
THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

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Remote Work as a Reasonable Accommodation: Implications for Colleges and Universities

Ellen M. Babbitt and Claire E. Hawley

Prior to March, 2020, individuals with disabilities faced challenges when requesting remote work as an accommodation for a physical or mental disorder. Employers were slow to agree to such requests and courts were slow to find that requested remote work accommodations were “reasonable accommodations,” even for office positions not necessarily requiring extensive in-office presence or personal interaction. Decisions frequently cited assumptions and concerns about the cost and feasibility of necessary technology, disruption of the workplace, difficulties overseeing and supervising off-site workers, and what employers and courts viewed as the inherently “in-person” nature of work. The events of 2020 through the present raise timely and important questions about how courts and agencies will and should evaluate remote work accommodation requests going forward—and how employers should modify or refine their ADA accommodation processes for purposes of legal compliance and alignment to mission. This issue is important to higher education, and particularly to brick-and-mortar campuses seeking to resume in-person learning. Because of the strong strategic emphasis on a return to “in person” learning, many such institutions may find themselves having a strong preference for a full “return” on the part of employees, may view remote work as a now-withdrawn “benefit” offered on an emergency basis, and may be reluctant to consider remote work even for individuals with a disability. In simplest terms, the question raised by these situations is whether and how the status of remote work has changed because of the shifting realities of the past few years—and what campuses should do to comply with the law while balancing their significant interest and overarching need to serve students on campus.

Florida's Stop Woke Act: A Wake-Up Call for Faculty Academic Freedom

Neal Hutchens and Vanessa Miller

In multiple states, legislation has been proposed or enacted to suppress ideas associated with critical race theory (CRT) and related lines of critical scholarship in schools and, in some proposals, in colleges and universities. These state endeavors can be traced to efforts to emulate Executive Orders 13950 and 13958 issued during the Donald Trump presidential administration, which Joseph Biden rescinded the day he was elected. Among the objections to these state legislative efforts include calls that they constitute an impermissible infringement on the First Amendment academic freedom rights of public higher education faculty. With a particular focus on what is widely referred to as Florida's Stop WOKE Act, this article examines how anti-CRT legislative initiatives that extend to public colleges and universities potentially violate the First Amendment academic freedom rights of individual faculty.

The authors contend that public higher education faculty professional speech made in carrying out employment duties connected to teaching, research, or shared governance should be eligible for First Amendment protection. The U.S. Supreme Court has held that public employee speech made in carrying out employment duties does not constitute First Amendment protected speech. But the Court has yet to address whether faculty speech in public higher education that implicates academic freedom concerns is exempted from these standards. In this article, the authors propose that the academic freedom statements adopted by public higher education institutions and systems provide a strong justification to provide First Amendment protection to faculty academic speech, such as that related to teaching and research. Additionally, the authors suggest that courts could use a public concern analysis tailored to higher education contexts to evaluate the interests of faculty and institutions in deciding cases that involve the academic speech of public higher education faculty.

Plagiarism as a Recurrent Issue

Helayna Schafer

Plagiarism in publicly funded research threatens research integrity and misuses taxpayer dollars. In the past two decades, clear discrepancies between how the Office of Research Integrity and the National Science Foundation address plagiarism have emerged. One factor driving this discrepancy is the use of plagiarism detection software. Advancements in the sophistication of plagiarism detection revealed the amount of plagiarism surpasses previous expectations. Continued education on responsible conduct of research is imperative to fostering research integrity and decreasing instances of research misconduct. Congress and

the National Science Foundation have initiated new policies to address plagiarism, and institutions and researchers must establish widespread implementation of these policies. By examining recent plagiarism cases and responsible conduct of research training, this article illuminates issues with the current approach to addressing plagiarism and advances arguments to remedy these issues.

California Dreamin': Can State Universities Legally Hire Non-Work Authorized Aliens

George Fishman

A notable group of immigration law professors has assured California that it can allow its State universities to hire aliens not authorized to work under federal law, concluding that the Immigration Reform and Control Act of 1986's "prohibition on hiring undocumented persons [known as employer sanctions] does not bind state government entities". They contend that Congress cannot intrude on the States' historic police power to regulate employment without being explicit about doing so, and IRCA does not explicitly spell out that employer sanctions apply to States as employers. The professors also contend that the States' constitutional right to select their elected and non-elected leaders allows them to hire unauthorized aliens as professors, regardless of any congressional command to the contrary.

I conclude that the professors' first argument is incorrect because 1) Congress clearly intended employer sanctions to apply to all employers, 2) Congress had good reason for not spelling out application to the States, 3) Congress can evidence its clear and manifest purpose without the need for such a spelling out, and 4) in any case, employer sanctions are unlikely to be the sort of mandate that require any spelling out in the first place.

I further conclude that the professors' second argument may possibly be correct—to the extent employer sanctions were applied to State policy-making officials. However, the right of State universities to hire unauthorized aliens as professors would have to be extrapolated from Supreme Court rulings that States have the right to impose citizenship tests for positions such as public school teachers. This is a bridge too far. It is not clear that courts would agree to the obverse of the principle—that States have a right to expand eligibility to non-citizens, even to aliens unauthorized to work in the United States. And even if courts were to agree in the context of public school teachers, it is unlikely that they would equate professors with school teachers as performing a role that goes to the heart of representative government.

Section 504 at Fifty Disability Policy and Practice in Higher Education Why 504 and the ADA Remain Relevant and Important

Laura Rothstein

The article provides an overview of the history and current status of federal disability discrimination law as it applies to institutions of higher education. It sets out the major issues of attention historically and provides a perspective on issues that most require current and focused attention because they are complex, changing, and high profile. It urges an approach that is proactive and encourages institutions not to just comply with the legal mandates, but to consider what actions can be done and should be done by balancing a range of concerns.

BOOK REVIEW

Review of Will Bunch's *After the Ivory Tower Falls: How College Broke the American Dream and Blew Up our Politics—and How to Fix It*

Madelyn Wessel

Notwithstanding the provocative title, Will Bunch's book does not actually demonstrate that America's colleges and universities are responsible for what he views as a total breakdown in the social compact and disintegration of our state of politics since the protests of the 1960s. Nor, despite some trying, does he make a convincing case that higher education owns what he views as the regrettable the rise of Donald Trump and MAGA politics. In fact, *After the Ivory Tower Falls* focuses only peripherally on what higher education has actually accomplished in this country and certainly not at all on what it gets profoundly right for hundreds of thousands of people every year. Lacking a particularly balanced perspective on what higher education is doing and where it is indeed falling short, renders Bunch's broad indictments unconvincing and, at times, profoundly frustrating. Yet, his overarching chronicle of a country in which public higher education was once apolitically supported and prized, was largely affordable to low- and middle-income families, and has come to be lost, has reality and resonance, and some of Bunch's analyses and proposed solutions are worth hearing.

REMOTE WORK AS A REASONABLE ACCOMMODATION: IMPLICATIONS FOR COLLEGES AND UNIVERSITIES

ELLEN M. BABBITT AND CLAIRE E. HAWLEY*

ABSTRACT

Prior to March, 2020, individuals with disabilities faced challenges when requesting remote work as an accommodation for a physical or mental disorder. Employers were slow to agree to such requests and courts were slow to find that requested remote work accommodations were “reasonable accommodations,” even for office positions not necessarily requiring extensive in-office presence or personal interaction. Decisions frequently cited assumptions and concerns about the cost and feasibility of necessary technology, disruption of the workplace, difficulties overseeing and supervising off-site workers, and what employers and courts viewed as the inherently “in-person” nature of work.

The events of 2020 through the present raise timely and important questions about how courts and agencies will and should evaluate remote work accommodation requests going forward — and how employers should modify or refine their ADA accommodation processes

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for purposes of legal compliance and alignment to mission. This issue is important to higher education, and particularly to brick-and-mortar campuses seeking to resume in-person learning. Because of the strong strategic emphasis on a return to “in person” learning, many such institutions may find themselves having a strong preference for a full “return” on the part of employees, may view remote work as a now-withdrawn “benefit” offered on an emergency basis, and may be reluctant to consider remote work even for individuals with a disability. In simplest terms, the question raised by these situations is whether and how the status of remote work has changed because of the shifting realities of the past few years—and what campuses should do to comply with the law while balancing their significant interest and overarching need to serve students on campus.

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INTRODUCTION

Section 504 of the Rehabilitation Act of 1973,¹ was the pioneering piece of federal legislation that, among other things, prohibited discrimination against employees on the basis of physical or mental impairments (“disabilities”). Section 504 applied to organizations accepting federal funding, including federal financial aid (and therefore applied to nearly all colleges and universities). Section 504 also articulated a related and powerful additional protection, requiring that, in defined circumstances, an employer must “reasonably accommodate” a qualified employee’s disability to promote the statute’s fundamental goal of equal access and the broadening of opportunities for individuals with disabilities.

The central requirement that employers provide reasonable accommodations was codified and expanded in the provisions of the Americans with Disabilities Act (ADA).² The ADA was enacted on July 26, 1990. As has been noted, the ADA and the Rehabilitation Act are highly similar but they differ in breadth; among other things, Section 504 of the Rehabilitation Act only applies to employers that receive federal funds, while the provisions of the ADA apply without regard to acceptance of federal funding; encompassing private entities employing fifteen or more individuals (Title I); public entities (Title II);³ and places of public accommodation, including private colleges and universities (Title III).⁴ Since 1990, and particularly since the ADA was broadened through amendment in 2008,⁵ the ADA has served as the primary mechanism by which employees sought and employers granted reasonable accommodations in most workplaces, including on most college and university campuses.

The period since the ADA took effect now spans nearly thirty-two years. This has coincided with the lightning development of global cellular, Internet, and other electronic data transmittal and processing capabilities—and with the developing ability of most individuals to access electronic communication capabilities on a cost-effective basis. The 1990s saw the rapid spread of cell service, Internet and e-mail access, and real-time messaging, including texting. More recently, communication

1 29 U.S.C. § 794 (2000 & Supp. 2004), Pub. L. No. 93-112, 87 Stat. 355 (1973).

2 42 U.S.C. § 12101 et seq. P.L. No. 101-336, 104 Stat. 327 (1990), as amended by P.L. No. 102-166, 105 Stat. 1074 (1991) and P.L. No. 110-325, 122 Stat. 3553 (2008).

3 42 U.S.C. § 12131 et seq. Regarding the differences between the scope and remedial provisions of the statutes, see section 504, Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000 & Supp. 2004); Title I of ADA, 42 U.S.C. § 12101–12213 (1990; as amended 2008). *See also* B. Lee & K. Rinehart, “Dealing with Troublesome College Faculty and Staff: Legal and Policy Issues,” 37 J.C.U.L. 359, 363 & nn.19–21 (2011).

4 42 U.S.C. § 12181–12189 (1990; as amended 2008).

5 The ADA was amended in 2008, in response to decisions by the U.S. Supreme Court that Congress viewed as unduly narrowing statutory definitions and thus unduly limiting the population of individuals defined as “disabled” under the statute. *See* Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). Citations within this article are to the amended version of the ADA.

has come to be conducted through an ever-changing array of online, texting, social media, and other electronic communication strategies. This includes the now-familiar online platforms that allow remote, real-time video connection and are accessible through computers, tablets, or smartphones).

The online technological revolution has greatly enhanced the ability of individuals with disabilities to access workspaces and to communicate within workspaces; it has also greatly enhanced the ability of employers to provide workplace accommodations, modifications, and auxiliary aids that once were too costly or disruptive to be reasonable. Beyond this, however, the technological advances of the last few decades have also revolutionized the ability of many employees to work outside their offices. This has had vast implications not only for members of the workforce but also, most definitely, for individuals with disabilities and the institutions employing them.

Among the accommodations that began to be requested as technology advanced into the 1990s were requests for off-site work (variously termed “telework” or “remote work”), wherein an employee requested to work from home or off-site as a temporary or indefinite accommodation of a disability. As discussed in Part II below, employers were slow to agree to such requests and courts were slow to find that requested remote work accommodations were “reasonable accommodations,” even for office positions not necessarily requiring extensive in-office presence or personal interaction. Decisions frequently cited assumptions and concerns about the cost and feasibility of necessary technology, disruption of the workplace, difficulties overseeing and supervising off-site workers, and what employers and courts viewed as the inherently “in-person” nature of work.

The advent of the 2020 COVID-19 pandemic, during which many workspaces (and virtually all campuses) necessarily pivoted to remote operations, has called into question many such assumptions. In addition, unique aspects of the COVID-19 pandemic caused many institutions to adopt “Flex” work policies, sometimes operating parallel to ADA accommodation processes, in which many individuals who were not technically eligible for ADA accommodations were nonetheless permitted to work remotely to minimize COVID risk to themselves or close contacts. Employers across every industry gained a significant amount of experience and data regarding the real-world effects of remote work on the efficiency and operational effectiveness of their workplaces. The sheer number of remote work arrangements in effect during 2020 and 2021 essentially provided a “field test” of many of the assumptions and rationales that underlay employer and judicial denials of remote work as a reasonable accommodation in the pre-pandemic era.

The events of 2020 through the present raise timely and important questions about how courts and agencies will and should evaluate remote work accommodation requests going forward—and how employers should modify or refine their ADA accommodation processes for purposes of legal compliance and alignment to mission. This issue is important to higher education, and particularly to brick-and-mortar campuses seeking to resume in-person learning. Because of the strong strategic emphasis on a return to “in person” learning, many such institutions may find themselves having a strong preference for a full “return” on the part of employees. They may view remote work as a now-withdrawn “benefit” offered on an emergency basis and may be reluctant to consider remote work even for

individuals with a disability. In simplest terms, the question is whether and how the status of remote work has changed because of the shifting realities of the past few years—and how campuses should comply with the law while balancing their significant interest and overarching need to serve students on campus.

Part I of this article summarizes the history and relevant provisions of the ADA, with particular emphasis on the meaning of “reasonable accommodation” and the significance of the interactive process to a grant or denial of accommodation. Part II provides an overview of relevant agency and judicial analyses prior to the onset of the pandemic; Part III does the same for agency statements and judicial decisions since March 2020 through the present and discusses apparent trends in post-pandemic law and lessons learned to date. Finally, Part IV offers recommendations for institutions of higher education in resolving remote work requests in a “return-to-campus” world.

I. “REASONABLE ACCOMMODATION” AND THE “INTERACTIVE PROCESS” UNDER THE ADA

The ADA requires employers with fifteen or more employees (1) not to discriminate against employees with disabilities and, furthermore, (2) to provide reasonable accommodations for qualified applicants and employees with disabilities, and (3) to make other adjustments to their facilities and workplaces to provide equal access to goods, services, activities, benefits, and programs.⁶ For purposes of this article, the ADA’s definitions and provisions relating to employment are most directly relevant.

Under the ADA, a “disability” is defined as a “physical or mental impairment that substantially limits one or more of the major life activities” of the employee.⁷ The ADA was amended in 2008 to broaden the definition of “disability” in response to United States Supreme Court decisions that had narrowed the definition of

6 See 42 U.S.C. §§ 12101–12117; 29 U.S.C. §§ 793(d), 794(d). This article focuses on the reasonable accommodation provisions of the ADA and how they have applied or are likely to be applied going forward to a request for remote work as an employment accommodation.

7 29 C.F.R. § 1630.2(g)(1)(i) (2011). This definition requires that the condition in question constitute an “impairment,” involving a “major life activity,” that works a “substantial limitation” upon that activity. A physical or mental impairment is defined in the regulations as follows: “(1) [a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (2) [a]ny mental or psychological disorder, such as an intellectual disability (formerly termed ‘mental retardation’), organic brain syndrome, emotional or mental illness, and specific learning disabilities.” *Id.* § 1630.2(h)(1), (2). Major life activities include, among many other itemized circumstances, “[c]aring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.” *Id.* § 1630.2(i)(1)(i), (ii). Finally, whether a disability “substantially limits” the ability of an individual to perform a major life activity is a case-by-case, fact-intensive assessment that involves a comparison of the individual to “most people in the general population.” *Id.* § 1630.2(j)(1)(ii). “An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.” *Id.*

“disability” and therefore the protections of the ADA.⁸ As members of Congress explained, “[t]he ADA Amendments Act rejects the high burden required [by the Supreme Court] and reiterates that Congress intends that the scope of the Americans with Disabilities Act be broad and inclusive. It is the intent of the legislation to establish a degree of functional limitation required for an impairment to constitute a disability that is consistent with what Congress originally intended”⁹ In light of the 2008 amendments, many if not most physiological or mental conditions will fall within the definition of “disability,” as long as the condition is not temporary or otherwise excluded by the statute. This then triggers certain nondiscrimination protections under the ADA but does not necessarily entitle an applicant or employee with a disability to a reasonable accommodation.

Simply put, a disabled applicant or employee is eligible for a reasonable accommodation if the disability in question functionally affects the employee in a manner that needs—and can be addressed through—provision of a reasonable accommodation as defined in the statute and regulations. The ADA regulations define “reasonable accommodation” as a modification or adjustment “to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enables an individual with a disability who is qualified to perform the essential functions of that position.”¹⁰ The same regulation also encompasses within the definition “(iii) Modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.»¹¹

As one of many courts has noted, “[w]hether or not something constitutes a reasonable accommodation is necessarily fact-specific. Therefore, determinations on this issue must be made on a case-by-case basis.”¹² Whether a contemplated accommodation is reasonable depends, among other things, on whether it allows the particular employee in question to perform the “essential functions” of the particular position. Essential functions are “the fundamental job duties of the employment position the individual with a disability holds or desires.”¹³ The regulations set forth a nonexclusive list of reasons why a function may be viewed as essential: “(i) The function may be essential because the reason the position exists is to perform that function; (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.”¹⁴ Relevant factors include: “(i) The employer’s judgment;

8 ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

9 154 Cong. Rec. S8342, S8345 (daily ed. Sept. 11, 2008) (statement of the Managers).

10 29 C.F.R. § 1630.2(o)(1)(ii).

11 *Id.* § 1630.2(o)(1)(iii).

12 *Laguerre v. Nat’l Grid USA*, 2022 WL 728819 at *4 (2d Cir. Mar. 11, 2022) (quoting *Wernick v. Fed. Rsrv. Bank of N.Y.*, 91 F.3d 379, 385 (2d Cir. 1996)).

13 29 C.F.R. § 1630.2(n)(1) (2011).

14 *Id.* § 1630.2(n)(2).

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequences of not requiring the employee to perform the function; (v) The terms of a collective bargaining agreement; (vi) The work experience of past employees in the job; and / or (vii) The current work experience of employees in similar jobs.”¹⁵

Evaluated in light of these factors, a proposed accommodation is generally reasonable if it effectively addresses the particular manifestations of the employee’s disability while still allowing that employee to perform his or her essential job functions.¹⁶ Relevant examples of reasonable accommodations may include changes in existing facilities used by employees to ensure the facilities are readily accessible to and usable by individuals with disabilities, as well as job restructuring.¹⁷ Job restructuring takes a variety of forms: part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; and the provision of qualified readers or interpreters.¹⁸

In addition, even a proposed accommodation that addresses an employee’s ability to perform essential functions is not necessarily required under the ADA if it cannot be provided without “undue hardship” to the employer. The ADA defines “undue hardship” as “an action requiring significant difficulty or expense.”¹⁹ Demonstrating “undue hardship” is the burden of the employer, once an otherwise “reasonable” accommodation has been identified.²⁰

While the “undue hardship” concept is often assumed to incorporate only financial considerations, the regulations clarify that this exception is broader than assumed and encompasses significant concerns about operational effects and mission—which considerations are particularly relevant to institutions of higher learning. In fact, the ADA regulations articulate multiple considerations in evaluating whether undue hardship is demonstrated, stating,

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

- i. The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and / or outside funding;

15 *Id.* § 1630.2(n)(3).

16 *Id.* § 1630.2(n), (o)(1)(ii).

17 *Id.* § 1630.2(o)(2).

18 *Id.*

19 42 U.S.C. § 12111(10)(A), P.L. No. 101-336, 104 Stat. 327 (1990), as amended by P.L. No. 102-166, 105 Stat. 1074 (1991) and P.L. No. 110-325, 122 Stat. 3553 (2008).

20 As has been noted by courts and commentators, the “undue hardship” exception is an affirmative defense that the employer has the obligation to assert. *See, e.g., Rodal v. Anesthesia Grp. Of Onondaga, P.C.*, 369 F.3d 113, 121–22 (2d Cir. 2004) (“undue hardship is an employer’s affirmative defense, proof of which requires a detailed showing that the proposed accommodation would ‘require[e] significant difficulty or expense’ in light of specific enumerated statutory factors”) (quoting *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 221 (2d Cir. 2001)).

- ii. The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
- iii. The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
- iv. The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
- v. The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.²¹

The accommodation requirements of ADA compliance, including those pertinent to an undue hardship analysis, are quintessentially “fact specific,”²² and the ADA regulations set forth specific process requirements for analyzing reasonable accommodation requests, which courts have amplified over time. That is to say, once the employer becomes aware of an employee's potential need for accommodation, the employer and the employee must engage in an “informal, interactive process” to “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”²³ This is typically preceded by the employer's obtaining and reviewing appropriate medical documentation from the employee's treater. Medical documentation may be most helpful if it sets forth not only a diagnosis but also the functional effects of the particular condition on the employee's ability to perform essential functions, as well as offering proposed accommodations that may help the employee perform the essential functions of the job.

The interactive process then involves a dialogue between the employee and employer (in which the medical treater may also be consulted), which is intended to arrive at a determination of reasonable accommodation that may be different from the accommodation(s) originally requested by the employee but proves reasonable nonetheless. A critical aspect of this process is for the employer to recognize that the obligation to provide equal access remains, even if the accommodation originally requested is not reasonable. In that event, the employer has an ongoing duty to interact so as to identify and offer, if possible, alternative reasonable accommodations that may meet the needs of the employee. For instance, in response to an employee's request to work remotely, an employer might deny the request on the grounds it does not allow the employee their essential functions. At that point, the employer still has the obligation to offer an alternative reasonable accommodation, if one exists, that allows the employee to fulfill their essential functions. This might include offering as accommodations the employee's

21 29 C.F.R. § 1630.2(p)(2) (2011).

22 See *Laguerre v. Nat'l Grid USA*, 2022 WL 728819 at *4, n.6 (2d Cir. Mar. 11, 2022).

23 29 C.F.R. § 1630.2(o)(3).

use of a different workspace or the employee's ability to work through a "hybrid arrangement" (part work-at-home, part work-in-office at a different workspace).

Employers who fail to make a reasonable accommodation to the known limitations of an otherwise qualified employee or who fail to interact in good faith with an employee needing accommodation may be subject to a claim of failure to accommodate under the ADA.²⁴ This requirement of good-faith interaction is a parallel obligation applying to employees as well as employers, however; this means employees are also responsible to continue the dialogue for purposes of identifying reasonable accommodations. To prevail on a claim of failure to accommodate, the employee must demonstrate that "(1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith."²⁵

From these criteria, it is readily apparent that a good faith, robust interactive process is not only the best way to identify a reasonable accommodation but is also, for purposes of legal compliance, essential to demonstrate the employer's good faith. This will be particularly important where an interactive process ultimately does not adduce a proposed accommodation that the employee finds to be acceptable—which may well be the case where remote work, or a continuation of remote work, is denied as an accommodation.

II. REMOTE WORK: AGENCY AND JUDICIAL INTERPRETATIONS PRIOR TO 2020

At the onset of the COVID-19 pandemic in March 2020, the topic of work-from-home was thrust on many employees and employers alike, as many businesses shifted to remote operation pursuant to emergency orders and to promote fundamental public safety. But, well before 2020, remote work began to be requested as a reasonable accommodation, particularly once technology developed to the point where electronic communications from home offices became practicable. Agencies and courts also began to grapple with the implications of such requests, and their pre-2020 positions remain important to assessing the status of remote work in the post shutdown era.

A. PRE-2020 EEOC GUIDANCE ON REMOTE WORK ACCOMMODATION

On February 1, 2001, President George W. Bush announced the "New Freedom Initiative," which was described as "a comprehensive program to promote the full participation of people with disabilities in all areas of society by increasing access to assistive and universally designed technologies, expanding educational and employment opportunities, and promoting increased access into daily community

24 See 42 U.S.C. § 12112(b)(5)(A).

25 See, e.g., *McMillan v. City of New York*, 711 F.3d 120, 125–26 (2d Cir. 2013); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 319–20 (3d Cir. 1999).

life” in an effort to ensure the ADA is fully enforced.²⁶ As part of the New Freedom Initiative, the Bush Administration “[s]ought to increase the number of employees with disabilities in the Federal workforce by implementing innovative hiring and working practices, including telework.”²⁷

The Equal Employment Opportunity Commission (EEOC), the federal agency responsible for administering the ADA, began seriously to address the potential reasonableness of remote work as an accommodation in guidance documents dated 2002 and 2003.²⁸ Prior to this, EEOC ADA guidance tended not to emphasize remote work as an accommodation option, most likely because technology had not advanced enough to render remote work feasible for most positions.²⁹

1. 2002 Guidance

In its “Guidance on Reasonable Accommodation and Undue Hardship under the ADA” (the “2002 Guidance”), the EEOC took the position that employers are not obligated to create or maintain formal “telework” programs under the ADA.³⁰ However, in the appropriate individual case, an employer “*must* modify its policy concerning where work is performed” if (1) the modification “is needed as a reasonable accommodation”; (2) the accommodation would be “effective”; and (3) the accommodation would not cause “undue hardship.”³¹ The 2002 Guidance continued by noting that “[w]hether this accommodation is effective will depend on whether the essential functions of the position can be performed at home.”³² If the essential functions of the job could only be performed at the workplace, such as a “food server” or “cashier in a store,” then remote work would not be “effective” and therefore would not be required under the ADA.³³

26 Press Release: President’s New Freedom Initiative, The White House (Feb. 1, 2001), <https://georgewbush-whitehouse.archives.gov/infocus/newfreedom/>.

