 79, at 1267.

129. Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 799–801 (2010).

130. Metzger, *supra* note 79, at 1268.

131. *See generally* William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (1990).

132. *See generally* Metzger, *supra* note 79.

reveals a line of reasoning that foreshadows that of the courts and admits of a subtler understanding of academic freedom, one that is reconcilable with the judicial concepts of academic freedom.

The *1915 Declaration* begins by noting that the board of a college or university owes its duty to the public; "The trustees [of the college or university] are trustees for the public. In the case of our state universities this is self-evident. In the case of most of our privately endowed institutions, the situation is really not different."[133] It goes on to state that the university's duty to the public was: "a. To promote inquiry and advance the sum of human knowledge. b. To provide general instruction to the students. [and] c. To develop experts for various branches of the public service."[134] In order to discharge these duties it would be required that "our universities shall be so free that no fair-minded person shall find any excuse for even a suspicion that the utterances of university teachers are shaped or restricted by the judgment, not of professional scholars, but of inexpert and possibly not wholly disinterested persons outside their ranks."[135]

The AAUP recognized the duty of the college or university to society and believed that this duty was best served by according professional autonomy to professors. In order to achieve this freedom, a system of tenure and review was proposed; it has subsequently been adopted in some form by virtually all colleges and universities.[136] But the goal was not to protect the professoriate. The goal was to "promote inquiry", advance knowledge, "provide general instruction" and "develop experts". These are roughly the same values that colleges and universities serve under the First Amendment theories of truth seeking and democracy.[137] The protections promulgated and championed by the AAUP were intended to advance these goals, just as First Amendment academic freedom protects different higher education actors in public education to promote similar goals. The AAUP, of course, has as its main concern the professoriate, but its policies are consistent with a constitutional academic freedom that adheres primarily in the academic endeavor.

IV. CONCLUSION

Academic freedom serves special, central First Amendment values; it therefore should be granted special constitutional protection. Over the years, the Supreme Court has recognized that colleges and universities serve these special First Amendment values and has developed a doctrine

133. 1915 DECLARATION, *supra* note 28, at 293; *See generally*, Metzger, *supra* note 79.

134. 1915 DECLARATION, *supra* note 28, at 295.

135. *Id.* at 294.

136. Metzger, *supra* note 79, at 1266.

137. *See supra* Part I.

that is consistent with a right of academic freedom supported by the full force of the Constitution. Academic freedom—understood as protecting the academic endeavor—should protect college and university admissions policies insofar as they further the academic endeavor. And, as the Supreme Court recognized in *Grutter*, institutions of higher education further the academic endeavor by admitting a diverse student body.

The emergence of state anti-affirmative action constitutional provisions provides an opportunity to test the force of the constitutional academic freedom described above. The interpretation of academic freedom developed in this article would—if found compelling by a court—provide colleges and universities with a Constitutional shield against these laws if such a shield was desired. Whether the shield is taken up, and whether this theory of academic freedom is tested, remains to be seen.

THE AILING STUDENT EXCEPTION: MEDICAL RESIDENTS AND THE FEDERAL INSURANCE CONTRIBUTIONS ACT

ERIN ROGOZINSKI*

INTRODUCTION

The Federal Insurance Contributions Act of 1954 (FICA) is a payroll tax that imposes mandatory contributions to Social Security and Medicare upon both employees and their employers based on employee wages.[1] FICA defines "wages" broadly, as "all remuneration for employment,"[2] but the Internal Revenue Code also lists twenty-one exceptions to the payment of this tax,[3] including a student exception.[4] Students "enrolled and

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1. *See* Federal Insurance Contributions Act of 1954, 26 U.S.C. §§ 3101-3128 (2000).
2. § 3121(a).
3. § 3121(b)(1)-(20).
4. § 3121(b)(10).

regularly attending classes at [a] school, college, or university"[5] are exempt from making FICA payments provided their work is a "service performed in the employ of a school, college, or university."[6] Despite the seemingly plain language used within this statute, an attempt to interpret the legislature's intended meaning of the word "student" and determine exactly who may qualify for this FICA exception has resulted in years of litigation.[7] For over a decade, the federal courts reached inconsistent conclusions on this matter, specifically in regard to whether medical residents should be categorized as students or employees.[8]

As a result of the continued controversy, the Supreme Court granted the Mayo Foundation's petition for certiorari in 2010[9] and issued a ruling for the Government on January 11, 2011.[10] Employing the Chevron two-step,[11] the Court found § 3121's reference to "student" ambiguous, and since Congress had not directly spoken to whether medical residents were students, the Court looked to the Treasury Department's regulation and determined it was reasonable.[12] Therefore, medical residents will not be considered students for the purpose of exempting them and their employers from making Social Security contributions.

Before the Supreme Court's ruling, the judicial branch had little assistance with its efforts on this issue, since the federal government as a whole had been unable to reach a definitive determination as to whether the student exception pertains to medical residents. The divisions and departments of the federal government had been unable to speak with a unified voice, as each division sought to classify medical residents as

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5. § 3121(b)(10)(B).

6. *Id.*

7. Since 1998, over 7,000 FICA tax refund claims have been made for previous FICA contributions, amounting to well over one billion dollars. *See* United States v. Mount Sinai Med. Ctr. of Fla., Inc., 353 F. Supp. 2d 1217, 1229 (S.D. Fla. 2005).

8. *Compare* Minnesota v. Apfel, 151 F.3d 742 (8th Cir. 1998) (applying factual inquiry into the nature of the relationship between medical students and universities and affirming the district court's ruling that medical residents meet the requirements for the student exception) *and* United States v. Mayo Found. for Med. Educ. & Research, 282 F. Supp. 2d 997, 1010 (D. Minn. 2003) (*Mayo I*) (holding the student exception applicable to all medical residents at each of Mayo's various institutions and ordering a refund for FICA taxes Mayo paid) *with* United States v. Detroit Med. Ctr., No. 05-71722, 2006 WL 3497312 at *12 (E.D. Mich. Dec. 1, 2006) (finding the language of the exception ambiguous, requiring a review of statutory and legislative history, and holding that residents are categorically precluded from being students) *and* Albany Med. Ctr. v. United States, 2007 WL 119415 at *5 (N.D.N.Y. Jan. 10, 2007) (holding residents are categorically precluded from being students).

9. Mayo Found. for Med. Ed. and Research v. United States, 131 S.Ct. 704 (U.S. 2011).

10. *Id.* The Court's ruling was a unanimous 8-0 decision. *Id.* at 708. Justice Elena Kagan took no part in the consideration or decision of the case. *Id.* at 716.

11. *Id.* at 711.

12. *Id.* at 714–15.

whatever would be most beneficial to it at that time.[13] For example, while the Internal Revenue Service (IRS) argued that all medical residents should be categorically denied student status so as to collect more tax revenue,[14] the National Labor Relations Board (NLRB) wavered back and forth for its own benefit.[15] After initially determining that medical residents were students and not employees in order to prevent them from unionizing (and increasing the Board's workload),[16] the Board overruled its prior holding, finding that medical residents could be students and employees simultaneously (and thereby still preventing unionization).[17]

Unlike the NLRB, the federal courts could not straddle both sides of the fence by granting medical residents dual status as both employees and students because of the distinction FICA requires.[18] Ultimately, whether medical residents must contribute to Social Security hinges upon the critical classification of medical residents as either employees who must pay the tax or students who are explicitly exempt from paying that tax.