27 *Id.*

28 U.S. Equal Opportunity Emp. Comm’n, EEOC-CVG-2003-1, “EEOC Guidance on Reasonable Accommodation and Undue Hardship under the ADA” (Oct. 17, 2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> [hereinafter 2002 Guidance]; U.S. Equal Opportunity Emp. Comm’n, EEOC-NVTA-2003-1, “Work at Home/Telework as a Reasonable Accommodation” (Feb. 3, 2003), <https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation> [hereinafter 2003 Guidance].

29 See U.S. Equal Opportunity Emp. Comm’n, EEOC-CVG-2000-4, “Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA” (July 27, 2000), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>; U.S. Equal Opportunity Emp. Comm’n, EEOC-NVTA-2001-1, “Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures” (Oct. 31, 2001), <https://www.eeoc.gov/laws/guidance/obtaining-and-using-employee-medical-information-part-emergencyevacuation-procedures>; U.S. Equal Opportunity Emp. Comm’n, EEOC-CVG-1995-3, “Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations” (Oct. 10, 1995), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-preemployment-disability-related-questions-and-medical>.

30 EEOC, 2002 Guidance, *supra* note 28.

31 EEOC, 2002 Guidance, *supra* note 28, Q.34 (citing 29 C.F.R. § 1630.2(o)(1)(ii), (2)(ii) (1997)).

32 *Id.*

33 *Id.*

Drawing directly from the statute and regulations, the EEOC reemphasized that the effectiveness of remote work is a fact-specific inquiry, which depends on the nature of the employee's duties, the employer's ability to adequately supervise the employee, and the employee's need to work with certain equipment or tools that cannot be replicated at home.³⁴ The 2002 Guidance identified certain positions, such as telemarketers and proofreaders, as examples of positions with essential functions that could likely be performed from home.³⁵ For those types of positions, the EEOC indicated that an employer could not deny a request to work at home unless the employer could show that remote work would cause undue hardship or that another accommodation would be effective.³⁶

2. 2003 Guidance

The next year, the EEOC issued "Work at Home/Telework as a Reasonable Accommodation" (the "2003 Guidance").³⁷ This Guidance was the EEOC's first to address remote work in depth and offers practical detail as to what EEOC views as the appropriate process for assessing the reasonableness of a remote work accommodation.³⁸

The 2003 Guidance directs that the employer first consider all of the employee's duties and then determine which are "essential," as opposed to "marginal," functions.³⁹ If any essential duties are incapable of being performed from home, the employer is not required to permit remote work; however, if only minor or marginal job duties cannot be performed from home, the employer "may need to reassign" them and/or "substitute another minor task" that could be performed at home.⁴⁰ In addition to identifying cashiers and food servers as presumably ineligible for remote work (as in the 2002 Guidance), the 2003 Guidance now added "truck drivers" to the list of positions with essential functions that probably cannot be performed from home.⁴¹

The 2003 Guidance identified three additional considerations for determining whether remote work is a reasonable accommodation, all of which remain very relevant to an assessment of the reasonableness of remote work on campus: (1) whether the job requires face-to-face interaction with customers, coworkers, or associates; (2) whether the job requires in-person interaction with outside colleagues, clients, or customers; (3) and where the job requires "[a]ccess to documents or

34 *Id.*

35 EEOC, 2002 Guidance, *supra* note 28.

36 *Id.*

37 EEOC, 2003 Guidance, *supra* note 28.

38 The 2002 Guidance contained EEOC responses to forty-six discrete questions about ADA compliance, only one of which pertained to remote work. The 2003 Guidance, by contrast, was entirely focused on remote work as a reasonable accommodation, with its stated purpose of "explain[ing] the ways that employers may use existing telework programs or allow an individual to work at home as a reasonable accommodation."

39 EEOC, 2003 Guidance, *supra* note 28, Q.4.

40 *Id.*

41 *Id.*

information located only in the workplace.”⁴² The EEOC emphasized that, “[f]requently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.”⁴³ The EEOC also stressed the need for flexibility, advising that employers consider part-time remote-work arrangements where at least some of the employee’s position can be performed from home.⁴⁴

By the same token, the 2003 Guidance also reinforced the significant caveat that employers are not and should not be required to alter performance criteria for employees working from home: while employers should take a “flexible” approach, they do “not have to lower production standards for individuals with disabilities who are working at home.”⁴⁵ The 2003 Guidance also affirmed that employers are not required to grant employee requests to work remotely where another accommodation or combination of accommodations would be effective and permit an employee to remain in the workplace; it remains the employer’s choice as to which of several reasonable accommodations will be selected.⁴⁶ Potential alternative accommodations include “providing devices or modifying equipment, making workplaces accessible (e.g., installing a ramp), restructuring jobs, modifying work schedules and policies, and providing qualified readers or sign language interpreters.”⁴⁷

3. 2009 H1N1 Guidance

In 2009, following an international outbreak of the H1N1 virus, the EEOC issued “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” (the “2009 Guidance”).⁴⁸ The central focus of the 2009 Guidance was to “identif[y] established ADA principles that are relevant to questions frequently asked about workplace pandemic planning.” While the 2009 Guidance dealt with multiple areas of ADA compliance, the EEOC accurately predicted that remote work would be a critical component in the management of pandemics, and it was prescient in devoting significant attention to remote work as a reasonable accommodation and a public health imperative during a pandemic.⁴⁹

The 2009 Guidance described remote work as “an effective infection-control strategy that is also familiar to ADA-covered employers as a reasonable

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.* at Q.5.

46 *Id.* at Q.6.

47 *Id.* at Q.6.

48 U.S. Equal Opportunity Emp. Comm’n, EEOC-NVTA-2009-3, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” (Oct. 9, 2009), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> [hereinafter **2009 Guidance**]. The 2009 Guidance was updated in March 2020, in response to the COVID-19 pandemic, as discussed below. The EEOC now maintains the 2009 Guidance and the updated March 2020 Guidance in the same document, with the March 2020 updates appearing in bold.

49 *Id.* (updated Mar. 2020).

accommodation.”⁵⁰ The 2009 Guidance affirmed that, during a pandemic, employers may encourage remote working arrangements and employees “with disabilities that put them at high risk for complications of pandemic influenza or coronavirus may request telework as a reasonable accommodation.”⁵¹ Moreover, employers must “continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship.” Thus, if an employee with a disability begins working from home due to the pandemic, the employer should provide the same reasonable accommodation the employee received at the workplace to the employee at the remote work site.⁵²

B. JUDICIAL DECISIONS ABOUT REMOTE WORK ACCOMMODATIONS, PRIOR TO MARCH 2020

Prior to the 2020 pandemic shutdown, courts reached differing opinions on whether remote work is a reasonable accommodation.⁵³ During the 1980s and 1990s, many federal courts, including the D.C. Circuit, Federal Circuit, and Fourth Circuit, affirmed that coming to work regularly was either an “essential function,” a “necessary element,” or the bare requirement of performing a job successfully.⁵⁴ Courts that found remote-work accommodations to be unreasonable tended to focus on evidence that personal contact, interaction, and coordination are needed for a specific position.⁵⁵

Prior to the seminal decision in *Vande Zande v. Wisconsin Department of Administration*,⁵⁶ courts often approached remote work accommodations requests on a case-by-case basis, considering the specific facts and circumstances in great detail. For example, in *Tyndall v. National Education Center, Inc.*, the United States Court of Appeals for the Fourth Circuit ruled that remote work was not a reasonable accommodation for a professor at the beginning of a semester.⁵⁷ The court emphasized that the start

50 *Id.* at Q.10.

51 *Id.*

52 *Id.* at Q.14. The EEOC provided a specific example to illustrate this principle: “An accountant with low vision has a screen-reader on her office computer as a reasonable accommodation. In preparation for telework during a pandemic or other emergency event, the employer issues notebook computers to all accountants. In accordance with the ADA, the employer provides the accountant with a notebook computer that has a screen-reader installed.” *Id.*

53 *Compare* *Langon v. Dep’t of Health and Hum. Servs.*, 959 F.2d 1053, 1060 (D.C. Cir. 1992); *Anzalone v. Allstate Ins. Co.*, 5 AD Cas. (BNA) 455, 458 (E.D. La. 1995); *Carr v. Reno*, 23 F.3d 525, 530 (D.D.C. 1994), *with* *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995).

54 *See* *Tyndall v. Nat’l Edu. Ctr. Inc.*, 31 F.3d 209, 213 (4th Cir. 1994) (citing *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994) (holding that “coming to work regularly” is an “essential function”)); *see also* *Law v. U.S. Postal Serv.*, 852 F.2d 1278, 1279–80 (Fed. Cir. 1988) (holding that attendance is a minimum function of any job); *Walders v. Garrett*, 765 F. Supp. 303, 310 (E.D. Va. 1991) (“[R]egular, predictable attendance is fundamental to most [jobs]”), *aff’d*, 956 F.2d 1163 (4th Cir. 1992).

55 *See, e.g.*, *Whillock v. Delta Air Lines*, 926 F. Supp. 1555, 1564, 5 AD Cas. (BNA) 1027 (N.D. Ga. 1995), *aff’d*, 86 F.3d 1171, 7 AD Cas. (BNA) 1267 (11th Cir. 1996); *Misek-Falkoff v. IBM Corp.*, 854 F. Supp. 215, 227–28, 3 AD Cas. (BNA) 449, 457-58 (S.D.N.Y. 1994), *aff’d*, 60 F.3d 811, 6 AD Cas. (BNA) 576 (2d Cir. 1995).

56 44 F.3d 538 (7th Cir. 1995).

57 31 F.3d 209, 213 (4th Cir. 1994).

of a new semester is a particularly pivotal time in the formation of a class, and it was important that the professor be there in person.⁵⁸

In *Vande Zande v. Wisconsin Department of Administration*, the United States Court of Appeals for the Seventh Circuit rejected a request for remote work as a reasonable accommodation in a 1995 decision that remains significant.⁵⁹ The plaintiff in *Vande Zande* was a clerical employee within the state's housing division who was paralyzed and prone to ulcers; to accommodate this disability, plaintiff sought to work full-time from home and asked the employer to supply a desktop computer for her home. The court of appeals found for the employer, indicating that no jury could "be permitted to stretch the concept of 'reasonable accommodation' so far."⁶⁰ The court explained that, in its view, "[m]ost jobs ... involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance."⁶¹ The court noted that this was the "majority view," with which it agreed.⁶² Second, the court stressed that individuals who work as part of a larger team needed to be in-person to facilitate collaboration.⁶³ Without assessing whether supervisory or team-building challenges in fact undermined the request of the employee in that case, the court concluded that "[a]n employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced."⁶⁴ The court acknowledged that there might be exceptions but offered the opinion that "it would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home."⁶⁵

Although *Vande Zande* was not the first case to indicate that physical presence was an essential job function,⁶⁶ the decision was reaffirmed by the Seventh Circuit on several occasions after 1995⁶⁷ and was influential in several other circuits. Two years after the *Vande Zande* decision, the United States Court of Appeals for the Sixth Circuit in *Smith v. Ameritech* adopted and reinforced the Seventh

58 *Id.*

59 44 F.3d 538.

60 *Id.* at 544.

61 *Id.* at 545.

62 *Id.* at 544 (citing *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 213–14 (4th Cir. 1994); *Law v. U.S. Post Serv.*, 852 F.2d 1278 (Fed. Cir. 1988) (*per curiam*)).

63 *Vande Zande*, 44 F.3d at 544. Subsequent cases have also stressed working in person when special equipment is involved. See *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012) (holding a 2006 part-time work plan reasonable).

64 *Vande Zande*, 44 F.3d at 544.

65 *Id.*

66 *Law*, 852 F.2d at 1279–80; *Langon v. Dep't of Health & Hum. Servs.*, 959 F.2d 1278 (Fed. Cir. 1998); *Carr v. Reno*, 23 F.3d 525, 529 (D.C. Cir. 1994) (holding that "coming to work regularly" is an "essential function" of any job).

67 *E.g.*, *Bilinsky v. Am. Airlines, Inc.*, 928 F.3d 565, 573 (7th Cir. 2019), as amended, *reh'g en banc denied* Aug. 9, 2019; *Rauen v. U.S. Tobacco Mfg. Ltd. P'ship*, 319 F.3d 891, 896 (7th Cir. 2003).

Circuit standard.⁶⁸ *Smith* involved a phonebook salesman’s request to work from home, due to a herniated disc. The court of appeals found that this was not a reasonable accommodation because at-home work was presumed to result in lower productivity.⁶⁹ More recently, in *EEOC v. Ford Motor Co.*, the United States Court of Appeals for the Sixth Circuit extended this principle, ruling *en banc* that remote work was not required as an accommodation for a resale buyer because “[r]egular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones.”⁷⁰ In response to the argument that technology had advanced to the point of making remote work feasible, the court noted that “technology has not changed so much as to make regular in-person attendance marginal for [the] job.”⁷¹

Even before 2020, the presumption articulated in *Vande Zande* and reiterated by other courts—namely, that physical attendance is an essential function of nearly all jobs—was not universally accepted as a rationale to deny remote work as a reasonable accommodation. For instance, in the 2010 decision in *Bisker v. GGS Information Systems*, the United States District Court for the Middle District of Pennsylvania declined, among other rulings, to accept the physical attendance requirement as a *per se* rule.⁷² Rather, the court held that remote work was a reasonable accommodation where the plaintiff’s disability was established through medical documentation and plaintiff had shown they could replicate their work setup in a manner that was not overly costly and allowed for performance of essential functions.⁷³ In 2013, the United States Court of Appeals for the Second Circuit in *McMillan v. City of New York* denied an employer’s motion for summary judgment on a failure-to-accommodate claim brought by an employee with a history of tardiness who sought a hybrid work schedule.⁷⁴ The court found that the employer failed to demonstrate undue hardship in the particular case.⁷⁵ In the process, the court noted that simply assuming regular attendance to be an essential function for every job is antithetical to the individualized inquiry mandated by the ADA.⁷⁶

Notwithstanding these decisions, it is fair to say that the approach employed in *Vande Zande* and many other court of appeals decisions, in which in-person attendance was presumed to be an essential function of most if not all positions, was the prevailing judicial view prior to the COVID-19 pandemic.⁷⁷ Several

68 129 F.3d 857, 860 (6th Cir. 1997).

69 *Id.* at 867.

70 782 F.3d 753, 757, 758 (6th Cir. 2015) (*en banc*); see also *Tchankpa v. Ascena Retail Grp., Inc.*, 951 F.3d 805, 813 (6th Cir. 2020) (citing *Ford Motor Co. en banc* decision).

71 *EEOC v. Ford Motor Co.*, 782 F.3d at 765.

72 2010 WL 2265979 (M.D. Pa. June 2, 2010).

73 *Id.* at *4.

74 711 F.3d 120, 125–26, 126–29 (2d Cir. 2013).

75 *Id.* at 126–29.

76 *Id.* See also M. Hancock, Note, “Working from Home” or “Shirking from Home”: *McMillan v. City of New York’s Effect on the ADA*, 16 DUQ. BUS. L.J. 155–56, 162 (2013).

77 In addition to *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538 (7th Cir. 1995), and *Ford*

commentators have noted the general unwillingness of courts in the pre-pandemic era to consider remote-work accommodations as even potentially reasonable, notwithstanding EEOC guidance encouraging individualized assessment as well as the rapid development of technology that made remote work more feasible.⁷⁸ It has been argued that, by assuming in-person attendance was an essential function of “most” (usually, all) jobs, courts improperly conflated the concepts of reasonableness and “undue hardship,” thus making both showings the burden of the employee when demonstrating undue hardship is in fact the burden of the employer.⁷⁹

For whatever reason, in the view of many courts that ruled on the issue before the 2020 pandemic, in-person work was not only the dominant workplace paradigm but was also presumed to be an essential function of most jobs. The question is whether the many advances experienced during the pandemic regarding the feasibility of remote work have changed this paradigm and, in particular, whether they call for a refined approach by colleges and universities to the question of remote work as an accommodation.

III. REMOTE WORK: OVERVIEW OF GUIDANCE AND DECISIONS SINCE MARCH 2020

In 1995, the court in *Vande Zande* noted briefly that the balancing of interests with respect to remote work accommodation requests “will no doubt change as communications technology advances.”⁸⁰ This prediction clearly turned out to be accurate, although neither the *Vande Zande* court nor anyone else appears to have anticipated just how quickly and profoundly changes would occur in response to an emergency like the COVID-19 pandemic. Not only did the COVID-19 shutdowns demonstrate the feasibility of remote work on an unprecedented scale, but they also highlighted how employees could in fact be supervised and collaborate remotely and how students could in fact be taught remotely.

Motor Company, 782 F.3d 753 (6th Cir. 2015)(en banc), examples include the Fifth Circuit’s decision in *Credeur v. La*, 860 F.3d 785 (5th Cir. 2017) (in-house litigation attorney for the state was not entitled to work remotely as an accommodation where he worked in a supervisory role requiring collaboration with other employees). See also *Mason v. Avaya Commc’ns, Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004) and *Heaser v. Toro Co.*, 247 F.3d 826, 829 (8th Cir. 2001) (both identifying in-office attendance as an essential function of the job).

78 See generally N. B. Porter, *A New Look at the ADA’s Undue Hardship Defense*, 84 MO. L. REV. 121, 156 (2019) (noting that many courts find “undue hardship” without requiring that employers prove one or more of the factors identified in the statute and regulations as the undue hardship defense). See also Note, *The Future of Teleworking Accommodations Under the ADA Post-COVID-19*, 70 U. KAN. L. REV. 105, 116–17 (2021) (arguing that identifying in-person attendance as an “essential function” improperly conflates “reasonableness” and “undue hardship” requirements of ADA). Other post-March 2020 articles, which also are not related to higher education but speak more generally to workplace accommodation, include R. Gillette, *The New Normal? Rethinking Telework Accommodations in a Post COVID-19 World*, 9 BELMONT L. REV. 231 (2021); C. Headrick, “Remote Work ‘Reasonable’? Why the COVID-19 Pandemic Calls for a Reinterpretation of the ‘Reasonable Accommodation’ Standard, and How Companies Can Respond”, 40 MINN. J.L. & INEQ. 211 (2022); S. Hickox & C. Liao, *Remote Work as an Accommodation for Employees with Disabilities*, 38 HOFSTRA LAB. & EMP. L.J. 25 (2020); R. Arnov-Richman, *Is There an Individual Right to Remote Work? A Private Law Analysis*, 35 ABA J. LAB. & EMP. L. 1 (2020).

79 See Note, *supra* note 78 at 116–17.

80 *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 544–45 (7th Cir. 1995).

Technology also advanced at lightning speed—because it had to do so—and advances in technology have definitely affected how and whether the essential functions of a particular job can be fulfilled remotely. As the EEOC has noted, in the current age of cloud computing, “access to documents or information located in the workplace” may be far less of a concern than was the case twenty years ago (although information security concerns may be far greater now than they were when the 2003 EEOC Guidance was issued).⁸¹ In short, the 2020 pandemic—and, specifically, the sudden, mass migration to remote work for significant portions of the work population—have definitely challenged a number of the assumptions that underlay pre-pandemic jurisprudence about the reasonableness of remote work, although much more development of the law is likely going forward.

A. EEOC GUIDANCE AND ENFORCEMENT

On March 14, 2020, the EEOC issued a Technical Assistance Q & A document entitled “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (“2020 Technical Assistance Q & A”). In this document, issued as the United States moved into the March 2020 emergency business shutdowns, the EEOC urged employers to “thoroughly consider all possible reasonable accommodations, including telework and reassignment.”⁸² The EEOC was judicious in the 2020 Technical Assistance Q & A and other public statements regarding the significance of the emergency shutdowns; specifically, the EEOC clarified that allowing remote work during the pandemic does not mean employers would be required to continue permitting remote work arrangements indefinitely as a reasonable accommodation under the ADA, especially if the employer could effectively address the employee’s need through a different accommodation within the workplace.⁸³ Additionally, the 2020 Technical Assistance Q & A clarified that an employee without a disability is not entitled under the ADA to work remotely in order to protect a family member with a disability from COVID-19 exposure.⁸⁴ But the EEOC also cautioned employers not to engage in disparate treatment of disabled employees if remote work was allowed.⁸⁵ Moreover, the EEOC emphasized that an

81 Several recent NACUA presentations also offer extremely useful post-March 2020 analyses of EEOC and judicial decision-making regarding pandemic-related changes to remote work, both as they affect institutional management and also as they affect ADA accommodation. *See, e.g.*, K. Baillie, P. Connelly & K. Kleba, “Remote Work Accommodations: A Brave New World or Same Old, Same Old?” NACUA Annual Conference (June 26–29, 2022); K. Caggiano-Siino, S. Gilbertson & F. F. Thompson, “In a State of Flux: The Future of Employment Compliance Amidst the Pandemic’s Effects,” NACUA Fall 2021 Virtual CLE Workshop (Nov. 10–12, 2021).

82 EEOC Technical Assistance Q & A, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (Mar. 14, 2020, as updated Mar. 19, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [hereinafter (2020 Technical Assistance Q & A)].

83 *Id.* The EEOC also posted a video conference dated March 30, 2020, discussing the status of remote work in a “post-COVID” world. *See* EEOC, “The COVID-19 Pandemic and Antidiscrimination Laws,” YOUTUBE (Mar. 30, 2020), <https://www.youtube.com/watch?v=X50G7I41NKg> [<https://perma.cc/3MD7-RB67>] (acknowledging telework will not automatically become a reasonable accommodation post-COVID-19 in a conference from late March).

84 *Id.*

85 2020 Technical Assistance Q & A, D.13.

employee's request for a disability-related accommodation is a specific, protected activity; as such, regardless of whether the request is granted, retaliation against employees who make such requests is a violation of federal law.⁸⁶

On March 19, 2020, the EEOC also updated its 2009 H1N1 Guidance in response to the COVID-19 pandemic (the "2020 Guidance").⁸⁷ The 2020 Guidance reiterated the core principles articulated by the EEOC in 2009, including that remote work is an "effective infection-control strategy;" that a pandemic may increase the likelihood that remote work is a reasonable accommodation for individuals with disabilities, placing them at greater risk of complications should they be infected; and that employees who move to remote work because of the pandemic are still entitled to the same accommodations at home that they received in the workplace (even where the initial accommodation was unrelated to the pandemic).⁸⁸

The 2020 Guidance also offered new content, including the EEOC's acknowledgment that "[t]he rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation."⁸⁹ It encouraged employers to address these requests as soon as possible, but noted that "the extraordinary circumstances of the COVID-19 pandemic may result in delay" in discussions about and provisions of ADA accommodations.⁹⁰ "Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible."⁹¹

Although the EEOC's Technical Assistance and updated 2020 guidance exhibited a significant level of pragmatism and flexibility about challenges facing employers navigating the initial shutdown phase of the COVID-19 pandemic, the EEOC has also taken a strong position on the parallel issue of denial of remote work accommodations consequent to the "return to work" initiatives that began in 2021. On September 9, 2021, the EEOC filed a complaint in the United States District Court for the Northern District of Georgia against ISS Facility Services, Inc. In this enforcement action, the EEOC indicated that it sought to "correct unlawful employment practices on the basis of disability and to provide appropriate relief to Ronisha Moncrief."⁹² Moncrief worked at ISS Facility Services in Covington, Georgia.⁹³ At the onset of the pandemic, all ISS employees were required to work remotely from

86 *Id.*; see 42 U.S.C. § 12203 (ADA § 503); 29 C.F.R. § 1630.12. Retaliation occurs where there is a causal connection between an employee's protected activity (such as a request for reasonable accommodation) and an employer's taking an adverse employment action against that employee. *Id.*

87 EEOC, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" (updated Mar. 19, 2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> [hereinafter 2020 Guidance]. This is, as noted above, an update to the 2009 H1N1 Guidance, with updated noted on the posted 2020 Guidance.

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.* at Q.14.

92 EEOC v. ISS Facility Servs., Inc., No. 1:21-CV-3708-SCJ-RDC (N.D. Ga. 2021).

93 *Id.*

March 2020 to June 2020.⁹⁴ When the facility reopened, plaintiff asked to work remotely two days per week and take frequent breaks while working on-site because of her pulmonary condition, which causes her to have difficulty breathing.⁹⁵ Although other employees allegedly were allowed to continue to work from home, plaintiff's reasonable accommodation request was denied and she was fired.⁹⁶

The EEOC sued, viewing the employer's actions as relating directly to the employee's disability and to her request for accommodation and as raising substantial evidence not only of discrimination but also of retaliation. The underlying facts are difficult to adduce on the basis of the court filings to date; but, in a statement accompanying this filing, the EEOC said, "[d]enying a reasonable accommodation and terminating an employee because of her disability clearly violates the ADA at any time. In light of the additional risks to health and safety created by COVID-19, it is particularly concerning that an employer would take this action several months into a global pandemic."⁹⁷ The case remains pending in the United States District Court for the Northern District of Georgia.⁹⁸

B. JUDICIAL DEVELOPMENTS

In addition to the EEOC filing, since March 2020 a significant number of lawsuits have been filed against employers who allegedly violated the ADA by denying remote work or a continuation of remote work as a reasonable accommodation. While many suits are still pending or on appeal, there are a sufficient number of decisions allowing for assessment of trends and allowing employers to draw preliminary conclusions as to whether the lightning-fast—and, in some ways, successful—pivot to remote work in March of 2020 has refined the judicial approach to assessment of remote work as a reasonable accommodation. Several such lawsuits, discussed below, offer insight into how educational institutions may wish to go about managing remote work requests going forward.