By the late 2000s, it seemed the United States Courts of Appeals had finally agreed that medical residents could not be categorically precluded

13. *Compare* Cedars-Sinai, 223 N.L.R.B. 251, 251–52 (1976) (holding medical residents are students) *and* Boston Med. Ctr. Corp., 330 N.L.R.B. 152, 160 (1999) (holding medical residents hold dual status as both students and employees) *with* Mayo Found. for Med. Educ. and Research, v. United States (*Mayo II*), 568 F.3d 675, 680–83 (8th Cir. 2009) (upholding IRS regulations that prevent residents from falling within the FICA student exception).

14. The IRS argued that medical residents were not students in the early 1990s by investigating the withholdings from the University of Minnesota's teaching hospital, and has yet to cease fighting for collecting FICA wages from medical residents and the schools, hospitals, and institutions at which they work. The Social Security Administration also claims that resident physicians are not students. S.S.R. 78-3, 1975-1982 Soc. Sec. Rep. Serv. 315.

15. *See* Sarah L. Geiger, Note, *The Ailing Labor Rights of Medical Residents: Curable Ill or a Lost Cause?*, 8 U. PA. J. LAB. & EMP. L. 523, 529–32 (2006).

16. *Cedars-Sinai*, 223 N.L.R.B. at 251–52. (citing grand rounds, teaching rounds, laboratory instruction, seminars, and lectures as educational rather than employment activities). The decision also noted that residents participate in these programs not for the purpose of earning a living, but instead in pursuit of fulfilling the requirement of graduate medical education necessary to enter into the practice of medicine. *Id.* at 253.

17. *See Boston Med. Ctr. Corp.*, 330 N.L.R.B. at 160 ("Ample evidence exists here to support our finding that interns, residents and fellows fall within the broad definition of 'employee' under Section 2(3), notwithstanding that a purpose of their being at a hospital may also be, in part, educational."). Despite the dual status granted to medical residents by the NLRB, the decision did not purport to be a legal conclusion, but rather the reflection of a new board policy. Geiger, *supra* note 15, at 532 ("Residency programs did not undergo any significant changes which would warrant a renewed status for residents.").

18. While FICA contributions may not greatly impact individual medical residents, the consequences for the teaching hospitals required to match each employee's individual FICA contributions are great indeed. *See* 26 U.S.C. § 3111(a)–(b) (2000) ("[T]here is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages . . . paid by him with respect to employment . . . .").

from classification as students.[19] In 2009, however, the Eighth Circuit overturned two district court rulings and held that the recent IRS regulations excluding medical residents from student classification were indeed valid.[20] This decision further blurred the contours of the student exception by creating an incongruous dichotomy and left medical residents (as well as the hospitals and institutions for which they work) unsure of their statuses under FICA.

By exploring the history of the student exception from its legislative inception to its current form—a result of the interpretations of many federal courts and continuous revision by the IRS—this Note will discuss whether medical residents should be categorized as employees or students, and therefore whether they and the hospitals in which they learn and work must contribute to Social Security through the FICA tax. After much investigation and careful contemplation, the author of this Note believes that medical residents do not meet the criteria required to be exempt from contributing to FICA. While medical residents are still in the learning process of their profession, they have obtained advanced degrees, provide valuable services to hospitals and medical centers, often in excess of forty hours per week, and are paid wages for these services. When a person dedicates such a significant portion of his or her time to providing a service for which he or she is paid, effectively creating an employee–employer relationship, both the employee and the employer should contribute to the Social Security system envisioned by Congress.

I. THE ORIGINS OF THE TAX POLICY

A. The Social Security Act of 1935 and the Federal Insurance Contributions Act

The architects of the Social Security system considered a variety of potential tax schemes to provide social insurance for the general public.

19. *See* United States v. Mem'l Sloan-Kettering Cancer Ctr., 563 F.3d 19, 24–28 (2d Cir. 2009) (holding that medical residents could not categorically be precluded from student status, and that questions as to whether a medical resident was a "student" and whether he was employed by a "school, college, or university" were separate factual inquiries that depended on the nature of the residency program in which the medical residents participated and the status of the employer); United States v. Detroit Med. Ctr., 557 F.3d 412, 417–18 (6th Cir. 2009) (granting a continuance to permit additional discovery on issue of whether residents were students); Univ. of Chi. Hosps. v. United States, 545 F.3d 564, 570 (7th Cir. 2008) (holding that the student exception is not per se inapplicable to medical residents as a matter of law, and a case-by-case analysis is required to determine whether medical residents qualify for the student exemption); United States v. Mount Sinai Med. Ctr. of Fla., Inc. 486 F.3d 1248, 1250–53 (11th Cir. 2007) (holding that medical residents enrolled in graduate medical education programs are not precluded as a matter of law from seeking the student exemption).

20. Mayo Found. for Med. Educ. and Research v. United States (*Mayo II*), 568 F.3d 675 (8th Cir. 2009).

Specifically, they examined whether the program should be funded by contributions from the federal government or self-supported.[21] The drafters also deliberated about whether to allow persons with private pension plans to choose whether or not to participate in social insurance coverage, but Congress determined that an entirely self-supporting insurance program funded by mandated contributions from both employees and their employers would provide the best chance for the program to function successfully.[22]

In 1939, the tax-withholding provisions of the Social Security Act of 1935 were repealed, but they were re-enacted along with the implementation of FICA.[23] The current Social Security system still functions under FICA, but with significant modifications.[24] The 1939 amendments placed more emphasis on ensuring that the tax would provide adequate benefits rather than its original goal of individual equity.[25] This Note will focus on the 1939 amendment establishing the student exception from mandated contribution to Social Security through FICA.

B. The Student Exception

1. Congressional Amendments

The student exception, codified at 26 U.S.C. § 3121(b)(10), has evolved into its current form under FICA since Congress originally enacted it in 1939.[26] The 1939 version of the student exception read:

> The term "employment" means any service of whatever nature, performed within the United States by an employee for his employer, except . . . (8) [s]ervice performed in any calendar quarter in the employ of any organization exempt from income tax under section 101 of the Internal Revenue Code, if . . . (iii) such service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university.[27]

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21. SYLVESTER J. SCHIEBER & JOHN B. SHOVEN, THE REAL DEAL: THE HISTORY AND FUTURE OF SOCIAL SECURITY 38 (1999).

22. *Id.* at 33, 38, 40–41.

23. *Id.* at 64.

24. *See* H.R. REP. NO. 728, 76th Cong., 1st Sess. 18, 1939-2 C.B. 538 (1939). *See also* Patrick Timothy Rowe, *The Impossible Student Exception to FICA Taxation and Its Applicability to Medical Residents*, 66 WASH. & LEE L. REV. 1369, 1390 n.127 (2009) (quoting the same House Report, which states: "The present bill is designed to widen the scope and to improve the adequacy and the administration of these [social welfare] programs without altering their essential features.") (alteration in original).

25. SCHIEBER & SHOVEN, *supra* note 21, at 59 ("Over the years, debate has continued over the relative weight that the equity and adequacy goals of the program should receive.").

26. *See* Federal Insurance Contributions Act of 1939, 26 U.S.C. §§ 1400–1431 (imposing additional tax on employees and their employers).

27. *Id.* § 1426(b).