1. General Trends in Judicial Decisions Analyzing Remote Work

The COVID-19 pandemic cast doubt on many of the arguments previously accepted by the courts as to why remote work was not a reasonable accommodation. And, inasmuch as court systems themselves pivoted to remote work for substantial periods of time during 2020 and 2021, there is every reason to believe that courts are now much more familiar with the feasibility of remote work on a technological level. Courts have not necessarily ruled in favor of employees in remote work disputes and certainly are not overly sympathetic to the argument that, as one court termed it, "[i]f we worked remotely during COVID-19, then remote work is a

94 *Id.*

95 *Id.*

96 *Id.*

97 EEOC, "Press Release: EEOC Sues ISS Facility Services for Disability Discrimination" (Sept. 7, 2021).

98 EEOC v. ISS Facility Servs., Inc., No. 1:21-CV-3708-SCJ-RDC (N.D. Ga. 2021).

reasonable accommodation.”⁹⁹ Nonetheless, it also appears from a survey of recent remote work decisions that the persuasive value of *Vande Zande* and its progeny is diminishing—and that employers should prepare to respond on an individualized, interactive basis to requests for remote work. Simply put, it appears advisable to engage in a robust interactive process, recognizing that the in-person paradigm, even if strongly embraced in a “return to campus” scenario, may be subject to exception for purposes of ADA compliance.

One useful example is the 2021 decision in *Frantti v. New York*,¹⁰⁰ in which the United States Court of Appeals for the Second Circuit affirmed summary judgment in favor of the employer (a state agency). The court of appeals found that the state employee’s insistence on remote work, an alternative schedule, or a transfer were not reasonable accommodations and that he had not been denied accommodation by the employer. With regard to the requests for remote work or an alternative schedule, the court noted that the essential functions of the employee’s particular position required him to perform involved analysis on complex, collaborative projects that unfolded over long periods of time; this in turn involved his communicating closely with coworkers and other parties, which the employer believed could not be done remotely. With regard to the full range of accommodations requested, the court also determined that, given the severity of his illness, the employee would not have been able to perform the essential functions of the position even with these or alternative accommodations.¹⁰¹

Also significant was the employee’s failure to make a direct request for the accommodations in question or engage in what the court viewed as a good faith interactive process. In fact, the employee “resigned instead of seeking accommodations,” essentially breaking off the interactive process. Therefore, the employer did not “refuse” to grant accommodations.¹⁰² Based on this individualized analysis of the accommodations at issue and the terminated interactive process, the court found summary judgment in favor of the employer to be warranted.

Likewise, in *Brown v. Austin*,¹⁰³ the United States Court of Appeals for the Tenth Circuit affirmed summary judgment in favor of the employer, again finding a remote work accommodation request to be unreasonable because it would not allow the employee to fulfill the essential functions of the position. In this case, the employer worked as a health care fraud specialist conducting fraud investigations. To do so, he needed to use case files maintained only in his office and in paper format. While noting that “physical presence in the office does not become an essential function ... just because [the employer] says so,” the court noted that the employee had offered no plausible evidence that he needed the accommodations in question (or alternatives such as reassignment), while the employer had

99 See *Montague v. U.S. Postal Serv.*, No. CV H-20-4329, 2022 WL 35825 (S.D. Tex. Jan. 4, 2022).

100 850 F. App’x 17, 20 (2d Cir. 2021).

101 *Id.*

102 *Id.*

103 13 F.4th 1079, 1085 (10th Cir. 2021). *Brown* arose under the Rehabilitation Act because the employer was the U.S. government but the court noted that the standards for accommodation under the Rehabilitation Act incorporate ADA standards. *Id.* at 1094 n.3.

offered extensive evidence of the essential functions of the position requiring the employee's in-office presence, including the testimony of other employees about the nature of the position.¹⁰⁴ The employer had also offered extensive evidence that the accommodations requested would result in undue hardship from the standpoint of operations and finances, but the court did not reach this defense.¹⁰⁵ Again, based on an individualized analysis of the needs of the employee and the essential functions of his position, the court found in favor of the employer.

On similar reasoning, the United States District Court for the District of Columbia in *Tobey v. United States General Services Administration [GSA]*¹⁰⁶ granted summary judgment in favor of the employer. There, the district court found that an assistant general counsel working within GSA could not perform the essential functions of his position working remotely, which included making timely in-person court appearances and meeting with clients. In addition, plaintiff exhibited performance issues, which the employer was entitled to take into account in assessing whether remote work was reasonable in this situation.¹⁰⁷ As such, the employer's provision of alternative accommodations in lieu of granting the accommodation of remote work was neither a violation of the ADA accommodation requirements nor an act of retaliation against the employee.¹⁰⁸

The court in *Tobey* also reviewed and rejected a claim that the employer did not interact in good faith with the employee in considering reasonable accommodations. On the contrary, the employer "adequately engaged in the interactive process" and provided temporary remote work, advanced sick leave, an ergonomic chair, and assistance with lifting and hauling, both before and after the employee formally requested accommodations. The employer also afforded the employee an extension of time to submit documentation and permitted the employee an unscheduled leave when the employee needed it. The court concluded that the interactive process was honored by the employer and that this was another basis on which the employer's conduct was "not actionable."¹⁰⁹

These are only a few of the decisions issued since March of 2020 addressing remote work accommodation requests; and, as noted, the trend continues to favor the positions of employers on the central question of remote work accommodation.¹¹⁰ This trend is not universal, but it definitely remains the case that the majority of remote-work accommodation lawsuits are decided in favor of employers.¹¹¹

104 *Id.* at 1089–90.

105 *Id.* at 1088–90.

106 480 F. Supp. 3d 155 (D.D.C. 2020).

107 *Id.* at 168–71.

108 *Id.*

109 *Id.* at 169–70.

110 Other decisions rendered since March of 2020 are noted in K. Baillie, P. Connelly & K. Kleba, "Remote Work Accommodations," *supra* note 81.

111 An example of a decision decided in favor of the employee is *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56 (D. Mass. 2020) further discussed *infra* note 112.

But it also seems clear, both from the sampling above and from other recent decisions, that the approach of courts is shifting away from assumptions about remote work and toward individualized assessment of remote work requests. Courts appears to be scrutinizing the essential functions of the particular position and the interactive process used to engage with the particular employee, and the employers who are prevailing in decisions such as those summarized above appear to be employing compliant interactive processes in addressing accommodation requests.¹¹² While the opinions of employers on the need for in-person work are respected (as in *Frantti and Brown*), courts do not appear to be relying on presumptions favoring in-person work, in a pronounced departure from *Vande Zande*, *Ford Motor Company*, and similar decisions rendered prior to 2020. For instance, in *Frantti and Tobey*, both courts emphasized the importance of the interactive process—*Frantti* in finding that the employee himself failed to interact and *Tobey* in finding that the employer adequately did so. Equally significant is the judicial response where the employer fails to engage in an individualized assessment; for instance, where one employer failed to offer evidence that satisfied the requirements of an undue hardship defense, no assumptions were made in the employer's favor and the court granted an injunction requiring the employer to continue remote work for the disabled employee.¹¹³

2. Focus Upon Decisions Involving Educational Institutions

Several decisions relating to remote work and involving educational institutions have been reported since March 2020. They are worth noting because the contexts in which those matters arose are likely to recur within higher education. Moreover, the arguments that those institutions successfully advanced may be instructive in developing good campus accommodation practices for the future.

In *Thomas v. Bridgeport Board of Education*,¹¹⁴ the United States District Court for District of Connecticut denied a motion for a preliminary injunction that would have required a public school district to let a high school teacher teach remotely as a reasonable accommodation. The court found the employee was not likely to succeed on her failure-to-accommodate claim, in part because the school district had determined, based on an assessment of school and student needs, that in-person instruction was an essential function of the plaintiff's and other K-12 teaching positions. Related to this, the court also noted that the school district had presented credible evidence of undue hardship in that, if this teacher could not work in person, the district would be forced to hire another teacher to replace the

112 See cases in K. Baillie, P. Connelly & K. Kleba, "Remote Work Accommodations," *supra* note 81.

113 In *Peebles v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 59-61 (D. Mass. 2020), the United States District Court for the District of Massachusetts ruled in favor of a trauma center manager who, after performing his job remotely during the initial months of the pandemic, submitted evidence of disability and subsequently refused to return to in-person work. The employer denied a remote-work accommodation. After hearing, the district court granted an injunction in favor of the employee, permitting him to work from home because there was no evidence of undue hardship upon the employer. *Id.*

114 2020 WL 12188900 (D. Conn. Nov. 19. 2020).

employee in the in-person classroom, which would “be an added expense, [and] extremely difficult to do as there is currently a shortage of substitute teachers.”¹¹⁵ The court denied the motion for preliminary injunction.

Similarly, the United States District Court for the Middle District of Tennessee in *Dobbs-Weinstein v. Vanderbilt University* ruled in favor of an educational institution on a university professor’s motion for an injunction that would have required the university to let her teach and mentor students remotely.¹¹⁶ The court found insufficient evidence of irreparable harm or the other elements necessary to support an injunction, noting that the university had denied the request for remote teaching but offered plaintiff the alternative accommodations of (1) letting her teach her two in-person classes in a larger room than scheduled, with all students wearing N95 or KN95 masks; or (2) allowing her to take paid leave under the FMLA. There is a strong indication that the court also felt the employee was not interacting in good faith, in that she apparently refused the paid leave offer because she was concerned it might preclude her from using previously approved research grants to visit Paris and Rome. In denying the injunction, the court noted that it could not “reconcile the incongruity of Plaintiff’s request to be excused from [teaching in-person classes] ... with her intention to travel internationally for conferences ...”¹¹⁷

A third decision involving education, *Mundy v. Board of Regents for the University of Wisconsin System*,¹¹⁸ is also noteworthy in its denial of a claim of failure to accommodate and its analysis in doing so. That decision involved a graduate student employed as a research assistant in a bacteriological lab who requested remote work as an accommodation of her anxiety disorder. The university offered evidence that the plaintiff exhibited performance issues, both in progressing on her thesis and also in her research assistant employment. Her faculty advisor, who also managed the lab, was therefore reluctant to allow her to work remotely because she had not demonstrated she could be productive working outside the lab.¹¹⁹ The court also noted that, when the university denied remote work to the plaintiff but instead offered other options for accommodations, the plaintiff ceased interacting with the university to explore the possibility of a “mutually agreeable accommodation,” unilaterally rejected what the university proposed, and terminated the interactive process; in this instance, as the court noted, a plaintiff is not entitled to relief.¹²⁰ The court thus granted the university’s motion for summary judgment.

These recent decisions are consistent with the trends noted above in cases that do not involve educational institutions, in that courts have emphasized individualized assessment of the essential functions appropriate to the particular

115 *Id.* at *3.

116 2022 WL 860450 (M.D. Tenn. Mar. 22, 2022).

117 *Id.* at *1–2.

118 2022 WL 103562 (W.D. Wisc. Jan. 11, 2022).

119 *Id.* at *7–8.

120 *Id.*

case. While it is important to note that two of these three education-related decisions involved motions for a preliminary injunction (and therefore could conceivably be decided differently on the merits), such decisions as well as other rendered since March 2020 suggest that institutional employers should engage in individualized assessments and good faith interactive processes when assessing remote work requests—even where, in the shift back to in-person learning, there is a reluctance to continue permitting remote work, either as an accommodation or as part of a flexible approach to pandemic management.

Cases like *Dobbs-Weinstein*, *Thomas*, and *Mundy* also underscore the importance to educational institutions of being prepared on an operational level to not only undertake, but demonstrate, the essential functions of positions, their contentions about undue hardship, and their commitments to the interactive process. In *Dobbs-Weinstein*, the university could show it responded to the faculty member's request for remote teaching with two alternative accommodations; by contrast, the faculty member refused them both and arguably did not interact in good faith.¹²¹ In *Mundy*, the university could show that the graduate research assistant exhibited performance issues when she worked outside the lab, with the requested remote work therefore denied because she would be unable to perform the essential functions of her job. In addition, the university offered her several alternative accommodations, which she rejected and then terminated the interactive process.¹²² In *Thomas*, which addressed both the reasonableness of accommodations and the "undue hardship" defense, the school district made a judgment that the best interests of the students and school district required a return to in-person learning; the court respected this, and courts generally can be expected to respect such findings, as long as institutions also can demonstrate that they were flexible with employees who are denied remote work accommodations (which, in *Thomas*, was demonstrated by the faculty member's being placed on unpaid leave but not losing her position).¹²³ The court in *Thomas* also respected the school district's offering evidence of "undue hardship," specifically, its showing that replacing the plaintiff would have resulted in the district's incurring the cost of hiring an additional teacher as well as injecting operational challenges because it was difficult to hire temporary faculty at that time.¹²⁴

These cases, as well as the non-education cases summarized above, definitely suggest that educational institutions should not rely on the kinds of assumptions about in-person workplaces that threaded through pre-pandemic decisions such as *Vande Zande* and *Ford Motor Company*, even in jurisdictions where such decisions might remain settled law. Perhaps even more important, these recent decisions and others postdating March of 2020 strongly suggest that educational institutions may be able to prove up "undue hardship" defenses in cases beyond those involving significant financial impact—serious though financial impact may prove to be within higher education going forward. Perhaps even more than in the

121 *Dobbs-Weinstein*, *supra* note 115, at *1–2.

122 *Mundy*, *supra* at n.117, at *7–8.

123 *Thomas v. Bridgeport Bd. of Educ.*, 2020 WL 12188900, at *3 (D. Conn. Nov. 19, 2020)..

124 *Id.*

corporate world, higher education faces complicated situations in which difficult interests will collide and create unique circumstances supporting a finding of undue hardship. For instance, a faculty member may seek to teach remotely but the institution may judge, as did the school district in *Thomas*, that this is not in the best interests of the students themselves. Indeed, legitimate considerations in such circumstances may include whether students themselves may be experiencing disabilities or other learning challenges that make remote learning undesirable as a pedagogical matter and as a matter of institutional mission. These kinds of considerations are legitimate under the “undue hardship” provisions of the ADA and regulations. In addition, higher education also offers certain modalities of teaching, and offers certain subjects, that arguably cannot be provided effectively on an ongoing basis through remote learning (*e.g.*, clinical training healthcare or teacher education programs; certain types of music training). A grant of remote work to faculty teaching within those areas might therefore raise the undue hardship issue identified in *Thomas*, in which an institution was forced to hire additional personnel, perhaps at great expense, to provide necessary in-person instruction. Moreover, in-person campuses employ individuals in unique positions that have no analogies within much of the corporate world—residence hall advisors and other student-focused positions come to mind as positions that probably cannot be undertaken remotely when students are in residence on campus. Again, a grant of remote work for such positions, while students are on campus, is likely to be both unreasonable, given the essential functions of the positions, and also an undue hardship.

On the other hand, many educational institutions have in recent years enhanced their commitments, as a matter of institutional mission, to the principles of diversity, equity, and inclusion on campus. These commitments definitely encompass inclusion and expansion of opportunities for individuals with disabilities, whose difficulties accessing the workplace were part of the impetus for the passage of the ADA and later amendments. Under these circumstances, conducting a workplace accommodation process in an interactive, flexible manner—and limiting “undue hardship” defenses to those circumstances that are well-supported by objective evidence, not assumptions—is an approach that aligns not only with legal compliance obligations but also with fundamental institutional diversity missions.

In sum, recent agency guidance and court decisions indicate that institutions should prepare going forward to demonstrate the essential functions of positions, individualized assessment of remote-work requests, good faith involvement in an interactive process, and flexibility in accommodating employees through alternatives, if not through remote work. Assumptions about the “essential” nature of in-person work for all positions are no longer a sound basis for denying accommodations, if indeed they ever were. In any event, the lessons from the 2020 pivot toward remote work, and subsequent decisions about remote work, suggest that a robust interactive approach will now be expected, and also respected, by agencies and courts—if institutions engage in the process in good faith and can demonstrate that they did so. Recent decisions also suggest that educational institutions, which may experience unique operational challenges compared to the corporate world, may have more opportunity than previously thought to demonstrate “undue hardship,” when operational or mission considerations indicate it is necessary to do so.

IV. PRACTICAL GUIDANCE FOR HIGHER EDUCATION IN MANAGING REMOTE WORK REQUESTS

Below, this article concludes by offering practical guidance to practices and procedures that will assist institutions in interacting about remote work accommodation requests. Specifically, it is recommended that institutions commit (or recommit) to using ADA-compliant policies; updating and then applying job descriptions that clarify the essential functions of positions; using a flexible and good faith interactive process; and employing appropriate communication and documentation in all dealings with employees, supervisors, and other stakeholders involved in the ADA accommodation process. Robust policies and practices, focused on employing and documenting good faith, and individualized assessment, will best position institutions to make appropriate, defensible, and nondiscriminatory remote work decisions that are consistent with their institutional missions.

1. UPDATE AND APPLY ADA POLICIES

- The guidance, decisions, and trends discussed above suggest that institutions must begin with the “first principle” of effective campus ADA compliance—which is that ADA policies are legally compliant and capable of being understood and used by campus personnel. Most policies need to be updated every few years to reflect changes in institutional structure or staffing; an update to incorporate learning from the pandemic is also well advised.
- Institutions should err on the side of detailing the procedures that will be used to evaluate accommodation requests, interact with medical providers, and interact with the employee themselves. Individuals seeking accommodation (particularly those who are emotionally distressed or medically compromised) often benefit from detail about what is required, what is expected, and what will happen during the process. Their medical providers may also benefit from being afforded more detail and information, rather than less.
- Institutions should consider reviewing and updating their full range of ADA-related policies, including policies such as service animal/emotional support animal policies and barrier-removal plans for facilities. While these policies do not necessarily bear directly on a remote work request, they may affect the alternative accommodations that an institution can offer during an interactive process.
- It is important to make sure the institution has identified a Section 504 coordinator, provided appropriate grievance policies, and otherwise complied with “nuts and bolts” regulatory requirements of disability legal compliance (under both federal and state laws).

2. TAKE CARE NOT TO CONFLATE ADA AND FLEX POLICIES

- Many institutions adopted “Flex Work” policies during the early (prevaccination) stages of the COVID-19 pandemic to accommodate individuals who were immune compromised but not necessarily

disabled (or who lived with medically fragile individuals who were at risk if exposed to COVID).

- Flex policies are different from ADA accommodation policies, the latter of which reflect legal compliance obligations, not policy decisions that may be rescinded or changed at the discretion of the institution. It is important for institutions always to distinguish between ADA requests and requests made under flex policies.
- If an institution continues to maintain a flex policy as the pandemic winds down, it is important to guard against discrimination claims by individuals with disabilities who are seeking accommodations as a matter of right: it should not be more difficult for an individual with a disability to justify remote work as a reasonable accommodation than for a similarly situated, nondisabled person to do so using a flex policy. Moreover, disabled employees whose remote work accommodation requests have been denied should remain eligible to seek and obtain flex policy grants on the same basis as similarly situated non-disabled employees. Drawing these distinctions may be challenging and may lead employers to rescind or significantly limit the availability of flex policy arrangements in order to avoid potential issues of discrimination.
- Likewise, it is important to avoid related retaliation claims: individuals with disabilities now seeking ADA accommodations should not be penalized for having previously benefited from flex policies or for having engaged in prior protected activity.
- By the same token, and as noted by the EEOC, individuals with disabilities who have previously worked remotely during general shutdowns or under previous flex policy arrangements are not automatically entitled to continue working remotely, once the institution returns to more in-person service or rescinds its flex policy.

3. UPDATE JOB DESCRIPTIONS TO DISTINGUISH BETWEEN “ESSENTIAL” AND “MARGINAL” FUNCTIONS

- In order to perform a proper analysis of the reasonable accommodations needed, institutions first have to know the essential functions of a particular position.
 - Many positions lack updated job descriptions and rely instead on original job postings (which may be decades old and reflect a hiring “laundry list,” rather than realistically reflecting the current job responsibilities).
 - Job descriptions are also useful to provide medical treaters with information about the essential functions of a position, which may help treaters make realistic recommendations about accommodation options (see Guidance 4 below).
- Functions assessed during annual evaluations may constitute a useful “proxy” summary of current essential functions, if no updated job descriptions exist; but updating job descriptions is an extremely

useful compliance and risk management initiative that is highly recommended.

4. *SEEK AND USE MEDICAL DOCUMENTATION*

- The interactive accommodation process requires that institutions understand not only the employee's diagnosis but also the functional limitations of the particular disabling condition upon the particular employee.
- Therefore, medical documentation should usually be required, properly verified, and reasonably current.
- The institution should be flexible as to the particular type of treater whose documentation is sought, which will depend on the medical or mental condition for which accommodation is requested.
- Documentation should describe not only the condition but also the particular functional issues raised by the condition. It should also describe the expected duration of those limitations.
- Institutions may also wish to ask the treater to identify accommodations and explain how the recommended accommodations will enable the employee to fulfill the essential functions of the job.
 - Consider asking specific questions to promote a more useful treater response.
 - Consider also providing the job description, if one exists, or information about the employee's essential functions (again, to promote a more useful response).
- As part of the documentation process, the employee should sign a release allowing follow-up questions to be asked directly to the medical treater.
- A good practice is to ask the employee to seek the documentation directly from the treater but to provide a form (and, ideally, a job description), with directions for the treater to send the information directly to the institution.

5. *INDIVIDUALIZED ASSESSMENT AND INTERACTION: STILL CRITICAL*

- As demonstrated by the above case law, guidance, and regulations, it is still extremely important (perhaps, more important than ever) to conduct an individualized assessment of every ADA accommodation request and to make no assumptions about the reasonableness—or unreasonableness—of remote work requests.
- This remains the case even if the institution has determined to resume in-person learning and is reluctant to continue any remote work.
- Institutions should perform an individualized assessment in every situation in which an employee requests remote work as an accommodation; supervisors should not grant or deny remote work requests informally (without the benefit of documentation or knowledge of

the appropriate interactive process).

- To facilitate a good faith process, ask for and use documentation, but be flexible in what is accepted.
- It is also important to be proactive in responding to requests and in initiating the interactive process—even with repeat “requesters” or where a grant of remote work is unlikely.

6. INTERACT IN GOOD FAITH, DOCUMENTING THE PROCESS AND RESULTS

- Although interactive processes need not be formal (and meetings are not required by the regulations or statute), it is often advisable to meet separately at least once with the employee—and with their supervisor (the person who will manage the remote work or other accommodations). Meetings with these different stakeholders are often important to adduce the practical implications of particular requests. In particular, it is important to hear from the supervisor about performance issues on the part of the employee or operational challenges within the unit, which may factor into the institution’s consideration whether to grant a remote work request.
- It is recommended that the individual representing the university during the interactive process ask questions, take and maintain notes, and follow up in writing with the employee (and, often, with the supervisor).
- The institution should give due consideration to the employee’s preference for a particular accommodation, even though the institution retains discretion to grant or deny it if another accommodation is reasonable or if the accommodation imposes undue hardship.
- It is vital to avoid assumptions about what is being requested, the implications of the requests, and other details about how the remote work request will work on a practical level for a particular job or within a particular unit. When in doubt, ask the employee for clarification or follow up with the teacher or supervisor. Treating the interactive process as a dialogue may yield the best-informed decision.
- Documentation is critical. Every step in the interactive process should be documented, both internally and to the employee. This is important not just for compliance purposes but also to maintain central institutional knowledge of the accommodations being provided to different employees.
- In addition, employees seeking accommodations need and are entitled to clear instructions and communications. They may have difficulty understanding institutional policies and procedures in meetings or oral communications, making written follow up (sometimes, multiple written follow-ups) advisable.

7. PROPOSE ALTERNATIVES AND AVOID BEING THE PARTY THAT “CUTS OFF” THE PROCESS

- The responsibility to provide equal access and benefits does not end simply because remote work or the originally requested accommodation cannot be granted.
- As shown by the above case law, it is important to propose reasonable alternatives, which may include hybrid work, flexible hours, change in work location, or job transfer.
- As shown by decisions like Mundy, it is also important not to cut off the interactive process unless there are no further alternatives to discuss or the employee rejects reasonable offers. In practical terms, an institution should almost never say “no” without also proposing an alternative. Moreover, every institution should be prepared to document its attempts to continue seeking a reasonable resolution.
- One alternative that is underutilized is the “temporary accommodation,” which can be granted both as a stopgap during the interactive process and also as a “test period” to see if remote work is feasible for a particular position.
- A related strategy is to grant remote work as an accommodation while placing an “end date” upon the grant of remote work, at which time the institution and employee will interact again to reassess the reasonableness and effectiveness of the measure.
- It may also be advisable to schedule periodic “check-in meetings” with the employee and supervisor during any such temporary or time-limited grant of accommodation.

8. PREPARE TO ESTABLISH AND DOCUMENT ANY BONA FIDE, “UNDUE HARDSHIP” DEFENSE

- Institutions bear the burden of showing that a remote work request would result in bona fide operational, programmatic, financial, or strategic difficulties constituting “undue hardship.” Consistent with the regulations, these may include
 - Needs of students (some courses cannot be taught remotely; sometimes a critical mass needs to be on campus to make up a cohort).
 - Specific financial or operational requirements of the job or of the institution.
 - Impact on other individuals with disabilities or other campus stakeholders with special needs of a request to teach remotely or another accommodation.
 - Prior experience supervising the employee remotely; this employee’s job performance.
- Ideally, such concerns will be reflected in documentation within the institution that predates the request for accommodation, such as prior documentation of issues with employee conduct or job performance.

- The grounds for denying an accommodation on the basis of undue hardship must be documented not just internally but also to the employee (and, again, alternatives to remote work should be offered, if any exist).
- Because a showing of undue hardship is the employer's burden, it is particularly important to base any such defense on objective evidence and documentation. Institutions should try to avoid assumptions, which may be challenged on the grounds of discrimination, retaliation, or arbitrary and capricious decision-making.

9. MAINTAIN CONFIDENTIALITY; BE PROMPT

- The ADA includes specific confidentiality limitations, and these should be honored. It is important that those institutional representatives interacting on behalf of the institution share, even within the institution, only the minimum information needed to assess and provide accommodations. This applies not only to medical documentation from treaters (which may be subject to state law confidentiality protections) but also information about accommodation requests and diagnoses, which institutional employees may be eager to learn but which should only be shared on a strict "need-to-know" basis.
- It is also valuable to be prompt in responding to and resolving requests for accommodation. Delays have real-world implications for an employee's ability to perform the essential functions of a position. Moreover, undue delay on the part of the institution, once an accommodation has been requested, may undermine the institution's ability to show good faith interaction.