While the history of the legislative intent behind the inclusion of the student exception is documented minimally, this comment to the exception explicates the contemporary congressional motivation:

> In order to eliminate the nuisance of inconsequential tax payments the bill excludes certain services performed for fraternal benefit societies and other non-profit institutions exempt from income tax, and certain other groups. While the earnings of a substantial number of persons are excluded from this recommendation, the total amount of earnings involved is undoubtedly very small. . . . The intent of the amendment is to exclude those persons and those organizations in which the employment is part-time or intermittent and the total amount of earnings is only nominal, and the payment of the tax is inconsequential and a nuisance. The benefit rights built up are also inconsequential. Many of those affected, such as students . . . will have other employment which will enable them to develop insurance benefits. This amendment, therefore, should simplify the administration for the worker, the employer, and the Government.[28]

Congress' incentive for including the student exception appears to have been a simple cost-benefit analysis: a fear that the ultimate costs accruing as a result of the collection of taxes from employees receiving minimal compensation, as well as their employers, would outweigh any benefit society would receive from the revenues of such a collection, creating a serious inefficiency and substantially decreasing the value of the overall program.[29] Since the Act's initiation, the potential impact an economical social welfare system could have on the country was apparent, as was the need to reassess the program to discover possible areas of weakness and opportunities for improvement over time.[30]

In order to put FICA into action, the 1939 Internal Revenue Code assigned rulemaking authority for administration and oversight of the tax collection to the Secretary of the Treasury.[31] The following year, the

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28. H.R. REP. NO. 728, 76th Cong., 1st Sess. 18, 1939-2 C.B. 538, 543 (1939).

29. *See* Rowe, *supra* note 24, at 1391–92.

30. H.R. REP. NO. 728, 76th Cong., 1st Sess. 18, 1939-2 C.B. at 543 ("Tremendous as is the scope of [the Social Security] program, it was recognized from the beginning that changes would have to be made as experience and study indicated lines of revision and improvement.").

31. 26 U.S.C. § 1429 (1939) ("Secretary shall make and publish such rules and regulations . . . as may be necessary to the efficient administration of the functions with which he is charged under this subchapter. The Commissioner, with the approval of the Secretary, shall make and publish rules and regulations for the enforcement of this subchapter."). Under current law, the Secretary of the Treasury has the authority to issue two types of regulations: legislative regulations pursuant to specific congressional delegation, or interpretive regulations pursuant to the Secretary's general rulemaking authority under 26 U.S.C. § 7805(a). *See* 26 U.S.C. § 7805(a) (2000) ("[T]he Secretary

Secretary used the granted authority to promulgate regulations for the student exception. Those regulations stated:

> Services performed . . . by a student in the employ of a school, college, or university not exempt from income tax under section 101 of the Internal Revenue Code are excepted, provided: (a) The services are performed by a student who is enrolled and is regularly attending classes at such school, college, or university; and (b) The remuneration for such services performed . . . does not exceed $45.[32]

Although the 1940 regulations for the student exception concentrated on exempting only a specific, nominal amount of wages, Congress again edited the exclusions in 1950, this time consolidating many student exclusions together to locate them within one provision.[33] The 1950 amendments eliminated the compensation limitation and broadened the exception by maintaining the exclusion of wages earned at a non-profit organization.[34] Federal courts reinforced the position that the nominal amount a student earns is irrelevant in applying the student exception according to the plain language of the 1950 amendments.[35] Courts also

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shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.").

32. 20 C.F.R. § 403.821 (1940). The regulations continued:

> [T]he type of services performed by the employee and the place where the services are performed are immaterial; the statutory tests are the character of the organization in whose employ the services are performed, the amount of remuneration for services performed by the employee in the calendar quarter, and the status of the employee as a student enrolled and regularly attending classes at the school, college, or university in whose employ he performs the services. The term "school, college, or university" within the meaning of this exception is to be taken in its commonly or generally accepted sense.

Id.

33. *See* Univ. of Chi. Hosps. v. United States, No. 05 C 5120, 2006 WL 2631974, at *4 (N.D. Ill. Sept. 8, 2006).

34. *Id.* ("Moreover, in 1950, when Congress consolidated the student exclusions, it opted not to include any limitation on renumeration [sic] but maintained it for the exclusion for wages earned at a nonprofit organization.") (citing Social Security Act Amendments of 1950, Pub. L. No. 81–734, § 204(a), 64 Stat. 477, 531 (1950)).

35. *See* Univ. of Chi. Hosps., 2006 WL 2631974 at *3 ("In this case, the Treasury Regulation at issue . . . clearly states that the amount of renumeration [sic] earned by an individual is immaterial to the applicability of the student exclusion."). The court also noted that "[b]ecause the plain language of the Treasury Regulation is clear, there is no need to resort to other sources, such as the agency's interpretation of its regulation or the legislative history of the underlying statute, to determine its meaning." *Id. See also* Det. Med. Ctr., 2006 WL 3497312, at *10 (agreeing with the district court in *University of Chicago Hospitals* that the regulation "unambiguously does not include a nominal compensation requirement."). In *Detroit Medical Center*, the Government urged the court to review the student exception in the context of the Sixth Circuit's treatment of the student "nurse exception," which was enacted concurrently with the general student exception in 1939. *Id.* In *Johnson City Medical Center v. United States*, the Sixth Circuit faced the question of what, if any, deference should be given to an IRS agency

took notice of additional amendments enacted to the regulations in 1973, extending the scope of the student exception not only to schools, colleges, and universities, but also to non-profit employers affiliated with schools, colleges, and universities.[36]

2. IRS Revisions to the Student Exception

In an effort to gain control, the IRS decided to narrow the services that could qualify for tax exemption under the student exception. The IRS released Revenue Procedure 98-16, which attempted to establish more lucid standards for determining whether services performed by those both enrolled in and working for colleges and universities qualified for the student exception.[37] The Revenue Procedure rejected the application of the student exception to medical residents, claiming the services medical residents provide were not qualified as "incidental to and for the purpose of pursuing a course of study."[38]

The State of Minnesota challenged this new IRS policy shortly after it was enacted by bringing an action against the Commissioner of Social Security for redetermination of the state's liability for FICA tax contributions in Minnesota v. Apfel.[39] In Apfel, the Eighth Circuit affirmed the lower court by holding in favor of the taxpayer and finding that medical residents at the University of Minnesota were employed by the University, their services were compensated in the form of stipends, and that the residents were indeed "students." [40] With this singular decision, the Eighth Circuit invalidated the substance of Revenue Procedure 98-16,[41] sharply distinguishing the issue and granting leeway for the flood of future litigation in which institutions would have a clear incentive to seek FICA refunds from the IRS.[42]

II. ANATOMY OF MEDICAL RESIDENCY

The Court of Appeals recognized that "[§ 3121(b)(10)] does not define 'student' but merely specifies where and how the student must be studying for the exemption to apply."[43] Without an express definition of who may

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ruling. Johnson City Med. Ctr. v. United States, 999 F.2d 973, 975–78 (6th Cir. 1993). A majority of the court held that the IRS ruling was entitled to *Chevron* deference and that the nominal amount requirement was a valid exercise of the IRS' agency power. *Id.* at 977–98.

36. Univ. of Chi. Hosps., 2006 WL 2631974, at *4 n.2.

37. Rev. Proc. 98-16, 1998-1 C.B. 403 (Feb. 2, 1998).

38. *Id.* at 2.02.

39. *See* 151 F.3d 742, 748 (8th Cir. 1998) (affirming the district court's ruling in favor of the state).