10. REMEMBER THAT THE ADA EQUAL ACCESS AND BENEFITS PROVISIONS NEVER LAPSE

- Circumstances change, medical conditions progress, and disabilities develop. There is no time or numerical limitation upon an employee's ability to request accommodations. As an employee's needs, available technology, or other circumstances change—or as accommodations prove ineffective—the employee may request new or enhanced accommodations. This includes accommodations that were previously denied, such as remote work.
- The employer has a renewed obligation to engage in an interactive process with each new request, including when repeated requests are received from the same employee.
- Even with positions that do not seem to lend themselves to remote work, institutions should consider each remote work request as it arises and try to offer alternatives if remote work is not reasonable. Assumptions about remote work are less likely than before to satisfy institutional legal compliance obligations, yield reasonable results, or align with institutional mission.

V. CONCLUSION

The implications of the COVID-19 pandemic on society will be debated for years and likely for decades, and this probably includes the effect of the pandemic upon workplace operations and structures. It is already clear that the COVID-19 related shutdowns beginning in March 2020 radically changed the ability of many workplaces and workers to perform work remotely; the benefits, burdens, and legal implications of this “new normal,” on campus and elsewhere, are just beginning to be assessed.

What has not changed, however, are the obligations of employers under the ADA and Rehabilitation Act to provide “reasonable accommodations” to qualified employees with disabilities. This includes providing, in appropriate instances, the once unusual but now much-better-accepted accommodation of remote or “hybrid remote” work. This article summarizes the state of agency and judicial assessment of remote work accommodations before and since the March 2020 shutdowns consequent to the COVID-19 pandemic. Recognizing that further legal developments regarding remote work accommodations are ongoing and inevitable, this article also identifies what are likely to be continuing trends away from judicial assumptions about remote work and toward judicial emphasis upon individualized and interactive assessment of remote-work accommodation requests. An apparent corollary is that institutions of higher learning may also have more opportunity to establish “undue hardship” defenses than was previously assumed due to their unique operational challenges and missions of colleges and universities.

This article concludes in Part IV by offering practical guidance as to policies and processes that institutions of higher learning may wish to consider implementing in order to ensure they are employing good practices in evaluating remote work accommodation requests. These include updating institutional ADA policies; compiling useable information about the essential functions of positions; using a consistent, flexible, and good faith interactive process to evaluate accommodation requests; and committing to proper communication and documentation in all dealings with employees, supervisors, and other stakeholders during the interactive process.

As the above agency guidances and judicial decisions suggest, and as bears repeating, robust ADA policies and practices, focused on individualized assessment, will best position institutions of higher learning to make reasonable, defensible accommodation decisions about remote work requests. When well and consistently applied, this approach will in turn promote our institutional missions of diversity and inclusion.

FLORIDA'S STOP WOKE ACT: A WAKE-UP CALL FOR FACULTY ACADEMIC FREEDOM

NEAL HUTCHENS AND VANESSA MILLER*

ABSTRACT

In multiple states, legislation has been proposed or enacted to suppress ideas associated with critical race theory (CRT) and related lines of critical scholarship in schools and, in some proposals, in colleges and universities. These state endeavors can be traced to efforts to emulate Executive Orders 13950 and 13958 issued during the Donald Trump presidential administration, which Joseph Biden rescinded the day he was elected. Among the objections to these state legislative efforts include calls that they constitute an impermissible infringement on the First Amendment academic freedom rights of public higher education faculty. With a particular focus on what is widely referred to as Florida's Stop WOKE Act, this article examines how anti-CRT legislative initiatives that extend to public colleges and universities potentially violate the First Amendment academic freedom rights of individual faculty.

The authors contend that public higher education faculty professional speech made in carrying out employment duties connected to teaching, research, or shared governance should be eligible for First Amendment protection. The U.S. Supreme Court has held that public employee speech made in carrying out employment duties does not constitute First Amendment protected speech. But the Court has yet to address whether faculty speech in public higher education that implicates academic freedom concerns is exempted from these standards. In this article, the authors propose that the academic freedom statements adopted by public higher education institutions and systems provide a strong justification to provide First Amendment protection to faculty academic speech, such as that related to teaching and research. Additionally, the authors suggest that courts could use a public concern analysis tailored to higher education contexts to evaluate the interests of faculty and institutions in deciding cases that involve the academic speech of public higher education faculty.

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INTRODUCTION

In what has been characterized as the “Ed Scare,”¹ multiple state-level proposals have been advanced—with these initiatives characterized as “educational gag orders” by one national free expression advocacy organization—to suppress certain ideas and views in schools and in higher education.² These state endeavors can be traced to efforts to emulate executive orders issued during the Donald Trump presidential administration,³ which were rescinded after the election of Joseph Biden.⁴ State legislative initiatives have now become the focus of efforts to censor critical race theory (CRT) or related lines of critical inquiry or thought in educational settings, including, in some proposals, at public colleges and universities.⁵ Among the objections to these legislative efforts include calls that they constitute an impermissible infringement on the First Amendment academic freedom rights of public higher education faculty. With a particular focus on Florida’s House Bill 7 (HB 7) Individual Freedom Act, more widely referred to as the Stop “Wrongs to Our Kids and Employees” Act (Stop WOKE Act),⁶ this article examines how anti-CRT legislative initiatives that encompass public colleges and universities potentially violate the First Amendment academic freedom rights of individual faculty. In Florida, the issue of potential infringement on constitutionally protected academic freedom has been squarely raised in litigation over the Stop WOKE Act. In defense of the legislation, the Florida Board of Governors of the State University System argued in a lawsuit challenging the Stop WOKE Act’s application to higher education that faculty

1 Jonathan Friedman, *Goodbye Red Scare, Hello Ed Scare*, Inside Higher Ed (Feb. 24, 2022), <https://www.insidehighered.com/views/2022/02/24/higher-ed-must-act-against-educational-gag-orders-opinion>. Friedman compares recent attempts to suppress ideas in schools and colleges, including in libraries, to efforts during the McCarthy period to root out supposed communist influences in American life. See Part III for consideration of U.S. Supreme Court opinions raising academic freedom concerns during this era.

2 In November 2022, PEN America’s tracker of these efforts reported that proposals had been introduced in forty-one states and that nineteen laws had been passed in fifteen states. PEN America, Index of Educational Gag Orders, <https://pen.org/issue/educational-censorship/> (last visited Dec. 1, 2022).

3 Exec. Order No. 13950, 85 Fed. Reg. 66083 (Sept. 22, 2020) (prohibiting trainings conducted by federal contractors that promote “divisive concepts”); Exec. Order No. 13958, 85 Fed. Reg. 70951 (Nov. 2, 2020) (establishing 1776 Commission, which issued the “1776 Report” that sought to promote a patriotic interpretation of U.S. history and opposed efforts such as the 1619 Project, which places race and slavery as central to understandings of American history). See The President’s Advisory 1776 Commission (Jan. 2021), *The 1776 Report*, <https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/The-Presidents-Advisory-1776-Commission-Final-Report.pdf>.

4 Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

5 See PEN America’s Index of Educational Gag Orders, *supra* note 2.

6 The legislation passed by the Florida legislature as House Bill 7 is named the Individual Freedom Act, but the legislation includes several of the provisions advanced by Florida Governor Ron DeSantis in the Stop WOKE Act bill, which is a name that continues to be commonly used to refer to the law enacted. See *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, No.: 4:22-cv-304-MW/MAF, *2 n.2 (N.D. Fla. Nov. 11, 2022) (order granting in part and denying in part motions for preliminary injunction). We will refer to the law as the Stop WOKE Act since that name is commonly used.

classroom speech is governmental speech for First Amendment purposes.⁷ In doing so, the Board of Governors rejected the position that professors in public higher education possess individual constitutional academic freedom rights relative to their classroom speech.

Anti-CRT provisions, such as the Stop WOKE Act, and related legislation that seek to regulate faculty *academic speech*⁸—the term we use for professor speech made in carrying out professional employment duties in teaching, research, and shared governance—highlight ongoing legal ambiguity and debate over First Amendment protection for faculty academic freedom in public higher education.⁹

In Part I of the article, we present a general overview of the development of CRT and its scholarly roots, which makes clear how anti-CRT provisions, such as Florida's Stop WOKE Act, are based on an uninformed and distorted interpretation of CRT that aims to subvert a firmly established area of scholarly discourse in higher education. The article then moves to consideration of how Florida's Stop WOKE Act and related proposals encroach on the constitutional academic freedom rights of professors in public higher education. Part II of the article provides an outline of the emergence of the concept of constitutional academic freedom and of how the public employee speech standards have come to provide a framework commonly used by courts to evaluate faculty speech claims raising academic freedom concerns. Consideration of a preliminary injunction granted to block enforcement of Florida's Stop WOKE Act as to higher education serves as the focus for Part III of the article. In Part IV of the article, we contend that courts, as part of engaging in the public employee speech analysis, should take into account when a public higher education employer defines the job duties of professors to encompass independent speech in carrying out their teaching, research, and shared governance duties. Such an approach, one guided by pragmatic recognition of how constitutional academic freedom claims by professors have largely been subsumed under the public employee speech framework, provides a basis for courts to recognize First Amendment protection for public higher education faculty when engaging in academic speech. In conclusion, in Part V of the article, we summarize the positions advanced in the article supportive of judicial recognition of First Amendment protection for faculty academic speech in public higher education.

I. THE ATTACK ON "CRITICAL RACE THEORY"

On July 1, 2022, Florida's House Bill 7, commonly referred to as the "Stop Wrongs to Our Kids and Employees Act" (Stop WOKE Act), went into effect.¹⁰

7 Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22-cv-304-MW/MAF, *19 (N.D. Fla. Sept. 22, 2022) (defendants' response in opposition to plaintiffs' motion for preliminary injunction).

8 We adopt the term "academic speech" used by Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 *Geo. L.J.* 945, 994 (2009). Academic speech refers to faculty speech made by professors in carrying out their employment duties in the context of teaching, research, or "faculty governance matters." *Id.* at 985–86.

9 For an overview of the legislative efforts to ban CRT in public institutions of higher education, see Vanessa Miller et al., *The Race to Ban Race: Legal and Critical Arguments Against State Legislation to Ban Critical Race Theory in Higher Education*, 88 *Missouri L. Rev.* (forthcoming 2023).

10 As covered *supra* note 6, the enacted legislation is formally named the Individual Freedom

Florida Governor Ron DeSantis said the law stood against the “state sanctioned racism” embedded in the teachings of “critical race theory” found in schools, universities, and workplaces.¹¹ He touted the law as a prioritization of education in the face of indoctrination and discrimination.¹² With the Stop WOKE Act, Florida became the tenth state to pass legislation prohibiting faculty members at public institutions of higher education from teaching so-called “divisive concepts” found in CRT.¹³ By the time the Stop WOKE Act became law, public discourse surrounding “critical race theory” was widespread. News media outlets,¹⁴ social media platforms,¹⁵ local newspapers,¹⁶ city council meetings,¹⁷ and school board meetings¹⁸ placed “critical race theory” at the center of public attention.

However, the “critical race theory” on display in media accounts and from certain pundits and elected officials¹⁹ was not the decades-old, well regarded legal academic theory that interrogates the legal system’s relationship to race.²⁰ It was a fictionalized boogeyman conjured to undermine social and racial justice activism. This fabricated account of “critical race theory” provided government officials with the justification to introduce and pass indeterminate anti-CRT legislation, including as applied to public institutions of higher education.

Act, but the law is commonly referred to as the Stop WOKE Act. This article uses quotation marks to differentiate between the “critical race theory” used and attacked by conservative politicians and the critical race theory developed by academics within the academic setting.

11 See, e.g., News Release, Office of Ron DeSantis 46th Governor of Florida, Governor Ron DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/>.

12 See, e.g., News Release, Office of Ron DeSantis 46th Governor of Florida, Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination (April 22, 2022), <https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/>.

13 See generally Miller et al., *supra* note 9.

14 Sam Dorman, *What Is Critical Race Theory?*, Fox News (May 14, 2021), <https://www.foxnews.com/us/what-is-critical-race-theory>.

15 Peter Suci, *Critical Race Theory Debated on Social Media—It Could Decide Virginia Gubernatorial Election*, Forbes (Nov. 2, 2021), <https://www.forbes.com/sites/petersuci/2021/11/02/critical-race-theory-debated-on-social-media-it-could-decide-virginia-gubernatorial-election/?sh=20a6c9f57986>.

16 Jeremy I. Levitt, *Before Attacking Critical Race Theory, Learn What It’s About*, Orlando Sentinel (July 29, 2021), <https://www.orlandosentinel.com/opinion/guest-commentary/os-op-critical-race-theory-define-understand-20210729-hwdcf3tiujdajpuzew5j65wyhy-story.html>.

17 Tom Fitzgerald, *Anne Arundel County Council to Debate Critical Race Theory at Monday Night Meeting*, Fox5 News (Oct. 18, 2021), <https://www.fox5dc.com/news/anne-arundel-county-council-to-debate-critical-race-theory-at-monday-night-meeting>.

18 Katie Reilly, *Culture Wars Could Be Coming to a School Near You*, TIME (Mar. 23, 2022), <https://time.com/6159177/school-board-elections-covid-19-critical-race-theory/>.

19 See, e.g., Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, New Yorker (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory>.

20 For a foundational understanding of critical race theory scholarship, see Kimberle Crenshaw et al., *The Key Writings that Formed the Movement* (1995), and Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction* (2017).

Anti-CRT laws villainize “critical race theory” without reflecting upon its actual tenets. The laws attack and suppress concepts that CRT touches upon, such as white supremacy and colorblindness, as a tactic to hold the entire theory politically hostage. In doing so, any discussion—whether critical or not—of race and racism becomes classified as a byproduct of “critical race theory” and therefore prohibited. Additionally, anti-CRT laws have been written to provide little guidance or clarity on what is actually prohibited or how it is prohibited.²¹ The laws’ ambiguity gives latitude to state officials to police speech and determine the parameters of what speech does or does not count as “critical race theory.”

In seeking to mandate acceptable views in public colleges and universities and to prohibit other viewpoints, the narratives advanced in anti-CRT laws raise important academic freedom concerns, including ones related to potential First Amendment academic freedom protections for faculty academic speech. Before turning directly to considerations of constitutional academic freedom for professors’ academic speech, in this part we contextualize and situate CRT as a strand of scholarly inquiry, one with deep roots in legal scholarship, that is well established in academe. The overview provided in this part helps to bring into sharp focus the significant threats to academic freedom posed by the Stop WOKE Act and similar laws.

A. THE HISTORICAL ROOTS OF CRITICAL RACE THEORY

A recent wave of legal scholarship has examined the concerns and critiqued the deficiencies of anti-CRT laws.²² For example, scholars have argued the anti-CRT laws are modern-day iterations of antiliteracy laws adopted during slavery,²³ racial backlash bills that have thrust a distorted narrative of CRT into law and the public discourse,²⁴ political manipulations meant to threaten the traditional norms of higher education as a social institution for teaching and scholarship,²⁵ and offensive to First Amendment doctrine.²⁶ An important component of the recent scholarly criticism of anti-CRT laws is the laws’ disregard for the theoretical foundations of CRT and its application in educational institutions.²⁷ This includes the historical development of CRT and its emergence from critical legal studies (CLS) as well as how

21 See Katheryn Russell Brown, “The STOP Woke Act:” HB 7, Race, and Florida’s 21st Century Anti-Literacy Campaign, NYU Rev. L. & Soc. Change (forthcoming 2023) (discussing the ambiguity of Florida’s HB 7 as applied in legal education).

22 See generally Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 Wm. & Mary J. Race, Gender & Soc. Just. 61 (2021); Jonathan Feingold, *Reclaiming CRT: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. Rev. 723 (2022); Brown, *supra* note 21; Miller et al., *supra* note 9.

23 See generally Brown, *supra* note 21.

24 See generally Feingold, *supra* note 22.

25 See generally Miller et al., *supra* note 9.

26 Meriam Mossad, *Silence or Discrimination: Is the Ban on Critical Race Theory a Violation of Teachers’ Free Speech or Does It Discriminate Against Students?*, U. Balt. L. Rev. (Jan. 28, 2022), <https://ubaltlawreview.com/2022/01/28/silence-or-discrimination-is-the-ban-on-critical-race-theory-a-violation-of-teachers-free-speech-or-does-it-discriminate-against-students/>.

27 Gloria Ladson-Billings & William F. Tate, *Toward a Critical Race Theory of Education*, 97 Tchrs. Coll. Rec. 47 (1995).

critical philosophies of race and philosophies of law understand how race—a socially constructed concept—has real impacts in the administration of law and justice.

CRT developed from the CLS movement in the 1970s and 1980s.²⁸ CRT leaned on CLS to center the creation and distribution of power in the law and critically reflect on the racialized operation of the legal system.²⁹ CLS borrowed from the social sciences to critique the relationship of law to society and focused on the role that law plays in “maintaining the status quo and stymieing efforts to effect fundamental change” for marginalized groups.³⁰ Anti-CRT legislative efforts, such as Florida’s Stop WOKE Act, provide a textbook example of the type of law to which a critical studies framework can be applied to examine and better understand the potential impacts and motivations behind such anti-CRT laws.

1. *Legal Realism and Critical Legal Studies*

The relationship between law and the social sciences is cradled in the conceptual framing of the law itself. Whether the law can or should interact with the social world is determined by the purposes and objectives of the law.³¹ A legal system premised on a systemic pattern of predictions, such as legal precedent, is characteristically opposed to relying on extralegal facts as sources of authority.³² However, whether a legal system controlled and operated by persons living in a social world can in fact operate on systematic patterns remains challenged. Accordingly, CLS offers, even demands, a critical reflection of the operation of the legal system.

CLS’s critical reflection of the legal system was not novel; it held historical roots in another intellectual movement—the American legal realist movement. CLS can trace its origins back to the early 1920s and 1930s when legal realism entered American jurisprudence. At the time, legal realism shook the foundation of the American legal system. Legal realism directly opposed classical, formalistic theories of law that governed much of American legal thinking.³³ As a normative theory, formalism posits there is an underlying, logical application of legal principles to a particular case.³⁴ For formalists, legal rules and principles are readily available for application and, most importantly, are removed from individualistic interpretations from judges.

Legal realism, however, critically assessed the *method* of interpretation and application of the law in the judiciary.³⁵ Legal realists challenged the view that the law operates

28 For a comprehensive overview of the critical legal studies movement, see Guyora Binder, *Critical Legal Studies*, in *A companion to philosophy of law and legal theory* (2010); Roberto M. Unger, *The critical legal studies movement* (Dennis Patterson ed., 1986).

29 See generally Crenshaw et al., *supra* note 20; Delgado & Stefancic, *supra* note 20; Victor Ray, *On Critical Race Theory: Why it Matters and Why You Should Care* (2022).

30 Allan C. Hutchinson, *Critical Legal Studies* (1989).

31 Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 *Legal Theory* 111 (2010).

32 John Henry Schlegel, *American legal realism and empirical social science* (1995).

33 John Monahan & W. Laurens Walker, *Social science in law: Cases and materials* (9th ed. 2017).

34 See generally Leiter, *supra* note 31.

35 See generally Schlegel, *supra* note 32.

as a systematic or predictive method because judges have personal biases or attitudes that shape the way they view or interpret the law.³⁶ Legal realists claim that a judge's personal attitudes about the law do not exist independently from the law. This is not to say judges *cannot* separate their beliefs or views about the law from its application but that judges are influenced by their ideas and values in the law.³⁷ Legal realism altered how jurists and scholars understood the function of the law by questioning the determinacy of legal rules. Legal realism supported the proposition that law is neither determinate nor objective.³⁸ It challenged the formalist view that judges systematically apply the law by deducing legal conclusions from a set of concise legal rules.³⁹ Instead, legal realism claims that judges decide cases on nonlegal considerations embedded in specific ideological reflections.⁴⁰

Justice Oliver Wendell Holmes effectively laid the philosophical foundation for a realist, nonformalistic interdisciplinary approach to the law when he wrote *The Common Law* in 1881. Holmes famously wrote that “the life of the law has not been logic: it has been experience.”⁴¹ Unpersuaded by formalistic approaches to the interpretation and application of law, he instead supported a “rational study of law” that considers history, statistics, and economics.⁴² He insisted on a “realist” legal philosophy that emphasized the *judges* who apply the law and not the *method* that applies it. For Holmes, this approach was more suitable for a modern and evolving society.⁴³

Furthering Justice Holmes's beliefs, Louis D. Brandeis, prior to joining the Supreme Court, incorporated social science research into his legal briefs in the early 1900s to highlight the shifting needs of society.⁴⁴ Brandeis believed the social sciences could provide the “broad knowledge of present-day problems essential to the administration of justice.”⁴⁵ He argued that the law is incapable of addressing societal problems by itself, and judges should be knowledgeable of the economic and social developments that occur outside of the law.⁴⁶ Thus, Brandeis encouraged judges to consider and utilize empirical evidence if applicable to the legal question at hand.⁴⁷ Like many other legal realists, truth no longer resided inside law schools but in the economics department across the way.⁴⁸

36 Michael S. Green, *Legal Realism as Theory of Law*, 46 Wm. & Mary L. Rev. 1915 (2005).

37 Oliver Wendell Holmes, Jr., *The Common Law* (1881).

38 Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. Pa. L. Rev. 549 (1993).

39 *See generally* Leiter, *supra* note 31.

40 Green, *supra* note 36.

41 Holmes, Jr., *supra* note 37.

42 *Id.*

43 Neil Duxbury, *The Birth of Legal Realism and the Myth of Justice Holmes*, 20 Anglo-Am. L. Rev. 81 (1991).

44 Monahan & Walker, *supra* note 33.

45 Alpheus T. Matson, *Mr. Justice Brandeis: A Student of Social and Economic Science*, 79 U. Pa. L. Rev. 665, 674 (1931).

46 *Id.*

47 *Id.*

48 James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. Pa. L. Rev. 685 (1985).

Contemporary iterations of legal realism are not only found in the CLS movement but the new legal realism movement of the early 2000s.⁴⁹ Both movements are rooted in the principles of legal liberation and transformation that seek to usher in a more just American society.⁵⁰ Embedded in the movements are tenets of critical theory: unraveling “the ideology of legal institutions” and questioning conventional methods of the law.⁵¹ As progressive sociolegal approaches to the law, demystifying and decoding legal doctrine is central to the advancement of social liberation and transformation.⁵² Here, the relationship between law and society becomes relevant and central to jurisprudential scholarship.

Critical legal scholars and new legal realists hold legal realist views that are antithetical to formalist theories of law. They reject legal methodology that ignores societal dynamics.⁵³ Moreover, they supplement their approach with extralegal sources like social science research. The turn to social science research is due, in part, to the rise of the social sciences in the early twentieth century, and, in other part, to obtain an understanding of societal dynamics.⁵⁴ In particular, the CLS movement turns a critical eye toward the language of the law.⁵⁵ It seeks to “decode and delegitimize the existing language and its underlying structures” while analyzing “the alternative societal arrangements” that will guide society towards justice and equity.⁵⁶ The legal system operates a common language through the use of doctrinal method. This form of legal methodology disseminates authority within the law and ultimately legitimizes the system.⁵⁷ Seemingly objective and apolitical legal language is then used to justify the legal rules necessary to a doctrinal method of adjudication.⁵⁸ However, CLS questions the plausibility of an objective or apolitical legal system.⁵⁹ It suggests that the law is inherently subjective and, taking from American legal realism, the vested power in the judge to apply law according to personal ideology is only presented under the guise of objectivity.⁶⁰

Roberto Mangabeira Unger, a central figure in the CLS movement, helped disrupt the tenets of objectiveness in legal methodology. He proposed a radical critique of legal

49 Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 *Stan. L. Rev.* 623 (1984).

50 Andrew W. Haines, *The Critical Legal Studies Movement and Racism: Useful Analytics and Guides for Social Action or an Irrelevant Modern Legal Scepticism and Solipsism?* 13 *Wm. Mitchell L. Rev.* 685 (1987).

51 Frank W. Munger & Carroll Seron, *Critical Legal Studies Versus Critical Legal Theory: A Comment on Method*, 6 *Law & Pol’y* 257, 257 (1984).

52 Haines, *supra* note 50, at 257.

53 *See generally* New legal realism Volume I: Translating law-and-society for today’s legal practice (Elizabeth Mertz et al. eds., 2016).

54 *See generally* Scott Gordon, *The history and philosophy of social science* (1993).

55 *See generally* Haines, *supra* note 50.

56 *Id.* at 700.

57 Munger & Seron, *supra* note 51, at 257.

58 *See generally* Unger, *supra* note 28.

59 *Id.*

60 *See generally* New legal realism Volume I, *supra* note 53.

methodology and legal analysis that not only viewed the law as indeterminate but as something that cannot universally resolve disputes of legal consequence.⁶¹ Unger describes legal doctrine or legal analysis as a conceptual practice that combines two characteristics: (1) the ability to work from an institutionally defined tradition and (2) the claim to speak authoritatively within this tradition. For Unger, the creation and application of law diverge both in method and in justification. It is in the method and justification of the law that Unger is critical of the language and power required to structure and apply the law.

The CLS movement began at a time in American legal thought when critical theories began to center the voices of minoritized communities. Critical legal theory places an obligation on jurists and scholars to confront legal issues of social importance⁶² while recognizing those with the power to make issues important or not. For example, structures of power exist in society that create and maintain hierarchies based on race, sex, sexual orientation, or wealth.⁶³ For many critical legal scholars, social hierarchies are reinforced in the law and must be critically assessed.⁶⁴ By highlighting the effect of law, critical legal scholarship centered the relationship of law and society that informs the very ways critical scholars, particularly critical race scholars, analyze Florida's Stop WOKE Act.

The analytical framework and theoretical development of CRT is crucial to understanding CRT's connection to issues of academic freedom. In particular, CRT's history anchors it into a long line of legal history that has ancestors in Oliver Wendell Holmes and Louis Brandeis. Jurists and legal scholars may not agree with the tenets of CRT because it challenges the standard in American jurisprudence, but CRT's development is not unlike other academic theories and frameworks. Just as classical formalism espouses one way to approach the law and legal system, so, too, does CRT present a way to interpret and analyze the law. CRT is a well-grounded theory, central to many disciplines with scholarly expertise that is imperative to the flourishing intellectual life of the academy. Importantly, laws that forbid CRT are not only prohibiting (what is believed to be) CRT but prohibiting the process that generates revolutionary theories about the world around us.⁶⁵

B. DEVELOPMENT OF CRITICAL RACE THEORY

Anti-CRT laws claim to prohibit educational institutions from teaching divisive concepts embedded within CRT. Under Florida's Stop WOKE Act, divisive concepts include teaching that

61 Hugh Collins, *Roberto Unger and the Critical Legal Studies Movement*, 14 J.L. & Soc'y 387 (1984).

62 See generally Monahan & Walker, *supra* note 33; Munger & Seron, *supra* note 51.

63 See generally Binder, *supra* note 28.

64 For a broad understanding of how critical legal scholars use critical legal studies, see Monahan & Walker, *supra* note 33, and Binder, *supra* note 28.

65 Examples of revolutionary theories that changed the course of history include Isaac Newton's theory of gravity, Aristotle's logic, Charles Darwin's theory of human evolution, the Big Bang Theory, Svante Arrhenius's observations about atmospheric carbon dioxide levels that led to global warming, or Machiavellian politics.

An individual, by virtue of his or her race, color, sex, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously. [...] An individual, by virtue of his or her race, color, sex, or national origin, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, sex, or national origin. [...] An individual, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the individual played no part, committed in the past by other members of the same race, color, sex, or national origin. [...] Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, sex, or national origin to oppress members of another race, color, sex, or national origin.⁶⁶

However, the concepts described in Florida's law neither come from nor developed from CRT. They do not align with the rich history of CRT scholarship or expertise embedded within legal realism, CLS, or critical theory. Instead, the Stop WOKE Act targets concepts that CRT uses in its analytical framework to investigate and expose the prevalence of race and racism in American society. The targeted concepts in the law are standalone concepts that critical scholars use to explain and describe hierarchies of power and privilege in American social and political institutions such as education, health care, law, and employment.⁶⁷

Despite Florida's depiction, CRT is not a race-based training module or fixed list of directives. CRT is an established theoretical framework with a rich lineage of scholarship in the academy that explores the deep implications of race in American history. It is an interdisciplinary approach to answer questions about race by analyzing epistemic foundations of racism in American history.⁶⁸ Specifically, CRT "faces America's brutal racial history, recognizes the parts of that history that remain unchanged, and works toward changing the rest."⁶⁹ CRT has deep-seated roots in significant intellectual movements—legal realism and CLS—that fundamentally shaped legal thought and is anchored in the scholarly work of the professoriate. Eminent scholars center their work in CRT and continue to develop the applicability of CRT in several academic disciplines. Such past and current scholars include Derrick Bell, Kimberle Crenshaw, Richard Delgado, Alan Freeman, Cheryl Harris, Charles R. Lawrence III, Mari Matsuda, Jean Stefancic, Tara J. Yosso, and Patricia J. Williams.

CRT first emerged in the legal academy in the 1970s and 1980s as a way to explain why the civil rights movement failed to improve the living conditions for Black and other racially marginalized communities in the United States despite

66 H.R. 7, 124th Leg. Reg. Sess. (Fla. 2022).

67 Specifically, the law targets concepts such as implicit bias and anti-Black racism, accountability, neutrality, affirmative action policies and initiatives, white privilege, and color-evasiveness.

68 See generally Kimberle Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 Conn. L. Rev. 1253 (2011).

69 See generally Ray, *supra* note 29.

advancements in racial justice and liberation.⁷⁰ Derrick Bell, widely considered the legal pioneer of CRT, challenged conventional legal strategies meant to achieve racial justice by developing critical legal theories that took into consideration the importance of race in American life. Bell and other law-based critical race scholars were central in uncovering the long-lasting impact of slavery, segregation, and exclusionary measures on Black Americans. They explained how laws and policies, despite legal mandates and assurances of antidiscrimination, permit institutionalized racism to permeate American institutions.⁷¹ In the 1990s and 2000s, CRT expanded beyond legal scholarship into several other disciplines. Scholars in education, political science, sociology, ethnic studies, American studies, and criminology began to incorporate the themes and tenets of CRT in their work.

Critical race scholars examine how racism is weaved into concepts that often describe the substantive and procedural components of the American legal system such as “neutral” or “traditional.”⁷² They argue these foundational legal doctrines exist to substantiate dominant experiences.⁷³ Most notably, critical race scholars examine how “neutrality” and “color-evasiveness”⁷⁴ are not disassociated from the social and political realities of racially marginalized communities. Color-evasive frameworks posit the law should be interpreted without regard to race because the effects of historical racism no longer exist.⁷⁵ It asserts that American society has moved past its history of racial discrimination and racially marginalized communities have the same opportunities and advantages as White Americans do.⁷⁶

Color-evasive proponents believe equality and equal opportunity function in a neutral manner, where race is reduced to an arbitrary societal factor that has no bearing on social, legal, political, or economic outcomes.⁷⁷ However, the lived experiences of racially marginalized persons would suggest otherwise. Because the notion that racism is common is central to CRT, the everyday lived experiences

70 *Id.*

71 Importantly, the *critical* in CRT emphasizes the importance of critical thinking skills related to understanding the social, legal, and political dynamics of American institutions. It is not about criticism of those institutions. Generally, CRT as a whole is not concerned with criticizing the power structures in American society because it already recognizes the existence of a severe imbalance of power. Instead, CRT seeks to interrogate the power dynamics and find solutions to correct them.

72 See generally LaWanda W. Ward, *Radical Affirmative Action: A Call to Address Hegemonic Racialized Themes in U.S. Higher Education Race-Conscious Admissions Legal Discourse*, 34 *Int'l J. Qualitative Stud. in Educ.* 315 (2020).

73 *Id.*

74 We use the term “color-evasive” here instead of “color-blind” to refrain from using ableist language and to identify the intentional and willful ignorance of the acknowledgment of race and racism. See Subini Ancy Annamma et al., *Conceptualizing Color-Evasiveness: Using Dis/ability Critical Race Theory to Expand a Color-Blind Racial Ideology in Education and Society*, 20 *Race Ethnicity & Educ.* 147 (2015). However, we recognize that notable critical race scholar Eduardo Bonilla-Silva uses the term “color-blind” in his work. See Eduardo Bonilla-Silva, *Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America* (5th ed. 2018).

75 See generally Bonilla-Silva, *supra* note 74.

76 *Id.*

77 See generally Uma M. Jayakumar, *The Shaping of Postcollege Colorblind Orientation among Whites: Residential Segregation and Campus Diversity Experiences*, 85 *Harv. Educ. Rev.* 609 (2015).

of racially marginalized communities help communicate the prevalence of racism. Critical race theorists lean on the power of stories to engage in meaningful discussions about the ways people view race. These stories, often contrary to dominant groups and their interests, are referred to as “counterstories.”⁷⁸ Counterstories help create and contextualize the narrative of those often ignored as a way to expose assumptions and misconceptions about the humanity of others. They challenge the dominant discourse on race, racism, and privilege. However, counterstories are not a direct response to majoritarian stories. Importantly, counterstories also exist to strengthen and validate the traditions, histories, and knowledge of racially marginalized communities as a form of survival.⁷⁹ Thus, rather than the simplistic and incorrect narratives of CRT advanced in the Stop WOKE Act and similar laws, CRT and related lines of critical inquiry represent strongly established areas of scholarship in higher education. Efforts to squash CRT in public higher education classrooms (and beyond) represent a stark threat to academic freedom, including in relation to the academic speech of individual faculty.

II. DISAGREEMENT OVER FIRST AMENDMENT FACULTY ACADEMIC FREEDOM

The Stop WOKE Act and its attack on CRT and related critical lines of inquiry that are firmly established traditions of scholarship in higher education raise important academic freedom considerations, including questions over public higher education faculty academic freedom rights under the First Amendment. Before turning to litigation directly involving the Stop WOKE Act, we first sketch out the status of constitutional academic freedom for professors in public higher education. Debates and uncertainty over constitutional protection for academic freedom are long running.⁸⁰ Within the contested terrain of constitutional academic freedom, a key issue pertains to whether individual scholars in public higher education possess First Amendment academic freedom rights that could serve to limit the reach of anti-CRT provisions such as Florida’s Stop WOKE Act. Or,

78 For counterstorytelling and critical counternarratives, see Delgado & Stefancic, *supra* note 20; Tara J. Yosso, *Critical Race Counterstories Along the Chicana/Chicano Educational Pipeline* (2005); Daniel G. Solorzano & Tara J. Yosso, *Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Education Research*, 8 *Qualitative Inquiry* 23 (2002)

79 See generally Solorzano & Yosso, *supra* note 78.

80 For a sampling of authors noting the ambiguity and lack of agreement on constitutional academic freedom, see Lawrence Rosenthal, *Does the First Amendment Protect Academic Freedom*, 46 *J.C. & U.L.* 223, 225 (2022) (“The constitutional status of academic freedom . . . is a matter of some dispute.”); Robert C. Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State* 62 (2012) (“At present . . . the doctrine of academic freedom stands in a state of shocking disarray and incoherence.”); J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 *J.C. & U.L.* 79, 79 (2004) (“The interpretation of academic freedom as a constitutional right in judicial opinions remains frustratingly uncertain and paradoxical.”); Erica Goldberg & Kelly Sarabyn, *Measuring A “Degree of Deference”: Institutional Academic Freedom in A Post-Grutter World*, 51 *Santa Clara L. Rev.* 217, 217 (2011) (“Academic freedom, as a constitutional right, has long suffered from a lack of consensus over its scope and application. Although academic freedom is generally conceptualized as insulating certain aspects of the academy from government intrusion, the courts are as divided as scholars on the issue of who may invoke the right, and in what circumstances.”); Nathan A. Adams, IV, *Resolving Enmity Between Academic Freedom and Institutional Autonomy*, 46 *J.C. & U.L.* 1, 3 (2022) (“Academic freedom is a constitutional doctrine in shambles.”).

instead, does academic freedom, if a viable constitutional doctrine at all, only exist as a right to be exercised at the institutional level so that individual faculty could not lodge a legal challenge on First Amendment academic freedom grounds to laws like the Stop WOKE Act?⁸¹

Current disarray and disagreement over First Amendment academic freedom reveals a legal doctrine that has failed to live up to the lofty promise of the well-known declaration from the U.S. Supreme Court in *Keyishian v. Board of Regents of the University of the State of New York* describing academic freedom as a “special concern” of the First Amendment.⁸² Prior to *Keyishian*, the Court had rendered a series of decisions in the context of the McCarthy era⁸³ in which principles of academic freedom were mentioned in concurring⁸⁴ and dissenting Supreme Court opinions.⁸⁵ In *Adler v. Board of Education*, for instance, the Supreme Court considered the legality of a New York law, known as the Feinberg Law, that prohibited employment in public educational settings by individuals determined to hold current or past membership in groups deemed subversive.⁸⁶ A majority of the Court upheld the law as permissible,⁸⁷ but, in a dissenting opinion, Justice William O. Douglas argued that the law threatened to turn schools into a system of surveillance and inhibit the educational process, including so as “to raise havoc with academic freedom.”⁸⁸

81 For more on institutional academic freedom, including whether, if constitutionally recognized, it exists as a right exclusive to institutions or one shared with individual faculty, see generally Areen, *supra* note 8; Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 Yale L.J. 251 (1989); David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 Law & Contemp. Probs. 227 (1990); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 U.C.L.A. L. Rev. 1497 (2007); Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded upon the First Amendment*, 30 Hamline L. Rev. 1 (2007); Matthew Finkin, *On “Institutional” Academic Freedom*, 61 Tex. L. Rev. 817 (1983); Adams, *supra* note 80; Goldberg & Sarabyn, *supra* note 80.

82 385 U.S. 589, 603 (1967).

83 During the McCarthy period that arose following World War II, with these years also referred to as the Second Red Scare to differentiate them from the First Red Scare during and subsequent to World War I, efforts were made by government officials during the Cold War to root out supposed infiltration by communist forces into American society and institutions. Many individuals, including in colleges and universities, were often unfairly targeted and harassed and could face sanctions that included loss of employment. For more on McCarthyism and higher education, see generally Ellen Schrecker, *No Ivory Tower: McCarthyism and the Universities* (1986).

84 See *Wieman v. Updegraff*, 344 U.S. 183, 194 (1952) (Frankfurter, J., concurring); *Sweezy v. N.H.*, 354 U.S. 234, 255 (1957) (Frankfurter, J., concurring).

85 See *Adler v. Bd. of Educ. of City of New York*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting). As Lawrence Wright relates in *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 842 (2010), the first mention of academic freedom in a court opinion in the United States occurred in *Kay v. Board of Higher Education of the City of New York*, 18 N.Y.S.2d 821 (1940). The case centered on the revocation of a faculty appointment for philosopher Bertrand Russell to the City College of New York. As Wright relates, in ordering the rescission of the employment offer, the judge offered a “semi-contemptuous aside” to arguments made in an amicus brief in the case that principles of academic freedom should have allowed the college to appoint Russell to the position. *Wright, supra* at 842 n.5.

86 342 U.S. at 487–89.

87 *Id.* at 497.

88 *Id.* at 509.

In the same year that *Adler* was decided, the Supreme Court in *Wieman v. Updegraff*⁸⁹ struck down a state loyalty oath provision that permitted the punishment of public employees even for “innocent”⁹⁰ membership in impermissible organizations where individuals had “joined a proscribed organization unaware of its activities and purposes.”⁹¹ Justice Felix Frankfurter in a concurring opinion in the case offered the following view regarding the roles of teachers in a democratic society:

To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by National or State government.⁹²

In another well-known academic freedom case, *Sweezy v. New Hampshire*,⁹³ the Supreme Court considered the permissibility of holding Paul Sweezy, a Marxian economist, in criminal contempt for refusing to answer questions from the New Hampshire attorney general’s office, including providing information about lectures that Sweezy had given at the University of New Hampshire.⁹⁴ In its majority opinion, the Supreme Court invalidated the exercise of contempt powers against Sweezy on Fourteenth Amendment due process grounds.⁹⁵ In a concurring opinion, Justice Felix Frankfurter warned against “governmental intervention in the intellectual life of a university”⁹⁶ and urged the necessity of noninterference by government in the intellectual freedom in colleges and universities:

Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and

89 344 U.S. 183 (1952).

90 *Id.* at 189.

91 *Id.* at 190.

92 *Id.* at 196–97.

93 354 U.S. 234 (1957).

94 *Id.* at 245–46.

95 *Id.* at 255.

96 *Id.* at 262.

speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. 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.⁹⁷

Looking to a statement by South African scholars, Justice Frankfurter also wrote of the four essential freedoms that a university should possess to determine ““on academic grounds who may teach, what may be taught, what may be taught, how it shall be taught, and who may be admitted to study.””⁹⁸

In *Keyishian*,⁹⁹ arguably the legal apex for constitutional academic freedom, the Supreme Court, again considering the provision at issue in *Adler*, struck down the law.¹⁰⁰ In doing so, the Court's majority, in an often repeated refrain, referred to academic freedom as a “special concern” of the First Amendment.¹⁰¹ In later cases, the Supreme Court has periodically referenced the importance of academic freedom, such as among the justifications to allow race-conscious admissions in higher education.¹⁰² The Court, however, has failed to delineate clear legal standards for constitutional academic freedom, though it has noted seeming tensions with academic freedom along its institutional and individual faculty dimensions.¹⁰³ Faced with the constitutional academic freedom road not fully taken by the Supreme Court, lower courts have turned to other lines of precedent in cases raising constitutional academic freedom considerations, including claims by individual faculty. For instance, in cases with a curricular dimension, some courts have turned to cases involving student classroom speech, notably *Hazelwood School District v. Kuhlmeir*,¹⁰⁴ to set out the parameters of faculty speech rights in relation to institutional authority to regulate faculty speech in curricular contexts.¹⁰⁵

97 *Id.* at 261–63.

98 *Id.* at 263.

99 *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589 (1967).

100 *Id.* at 593.

101 *Id.* at 603.

102 *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003) (noting with approval in upholding race-conscious admissions in higher education the reliance on academic freedom principles in Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)).

103 *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decision making by the academy itself . . .” (citations omitted)).

104 484 U.S. 260 (1988). *See* Part III for more on *Hazelwood*'s use in the litigation involving the Stop WOKE Act.

105 *See, for example, Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), which is covered more in Parts III and IV.

The dominant approach taken by courts to adjudicate faculty speech claims that implicate constitutional academic freedom has been to look to the public employee speech cases.¹⁰⁶ In one notable case, *Urofsky v. Gilmore*,¹⁰⁷ a federal appeals court considered a challenge to a Virginia law that prohibited state workers from accessing sexually explicit materials on state computers.¹⁰⁸ A group of faculty members challenged the law as a violation of their First Amendment academic freedom rights. Rejecting this argument, the appeals court, following an *en banc* hearing, concluded that public college faculty did not possess any additional First Amendment speech rights than those of any other governmental employers.¹⁰⁹ According to the court, if academic freedom exists at all as a constitutional doctrine, then it attaches at the institutional level and not to individual faculty members.¹¹⁰ In contrast, other courts have viewed the public employee speech standards as potentially protective of faculty speech that raises academic freedom concerns.¹¹¹

While an imperfect match for collegiate settings¹¹² and resulting in outcomes where institutions have generally prevailed over faculty litigants,¹¹³ the public employee speech standards have provided one approach to provide First Amendment protection for faculty speech raising academic freedom concerns at public colleges and universities. Under the public employee speech standards,

106 See Michael H. LeRoy, *How Courts View Academic Freedom*, 41 J.C. & U.L. 1, 14 (2016) (“Speech rights for professors merged with the Court’s growing regulation of speech for public employees. Over the next 40 years, the law did little to distinguish between the expressive elements for the occupation of professor, on the one hand, and high school teacher, hospital nurse, and assistant state’s attorney, on the other. The result is a one-size-fits-all First Amendment jurisprudence.”).

107 216 F.3d 401 (4th Cir. 2000) (en banc).

108 *Id.* at 404.

109 *Id.* at 409–15.

110 *Id.* at 415.

111 See, e.g., *Schilcher v. Univ. of Ark.*, 387 F.3d 959, 965 (8th Cir. 2004) (determining that professor’s speech on perceived deficiencies in Middle East studies program dealt with issues of public concern); *Kurtz v. Vickrey*, 855 F.2d 723 (11th Cir. 1988) (holding that professor’s speech on university’s finances dealt with matter of public concern); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001) (concluding instructor’s use of offensive terms in teaching dealt with issues of public concern, though the employer college’s interest in regulating the speech outweighed the instructor’s interest in making the speech). See also *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001) (concluding that professor’s in-class speech containing vulgarities not protected speech but out-of-class speech about sexual harassment where complaining student not identified dealt with matters of public concern where employee’s interests outweighed those of employer institution).

112 See, e.g., Areen, *supra* note 8, at 975 (stating “neither the *Pickering* balancing test nor the *Connick* public concern test seems particularly suited to the nature of the academic workplace”); LeRoy, *supra* note 106, at 14 (noting generic application of public employee speech standards to faculty); Post, *supra* note 80, at 84 (describing the public concern test as “entirely misplaced in an academic inquiry”); Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 818 (2010) (stating “academic freedom is diminished when faculty members are categorized *first* as state employees and only secondarily as specially entitled professionals. When we define academic freedom as a *constitutional* right, we dilute it—on the simplest level by disqualifying faculty members at private institutions from its protection, and on another level by treating professors like public school custodians.”).

113 See generally LeRoy, *supra* note 106.

with the decisions in *Pickering v. Board of Education*¹¹⁴ and *Connick v. Myers*¹¹⁵ serving as key precedents, courts evaluate whether the speech at issue deals with an issue of *public concern*.¹¹⁶ If so, the speech is potentially eligible for First Amendment protection.¹¹⁷ Courts then engage in a balancing test to determine whether, despite the speech having addressed a matter of public concern, countervailing justifications, such as the need for efficient business operations, suffice for the public employer to regulate or restrict the speech.¹¹⁸ The arrangement of using the *Pickering-Connick* framework to evaluate public higher education faculty speech claims raising academic freedom concerns fell into doubt, however, with the Supreme Court's decision in *Garcetti v. Ceballos*,¹¹⁹ a case dealing with whether a Los Angeles deputy district attorney's First Amendment rights were violated based on communications by him that doubted the veracity of representations made in an affidavit used to obtain a search warrant.¹²⁰

In *Garcetti*, the Supreme Court created a new layer of inquiry in the public employee speech analysis. If a public employee engages in speech as part of carrying out their official employment duties, then the speech is ineligible for First Amendment protection.¹²¹ In a dissenting opinion, Justice David Souter raised the issue of whether this requirement impinged on faculty academic freedom protections under the First Amendment.¹²² Writing for the majority, Justice Anthony Kennedy stated that Souter raised a potentially salient matter but one not at stake in the *Garcetti* case.¹²³ The Supreme Court offered some clarification about what

114 391 U.S. 563 (1968).

115 461 U.S. 138 (1983).

116 See *Lane v. Franks*, 573 U.S. 228 (2014). In *Lane*, Justice Sotomayor's opinion for a unanimous Supreme Court summarized the "framework" provided by *Pickering* to analyze public employee speech claims. *Id.* at 236. *Pickering*, wrote Justice Sotomayor, articulated a balancing test where courts evaluate the interests of the public employee in a private citizen capacity to comment upon an issue of public concern versus the interests of the public employer to regulate the speech in carrying out its public service functions and achieving efficiency in operations. *Id.* at 236–37.

117 The issue of whether the speech in question involves matters of public concern is a threshold inquiry into whether the speech is potentially eligible for First Amendment protection. In *Connick v. Myers*, 461 U.S. 138 (1983), the Supreme Court provided important clarification regarding First Amendment protection as to when a public employer's speech only addresses matters of personal interests as opposed to raising issues of public concern:

We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 138.

118 *Lane*, 573 U.S. at 236–37.

119 547 U.S. 410 (2006).

120 *Id.* at 414–15.

121 *Id.* at 421 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

122 *Id.* at 438.

123 *Id.* at 425.

activities fall under the official employment duty umbrella in *Lane v. Franks*¹²⁴ in holding that activities falling outside the “scope of ordinary job responsibilities” were not exempt from First Amendment speech protection. In *Lane*, a community college administrator had given truthful court testimony compelled by a subpoena.¹²⁵ The case does little to clarify, however, about faculty speech under *Garcetti* because many of the types of professorial speech that would be at issue, such as teaching, publishing research, or participation in shared governance, clearly constitute ordinary job duties for faculty members.

Since *Garcetti* was decided, courts have taken divergent stances on whether some type of academic freedom exception exists under the *Pickering-Connick-Garcetti* public employee speech standards. Some courts have applied the *Garcetti* standards to multiple types of faculty speech.¹²⁶ Yet, other courts, including several federal appeals courts, have ruled that faculty speech raising academic freedom concerns and made in carrying out employment duties is eligible for First Amendment protection despite *Garcetti*.¹²⁷

For federal appeals courts that have recognized an academic freedom exception under *Garcetti*, a key approach has been to fall back on the *Pickering-Connick*¹²⁸ analysis of whether the speech at issue deals with a matter of public concern and, if so, whether the employer institution can assert a sufficient justification to censor or discipline the faculty member for the speech.¹²⁹ In *Demers v. Austin*, for instance,

124 573 U.S. at 238.

125 *Id.* at 233, 238.

126 *See, e.g.,* *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (holding that professorial speech dealing with research grant administration constituted official duties within the scope of *Garcetti*); *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009) (deciding that professor’s speech offering support of student in disciplinary hearing and in withdrawing invitation to appear at a fraternity prayer breakfast to a university’s president occurred within the context of official duties); *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *aff’d*, 403 F. App’x 236 (9th Cir. 2010) (concluding that comments made in the context of promotion and tenure committee made pursuant to official duties and subject to *Garcetti* standards); *Huang v. Rector and Visitors of Univ. of Va.*, 896 F. Supp. 2d 524 (W.D. Va. 2012) (determining that researcher’s speech about alleged fraudulent allocations of effort in grant-funded research constituted employee speech ineligible for First Amendment protection).

127 *See, e.g.,* *Demers v. Austin*, 746 F.3d 402 (2014) (holding professor’s speech on plan to reform curriculum protected under First Amendment); *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011) (holding that professor’s inclusion of writings into promotion dossier, which were undoubtedly protected speech prior to their submission, did not lose First Amendment protection under *Garcetti* when included in the dossier); *Kerr v. Hurd*, 694 F. Supp. 2d 817 (S.D. Ohio 2010) (holding that *Garcetti* did not apply to in-class speech by a faculty member specializing in obstetrics and gynecology who offered views on certain delivery methods).

128 *See, e.g.,* *Demers*, 746 F.3d at 410–12; *Adams*, 640 F.3d at 563.