40. *Id.* at 747-48.

41. *Id. See also* Rowe, *supra* note 24, at 1392.

42. *See also* Rowe, *supra* note 24, at 1392.

43. United States v. Detroit Med. Ctr., 557 F.3d 412, 417 (6th Cir. 2009).

be categorized as a student, and thus qualify for the tax exclusion, federal courts have had much difficulty in determining whether medical residents may be classified as students. While many Courts of Appeals agreed that residents were not categorically precluded from being students,[44] the Eighth Circuit disagreed and held that the new regulations promulgated by the IRS were valid, creating an impossible dilemma for teaching hospitals and institutions as to whether or not to withhold potential FICA contributions made on behalf of their medical residents.[45] An investigation into what participants in a certified residency program do and under what circumstances[46] could alleviate the burden of many specific inquiries for individual cases by fleshing out a definition for "medical resident."

The common path to becoming a licensed physician requires eight years of education beyond high school: generally four years of work toward a bachelor's degree at an undergraduate college or university and four years of work for a Doctor of Medicine (M.D.) in medical school, in addition to another three to eight years of residency and/or fellowships.[47] Specifically, medical education in the United States consists of two distinct phases, both of which are required to gain a license to practice medicine.[48] While the first phase consists of attending four years of medical school to receive a medical degree, the second phase begins after graduation from medical school and is commonly referred to as Graduate Medical Education (GME). According to the American Medical Association (AMA),

> [t]o provide direct patient care, physicians in the United States are required to complete a three to seven year graduate medical program . . . in one of the recognized medical specialties. Certification requirements, as determined by individual specialty boards, usually include formal training (residency) and the passing of a comprehensive examination.[49]

Generally, GME consists of a residency or fellowship, both of which are

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44. *See* United States v. Mem'l Sloan-Kettering Cancer Ctr., 563 F.3d 19 (2d Cir. 2009); United States v. Detroit Med. Ctr., 557 F.3d 412 (6th Cir. 2009); Univ. of Chi. Hosps. v. United States, 545 F.3d 564 (7th Cir. 2008).

45. *See* Mayo Found. for Med. Educ. & Research, 568 F.3d 675, 684 (8th Cir. 2009).

46. *See, e.g.*, United States v. Detroit Med. Ctr., 557 F.3d 412, 417–18 (6th Cir. 2009).

47. United States Dept. of Labor, Bureau of Labor Statistics, Physicians and Surgeons, Occupational Outlook Handbook 2010–2011, http://www.bls.gov/oco/ocos074.htm (last visited Jan. 7, 2010).

48. Nat'l Resident Matching Program, *Why the Match?* 1 (Jan. 3, 2003), at http://www.aamc.org/newsroom/jungcomplaint/whythematch.pdf; Melinda Creasman, Note, *Resuscitating the National Resident Matching Program: Improving Medical Resident Placement Through Binding Dual Matching*, 56 VAND. L. REV. 1439 (2003).

49. Nat'l Resident Matching Program (NRMP), *Residency Match: About Residency*, http://www.nrmp.org//res_match/about_res/index.html (last visited Jan. 7, 2010) (emphasis added).

periods of clinical training.[50] During GME, "the second phase, novice physicians work in teaching hospitals [or academic health centers] where they gain in-depth training under the supervision of senior residents and attending physicians."[51] All states require participation in a residency program of at least one year before allowing a physician to obtain a license and begin to practice medicine,[52] making GME a prerequisite for entry into the medical profession.[53] Beyond state requirements, each medical field typically requires a residency of three or more years.[54]

Residency programs are accredited by the Accreditation Council of Graduate Medical Education (ACGME), which requires any residency program to be an organized educational program that combines didactic curriculum with direct exposure to patient care under the supervision of attending physicians in order to qualify.[55] "[T]he seminal 1910 Flexner Report helped to define standards and structures for medical education. This definition resulted in a process-based continuum of medical education that was predicated on a system in which students would spend a defined amount of time in medical school and residency training, with exposure to a standard yet evolving curriculum."[56] As a condition of accreditation, the ACGME mandates that hospitals provide residents with the financial support needed to ensure the residents' participation in the residency programs.[57]

Residency at a teaching hospital is a continuation of medical school.[58]

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50. United States v. Mem'l Sloan-Kettering Cancer Ctr., 563 F.3d 19, 21 (2d Cir. 2009).

51. Creasman, *supra* note 48 at 1442.

52. Carl Bianco, M.D., *How Becoming a Doctor Works*, *available at* http://money.howstuffworks.com/becoming-a-doctor15.htm. For example, in Michigan, two years of postgraduate medical training are required before a doctor can take a state medical board examination. Detroit Med. Ctr., 557 F.3d at 413. New York requires physicians to complete a residency program of at least one year before becoming eligible for a medical license. Mem'l Sloan-Kettering Cancer Ctr., 563 F.3d at 21.

53. Katherine Huang, Note, *Graduate Medical Education: The Federal Government's Opportunity to Shape the Nation's Physician Workforce*, 16 YALE J. ON REG. 175, 175 (1999).

54. Bianco, *supra* note 52.

55. United States v. Mem'l Sloan-Kettering Cancer Ctr., 563 F.3d 19, 21–22 (2d. Cir. 2009).

56. Lynne M. Kirk, M.D. and Linda L. Blank, *Professional Behavior – A Learner's Permit for Licensure*, 353 NEW ENG. J. MED. 2709, 2709 (2005). *See also* DAVID EWING DUNCAN, RESIDENTS: THE PERILS AND PROMISE OF EDUCATING YOUNG DOCTORS 51 Scribner (1996) (in the report, Flexner accused some medical schools of failing to grant students a standard clinical experience).

57. United States v. Mem'l Sloan-Kettering Cancer Ctr., 563 F.3d 19, 22 (2d Cir. 2009).

58. United States v. Mount Sinai Med. Ctr. of Fla., Inc., 486 F.3d at 125. *See also* Dustin M. Covello, Jacquelyn L. Griffin, and Svetoslav S. Minkov, *Federal Taxation*, 60 MERCER L. REV. 1235, 1251 (2009).

Residency programs differ very little from the third and fourth years of medical school when students begin treating patients. Furthermore upon completing a residency program, participants receive a certificate of completion and participate in a graduation ceremony.[59] Most importantly, graduates of medical schools are still not eligible to take board certification examinations necessary to work in the area of their specialty or sub-specialty until they have completed a residency program.[60]

While residencies and fellowships provide a further degree of education through classroom lectures and exams as well as hands-on experiences,[61] medical residents are compensated for their work. Residents provide much of the patient care in teaching hospitals and comprise an important group of inexpensive yet highly skilled health professionals, enabling hospitals to function at lower costs.[62] Medical residents often work more than forty hours per week, with the majority of their time spent providing services to patients within hospitals. Although most of the work residents do is eventually overseen by a doctor with more experience, many initial healthcare decisions are made by the residents themselves, granting the more experienced doctors time to perform more intricate procedures requiring their specialty.

III. EARLY JUDICIAL INTERPRETATIONS OF THE STUDENT EXCEPTION

For years, federal courts wrestled with the facts in trying to classify the roles medical residents perform as primarily student-focused or primarily employee-driven. The courts' inconsistent conclusions derived from their divergent viewpoints on whether the language of § 3121(b)(10) is ambiguous,[63] the issue on which the Supreme Court ultimately ruled in the Government's favor, finding the language ambiguous and the Treasury Department's clarification reasonable.[64]

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59. Mayo I, 252 F. Supp. 2d at 1004; Mount Sinai, 486 F.3d at 126. *See also* Covello, Griffin, and Minkov, *supra* note 58, at 1251.

60. Mayo I 252 F. Supp. 2d at 1004; Mount Sinai, 486 F.3d at 127. *See also* Covello, Griffin, and Minkov, *supra* note 58, at 1251.

61. *See* DUNCAN, *supra* note 56 at 51–63 (analyzing the "plunge-in" method of resident education and emphasizing the critical nature of hands-on learning experiences). "The goal of our program is to train a person once and for all almost automatically how to move effectively into managing a medical problem, a medical emergency," says John Potts, Chief of Internal Medicine at Boston's Massachusetts General Hospital. His program is well known for placing interns in the midst of a busy ward from the moment they begin their training, giving them maximum responsibility and minimal interference by attendings. *Id.* at 55.

62. Huang, *supra* note 53, at 176.

63. *Compare* Minnesota v. Apfel, 151 F.3d 742, 748 (finding that student exception is unambiguous) *with* United States v. Detroit Med. Ctr., No. 05-71722, 2006 WL 3497312 at *8 (E.D. Mich. Dec. 1, 2006) (arguing the student exception is ambiguous and legislative intent should be investigated).

64. Mayo Found. for Med. Ed. and Research v. United States, 131 S.Ct. 704, 714–15 (2011).

According to well settled administrative law principles, if the court finds the statute's language ambiguous, a review of the statutory history is required, but if the statute is determined to be unambiguous, judgments must be made based solely upon the plain meaning of the words of the statute.[65] The early cases of *Minnesota v. Apfel*[66] and *United States v. Detroit Medical Center*[67] illustrate the dichotomy of the two approaches within the federal court system and the opposite conclusions reached with differing perspectives.[68]

A. Unambiguity in *Minnesota v. Apfel*

In 1955, Minnesota executed a section 418 Agreement with the Social Security Commissioner, affording the state and its political subdivisions the opportunity to participate in the national Social Security system.[69] According to section 418, states have the ability to define the specific details of their agreements with the Commissioner so long as the provisions of the agreement are not "'inconsistent with the provisions of' section 418."[70]

In 1958, Minnesota modified the initial Agreement to extend coverage to more groups of state employees, including the employees of the University of Minnesota.[71] This modification also listed several exclusions, among them any service performed by a student.[72] Consequently, the University of Minnesota did not withhold Social Security contributions from stipends paid to medical residents for over thirty years after the modifications took effect.[73]

In 1989, however, the Social Security Administration (SSA) initiated an investigation into the status of medical residents, and in 1990, the Commissioner issued a formal notice of statutory assessment claiming that

65. Detroit Med. Ctr., 2006 WL 3497312 at *11 (arguing that because the "student exclusion" provision is ambiguous, "[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms" (quoting Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 568 (2005))).

66. 151 F.3d 742 (8th Cir. 1998).

67. No. 05-71722, 2006 WL 3497312 (E.D. Mich. Dec. 1, 2006).

68. *See* Rowe, *supra* note 24, at 1372.

69. *Apfel*, 151 F.3d at 744. When the Social Security Act of 1935 was first enacted, there was some question as to whether Congress could compel states and their political subdivisions to participate in the Social Security System, necessitating the adoption of 42 U.S.C. § 418(a)(1) in 1950. *Id.* A section 418 agreement allows state, county, and municipal employees to earn credit toward social security and disability benefits by making the employees and their employing agencies subject to the mandatory social security contributions. *Id.*

70. *Id.* (quoting 42 U.S.C. § 418(a)(1)).

71. *Id.* at 744.

72. *Id.*

73. *Id.*

the State was liable for the unpaid Social Security contributions, totaling almost $8 million for the years of 1985 and 1986.[74] The State sought review of this assessment through an administrative appeal, which affirmed the assessment, and the State then appealed the administrative decision to the district court.[75] The district court overturned the assessment on two distinct grounds: 1) the medical residents were not "employees" of the University of Minnesota within the meaning of the 1958 modification; and 2) even if the residents were employees as expressed in the modification, they were excluded from coverage under the modification's student exclusion.[76] In determining that the medical residents were not employees, the court reviewed the 1958 modifications and its terms under contract law, examining the intent of both parties[77] and noting that unless Congress altered any terms of the section 418 agreements, the parties' intent would stand.[78]

More importantly for the purpose of the issue at hand, the district court also found that even if the residents were employees, they would still be excluded under the 1958 modifications.[79] Following the regulation implementing the student-exclusion exception,[80] the Court of Appeals ultimately determined that "[t]he undisputed facts make it clear . . . that the primary purpose for the residents' participation in the program is to pursue a course of study rather than to earn a livelihood."[81] Since the residents were enrolled at the University, paid tuition, and registered for fifteen credit hours per semester, the court deemed them students despite the fact

74. *Apfel*, 151 F.3d at 744.

75. *Id.*

76. *Id.* at 744–45. Section 418(c)(5) then provided that "[s]uch agreement shall, if the State requests it, exclude (in the case of any coverage group) any agricultural labor, or service performed by a student, designated by the State." *Id.* at 747. This section also cross-referenced the general student exclusion, then codified at § 410(a)(10), which applied to service performed in the employ of a school, college, or university "if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university." *Id.*

77. *Id.* at 745. In note seven of its opinion, the court acknowledged that many factors supported their finding that medical residents were not intended to be covered after the modification, specifically: that the modification expressly stated its intention to cover 225 employees while there were 422 medical residents enrolled at the time; minutes from a Board of Regents meeting that acknowledged the intention of covering only certain faculty positions; an IRS Ruling indicating that stipends paid to medical residents were excluded from wages because such stipends were primarily paid to further residents' education and training; and the 30-year consistency of the university's treatment of medical residents. *Id.* at 745 n.7.

78. *Id.* at 747.

79. *Id.*

80. 20 C.F.R. § 404.1028(c) ("Whether you are a student for purposes of this section depends on your relationship with your employer. If your main purpose is pursuing a course of study rather than earning a livelihood, we consider you to be a student and your work is not considered employment.").

81. *Apfel*, 151 F.3d at 748.

that they provided patient services that benefited the hospital, as an employee would.

B. A Different Interpretation: *Detroit Medical Center*

The District Court for the Eastern District of Michigan believed that the student exception displayed a clear congressional intent to include all medical residents within FICA's coverage.[82] In *United States v. Detroit Medical Center*,[83] the Government brought suit against the Detroit Medical Center (DMC) for repayment of Social Security tax refunds that DMC had successfully requested in 2003.[84] In responding to the Government's repayment action, DMC offered two grounds for claiming entitlement to the refund, one of which was its assertion that the student exemption should be held applicable to DMC's medical residents.[85] The court disregarded the approach followed in *Apfel*, however, and determined that the treasury regulation was ambiguous as to whether the medical residency program fell within the meaning of a "school, college, or university."[86] The court also found the regulation ambiguous as to whether residents were "students" under § 3121(b)(10), so it resorted to the history of the student exception.[87]

The court first turned to Congress's 1965 repeal of the student intern exception, which Congress enacted concurrently with the student exception in 1939.[88] The court believed this repeal was evidence that Congress

82. *See* Detroit Med Ctr., 2006 WL 3497312 at *12 ("To exempt medical residents conflicts with Congress' intent to have young doctors covered by social security as shown by the statutory history.").