129 *See, e.g.,* *Adams*, 640 F.3d 550 (4th Cir. 2011). In *Adams*, the court considered claims whether materials submitted for consideration for promotion to full professor by Adams were excluded from First Amendment protection based on *Garcetti*. *Id.* at 561. The court rejected the argument that the speech lost First Amendment protection when offered for promotion versus when Adams initially engaged in the speech in a private citizen capacity, where it was undoubtedly subject to protection. *Id.* at 561–62. Additionally, the court stated that *Garcetti* did not extend to the type of academic speech at issue in the case:

Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public

the U.S. Court of Appeals for the Ninth Circuit considered whether a professor's pamphlet that offered a plan to reorganize the school of communications at Washington State University qualified as protected speech under the First Amendment despite *Garcetti*.¹³⁰ The appellate court agreed with the district court that the pamphlet fell within the scope of the faculty member's official duties.¹³¹ Considering *Garcetti*, the court declared that the facts in *Demers* presented "the kind of case that worried Justice Souter."¹³² Concluding that teaching and academic writing constitute a "special concern of the First Amendment,"¹³³ the court held that teaching and academic writing fall outside the purview of *Garcetti*.¹³⁴

The court in *Demers* then turned to the other factors of the public employee speech framework to evaluate the faculty speech under consideration.¹³⁵ Notably, the court called for the calibration of the *Pickering* factors as applied to educational settings.¹³⁶ As to public concern, the court noted the need for nuance in applying the concept in an academic environment:

The nature and strength of the public interest in academic speech will often be difficult to assess. For example, a long-running debate in university English departments concerns the literary "canon" that should have pride of place in the department's curriculum. This debate may seem trivial to some. But those who conclude that the composition of the canon is a relatively trivial matter do not take into account the importance to our culture not only of the study of literature, but also of the choice of the literature to be studied. Analogous examples could readily be drawn from philosophy, history, biology, physics, or other disciplines. Recognizing our limitations as judges, we should hesitate before concluding that academic disagreements about what may appear to be esoteric topics are mere squabbles over jobs, turf, or ego.¹³⁷

The court also expressed the need for caution and subtlety in educational contexts in applying the balancing test under *Pickering* as to whether otherwise protected speech could still be regulated by the employer.¹³⁸ In the case of university professors, the

speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment.

Id. at 564.

130 746 F.3d at 406–07 (9th Cir. 2014). The professor also claimed that he suffered retaliation for a work-in-progress book, but the court concluded that the professor had provided insufficient information regarding the work or alleged retaliation to support a First Amendment claim concerning the book project. *Id.* at 414.

131 *Id.* at 409.

132 *Id.* at 411.

133 *Id.* (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967)).

134 *Id.* at 412.

135 *Id.*

136 *Id.*

137 *Id.* at 413.

138 *Id.*

court noted the permissibility, for instance, of content-based judgments in educational decision-making, such as in relation to the quality of written materials submitted by a faculty member in the promotion or tenure process.¹³⁹

In *Meriwether v. Hartop*,¹⁴⁰ the U.S. Court of Appeals for the Sixth Circuit added to the federal appellate courts that have repudiated application of *Garcetti* to faculty speech made in carrying out employment duties. Reversing a federal district court, the Sixth Circuit ruled that *Garcetti* did not bar a professor's free speech claims centered on the faculty member's refusal to use a student's preferred pronouns during class meetings.¹⁴¹ The court relied on *Sweezy* and *Keyishian* for the proposition that "the First Amendment protects the free-speech rights of professors when they are teaching."¹⁴² According to the court in *Meriwether*,

[O]ur court has rejected as "totally unpersuasive" "the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction." *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001). And we have recognized that "a professor's rights to academic freedom and freedom of expression are paramount in the academic setting." *Bonnell v. Lorenzo*, 241 F.3d 800, 823 (6th Cir. 2001); see *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1188–89 (6th Cir. 1995). Simply put, professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship.¹⁴³

The court also pointed out that three other federal circuits—the Fourth, Fifth, and Ninth—had rendered rulings that recognized an exception to *Garcetti* for faculty academic speech.¹⁴⁴

The *Meriwether* case is likely to cause concern in some quarters, even for those otherwise supportive of faculty speech rights under the First Amendment, as the

139 *Id.* The court in *Demers* also seemingly viewed the *Garcetti* exception as potentially applicable to elementary and secondary teachers in noting that status as an elementary or secondary teacher versus as a college faculty member was a relevant part of the balancing test. *Id.*

140 992 F.3d 492 (6th Cir. 2021).

141 *Id.* at 504.

142 The court also looked to cases most closely associated with student free speech, *Healy v. James*, 408 U.S. 169 (1972), and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), as Supreme Court cases supportive of free speech rights in the domain of academic freedom connected to professors' teaching. *Meriwether*, 992 F.3d at 505.

143 *Meriwether*, 992 F.3d at 505 (footnote omitted).

144 Alongside the *Demers* case (Ninth Circuit), which is covered previously in this part, and *Adams v. Trustees of University of North Carolina-Wilmington* (Fourth Circuit), *supra* note 129, the court also cited the decision in *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019). In *Buchanan*, the U.S. Court of Appeals for the Fifth Circuit held that a professor's "use of profanity and discussion of her sex life and the sex lives of her students was not related to the subject matter or purpose of training Pre-K-Third grade teachers" and did not constitute speech addressing issues of public concern. *Id.* at 853. However, the court, looking to *Keyishian*, described academic freedom as a "special concern of the First Amendment" and characterized "classroom discussion" as a "protected activity." *Id.* (citing *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967), and *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980) (holding a secondary teacher's classroom speech constituted protected activity under the First Amendment)).

case centered on use of a student's preferred pronouns.¹⁴⁵ For purposes of this article, however, the focal point is the court's determination, in alignment with several other federal appeals court decisions, that faculty classroom speech is excluded from the *Garcetti* standards and entitled to First Amendment protection. Other courts, even if upholding First Amendment academic freedom protections for public higher education faculty, could interpret the balancing process undertaken by the court in *Meriwether* as flawed in relation to how refusal to use an individual's preferred gender pronouns can impact students. When focusing on the general standard used in *Meriwether*, the case shows significant judicial support for an academic freedom exception to *Garcetti*.

As covered in the overview presented in this part, cases that include *Demers*, *Adams*, and *Meriwether* indicate that legal debates over First Amendment protection for the academic speech of individual faculty in public higher education are far from resolved. As wrangling and uncertainty over individual constitutional academic freedom continues, Florida's Stop WOKE Act squarely places the issue of First Amendment academic freedom protection for public higher education faculty under judicial scrutiny. Turning to litigation over the Stop WOKE Act, the next part in the article considers the preliminary injunction granted to stop application of the law to Florida's public colleges and universities.

III. "POSITIVELY DYSTOPIAN"—FLORIDA'S STOP WOKE ACT

Florida's Stop WOKE Act prohibits teaching CRT in all public schools and colleges and universities, ultimately regulating how these institutions address race and gender. The law bans faculty from providing "training or instruction that espouses, promotes, advances, inculcates, or compels" any student or employee to believe specific concepts.¹⁴⁶ Such concepts include contending members of one race or ethnic group are inherently racist and should feel guilt or anguish for wrongs committed by other members of the same race or ethnicity. The Florida Governor contends the law protects civil rights in employment and education by protecting persons in the state from "discrimination and woke indoctrination."¹⁴⁷

Besides public education, the law also extended coverage to private businesses. Less than seven weeks after the law went into effect, Chief U.S. District Judge Mark E. Walker of the Northern District of Florida blocked Florida from enforcing the act

145 We contend, for instance, that the court in *Meriwether* failed to engage in a sufficient balancing of the interests at stake. Specifically, we would argue that the court failed to give appropriate consideration to the harm caused to the student while overinflating the interests of the faculty member. Nonetheless, the outcome of the *Pickering* balancing of the interests at stake stands as a distinct issue from whether a professor's classroom speech is exempt from *Garcetti* on academic freedom grounds so as to trigger the balancing analysis. See Inara Scott et al., *First Do No Harm: Revisiting Meriwether v. Hartop and Academic Freedom in Higher Education*, 71 Am. U. L. Rev. 977 (2022), for an alternative approach to balancing the factors at stake in *Meriwether*, but with the authors still supportive of constitutional academic freedom rights for individual faculty.

146 H.R. 7, 124th Leg. Reg. Sess. (Fla. 2022).

147 See e.g., News Release, Office of Ron DeSantis 46th Governor of Florida, Governor Ron DeSantis Signs Legislation to Protect Floridians from Discrimination and Woke Indoctrination (Apr. 22, 2022), <https://www.flgov.com/2022/04/22/governor-ron-desantis-signs-legislation-to-protect-floridians-from-discrimination-and-woke-indoctrination/>.

on private companies for violating the First Amendment. Honeyfund, a honeymoon registry company, and Collective Concepts, a workplace diversity consultancy, filed suit to block enforcement of the Stop WOKE Act for unconstitutionally restricting their freedom of speech. In his decision, Judge Walker characterized the Stop WOKE Act as applied to private businesses as turning the First Amendment “upside down.”¹⁴⁸ Specifically, he held the challenged provision of the law is “a naked viewpoint-based regulation on speech that does not pass strict scrutiny.”¹⁴⁹

In relation to education, a lawsuit was brought on behalf of Florida faculty members and students arguing the Stop Woke ACT violated their First and Fourteenth Amendment rights in its application to public higher education.¹⁵⁰ In its response to these claims, the Florida Board of Governors, seeking to place faculty classroom speech under the *Garcetti* umbrella, argued in a court filing that “in-class instruction offered by state-employed educators is ... pure government speech, not the speech of the educators themselves.”¹⁵¹ As to academic freedom, the Board of Governors looked to *Urofsky* to support the position that any judicial recognition of constitutional academic freedom for public colleges and universities accrues to institutions and not to individual faculty.¹⁵² In granting a preliminary injunction to block the law as applied to higher education teaching contexts, the district court issued a withering opinion against the Stop WOKE Act.

The court compared the actions in Florida to the dystopian events in George Orwell’s novel *1984*.¹⁵³ It described the Board of Governors’ position, which it characterized as asserting that professors possessed academic freedom “so long as they express those viewpoints of which the State approves,” as “positively dystopian.”¹⁵⁴ The court listed various ways in which the law restrained classroom speech and discriminated on the basis of viewpoint, such as prohibiting an instructor or guest speaker from expressing support of affirmative action.¹⁵⁵ According to the court, under the law, U.S. Supreme Court Justice Sonia Sotomayor would be prohibited in Florida classrooms from offering reflections of her personal experiences that were supportive of affirmative action.¹⁵⁶

While stating that the Supreme Court “has never definitively proclaimed that ‘academic freedom’ is a stand-alone right protected by the First Amendment,” and noting Eleventh Circuit precedent declining to recognize individual academic

148 Honeyfund.com, Inc. v. DeSantis, No. 4:22-cv227-MW/MAF at *2, (N.D. Fla. Aug. 18, 2022).

149 *Id.*

150 See Pernell v. Fla. Bd. of Governors of State Univ. Sys., Case No. 4:22-cv-304 (N.D. Fla. Aug. 18, 2022).

151 Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22-cv-304-MW/MAF, *19 (N.D. Fla. Sept. 22, 2022) (defendants’ response in opposition to plaintiffs’ motion for preliminary injunction).

152 *Id.* at *25. For more on *Urofsky*, see Part II.

153 Pernell v. Fla. Bd. of Governors of State Univ. Sys., No.: 4:22-cv-304-MW/MAF, *1 (N.D. Fla. Nov. 11, 2022) (order granting in part and denying in part motions for preliminary injunction).

154 *Id.* at *2.

155 *Id.* at *9. In contrast, according to the court, views antagonistic to affirmative action would appear permissible under the Stop WOKE Act.

156 *Id.* at *10.

freedom as an “independent constitutional right,” the court offered that “academic freedom remains an important interest to consider when analyzing university professors’ First Amendment claims.”¹⁵⁷ The court acknowledged the substantial authority of Florida to “prescribe the content of its universities’ curriculum” but also pointed out this authority was not boundless.¹⁵⁸ In alignment with this stance, the court refused to approve *Garcetti* as a basis to strip faculty members of any First Amendment speech protections in the classroom, stating, “To the extent Defendants urge this Court to determine that university professors’ in-class speech is always pure government speech, the weight of binding authority requires this Court to decline the invitation.”¹⁵⁹ The court differentiated the state’s content-based rights to determine curriculum from an “unfettered discretion” to impose viewpoint-based restrictions on professors’ being able to express views on the curriculum.¹⁶⁰

Looking to Eleventh Circuit precedent, the court turned to the *Bishop v. Aronov* decision,¹⁶¹ which applied standards from *Hazelwood*, to evaluate the faculty speech claims in opposition to the Stop WOKE Act.¹⁶² Concluding that seven of the plaintiff professors in the case satisfied standing requirements,¹⁶³ the court—and making clear that it was not using *Garcetti* or the public employee speech rules—applied the standards from *Bishop* to assess the plaintiffs’ speech claims.¹⁶⁴ The court identified three factors to weigh under *Bishop*: (1) the context of the speech at issue; (2) the interests of public university employers to regulate employee speech, specifically in relation to class- and curricular-related matters; and (3) “the strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment.”¹⁶⁵ In weighing these factors, the court found it important that the Stop WOKE Act worked as an “*ante hoc* deterrent that ‘chills potential speech before it happens,’ and ‘gives rise to far more serious concerns than any single supervisory decision.’”¹⁶⁶ While recognizing substantial authority of the state to determine

157 *Id.* at *15–16.

158 *Id.* at *18.

159 *Id.* at *25.

160 *Id.* at *27.

161 926 F.2d 1066 (11th Cir. 1991). The case dealt with a public university professor who made references to his religious beliefs in class and also held “voluntary” class session to consider topics covered in an exercise physiology course from a religious perspective. *Id.* at 1068–69.

162 *Pernell*, No.: 4:22-cv-304-MW/MAF, at *30 (order granting in part and denying in part motions for preliminary injunction). The court also concluded that the *Bishop* framework applied to the students’ speech claims. *Id.*

163 *Id.* at *53. The court determined that an emeritus professor who offered a Black history bus tour had not established that the tour constituted instruction or training so as to fall under the purview of the act. *Id.* at 54. The court also concluded that one of the two student plaintiffs did not satisfy standing requirements. *Id.* at *79.

164 *Id.* at *87. While not using *Garcetti*, the court still took a balancing approach using the factors from *Bishop*.

165 *Id.* at *90 (citing and quoting *Bishop*, 926 F.2d at 1074–75).

166 *Id.* at *93 (quoting *United States v. National Treasury Employees Union*, 513 U.S. 454, 468 (1995), a case in which the Supreme Court struck down a prohibition from all government employees being able to accept honoraria as impermissible under the First Amendment).

curricular matters, the court, under *Bishop's* second prong, concluded that Florida failed to provide a meaningful justification to impose viewpoint restrictions on faculty (and students) in areas covered under the law.¹⁶⁷ Additionally, the court determined that the academic freedom considerations in the case were those of the "highest order."¹⁶⁸ The court described the law as "antithetical to academic freedom and has cast a leaden pall of orthodoxy over Florida's state universities."¹⁶⁹ Under these factors, the court granted a preliminary injunction in favor of the professor and student plaintiffs who had satisfied standing requirements.¹⁷⁰

The Stop WOKE Act, conjuring images of governmental action during the McCarthy period, and indicative of the current Ed Scare,¹⁷¹ pointedly highlights the issue of whether public higher education faculty possess any First Amendment academic freedom rights in carrying out their professional duties such as in teaching, research, or participation in shared governance. The arguments made by the Florida Board of Governors in defense of the Stop WOKE Act raise exactly the type of scenario Justice Souter called attention to in *Garcetti*, where a state government has attempted to treat public higher education faculty speech as wholly under its control, with faculty merely serving as hired mouthpieces for governmental speech.¹⁷² Keeping in mind the academic freedom stakes at issue in Florida and in relation to other anti-CRT legislation generally, the article now shifts to suggestions for how courts might address or reconcile some of the key arguments that have been made against recognizing First Amendment protection for faculty academic speech in public higher education despite *Garcetti*.

IV. THE *GARCETTI* STANDARD AND WHEN A PROFESSOR'S JOB DUTY IS TO SPEAK INDEPENDENTLY

The public employee speech cases, as noted earlier in the article,¹⁷³ are not a perfect match for academic freedom considerations, as they were not initially developed to deal with the nuances of faculty academic speech in higher education. Unlike general First Amendment speech protections, which are not subject to stringent quality control measures for speech to receive constitutional protection,¹⁷⁴ academic

167 *Id.* at *104.

168 *Id.* at *105.

169 *Id.* at *106.

170 *Id.* at *107. The court also agreed that the statute was deficient on vagueness grounds. *Id.* at 108.

171 *See generally* Friedman, *supra* note 1.

172 In *Mayer v. Monroe County Community School Corporation*, 474 F.3d 477, 479 (7th Cir. 2007), a case that dealt with applying *Garcetti* to the classroom speech of a secondary teacher, the court stated that a school does not "regulate" teacher speech but instead "hires" the speech that the school system wants from teachers based on the approved curriculum. The arguments advanced by the Florida Board of Governors characterize faculty classroom speech in higher education in a similar manner, arguing that professors are merely the suppliers (i.e., the mouthpieces) of approved governmental curricular messages.

173 *See supra* note 112.

174 Post, *supra* note 80, at 28 ("The fundamental First Amendment doctrine of content neutrality is meant to prevent the state from cutting off persons from access to processes of public opinion formation on the basis of what they intend to say. The doctrine advances the goal of democratic

decisions regularly entail making judgments about the quality of speech, such as in the tenure review process in relation to the quality of professor's scholarship and teaching or in making evaluations of student work.¹⁷⁵ Yet, as covered in Part III, the public employee speech standards have emerged as a dominant doctrinal area used by courts to evaluate faculty First Amendment speech claims, including ones that implicate academic freedom considerations. Given this state of affairs, the authors contend that continued reliance on the public employee speech standards, if properly adjusted to a higher education context, provide a workable approach for courts to follow in adjudicating faculty academic freedom claims under the First Amendment. Specifically, we argue that faculty *academic speech*¹⁷⁶ made in carrying out employment duties connected to teaching, research, or "academic governance speech"¹⁷⁷ should be exempt from *Garcetti* and eligible for First Amendment protection.¹⁷⁸ To provide meaningful opportunity for First Amendment protection for faculty academic speech under this proposed framework, courts could adopt a similar approach taken by the Ninth Circuit in *Demers v. Austin*¹⁷⁹ and tailor the concept of public concern to a higher education environment. Further, we assert that the academic freedom policies and standards adopted by public colleges and universities provide one compelling justification to negate application of *Garcetti* to faculty academic speech in public higher education,¹⁸⁰ an issue we tackle first in this part.

legitimation by ensuring that public opinion remains open to the subjective engagement of all, even of the idiosyncratic and eccentric. Fools and savants are equally entitled to address the public.").

175 In arguing for "democratic competence" as a basis for constitutional protection of academic freedom," as opposed to a marketplace of ideas rationale that undergirds most other First Amendment speech protections, Post, *supra* note 80, at 62, notes how "[u]niversities are essential institutions for the creation of disciplinary knowledge, and such knowledge is produced by discriminating between good and bad ideas." Post is critical of using the public employee speech standards to evaluate faculty speech implicating academic freedom.

176 As noted, we adopt the term *academic speech* used by Areen, *supra* note 8, at 994, to refer to faculty speech made in the course of carrying out employment duties in the areas of teaching, research, or "faculty governance matters."

177 *Id.* at 985. In addition to faculty speech related to teaching and research, Areen argues for First Amendment protection of faculty speech in higher education made as part of participation in shared governance, a position that we endorse.

178 The position taken in this article has similarities to the framework advocated by Areen, *supra* note 8, but we offer a different position on the "public concern" standard, which Areen argues should not apply to what she terms academic speech. *Id.* at 994. Areen, instead, advocates that academic speech should be subject to the "the same sort of reasonable time, place, and manner limitations that may be used to limit citizen speech under the First Amendment." Rather than any strong disagreement with the standard offered by Areen, a key reason for our suggestion for courts to use a modified public concern test for academic speech comes from a practical recognition that courts have largely looked to the public employee speech standards in assessing faculty First Amendment speech claims that implicate academic freedom considerations. Additionally, faculty speech made in a private citizen capacity, including that raising academic freedom concerns, would still be subject to a public concern analysis by a court. *See, e.g., Austin v. Univ. of Fla. Bd. of Trustees*, 580 F. Supp. 3d 1137, 1169 (N.D. Fla. 2022) (appeal filed) (granting preliminary injunction against university policy that governed when faculty could provide expert witness testimony in a private citizen capacity, with the court noting that the permissibility of faculty being able to provide such testimony, which involved their areas of scholarly expertise, raised academic freedom concerns relevant to the public concern analysis).

179 For more on the *Demers* case, see Part II.

180 In a 2009 article, one of the authors previously raised the issue of how institutional academic

A. *INSTITUTIONAL ACADEMIC FREEDOM STATEMENTS,
SCOPE OF EMPLOYMENT, AND THE FIRST AMENDMENT*

One of the arguments against judicial recognition for First Amendment protection for faculty academic speech is that doing so would result in an inconsistency where public college faculty members possess constitutional rights not held by other public employees.¹⁸¹ However, an important point about the nature of the working relationship between a faculty employee and their public higher education employer is overlooked in taking this position, namely, there is a failure to take into account how other public employers do not, unlike public colleges and universities, define the employment parameters—the scope of job duties—in the same way as they are delineated for public college and university faculty. That is, public colleges and universities define the employment duties of their professors to serve as independent voices and actors—rather than institutional mouthpieces—in relation to their academic speech and in carrying out their teaching, research, and shared governance duties. We take the stance that the role of institutions in defining faculty as independent voices in carrying out their academic speech is crucial for construing faculty academic speech claims under the First Amendment when using the public employee speech framework. Thus, we contend one avenue to alleviate the current legal impasse over the constitutional speech rights of faculty members in a way consistent with cases such as *Garcetti* is to recognize that a public college or university employer can recognize that its faculty are expected—are hired—to function as independent voices in carrying out the scope of their professional employment duties.

Reliance on institutional academic freedom statements or policies provides a strong rationale to blunt arguments that public higher education faculty are receiving unwarranted First Amendment treatment for their job-related speech compared to other public employees. Instead of an academic freedom exception, we are, rather, arguing for a modest, reasonable elaboration of the *Garcetti* standards

freedom policies or standards should affect application of *Garcetti* to faculty speech. Developments in case law, such as in *Demers v. Austin*, support the growing viability of this position as a basis, at least as one justification, to exclude faculty academic speech from *Garcetti*. See 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, 177 (2009) (“It seems reasonable ... for courts to consider how institutional policies and standards should impact the speech claims of faculty members.”).

181 See, e.g., Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 Miss. L.J. 677 (2014):

An individual First Amendment right to academic freedom violates the neutrality principle [of the First Amendment] in two ways. First, it asks the courts to treat publicly employed academics differently from all other classes of public employees. Second, because of this difference in the treatment of speakers, individual academic freedom inherently also requires the courts to designate scholarly and classroom speech as uniquely valuable, as compared with the job-required speech of non-academic public employees, and even the non-academic speech of academic public employees. If the *Demers* court is correct, in other words, then academic speech occupies a more protected niche in the First Amendment’s superstructure than all other public employee speech uttered pursuant to official duties, and public employees who happen to be academics therefore enjoy greater First Amendment protection than other public employees. This, of course, would be the opposite of government neutrality.

Id. at 731.

based on how the majority of public higher education institutions have defined faculty employment as premised upon independent academic speech when professors carry out their employment duties in the realms of teaching, research, and shared governance. For instance, the AAUP's 1940 Statement of Principles on Academic Freedom and Tenure¹⁸² is widely accepted in higher education, with many colleges and universities adopting some form of the statement, including in faculty handbooks or contracts, in their official institutional policies and standards.¹⁸³

In addition to any role in defining the contractual relationship that professors have with their employer institutions, the academic freedom standards and policies adopted by public colleges and universities should also be relevant to analyzing the employment duties of public higher education faculty for First Amendment purposes. Nothing in the *Garcetti* opinion or in the public employee speech standards prohibits a public employer from defining employment duties to assign a responsibility of the employee to engage in independent speech that is representative of the views of the individual employer and not the employee. Other public employers—or at least the overwhelming majority, such as with, say, a state agency in charge of motor vehicles—do not design employee job duties as premised on independent speech by employees for the successful functioning of the public agency. But public colleges and universities absolutely have created, and, in fact, insist and depend upon, such independent roles for their faculty.¹⁸⁴

In adjusting the *Garcetti* standards to take into account how public higher education faculty have job duties that are designed on the basis of independent academic speech, there are other speech examples in higher education that are instructive by comparison. For instance, public colleges and universities maintain fora, both virtual and physical, for student speech, including those supported by student mandatory fees, that are distinct from fora that other governmental agencies would establish for their clients. With such student fora, the Supreme Court has imposed First Amendment requirements, such as viewpoint neutrality,

182 American Association of University Professors, Policy Documents and Reports 13, 14 (11th ed. 2015).

183 A 2020 AAUP report stated that seventy-three percent of higher education institutions with a tenure system base their academic freedom policy on the 1940 Statement and that almost half of these institutions directly cite the AAUP as “source for their policy.” AAUP, *Policies on Academic Freedom, Dismissal for Cause, Financial Exigency, and Program Discontinuance* 4 (2020), <https://www.aaup.org/file/PoliciesonAcademicFreedom.pdf>. For a list of scholarly and educational organizations that have endorsed the 1940 Statement, see AAUP, *Endorsers of the 1940 Statement*, <https://www.aaup.org/endorsers-1940-statement> (last visited Dec. 1, 2022).

184 Areen, *supra* note 8, looks to the work of Post, *supra* note 80, to distinguish between the roles of “government as employer” versus “government as educator:”

In typical public workplaces, the government is understandably concerned with efficiency and employee morale. Universities need to be efficient as well, of course, but their primary goals are research and teaching, not the delivery of services to the general public. Debate that might be viewed as disruptive in other public agencies is an accepted, and even necessary, part of the production of new knowledge and its dissemination in classrooms. So, too, employee criticism that might seem insubordinate in other public agencies may be a necessary part of fulfilling the governance responsibilities of a faculty member in a college or university.