83. *See id.* at *14 (granting summary judgment in favor of the United States and finding student exception from FICA taxation inapplicable to stipends paid by defendant to its medical residents).

84. *Id.* at *1. DMC had based its original refund petition on the theory that its medical residents qualified for the student exemption under § 3121(b)(10). *Id.*

85. *See id.* (noting DMC's introduction of the argument that the stipends constituted "noncompensatory scholarships"). The District Court rejected DMC's scholarship theory, noting that even if DMC's program was "educational in nature . . . the residents' stipends [were] given as a substantial *quid pro quo* for patient care . . . ." *Id.* at *4. DMC also brought a counterclaim against the United States for denials of FICA refunds for taxable years 1995, 1996, 1997, 2002, and 2003. *Id.* at *1.

86. *See Detroit Med. Ctr.*, 2006 WL 3497312, at *10 ("Although GME programs provide a type of education to their residents, they are educational in a way similar to an apprenticeship or a position that involves on the job training."). Note how differently this court views "on-the-job training" in the context of GME programs from the court in *Mayo I*.

87. *Detroit Med. Ctr.*, 2006 WL 3497312, at *11–13. The court rejected DMC's argument that use of extrinsic evidence was improper under *Exxon Mobil Corporation v. Allapattah Services*. *See id.*

88. *Detroit Med. Ctr.*, 2006 WL 3497312, at *12 (noting that in 1939, Congress recognized a difference between students and medical interns as well as between resident doctors and medical interns). "The legislative history of the 1939 Amendment in the form of a House Report explained the intern exception covered only an intern, 'as distinguished from a resident doctor.'" *Id.* (quoting H.R. REP. NO. 76-728 at 550–

intended to protect all "actual and future doctors once their undergraduate schooling [was] complete" through FICA coverage,[89] but this argument is misguided, since it is generally accepted that the concept of "intern" is no longer part of the medical education construct.[90] While *Apfel* appears to be the first case in which the student exception made its appearance in conjunction with residency programs and medical residents, this does not suggest the general student exception was previously unavailable to medical residents. Nevertheless, the court stated that, while applicability of the student exception in the wake of the repeal of the intern exception may have some merit, it was for Congress—and not the judiciary—to make such a clarification.[91] Accordingly, the court found that, as a matter of law, the student exception under § 3121(b)(10) was inapplicable to DMC and its medical residents.[92]

On appeal, the Sixth Circuit overruled the district court's determination that the statute's language was ambiguous and returned to the *Apfel* analysis.[93] The court stated:

> We assume that in the absence of a congressional definition of "student," this common word in § 3121 was intended to have its usual and ordinary meaning of a person pursuing studies at an appropriate institution, which the Act defines as a "school, college, or university" for the purposes of the exemption.[94]

In this case, the court reversed the grant of summary judgment for the Government, and granted a continuance in order to allow the parties to gather evidence pertaining to the activities and nature of the residents' work within the Detroit Medical Center.[95]

In response to the *Apfel* decision, numerous teaching hospitals and health care organizations made claims seeking refunds of hundreds of millions of dollars in FICA taxes based on the Eighth Circuit's interpretation of the student exception.[96] In general, the decisions following

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51 (1939)).

89. *Id.*

90. While interns and resident doctors might once have been separate and distinct labels for "young doctors," that distinction no longer exists.

91. *Detroit Med. Ctr.*, 2006 WL 3497312, at *13.

92. *Id.* at *14.

93. United States v. Detroit Med. Ctr., 557 F.3d 412 (6th Cir. 2009).

94. *Id.* at 417.

95. *Id.*

96. *See Detroit Med. Ctr.*, 2006 WL 3497312, at *8 ("A majority of district courts, relying on *Apfel*, have determined that . . . GME programs may establish through a facts and circumstances inquiry that their residents qualify for the student exception."). In support of this assertion, the court cited four cases that utilized the majority approach: Univ. of Chi. Hosps. v. United States, No. 05 C 5120, 2006 U.S. Dist. LEXIS 68695 (N.D. Ill. Sept. 8, 2006); Ctr. for Family Med. v. United States, 456 F. Supp. 2d 1115 (D.S.D. 2006); United States v. Univ. Hosp., Inc., No. 1:05CV445, 2006 WL 1173455 (S.D. Ohio Mar. 29, 2006); and United States v. Mayo Found. for Med.

Apfel narrowly held that the FICA exception was unambiguous, allowing the statute to be interpreted through the plain meaning of the words and examining residency programs on a case-by-case basis to see if the residents' activities could be classified as educational.[97]

C. *Mayo I*

Similar to the facts of *Apfel*, the issue in *Mayo I* turned on whether the court believed the implementing regulations of § 3121(b)(10) allowed medical residents to fall under the protection of the student exception.[98] Finding that the Mayo Foundation employed the medical residents[99] and that the several institutions comprising the Foundation could properly be considered a "school, college, or university" under the exception,[100] the court focused upon whether the residents learning and working at the Mayo Foundation could qualify as students under the statute and its implementing regulations.[101] To analyze the relationship between the Mayo Foundation and the residents, the court examined the elements at the basis of a student–school relationship: enrollment, regular attendance, residents' purposes for participating, and rendering services as an incident to and for the purpose of pursuing a course of study.[102] The court found each element existed,[103]

Educ. & Research, 282 F. Supp. 2d 997 (D. Minn. 2003).

97. United States v. Mount Sinai Med. Ctr. of Florida, 486 F.3d 1248 (11th Cir. 2007); United States v. Mem'l Sloan-Kettering Cancer Ctr., 563 F.3d 19 (2d. Cir. 2009); United States v. Detroit Med. Ctr., 557 F.3d 412 (6th Cir. 2009); Univ. of Chi. Hosps. v. United States, 545 F.3d 564 (7th Cir. 2008). *See also* Rowe, *supra* note 24, at 1376–77.

98. *Mayo I*, 282 F. Supp. 2d 997, 1010–11 (D. Minn. 2003) (adopting the two-part test prescribed by 26 C.F.R. § 3121(b)(10) for the student exception qualifications). The court stated that the defendants would have to show that "the character of the organization in the employ of which the services [were] performed [was] a school, college, or university…" and that the residents were "enrolled and regularly attending classes at the school, college, or university by which [they were] employed or with which [their] employer is affiliated."

Id. at 1010 (quoting Treas. Reg. §§ 31.3121(b)(10)-1(b)(1)-(2)(2003) (alterations in original).

99. *See id.* at 1011–13 (examining the Mayo Foundation's influence over the medical residents and finding that the Foundation qualified as the residents' employer).

100. *See id.* at 1013–15 (rejecting the Government's primary purpose test for determining whether an institution qualified under the exemption and finding the "Mayo Foundation, a non-profit, charitable, tax-exempt institution, constitutes a 'school' within the term 'school, college, or university' for purposes of § 3121(b)(10).").

101. *Id.* at 1015.

102. *Id.* at 1015–18.

103. *Id.* Specifically, the court found that admission into the Mayo Graduate School of Medicine was based entirely on merit and that the admissions process showed that the residents were enrolled instead of hired or contracted for. The court also cited various educational conferences, teaching rounds, and mandatory lectures as sufficient to establish that residents "regularly attended classes." Furthermore, the residents testified that they participated to gain knowledge through hands-on

and in this case, the medical residents could be classified as students and protected from paying FICA taxes.[104] Employing the same case-by-case analysis as *Apfel*, *Mayo I* illustrated to the IRS a need to examine its current regulations, since those same regulations were ultimately being defeated by the majority of the residency programs it attempted to challenge.