Areen, *supra* note 8, at 990–91 (footnotes omitted).

for how universities treat student access to these fora and to attendant benefits such as funding.¹⁸⁵ Here, we do not argue that colleges and universities have created some type of limited forum when it comes to faculty speech. Rather, courts, in applying forum analysis principles, have taken into account the unique environment of a public college or university for First Amendment purposes. For instance, in one particularly instructive case, the Supreme Court in *Board of Regents of the University of Wisconsin System v. Southworth* held that public colleges and universities could use student fees to support the speech and expression of officially recognized student groups as long as such fees were distributed in a viewpoint neutral manner.¹⁸⁶

In *Southworth*, objecting students contended that they were being compelled to support speech with which they disagreed through the use of mandatory student fees.¹⁸⁷ In upholding the permissibility of using mandatory student fees to support student organizations, the Supreme Court in *Southworth* rejected a rule for the First Amendment that it had applied in other contexts involving professional associations.¹⁸⁸ In those cases, the Court had held that mandatory fees paid by members were limited to activities that were germane to the core purposes of the organization; otherwise, such activities had to be funded on a voluntary basis and members had to have the opportunity to opt out.¹⁸⁹ Noting the difficulty of defining germaneness in the context of these organizations, in terms of attempting to operationalize the concept in a higher education context, the Court stated, “If it is difficult to define germane speech with ease or precision where a union or bar association is the party, the standard becomes all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas.”¹⁹⁰ The Court approved the use of a mandatory fee system as in alignment with the institution’s mission to promote the independent sharing of ideas by students:

The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious,

185 See, e.g., *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 230 (2000) (requiring viewpoint neutrality in how a public university distributed funds collected from mandatory student fees to student organizations receiving official university recognition).

186 *Id.*

187 *Id.* at 220.

188 See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). In *Abood*, the Supreme Court limited the collection of mandatory union dues to those issues germane to a union’s collective bargaining duties. In *Keller*, the Supreme Court held that mandatory bar dues could not be used to finance political or ideological activities that were objectionable to members. The overturning of *Abood* in *Janus v. American Federation of State, County, & Municipal Employees, Council, 31*, 138 S. Ct. 2448 (2018), does not undercut the Court’s analysis in *Southworth*. In fact, the rejection of *Abood* reinforces the stance taken in *Southworth* that First Amendment standards should be calibrated in a way that comports with the specialized context of a public higher education environment. We argue that a similar logic should be applied to the public employee speech standards and the professional speech of faculty, especially when institutional academic freedom statements are considered.

189 *Abood*, 431 U.S. at 235–36; *Keller*, 496 U.S. at 14.

190 *Southworth*, 529 U.S. at 232.

scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.¹⁹¹

For our purposes in this article, it is perhaps also relevant to note that the Court in *Southworth* did not characterize the fees program for recognized student associations as a type of forum. Instead, the Court determined that the “public forum cases are instructive here by close analogy.”¹⁹² The *Southworth* decision shows how the Supreme Court has been willing to adjust or to calibrate First Amendment standards in a manner appropriate to the unique aspects of a public higher education environment as compared to other public entities or agencies. As such, we assert that institutional academic freedom standards and policies can and should be an integral part of the analysis when courts apply the public employee speech standards to the academic speech of college and university faculty.

To provide an illustration at the institutional level, among its policies, the University of Florida, one of the public universities covered by the Stop WOKE Act, maintains an “Academic Freedom and Responsibility” regulation.¹⁹³ The policy provides, in part, that

The University believes academic freedom and responsibility are essential to the full development of a true university and apply to teaching, research, and creativity. In the development of knowledge, research endeavors, and creative activities, the faculty and student body must be free to cultivate a spirit of inquiry and scholarly criticism and to examine ideas in an atmosphere of freedom and confidence. The faculty must be free to engage in scholarly and creative activity and publish the results in a manner consistent with professional obligations. A similar atmosphere is required for university teaching. Consistent with the exercise of academic responsibility, a teacher must have freedom in the classroom in discussing academic subjects selecting instructional materials and determining grades. The university student must likewise have the opportunity to study a full spectrum of ideas, opinions, and beliefs, so that the student may acquire maturity for analysis and judgment. Objective and skillful exposition of such matters is the duty of every instructor.¹⁹⁴

191 *Id.* at 233. The majority stated that a university did have the option of establishing a voluntary system in which students could receive refunds for speech that they did not support.

192 *Id.* at 218.

193 University of Florida Academic Affairs Regulations, *UF-7.018: Academic Freedom and Responsibility*, <https://regulations.ufl.edu/wp-content/uploads/2012/09/7018.pdf> (last visited Dec. 1, 2022).

194 *Id.* Language elsewhere in the policy dealing with responsibility and academic freedom also has important implications for the argument to use academic freedom policies in the public employee speech analysis in calling for professors to be “forthright and honest in the pursuit and communication of scientific and scholarly knowledge.” *Id.* Such language suggests an employment duty on the part of faculty members to adhere to sound academic standards in the pursuit of knowledge and in imparting such knowledge in their teaching and research. A faculty member acting merely as a conduit for the speech of their public university employer could not carry out this duty, such as with the Stop WOKE Act, which is so deficient in its understanding of CRT and critical

A cursory review of this portion of the policy shows that it is in complete contradiction to the dictates of the Stop WOKE Act. Adhering to the requirements of the Stop WOKE Act and having a faculty member acting as the mouthpiece of the university conflicts with the clear directive of the University of Florida in its academic freedom policy for its faculty members to be “free”¹⁹⁵ to engage in independent research and creative activities and in their teaching.

Academic freedom policies and standards such as those adopted by the University of Florida provide a compelling basis for courts to adjust the *Garcetti* standard to the needs of a public college or university when it comes to faculty academic speech. While such policies or standards may also be incorporated into faculty contracts, doing so does not preclude courts from taking institutional academic freedom policies or standards into account for First Amendment purposes. In the case of the University of Florida, the standard has been adopted as a general, stand-alone regulation related to the academic affairs of the institution. As pointed out, other public employers do not adopt academic freedom statements intended to apply to the speech and job duties that clearly fall within the scope of employment. However, when a public employer college or university has elected to design their faculty members’ employment duties to encompass independent speech (i.e., to require academic freedom as a necessary condition of carrying out employment tasks), then such action should trigger First Amendment consequences and influence application of the public employee speech standards.

The position taken in this article could spark some concern that it would allow a public college or university unrestrained authority to revoke its recognition of academic freedom to faculty members. In considering this potential worry, we argue that a public college or university should not be able to rely on *Garcetti* as a legal backdoor to strip faculty of their academic freedom and then be recognized as a legitimate university so as to reap the benefits of such status. If a public higher education institution or system wants to take the legal position that the academic speech of its faculty is controlled by *Garcetti*, then the institution or system should have to accept the overall consequences for what adopting such a legal stance means. For example, accrediting bodies have adopted standards around academic freedom and shared governance.¹⁹⁶ If an institution wants to advance the legal

lines of inquiry as to be bereft of academic integrity. See Part I for an assessment of such academic shortcomings in the Stop WOKE Act.

195 University of Florida Academic Affairs Regulations, *UF-7.018: Academic Freedom and Responsibility*, <https://regulations.ufl.edu/wp-content/uploads/2012/09/7018.pdf> (last visited Dec. 1, 2022).

196 The Southern Association of Colleges and Schools-Commission on Colleges (SACSCOC), for instance, serves as the institutional accreditor for the University of Florida. SACSCOC, *The Principles of Accreditation: Foundations for Quality Enhancement* (6th ed. 2017), <https://sacscoc.org/app/uploads/2019/08/2018PrinciplesOfAccreditation.pdf>. Under the SACSCOC accreditation standards, institutions are required to implement “appropriate policies and procedures for protecting academic freedom.” *Id.* at 17. Florida has enacted legislation requiring its public colleges and universities to switch accreditors for each new accreditation period, a move that critics was believed motivated, at least in part, on inquiries from SACSCOC over a presidential search at Florida State University and efforts at the University of Florida to stop faculty members from offering expert testimony in litigation that challenged restrictions on voting in Florida. See Natalie Schwartz, *Florida Passes Bill Pushing Accreditor Changes, Post-Tenure Review*, Higher Ed Dive (Mar. 10, 2022), <https://www.highereddive.com/>

argument that faculty speech related to teaching, research, or shared governance is subject to complete institutional control under *Garcetti*, then such a stance should serve as a strong indicator that the institution has decided to disavow a key criterion that is required for it to be eligible for accreditation. Similarly, there should also be consequences for external research funding opportunities, which are premised on the notion of scholarly integrity and independence in the research process.¹⁹⁷ The topic of constitutional academic freedom that accrues at the institutional level is beyond the scope of this article,¹⁹⁸ but scholars supportive of institutionally based academic freedom have stated the need for colleges and universities to operate within accepted academic norms to receive judicial recognition of such a right.¹⁹⁹ In

news/florida-passes-bill-pushing-accreditor-changes-post-tenure-review/620220/; Emma Whitford, *Florida Could Make Switching Accreditors Mandatory*, Inside Higher Ed (Feb. 11, 2022), <https://www.insidehighered.com/news/2022/02/11/florida-bill-would-require-colleges-change-accreditors>.

197 See, e.g., National Institutes of Health, *Principles of Disseminating Research Tools: Ensure Academic Freedom and Publication*, <https://sharing.nih.gov/other-sharing-policies/research-tools-policy> (last visited Dec. 1, 2022) (“Institutions that receive NIH research funding have an obligation to preserve research freedom, safeguard appropriate authorship, and ensure timely disclosure of their scientists’ research findings. Recipients are expected to avoid signing agreements that unduly limit the freedom of investigators to collaborate and publish, or that automatically grant co-authorship or copyright to the provider of a material.”).

198 For example, there are questions over whether a public college or university institution or system would be able to assert a constitutional academic freedom claim against another state entity, such as an executive branch agency or the legislature, as compared to asserting such a right against the federal government. See, e.g., William E. Thro, *Follow the Truth Wherever It May Lead: The Supreme Court’s Truths and Myths of Academic Freedom*, 45 U. Dayton L. Rev. 261, 282 (2020):

[W]ith respect to the creating state, a state university has no institutional academic freedom. State governments routinely determine the mission of an institution, what degree programs are offered, whether admissions will be highly competitive, competitive, or open, and the portion of students from the creating state. In *Schuette v. Coalition to Defend Affirmative Action*, the Supreme Court held that the people of a state could amend their state constitution to remove the ability of a state university to consider race in the admissions process. Although the issue of institutional academic freedom was not raised explicitly, the net effect of the Court’s decision seems to foreclose the notion that a public institution has a federal constitutional right against the state that creates the institution. Indeed, as Justice Scalia, joined by Justice Thomas, noted, the states have almost unlimited discretion to define the role of political subdivisions, state agencies, and state universities. This sovereign discretion includes the ability to remove decision-making authority from the institution and transfer to the people or another branch of government.

Id. (footnotes omitted).

199 See, e.g., Horwitz, *supra* note 81. Horwitz contends that universities, including public ones, should be “entitled to substantial deference, to a degree that indeed approaches immunity, to the extent that they are making genuinely academic decisions.” Using Michigan as example to explain this position, and describing alignment with the views of J. Peter Byrne on the issue of constitutional protection for institutional academic freedom, Horwitz states,

We might understand Byrne’s argument, and mine, in these terms. The people of the State of Michigan are entitled to rid themselves of the University of Michigan and other state universities altogether if they so choose. And they may well be free to vote to alter the nature and mission of those universities so deeply that we would no longer recognize them as First Amendment institutions entitled to autonomy as universities. To take an extreme example, if the people voted to replace a university’s usual functions and turn the whole campus into a branch of the state Department of Motor Vehicles, replacing classrooms and teachers with lineups, eye charts, and petty bureaucrats processing applications for drivers’ licenses, it would matter little for purposes of that site’s constitutional status that it happened still to have the words “University of Michigan” engraved on its gates. So long as the people have chosen to maintain the University

essence, if a public higher education system or institution wants to gain the benefits of *Garcetti* when it comes to total control of faculty academic speech, then these same systems or institutions should, in relinquishing a commitment to academic freedom, also forego the benefits that come with status as an authentic public higher education institution. The risk of losing such attendant benefits would place an important check on institutions or systems before making a wholesale repudiation of faculty academic freedom and claiming complete control over professorial speech under *Garcetti*.

We maintain that courts should hold public higher education systems or institutions accountable for their own commitments to academic freedom when it comes to analyzing First Amendment rights for faculty academic speech. An “academic freedom exception” to the *Garcetti* standard can be interpreted as not really an “exception” at all but, instead, a common-sense elaboration of the public employee speech framework, one based on institutional or system actions that define faculty employment duties as premised on independence in academic speech as a necessary condition for professors to carry out their official job duties in the areas of teaching, research, and shared governance.

B. AN IMPORTANT STIPULATION: TAILORING PUBLIC CONCERN TO ACADEMIC SPEECH CONTEXTS

Building on the idea of using institutional academic freedom standards as a basis to negate use of *Garcetti* in the academic speech arena, we further suggest that courts should turn to the *Pickering* framework to assess First Amendment claims involving faculty academic speech. In offering this position, we follow something of a practical strategy in acknowledging that courts have already consistently turned to the public employee speech standards in adjudicating faculty speech claims raising issues related to academic freedom.

Under the *Pickering* (or *Pickering-Connick*) framework, which is covered more in Part III of this article, courts deciding claims involving faculty academic speech would first consider if the academic speech at issue addressed a matter of public concern. If so, then the speech would receive First Amendment protection absent a sufficient justification on the part of the public employer college or university to regulate the speech. Under the approach we advocate, a brief, but essential, point is required on the need to tailor the concept of public concern to academic speech and higher education. That is, courts need to calibrate the concept of public concern in ways that are appropriate to college and university settings. This type of calibration was exactly the approach taken by the Ninth Circuit in *Demers v.*

of Michigan as a university, however, they must stand by the bargain. At least as long as it is to retain its constitutional value as a First Amendment institution, we should treat even a public university as an entity that retains the full set of institutionally oriented rights and privileges that mark it as a university. Thus, as shocking as the outcome may be, an institutional approach to the university would support Byrne’s argument that a state that voluntarily maintains a public university is not free to intrude upon its affairs in ways that fundamentally interfere with the university’s status as a self-governing institution.

Id. at 1550–51.

Austin,²⁰⁰ which indicates the feasibility of tailoring the *Pickering* framework to academic speech.

The strategy suggested in this article does not vest either faculty members or institutions with unbridled authority when it comes to academic speech. When faced with a claim based on academic speech, courts, as part of the public concern analysis and subsequent balancing test, could, as pointed out, account for the specific context and circumstances where the professorial speech took place. For example, a professor's speech in a classroom implicates considerations, such as institutional authority over curricular matters and academic standards, that may not be present in other settings, such as the presentation of research findings at an academic conference. Or, in a classroom setting, the institution has legitimate interests in ensuring that a learning environment is provided that is conducive to covering the content intended and approved for the course and to meet other criteria such as ones related to institutional or program accreditation. While looking to *Hazelwood* instead of the public employee speech cases, such a balancing approach was taken by the court in *Bishop*²⁰¹—a case decided prior to *Garcetti*—and, as covered in Part III, subsequently guided the approach followed by the court in granting a preliminary injunction against Florida's Stop WOKE Act as to higher education.²⁰²

In sum, courts have already engaged in a balancing of interests in deciding academic faculty speech cases, with the public employee speech framework relied upon most often. In our view, tailoring the public concern concept to the nuances of the higher education environment provides a workable approach for courts to continue using a framework that they have consistently employed in resolving faculty speech cases that implicate academic freedom concerns.

V. CONCLUSION

Florida's Stop WOKE Act casts a cloud over academic freedom in the Sunshine State. Rather than the simplistic and incorrect caricatures conveyed by supporters of anti-CRT legislation, CRT and related areas of inquiry are firmly established scholarly domains in higher education. Anti-CRT laws like the Stop WOKE Act undermine the academic speech of faculty who use CRT and related lines of scholarship in their teaching. If courts recognize the authority to limit and censor academic speech related to CRT under laws like the Stop WOKE Act, then, by implication, any scholarly domain in public colleges and universities could be subject to such restriction and censorship. This article has focused on anti-CRT

200 For more on *Demers*, see Part II.

201 In relation to the balancing aspect, the Eleventh Circuit in *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) held that a university had not acted inappropriately in restricting a professor from making in-class comments about his religious beliefs or scheduling voluntary class meetings with students outside of regular class meetings to provide a Christian perspective on the subjects taught in the class.

202 As covered in Part III, the court declined to look to the public employee speech standards as it concluded that it was bound by the Eleventh Circuit's precedent in *Bishop*, *supra* note 201, to look to *Hazelwood School District v. Kuhlmeir*, 484 U.S. 260 (1988) to assess the permissibility of the Stop WOKE Act as to higher education.

legislation, but it is worthwhile to stress that First Amendment protection for the academic speech of public higher education faculty cannot function as a one-way street in terms of safeguarding academic speech on only one end of the sociopolitical spectrum. Constitutional protection for faculty academic freedom must serve to safeguard professors' academic speech across the political continuum.

In defining the employment duties of faculty members to encompass independent academic speech as requisite to professors' carrying out their job functions, institutional or system academic freedom policies or standards should place such academic speech beyond the purview of *Garcetti*. Instead, the academic speech of public higher education faculty should be eligible for First Amendment protection. Given the consistent reliance by courts on the public employee speech standards to evaluate faculty speech claims with an academic freedom dimension, we take a pragmatic stance in suggesting continued use of these standards. But, for this approach to result in any meaningful protection for academic speech, we add the important stipulation that courts must calibrate or tailor the public concern analysis in a way appropriate for a higher education environment. In short, when public higher education institutions or systems hold out academic freedom standards and policies as sincere expressions of a commitment to academic freedom, then such standards and policies should have First Amendment consequences for faculty academic speech rights.

PLAGIARISM AS A RECURRENT ISSUE

HELAYNA SCHAFFER*

ABSTRACT

Plagiarism in publicly funded research threatens research integrity and misuses taxpayer dollars. In the past two decades, clear discrepancies between how the Office of Research Integrity and the National Science Foundation address plagiarism have emerged. One factor driving this discrepancy is the use of plagiarism detection software. Advancements in the sophistication of plagiarism detection revealed the amount of plagiarism surpasses previous expectations. Continued education on responsible conduct of research is imperative to fostering research integrity and decreasing instances of research misconduct. Congress and the National Science Foundation have initiated new policies to address plagiarism, and institutions and researchers must establish widespread implementation of these policies. By examining recent plagiarism cases and responsible conduct of research training, this article illuminates issues with the current approach to addressing plagiarism and advances arguments to remedy these issues.

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INTRODUCTION

Research misconduct in federally funded grants involves the misappropriation of public investment. Research misconduct is defined federally as “fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results.”¹ Misconduct is primarily overseen by two agencies within the federal government, the National Science Foundation (NSF), which determines cases involving NSF funding, and the Office of Research Integrity (ORI), which reports cases involving Public Health Service Funds (PHS).² Although other disciplines define plagiarism differently, both aforementioned agencies define plagiarism as “the appropriation of another person’s ideas, processes, results, or words without giving appropriate credit.”³ The federal definition excludes “self-plagiarism” and honest error. Furthermore, for a finding of research misconduct to be made, the following must be satisfied: “(1) There be a significant departure from accepted practices of the relevant research community; and (2) The research misconduct be committed intentionally, knowingly, or recklessly; and (3) The allegation be proven by a preponderance of evidence.”⁴

Plagiarism and research misconduct was initially explored by *Scientific Misconduct and the Plagiarism Cases* twenty-seven years ago.⁵ This formative article demonstrated the disjointed response to misconduct. Several years later, *Research Misconduct and Plagiarism* advanced discussion in the importance of plagiarism and clarified federal approaches to regulation.⁶

Developments in the intervening years in detection, policy, and public distrust in the scientific community have triggered the need to readdress plagiarism. Given the proliferation of digital resources, plagiarism detection software—for example, iThenticate and Turnitin—has substantially impacted how plagiarism is discovered and investigated. Attempts to address plagiarism extend beyond detection into prevention through training programs. The 2007 America COMPETES Act⁷ established a responsible conduct of research training (RCR) requirement for all institutions receiving funding from the NSF. Further, the CHIPS and Science Act of 2022⁸ revised these requirements to improve the effectiveness of RCR training. Integrity in scientific research is important today because of public distrust in the scientific community.⁹

1 42 C.F.R. § 93.103 (2017); 45 C.F.R. § 689.1 (2020).

2 Debra Parrish, *Scientific Misconduct and the Plagiarism Cases*, 21 J.C. & U.L. 517, 518–19 (1995).

3 42 C.F.R. § 93.103; 45 C.F.R. § 689.1.

4 42 C.F.R. § 93.103; 45 C.F.R. § 689.2(c) (2020).

5 See Parrish, *supra* note 2.

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

7 America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act, Pub. L. No. 110-69, 121 Stat. 572 (2020).

8 CHIPS and Science Act of 2022, Pub. L. No. 117-167, 136 Stat. 1366 (2022).

9 Overall confidence in medical scientists and scientists more broadly has declined since April 2020; See Brian Kennedy et al., *Americans’ Trust in Scientists, Other Groups Declines*, Pew Rsch. Ctr. (Feb. 15, 2022), <https://www.pewresearch.org/science/2022/02/15/americans-trust-in-scientists-other-groups-declines/>.

Although plagiarism is of greater importance to academics than the public, research misconduct furthers the gap in trust. Discussion of shrinking trust in science has been taking place for many years,¹⁰ and this distrust has grown recently.¹¹ Endeavors to decrease rates of plagiarism—such as more effective RCR training and greater support for inexperienced researchers—simultaneously address research integrity more broadly.

This article expands upon previous discussion of plagiarism and research misconduct in the following ways. I review the past sixteen years of plagiarism cases to call attention to the growing discrepancies between the ORI and the NSF in their findings. Subsequently, I examine the expansion of plagiarism detection software's capabilities and application. Data collected by this software provides a unique opportunity for assessing the vertical and horizontal extent of plagiarism. Third, I show the inability of RCR training to adequately teach the proper populations of researchers and recent solutions enacted by the NSF. Fourth, the effects of increased transparency regarding cases of plagiarism are unclear, but methods intended to decrease plagiarism also address issues of research integrity. These methods can help rebuild trust between the public and the scientific community as well as promoting proper citation practices. Finally, I suggest further development of strategies for decreasing instances of plagiarism.

I. RECENT PLAGIARISM CASES

A. GROWING DIVERGENCE

The recent cases of plagiarism show a growing discrepancy between the number of findings made by the NSF and ORI. Although the number of ORI findings of plagiarism has remained stable over the last few decades, NSF findings have ballooned because of developments in detection. Differences in how each agency responds to allegations have also emerged in recent years. Both agencies use the same definition of plagiarism and research misconduct, and therefore, this discrepancy must stem from how each agency is regulating plagiarism.

1. ORI Findings

Between 2005 and 2021, the ORI made eleven findings of research misconduct involving plagiarism.¹² The National Institutes of Health—the largest agency of the

10 See Richard Braun, *The Public's Growing Distrust of Science?* 17 *Nature Biotech.* 14 (1999).

11 See Patrick Boyle, *Why Do So Many Americans Distrust Science?* Assoc. of Am. Med. Colls. (May 4, 2022), <https://www.aamc.org/news-insights/why-do-so-many-americans-distrust-science#:~:text=The%20forces%20and%20factors%20behind,public%20nature%20of%20scientific%20research>.

12 See Ralph Highshaw 71 Fed. Reg. 120 (Jan. 3, 2006) [hereinafter Highshaw]; Bengu Sezen 75 Fed. Reg. 73084 (Nov. 29, 2010) [hereinafter Sezen]; Scott Weber 76 Fed. Reg. 61361 (Oct. 4, 2011) [hereinafter Weber]; Jayant Jagannathan 76 Fed. Reg. 68460 (Nov. 4, 2011) [hereinafter Jagannathan]; Gerald Lushington 76 Fed. Reg. 80371 (Dec. 23, 2011) [hereinafter Lushington]; Mahesh Visvanathan 77 Fed. Reg. 125 (Jan. 3, 2012) [hereinafter Visvanathan]; Shuang-Qing Zhang 77 Fed. Reg. 76491 (Dec. 28, 2012) [hereinafter Zhang]; Pratima Karnik 78 Fed. Reg. 47699 (Aug. 6, 2013) [hereinafter Karnik]; Rakesh Srivastava 83 Fed. Reg. 222 (Nov. 16, 2018) [hereinafter Srivastava]; Rahul Dev Jayant 85 Fed. Reg. 49661 (Aug. 14, 2020) [hereinafter Jayant]; Yibin Lin 86 Fed. Reg. 8203 (Feb. 4, 2021) [hereinafter Lin].

PHS—funds sixty thousand grants per year.¹³ In the sixteen-year period analyzed in this article, the ORI oversaw just under one million grants funded by the National Institutes of Health (NIH) and found eleven that met the federal definition of plagiarism. All eleven respondents¹⁴ were affiliated with a university, either as a professor or a researcher at the medical center, and the highest degree attained was a doctorate (most commonly a PhD or MD). Allegations were divided evenly between solely plagiarism (six cases) and plagiarism with falsification/fabrication (five cases).¹⁵ The venue in which plagiarism was found was predominantly publications¹⁶ and grant applications,¹⁷ with nine unpublished manuscripts,¹⁸ one abstract,¹⁹ and one doctoral thesis.²⁰

The ORI determines sanctions in accordance with the seriousness of the misconduct.²¹ Seriousness is determined by the following factors: intent, pattern, impact, whether the respondent accepted responsibility, retaliation, and other circumstances.²² Sanctions imposed in these cases all included prohibition from serving on a PHS advisory board for two to ten years, depending on the severity of the plagiarism. Nine of the eleven cases were resolved with a voluntary settlement agreement²³ or voluntary exclusion agreement.²⁴ Voluntary agreements are reached when the respondent commits to accepting the finding of research misconduct.²⁵ The other two respondents were debarred for two or five years.²⁶ A respondent may be debarred if the research misconduct seriously impacted the respondent's current

13 NIH Office of Budget, *FY18 Budget Executive Summary*, Nat'l Insts. of Health 19, <https://officeofbudget.od.nih.gov/pdfs/FY18/Executive%20Summary.pdf>.