IV. POST-LITIGATION REGULATION REVISIONS

In response to judicial defeat[105] and in recognition of the danger of the case-by-case analysis supported by *Apfel* and *Mayo I*, the IRS published a Notice of Proposed Rulemaking to amend existing guidelines defining "student" and "school, college, or university" on February 25, 2004.[106] The IRS was concerned that residency programs were actually more akin to "on-the-job training" than education and, as categorized, were being improperly included in the FICA student exception.[107] Before the 2004 amendments, the regulations stated: "The term 'school college, or university' within the meaning of [the student exception] is to be taken in its commonly or generally accepted sense."[108]

After extensive public comment and a hearing, final regulations were published on December 21, 2004, and became effective on April 1, 2005.[109] With the promulgation of the final regulations, the IRS hoped to take interpretive powers away from the courts and to gain ultimate control as to which employers could be classified as a "school, college or university," and which employees could be considered "students" for purposes of the FICA student exception.[110]

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experience. *Id.*

104. *Id.*

105. *See* Minnesota v. Apfel, 151 F.3d 742, 748 (8th Cir. 1998) (affirming the district court's ruling against the IRS); United States v. Mayo Found. for Med. Educ. & Research (*Mayo I*), 282 F. Supp. 2d 997 (D. Minn. 2003).

106. *See* Student FICA Exception, 69 Fed Reg. 8604 (proposed Feb. 25, 2004). Agencies may amend regulations to respond to adverse judicial decisions, or for other reasons, provided that the amended regulation is a permissible interpretation of the statute. *See* Dickman v. Comm'r, 465 U.S. 330, 343 (1984); Morrissey v. Comm'r, 296 U.S. 344 354–56 (1935). "[W]ords must be construed in context, and when the context is a provision of the Internal Revenue Code, a Treasury Regulation interpreting the words is nearly always appropriate." Mayo Foundation for Med. Educ. And Research v. U.S., 568 F. 3d 675, 680 (8th Cir. 2009).

107. *See* Mayo Found. for Med. Educ. & Research v. United States, 503 F. Supp. 2d 1164, 1168 (D. Minn. 2007) (discussing the IRS' motivation for readdressing those issues which had been "resolved" already by both the Eighth Circuit in *Apfel* and the District Court in *Mayo I*).

108. 26 C.F.R. § 31.3121(b)(10)-2(d) (2003). This general sense allowed courts to interpret the words in their broadest sense, granting medical residents easy access to the FICA student exception.

109. Rules & Regulations, Student FICA Exception, 69 Fed. Reg. 76404-01 (Dec. 21, 2004).

110. *Id.*

Per the 2004 revisions, the regulations read:

> [a]n organization is a school, college or university within the meaning of section 3121(b)(10) if its primary function is the presentation of formal instruction, it normally maintains a regular faculty and curriculum, and it normally has a regularly enrolled body of students in attendance at the place where its education activities are regularly carried on.[111]

The amended regulations also include a full-time employee exception declaring that "an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee,"[112] and the regulations further claimed that services performed by full-time employees are "not incident to and for the purpose of pursuing a course of study."[113] Even if "the services performed by that employee may have an educational, instructional, or training aspect,"[114] the "normal work schedule"[115] will not be affected. As medical residents work far beyond forty hours per week,[116] these amended regulations would explicitly exclude them from protection under the student exception if the courts uphold them as valid.

V. THE DIAGNOSIS: NO CURE AFTER *MAYO II*

A majority of the Courts of Appeals reviewing the statute as construed in prior regulations agreed that the student-exception statute is unambiguous and does not limit the types of services that qualify for the exemption, which would preclude the government from amending the statute to its liking and then consequently being able to succeed on its claim that medical residents are categorically ineligible for the student exception.[117] In the last three years, four circuits have held that the amended regulations to the student exception are invalid because the student exception statute as originally written is simply and clearly unambiguous.[118] These courts determined that since judges are well aware of what is a "school," who is a "student," and what it means to be "enrolled and regularly attending classes," the Treasury Regulation interpreting the very common terms is invalid because Congress had already spoken in plain terms.[119]

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111. 26 C.F.R. § 3121(b)(10)-2(c) (2008) (emphasis added).
112. 26 C.F.R. § 3121(b)(10)-2(d)(3)(iii).
113. *Id.*
114. *Id.*
115. *Id.*
116. *See supra* Part II.
117. *See* United States v. Mount Sinai Med. Ctr. of Fla., Inc., 486 F.3d 1248, 1251–56 (11th Cir. 2007); United States v. Mem'l Sloan-Kettering Cancer Ctr., 563 F.3d 19, 27 (2nd Cir. 2009); United States v. Detroit Med. Ctr., 557 F.3d 412 417–18 (6th Cir. 2009); Univ. of Chicago Hosps. v. United States, 545 F.3d 564, 567 (7th Cir. 2008).
118. *Id.*
119. *See* Mayo Foundation for Med. Educ. And Research v. U.S., 568 F. 3d 675, 679 (8th Cir. 2009).

However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[120] Treasury Regulations interpreting the Internal Revenue Code are entitled to substantial deference,[121] but a reviewing court must first question "whether Congress has directly spoken to the precise question at issue."[122] If Congress has spoken to the issue, both the court and the agency must give effect to the unambiguously expressed intent of Congress.[123]

The Eighth Circuit voiced disagreement with the other circuit courts by validating the most recent Treasury Regulations, thus precluding medical residents from qualifying for the student exception.[124] On appeal, *Mayo II* determined that the statute was silent or ambiguous as to whether a medical resident working for the school full-time is a "student who is enrolled and regularly attending classes" for the purposes of 26 U.S.C. § 3121(b)(10).[125] After finding the student-exception statute silent or ambiguous regarding its application to medical residents, the Court of Appeals then turned to the second part of the *Chevron* analysis: whether the Commissioner's amended regulation is a permissible interpretation of the statute.[126]

In order to make this determination, the court looked to *National Muffler*, in which the Supreme Court held:

> In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-

120. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

121. Boeing Co. v. United States, 537 U.S. 437, 448 (2003).

122. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 842-43 (1984).

123. *Id.* at 842-43.

124. *Mayo II*, 568 F.3d at 679.

125. *Id.* at 680. The Court did find the government's argument that Mayo is not a "school, college, or university" within the meaning of the student exception because its "primary function" is not education arbitrary and unreasonable. *Id.* at 683–84. Unfortunately for the medical residents and Foundation, this finding is not enough to except FICA payments.

126. *Mayo II*, 568 F. 3d at 680. For a more detailed explanation of the original analysis, see *Chevron*, 467 U.S. at 843.

enactments of the statute.[127]

The Eighth Circuit determined that the amended regulation modified the "incident to" test and consequently, harmonized with the plain language of the statute.[128] The historical record illustrates that the generally worded "incident to" regulation did not include full-time employees. Since the Commissioner responded to the holdings against the government by amending regulations to improve the policy, this modification was not only valid, but helpful,[129] as the Court cited the fact that the "IRS and Treasury believe that Congress has shown the specific intent to provide social security coverage to individuals who work long hours, serve as highly skilled professionals, and typically share some or all of the terms of employment of career employees, particularly medical residents and interns."[130]

Furthermore, the Court of Appeals looked to the Supreme Court, which has consistently upheld Treasury Regulations construing words in tax statutes that have a different meaning, even if common or plain, in other contexts.[131] If words are of a general or not obviously self-defining nature, the Court has allowed administrative interpretation for elucidation.[132] Courts must defer to Treasury Regulations, properly originated, so long as they are reasonable.[133] Since the full-time employee regulation is a permissible interpretation of the statutory student exception, the residents' compensation for health care and patient services was subject to FICA taxes.[134] By upholding the Treasury Regulations and splintering off from the jurisprudence of the other Courts of Appeals, the Eighth Circuit further compounded the medical resident conundrum, encouraging the Supreme

127. National Muffler Dealers Association, Inc. v. U.S., 440 U.S. 472, 477 (1979).

128. *Mayo II*, 568 F.3d at 681. The Regulation clarified the specificity of the "incident to" test with the provision, "[t]he services of a full-time employee are not incident to and for the purpose of a course of study," and went even further by defining an employee who works forty hours or more per week as "full-time." Treas. Reg. § 31.3121(b)(10)-2(d)(iii).

129. *Mayo II*, 568 F.3d at 683.

130. *Id.* at 683 (quoting 69 Fed. Reg. 8604 at 8608).

131. *See Mayo II*, 568 F.3d at 679 ("For example, in *Helvering v. Reynolds*, the Court upheld a regulation construing the statutory term 'acquisition' of a contingent remainder interest in property devised by will to mean when the decedent died, not when the remainderman obtained title many years later. . . . 'However unambiguous that word might be as respects other transactions . . . its meaning in this statutory setting was far from clear.'") (quoting *Helvering v. Reynolds*, 313 U.S. 428, 433 (1941) (citations omitted).

132. *See* Magruder v. Washington, Baltimore & Annapolis Realty Corp., 316 U.S. 69, 73 (1942); United States v. Correll, 389 U.S. 299, 304 (1967); Nat'l Muffler Dealers Ass'n v. Comm'r, 499 U.S. 554, 559-–1 (1991). *But see*, Knight v. Comm'r, 552 U.S. 181 (2008); Mass v. Higgins, 312 U.S. 443 (1941).

133. Cottage Savings Ass'n, v. Comm'r, 499 U.S. 554, 560–61 (1991).

134. *Mayo II*, 568 F.3d at 683.

Court to take this case and issue a final decision to bind all jurisdictions.[135]

VI. THE PROGNOSIS OF THE STUDENT EXCEPTION

The previous circuit split among the federal appellate courts forced both medical residents and hospitals not only to wonder about the future of their Social Security contributions, but also left them unaware of how to proceed in the present. Whether or not these doctors-in-training and the hospitals in which they learn and work should be forced to make payments hung upon a single thread: whether or not the Supreme Court would find the language of the student exception ambiguous, calling for a subsequent judgment about the reasonableness of the Treasury Regulations, or clearly written for direct application, granting protection to medical residents and teaching hospitals. On January 11, 2011, the Supreme Court issued its decision. Chief Justice Roberts published the opinion, which ultimately held that the definition of "student" as used in the student exception was ambiguous, and that the Court would defer to the Department of the Treasury, provided its regulations were reasonable, which the Court found they were.[136]

Many anticipated a long and hard fight for the protection of medical residents and teaching hospitals under FICA's student-exception provision. With a penchant for encouraging participation, especially the participation of skilled workers, in national programs, the Court seemed unlikely to grant medical residents the student exemption, and as predicted, the Court ruled in favor of the Government.[137]

From the vantage point of broad policy considerations, it also appears that the money residents and the hospitals would pay through the FICA tax may be most helpful if contributed into Social Security. While the money does not amount to a significant quantity of funds for an individual, if each medical resident contributed his or her share, the total would be a vast sum. For a crude calculation, consider that approximately 80,000 physicians are in residency or fellowship programs at any particular time in one of the 701 teaching hospitals offering residency programs in the United States[138] and that the mean salary for a first-year resident in 1998–99 was $34,104 (with a mean increase of $1,451 for each year of experience).[139] With those numbers, well over $5.4 billion would be available each year for taxation if medical residents were excluded from the student exception, creating a significant surplus in the federal budget.[140] Moreover, "[i]n the context of

135. *See* Mayo Found. for Med. Ed. and Research v. United States, 131 S.Ct. 704 (2011).

136. *Id.* at 715–16.

137. *Id.*

138. Bianco, *supra* note 52.

139. *Id.*

140. It is also interesting to note that currently, the federal government is the main financier of graduate medical education, "contributing $6.8 billion through Medicare, plus additional sums through the Department of Defense and Veteran Affairs." Huang,

Social Security, taxpayer protection against future hardship (such as decreased earning potential resulting from old-age [*sic*], disability, or the loss of a spousal wage-earner) comes at the price of our mutual contribution to the Social Security System."[141] Consequently, taxpayers are urged to contribute into the Social Security System as soon as they are eligible.[142]

On the other hand, the nature of GME programs and their uniform accreditation system through the ACGME presents a strong case for allowing teaching hospitals to operate outside the realm of FICA.[143] Since most medical residents cannot be licensed within their specialty or by a state without first completing a residency program, it is easy to paint the picture of the residency program as another rung on the ladder of a medical doctor's higher education rather than as a full-time employment position. Furthermore, granting the providers of graduate medical education this tax exemption could reduce costs of GME programs, allowing for better programs, better facilities, and better doctors within the medical system.[144]

While it appeared medical residents and GME programs were going to be given the benefit of the doubt and granted exemption from the FICA taxes, the Court of Appeals' decision in *Mayo II* created a serious roadblock in what had been a clear path toward ending over a decade of constant litigation. In an effort to solve this persistent dilemma, the Supreme Court has ruled, basing its decision on firmly entrenched principles within administrative law.

In agreement with the Eighth Circuit's analysis and following the framework presented in *Chevron*, the Supreme Court recognized that Congress did not address medical residents specifically, nor did the legislature clearly and explicitly define "student" when it wrote the student exemption.[145] The Court found the use of "student" ambiguous in this context, so it then evaluated the Treasury Department's regulation categorically excluding medical residents from attaining "student" status and determined it was reasonable.[146] While this result may provide consternation for some who believe medical residents should be categorized as students, the Supreme Court's definitive ruling now allows providers of GME to focus their attention on other, more pressing matters

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supra note 53, at 176–77 (citing James A. Reuter, The Balanced Budget Act of 1997: Implications for Graduate Medical Education 1 (1997)).

141. Rowe, *supra* note 24, at 1398 (citing 1939-2 C.B. 538 (June 2, 1939)).

142. *Id.* (citing Social Security: Coverage for Medical Residents, G.A.O. No. B-284947, at 9 (Aug. 31, 2000), *available at* http://www.gao.gov/archive/2000/h200184r.pdf (noting that "treating residents as students could have other potential consequences for the medical residents, such as not earning credits toward retirement, survivor and disability benefits")).

143. *See* Rowe, *supra* note 24, at 1406.

144. Rowe, *supra* note 24, at 1406.

145. *Mayo Found. for Med. Ed. and Research*, 131 S.Ct. 704, 711 (2011).

146. *Id.* at 711–15.

of life and death, in addition to creating an important source of funding for the United States government, especially in the current economic climate.

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