14 A respondent is subject of an allegation or proceeding of research misconduct. See 42 C.F.R. § 93.225 (2020).

15 See Highshaw, *supra* note 12 (plagiarism); Sezen, *supra* note 12 (plagiarism, fabrication, and falsification); Weber, *supra* note 12 (plagiarism, fabrication, and falsification); Jagannathan, *supra* note 12 (plagiarism); Lushington, *supra* note 12 (plagiarism); Visvanathan, *supra* note 12 (plagiarism); Zhang, *supra* note 12 (plagiarism, fabrication, and falsification); Karnik, *supra* note 12 (plagiarism); Srivastava, *supra* note 12 (plagiarism); Jayant, *supra* note 12 (plagiarism and falsification); Lin, *supra* note 12 (plagiarism, fabrication, and falsification).

16 See Highshaw, *supra* note 12; Sezen, *supra* note 12; Jagannathan, *supra* note 12; Lushington, *supra* note 12; Visvanathan, *supra* note 12; Zhang, *supra* note 12; Lin, *supra* note 12.

17 See Weber, *supra* note 12; Karnik, *supra* note 12; Srivastava, *supra* note 12; Jayant, *supra* note 12.

18 See Weber, *supra* note 12 (two manuscripts); Lin, *supra* note 12 (seven manuscripts).

19 See Lushington, *supra* note 12; Visvanathan, *supra* note 12.

20 See Sezen, *supra* note 12.

21 42 C.F.R. § 93.408 (2020).

22 *Id.*

23 See Jagannathan, *supra* note 12; Lushington, *supra* note 12; Visvanathan, *supra* note 12; Zhang, *supra* note 12; Jayant, *supra* note 12.

24 See Highshaw, *supra* note 12; Weber, *supra* note 12; Karnik, *supra* note 12; Lin, *supra* note 12.

25 Respondents can agree not to contest the findings without admitting to plagiarizing. See Highshaw, *supra* note 12; Jagannathan, *supra* note 12; Lushington, *supra* note 12; Zhang, *supra* note 12.

26 See Sezen, *supra* note 12 (two years); Srivastava, *supra* note 12 (five years).

responsibilities.²⁷ Other sanctions included exclusion from government contracts, supervision of future research, and certifications and assurances that submitted grant applications do not contain plagiarism.

Highly publicized plagiarism cases—such as Sezen²⁸—suggest that releasing the names of researchers found to have plagiarized could harm their careers.²⁹ Despite the public nature of ORI findings, many respondents were able to continue their careers. Six of the researchers were, at one point after the public report of misconduct, or are currently employed in their fields.³⁰ Although these researchers have attained industry jobs related to their fields, only one currently holds a faculty position in academia.³¹ This suggests that academic institutions take findings of plagiarism seriously and will not hire a researcher who has plagiarized. However, the careers of these researchers can continue in industry spheres unhindered. The ineffectiveness of public censure is not limited to plagiarism cases. Retraction Watch recently published an article about a researcher previously found to have falsified data and methods in a grant application who was recently awarded federal funding.³² The remaining five researchers had no readily available employment information after publication of the *Federal Register* notice of research misconduct.³³ With a sample size of eleven, it is difficult to make any broad assertions. However, findings of plagiarism appear to have a more substantial effect on the careers of postdoctoral researchers and students when compared to the consequences for

27 45 C.F.R. § 76.305(d) (2015).

28 See Sezen, *supra* note 12.

29 *Stress Test*, *The Economist* (Aug. 9, 2014). Tragic instances, such as this, also call attention to the need for stress management instruction in research training.

30 Data was gathered by searching for the researcher's name and their institution or field. Ralph A. Highshaw MD is currently listed as a urologist at Ascension Medical Group Sacred Heart Urology; see <https://healthcare.ascension.org/doctors/1386726453/ralph-anthony-highshaw-pensacola-fl>; Scott Weber was employed at Walden University after leaving the University of Pittsburgh; see <https://retractionwatch.com/2011/09/14/publishing-scandal-costs-nursing-researcher-his-post-at-online-university/>; see also <https://www.utimes.pitt.edu/archives/?p=18378>; Jayant Jagannathan is actively practicing neurosurgery at Jagannathan Neurosurgery; see <https://www.mi-neurosurgery.com/JN-DrJagannathan.shtml>; Gerald Lushington is presently the Chief Scientific Officer of Qnapsyn Biosciences, Inc., Editor in Chief of Combinatorial Chemistry & High Throughput Screening, and Adjunct Professor of Food Nutrition Dietic Health at Kansas State University; see <https://www.qnapsyn.com/the-team>; see also <https://benthamscience.com/journals/combinatorial-chemistry-and-high-throughput-screening/> and <https://search.k-state.edu/?qt=gerald+lushington&curtab=0>; Rakesh Srivastava is the President and CEO of GLAX Health; see <https://glaxhealth.com/about-us/>; Rahul Dev Jayant claims to be a Senior Medical Writer of Oncology at AstraZeneca in his LinkedIn profile; see <https://www.linkedin.com/in/djrahul>.

31 Lushington is listed as a faculty member of Kansas State University after a finding of research misconduct was made by Kansas University. He was also the only respondent not directly responsible for plagiarism.

32 Shuo Chen was awarded a \$135,945 grant only four months after sanctions were imposed by the ORI for research misconduct. See Ellie Kincaid, *NYU Postdoc with Federal Research Misconduct Settlement Awarded NIH Grant*, Retraction Watch, (June 24, 2022).

33 This information was gathered by researching each respondent's name, field, and last known place of employment. I would expect to see their names mentioned on the websites of any postsecondary institution, had they found academic employment, or on a platform such as LinkedIn, if they had done industry work.

established faculty. What may be occurring here is that established researchers are able to attain public industry jobs based on their long careers in their fields, despite sanctions from the ORI. Conversely, postdoctoral researchers and students do not have an established career to rely on when searching for employment after a finding of plagiarism is published. These less-experienced researchers rely heavily on recommendations from previous employers when looking for future employment. Perhaps the mentors of researchers who had plagiarized were hesitant or unwilling to support them.

The universities affiliated with the researchers at the time of the research misconduct were unlikely to release a public statement regarding the researcher's actions. Legal risks associated with disclosing misconduct is a persuasive factor for universities, but mitigation of these risks may still lead to reputational harm. A university's reputation is important to attracting funding and retaining students.³⁴ Public statements censuring researchers for lack of integrity may dissuade new students from enrolling or diminish current students' satisfaction with their educations.³⁵ In those cases in which a public statement of plagiarism was made, the statement only appeared in the student or faculty newspapers.³⁶ Research misconduct diminishes the reputation of affiliated institutions.³⁷ However, disavowing research misconduct is crucial to establishing a culture of research integrity, especially for universities with multiple instances of plagiarism.³⁸

It is rare for other researchers associated with the person who plagiarized to be held responsible for the misconduct. However, in one case, the supervisor was found partially responsible for the plagiarism of another.³⁹ In the *Lushington* case, an allegation of plagiarism was made against Mahesh Visvanathan by the authors of the article that had been copied.⁴⁰ The university's investigation revealed Visvanathan and Lushington, his supervisor, had dismissed a student's allegation of plagiarism

34 Meredith Downes, *University Scandal, Reputation and Governance*, 13 Int'l J. Educ. Integrity art. 8 (2017).

35 *Id.*

36 In the case of Weber, the University of Pittsburgh's faculty and staff newspaper released a feature on the research misconduct. See Kimberly K. Barlow, *Former Prof Sanctioned for Research Misconduct*, Univ. Times, Oct. 13, 2011, <https://www.utimes.pitt.edu/archives/?p=18378>. The case involving Lushington and Visvanathan was reported on in the student newspaper, the *University Daily Kansan*. See Ian Cummings, *Professors Censured for Plagiarism*, Univ. Daily Kansan, Oct. 11, 2011, https://www.kansan.com/news/professors-censured-for-plagiarism/article_bd64a0db-aa90-579a-bb0c-102e2298c187.html.

37 Chris Trigg & David Trigg, *What Is the Future of Peer Review? Why Is There Fraud in Science? Is Plagiarism Out of Control? Why Do Scientists Do Bad Things? Is It All a Case Of: "All That Is Necessary for the Triumph of Evil Is That Good Men Do Nothing?"* 3 Vascular Health & Risk Mgmt. 39.

38 The University of Kansas and its affiliated medical center have had three cases of plagiarism since 2006. See Lushington, *supra* note 12; Visvanathan, *supra* note 12; Srivastava, *supra* note 12.

39 Lushington was held indirectly responsible for the plagiarism he supervised and approved for publication. His research assistant professor, Visvanathan, was directly responsible for the plagiarized text. See Lushington, *supra* note 12; Visvanathan, *supra* note 12.

40 Eugene Samuel Reich, US Authorities Crack Down on Plagiarism, *Nature*, Jan. 11, 2012.

before publication.⁴¹ Plagiarism had occurred in three publications and one abstract, all of which had been approved by Lushington.⁴² This is the first known case in which ORI held a supervising faculty member accountable for approving plagiarized work. However, the finding apparently has not substantially impacted Lushington's career in academia. He remains the only respondent to have held a faculty or equivalent position at an accredited university after a finding of plagiarism is made public by the PHS.⁴³

Institutions play a fundamental role in these plagiarism cases. Institutions must assure that they review and report research misconduct allegations as a requirement to receive funding from the PHS.⁴⁴ Research misconduct proceedings begin when an allegation is reported to the ORI or the university research integrity department.⁴⁵ Allegations are made by internal and external sources, including universities, the publisher of the article, and unaffiliated individuals.⁴⁶ An inquiry to substantiate the allegation is conducted by the affiliated institution using a framework provided by the ORI. If the results of the inquiry warrant an investigation, the matter will be referred to an investigational committee at the institution and reported to the ORI. Institutions are the initial investigators of plagiarism accusations for both the NSF and the ORI. However, in the ORI cases, institutional proceedings are determinative. Institutions may request ORI assistance through the Rapid Response for Technical Assistance program intended to facilitate institutional investigations.⁴⁷ The ORI may also conduct oversight reviews after an institution reports its final findings.⁴⁸ Oversight reviews overwhelmingly find institutional investigations to be sufficient.⁴⁹ After receiving an institutional finding of research misconduct, the ORI sanctions the individual⁵⁰ and publishes the finding in the *Federal Register*.⁵¹ The ORI's role in investigations has primarily focused on supervision during the publication of findings rather than direct involvement during the investigation period.

41 *Id.*

42 Lushington, *supra* note 12.

43 See <https://search.k-state.edu/?qt=gerald+lushington&curtab=0>.

44 42 U.S.C. § 289b (2020).

45 Research misconduct proceedings include all stages assessing suspected research misconduct. Allegations are complaints of possible misconduct. See 42 C. F. R. § 93.223 (2020).

46 Only two recent plagiarism cases have been initiated by the ORI. The remaining nine cases originated from external sources such as peer reviewers or complaints sent to the publisher; the identity of the complainant was partially or fully redacted from all cases. See Karnik, *supra* note 12; Jayant, *supra* note 12; Documents accessed via Freedom of Information Act, on file with author.

47 *Rapid Response for Technical Assistance*, Off. of Rsch. Integrity, <https://ori.hhs.gov/rapid-response-technical-assistance>.

48 *ORI Oversight Review*, Off. of Rsch. Integrity, <https://ori.hhs.gov/ori-oversight-review>.

49 *Id.*

50 42 U.S.C. § 289b (2020).

51 See Parrish, *supra* note 6, at 72–75 for a detailed count of the investigational process of research misconduct allegations involving PHS funding.

2. NSF Findings

NSF findings of research misconduct show a drastically different picture of plagiarism. Between 2005 and 2021, the NSF made over 150 findings of plagiarism, primarily in grant applications.⁵² Per year, the NSF reviews over fifty thousand grant proposals and funds eleven thousand.⁵³ The NSF made 134 findings of research misconduct involving plagiarism in fiscal years 2007–17,⁵⁴ accounting for eighty-one percent of its research misconduct findings.⁵⁵ These statistics show a drastic increase in plagiarism cases from previous decades.⁵⁶ Both allegations and findings of research misconduct have increased by three times in the decade following 2003, according to NSF Inspector General Allison Lerner.⁵⁷ Examining the avenues through which the NSF obtains instances of research misconduct may highlight why NSF realized an increase in the number of findings. Most findings originate from external allegations received by the NSF.⁵⁸ These allegations can come from institutions, the NSF OIG Hotline, NSF reviewers, and program officers.⁵⁹ After receiving allegations of plagiarism, the NSF conducts inquiries and substantiates allegations using plagiarism software.⁶⁰ The other method for detecting plagiarism is NSF's proactive review using plagiarism software to detect copied text.⁶¹ Proactive reviews involve the NSF sending random samples of proposals through plagiarism detection software. Although it is not explicitly clear what is fueling this increase in detection, it can be inferred that plagiarism software has played an important role.

A review of two cases published in 2015 highlights the different mechanisms by which cases are brought to the NSF's attention and how the NSF handles each type. The first case was identified as containing plagiarized material via a proactive

52 Between 2016 and 2018 the NSF OIG did not categorize plagiarism findings by outcome. This created substantial difficulties for the author to determine the exact number of plagiarism cases. The twenty-five Closeout Memoranda omitted from the below link are on file with the author. https://oig.nsf.gov/investigations/case-closeout-memoranda?search_api_fulltext=&field_actions=106&field_classifications=58&field_date_start=2005-01-01&field_date_end=2021-12-31&items_per_page=10&page=0.

53 Nat'l Sci. Found., *Proposals and Award Policies and Procedures Guide*, at 3 (2016).

54 In the same period, the ORI made six findings of plagiarism.

55 , Nat'l Sci. Found. Off. of Inspector Gen., *Observations from NSF Plagiarism Investigations and Strategies to Prevent Plagiarism* (2022).

56 See Parrish, *supra* note 6, at 80–82.

57 Allison Lerner, *Top Challenges for Science Agencies: Reports from the Inspectors General-Part 1*, Nat'l Sci. Found. (2013). <https://docs.house.gov/meetings/SY/SY21/20130228/100293/HHRG-113-SY21-Wstate-LernerA-20130228.pdf>. See also <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=100293>

58 A small number of Case Closeout Memorandum include that plagiarism was detected in a proactive review done by the NSF.

59 Nat'l Sci. Found. Off. of Inspector Gen., *supra* note 55.

60 *Id.*

61 Aliza Sacknovitz, *Ensuring and Promoting Research Integrity*, Nat'l Sci. Found., Off. of Inspector Gen., <https://www.tamuc.edu/research/compliance/documentsCompliance/promotingResearchIntegrity.pdf>.

review⁶² of proposals funded in 2011.⁶³ Based on the plagiarism detected in the proactive review, the award was suspended and ultimately \$79,050 of public funds were reallocated.⁶⁴ The NSF program officer⁶⁵ stated that the proposal would likely have not received funding had he been aware of the plagiarism.⁶⁶ In the second case, the relevant university received an allegation of plagiarism against a member of its faculty.⁶⁷ The university notified the NSF OIG when its internal inquiry determined an investigation was warranted. The university investigation committee discovered that two NSF-funded publications and five additional publications contained self-plagiarism and copied text from uncited sources.⁶⁸ The NSF has indicated a limited ability to screen proposals for plagiarism using plagiarism software,⁶⁹ and most of its cases are initiated by allegations.

The NSF is less reliant on its grantee institutions when making findings of research misconduct than the ORI. Although, institutions are the primary investigators of allegations of plagiarism, the NSF will conduct a review of the allegation if an institution is unable to complete an investigation or the NSF is not satisfied with the institution's findings.⁷⁰ For example, the NSF used its ability to review investigations in a case where a funded grant application was alleged to contain plagiarism.⁷¹ The NSF conducted its own investigation after reviewing the university's findings. The NSF's investigation determined the university failed to fully examine the departure from accepted practices and whether there had been a

62 Off. of Investigations, *Case Closeout Memorandum A12100070*, Nat'l Sci. Found., Off. of Inspector Gen. (Feb. 28, 2015), <https://oig.nsf.gov/investigations/case-closeout-memoranda/a12100070>.

63 See Jeffrey Mervis, *NSF Audit of Successful Proposals Finds Numerous Cases of Alleged Plagiarism*, ScienceInsider, Mar. 8, 2013, <https://www.science.org/content/article/nsf-audit-successful-proposals-finds-numerous-cases-alleged-plagiarism>.

64 See Off. of Investigations, *supra* note 62.

65 NSF program officers make funding recommendations after evaluating a grant application and its associated peer review. Final determinations of funding grants are made by Division of Grants and Agreements officers. See Nat'l Sci. Found., *How We Work*, <https://www.nsf.gov/about/how.jsp>.

66 *Id.*

67 Off. Of Investigations, *Case Closeout Memorandum A13060074*, Nat'l Sci. Found., Off. of Inspector Gen. (Oct. 3, 2015), <https://oig.nsf.gov/investigations/case-closeout-memoranda/a13060074>.

68 Although the university's investigation found the respondent had self-plagiarized, the federal definition excludes self-plagiarism and the final finding of misconduct by the NSF does not include self-plagiarism. *Id.* at 4.

69 The NSF may have expanded its capability to screen proposals since comments by the OIG head of administrative investigation, James Kroll, in 2011, however, my analysis of the intervening years of cases indicates a continued reliance on allegations rather than internal audits. See Mervis, *supra* note 63.

70 See Off. of Investigations, *Case Closeout Memorandum I-18-0098-O* at 1 (Sept. 17, 2021), Nat'l Sci. Found., Off. of Inspector Gen., <https://oig.nsf.gov/investigations/case-closeout-memoranda/i-18-0098-o>; the university found the primary investigator to have acted carelessly and recklessly. The NSF determined the university's findings were incomplete. They conducted their own investigation and concluded that the primary investigator acted knowingly.

71 Off. of Investigations, *Case Closeout Memorandum A13020021*, Nat'l Sci. Found., Off. of Inspector Gen. (2015), <https://oig.nsf.gov/investigations/case-closeout-memoranda/a13020021>.

pattern of misconduct.⁷² After the NSF had determined a significant departure and pattern of plagiarism, it sanctioned the subject.

3. *Philosophical Differences Between the NSF and ORI*

The ORI and the NSF approach public reporting of findings of research misconduct differently. This difference stems from how each agency apparently believes plagiarism cases should be reported publicly. When the NSF closes an investigation, it publishes a Case Closeout Memorandum.⁷³ These memoranda do not disclose personal information about the respondent or the institution and do not include the source of the allegation. These memoranda are available to the public via the NSF OIG website. The NSF has accumulated aggregate data of its findings of plagiarism and based future action on its discoveries. In contrast to the NSF, the ORI publishes the respondent's and institution's names. As evident in the differences between these two methods of publication, the ORI focuses on the individual, and the NSF examines external and systemic factors. However, neither agency's approach adequately addresses why plagiarism occurs. Plagiarism occurs as a complex combination of external factors—such as highly competitive environments and pressure to publish—and the individual respondent's ability to mitigate those factors.⁷⁴ An effective approach to decreasing plagiarism finds a middle ground between the two approaches, possibly focusing on formative repercussions.

Another key difference is the emphasis placed on plagiarism as an issue in research integrity. The widespread use of plagiarism detection software has allowed the NSF to recognize the extent of plagiarism. By publishing public reports, the NSF has shifted focus to structural and environmental issues. The NSF has addressed how it is currently handling plagiarism and how it, as an agency, can improve.⁷⁵ Further, the NSF has made it clear to the scientific community and its grantee institutions that originality of academic research is paramount.⁷⁶ Based on the relatively low number of plagiarism cases reported by the ORI, it either experiences drastically fewer instances of plagiarism than the NSF, or it does not treat plagiarism as an important issue. According to the Gallup Organization's assessment of researchers' having witnessed misconduct, plagiarism occurs more frequently than is reported

72 *Id.*

73 See <https://live-nsf.oversight.gov/investigations/case-closeout-memoranda>.

74 Parker and Davies argue the benefits of moving away from No Blame Culture toward "responsibility culture" in the medical field. Allowing for individuals to be held responsible, without blame, creates an environment where both an individual's ability to avoid errors and systemic issues that increase the likelihood of errors can be addressed. See Joshua Parker & Ben Davies, *No Blame No Gain? From a No Blame Culture to a Responsibility Culture in Medicine*, 37 *J. Applied Phil.*, 646 (2020).

75 See Nat'l Sci. Found. Off. of Inspector Gen., *supra* note 55; Lerner, *supra* note 57; Nat'l Sci. Found. Off. of Inspector Gen., *Management Challenges for NSF in FY 2017*, at 11 (2017), https://oig.nsf.gov/sites/default/files/reports/2022-01/FY17_Mgmt_Challenge.pdf [hereinafter *Management Challenges for NSF in FY 2017*].

76 Plagiarism is a form of scientific fraud, and the OIG NSF's mission states its intentions to "prevent and detect fraud." See <https://oig.nsf.gov/about/office>.

by the ORI.⁷⁷ Plagiarism involves the misappropriation of public funding and should be treated as the important issue it is by the primary government agencies seeking to regulate it.

B. "TIP OF THE ICEBERG"

Throughout the history of research misconduct study, it has been unclear whether the reported cases are underrepresentative of the extent of the issue or if research misconduct is relatively rare. It is possible that the ORI accounts for all cases of potential misconduct, but the number of plagiarism cases the NSF finds makes that unlikely. Based on a survey conducted by the Gallop Organization, reported cases appear to be just the "tip of the iceberg."⁷⁸ Underreporting comes from multiple sources at the institutional and individual levels. The ORI reports indicated that institutions disclosed an average of 1592 allegations of misconduct annually from 1992–2006, yet the ORI oversaw investigations of only 24.⁷⁹ Further, of those twenty-four, an average of twelve investigations will result in a finding of research misconduct.⁸⁰ These investigations are done by universities and may indicate a lack of institutional willingness to investigate potential misconduct. Further, only half of possible misconduct cases are reported by individuals.⁸¹ Researchers are more likely to report their colleagues' potential misconduct, if they are aware of their institutions' policies and reporting venues.⁸² Institutional and individual underreporting likely has obscured the rate of plagiarism in research.⁸³ Therefore, findings of research misconduct officially reported by the ORI do not fully reflect the extent of research misconduct.

Use of plagiarism software by the NSF has substantiated the tip of the iceberg theory. Internal audits of funded proposals using plagiarism detection software have identified substantial amounts of verbatim plagiarism.⁸⁴ As of 2013, the NSF was unable to address all instances of plagiarism discovered by these internal audits.⁸⁵ Expanding the capacity of the NSF to review both external allegations and its own proactive reviews remains an issue for the agency.⁸⁶ To alleviate this pressure on the NSF and the public funding needed to address it, other actors

77 Gallop Org. for the Off. of Rsch. Integrity, *Final Report: Observing and Reporting Suspected Misconduct in Biomedical Research* (2008), https://ori.hhs.gov/sites/default/files/gallup_finalreport.pdf.

78 *Id* at 42.

79 *Id* at 42.

80 *Id* at 42.

81 *Id* at 42.

82 *Id* at 2.

83 It is unreasonable to expect reports of all instances of plagiarism, however, proactive review of publications receiving federal funding by the ORI may bring to light cases that are not reported.

84 Mervis, *supra* note 63.

85 The NSF has a set limit of how many proposals can be submitted to its plagiarism software. See Mervis, *supra* note 63.

86 Based on my analysis of Case Closeout Memoranda, most cases closed by the NSF are raised by external allegations.

should have a more active role. This includes researchers submitting their work to plagiarism software if available, pressuring their institutions to provide plagiarism software if unavailable, institutions meeting this need, and fully investigating substantial allegations of research misconduct before submission for funding.

In cases where no federal funding is involved, institutions are not required to report allegations of plagiarism to federal agencies.⁸⁷ Further, federal definitions of plagiarism and research misconduct only apply to research funded by the federal agency.⁸⁸ This subset of allegations are defined by institutional policies and addressed as that institution deems fit. Therefore, allegations of plagiarism at the institutional level are not reported by federal agencies, and due to the nature of reputational consequences for research misconduct, universities may be incentivized not to publicly report such findings.⁸⁹ The study by the Gallup Organization found that research misconduct surpassed expected levels due to lack of institutional responses.⁹⁰ If the strain of detecting plagiarism in the thousands of submitted grant proposals is at fault for the discrepancy, widespread use of plagiarism software by universities and researchers before submission of a grant application or manuscript may reduce strain on federal agencies investigating plagiarism.

C. MOTIVATIONS

The motivations and conditions of individuals who commit research misconduct are multifaceted and complex. Researchers who have observed colleagues commit misconduct are one source of information on what motivates plagiarism. To contribute to growing discussion of research misconduct in the biomedical field, the ORI produced a report in conjunction with the Gallup Organization.⁹¹ Scientists in the survey reported their observed conditions for research misconduct, including a competitive environment, funding pressure, “publish or perish,” and advancing their careers.⁹² Research shows that the number of PhD’s in biomedical research is rising, while the number of corresponding faculty positions falls.⁹³ Combined with declining success rates in grant applications, this phenomenon may contribute to hypercompetitive research environments.⁹⁴ Most universities stress researchers’ ability to bring in federal funding and place importance on publication when

87 42 C.F.R. § 689.1 (2020).

88 42 C.F.R. § 93.101(b) (2021).

89 Research misconduct cases brought against Carlo Croce and members of his group are atypical instances of universities pursuing distinguished researchers. See Richard Van Noorden, *Exclusive: Investigators Found Plagiarism and Data Falsification in Work from Prominent Cancer Lab*, *Nature*, July 20, 2022, <https://www.nature.com/articles/d41586-022-02002-5>.

90 See Gallop Org. for the Off. of Rsch. Integrity.

91 *Id.*

92 *Id.* at 34.

93 *Understanding the Causes*, in National Academy for the Sciences et al., *Fostering Integrity in Research* (2017) [hereinafter *Understanding the Causes*].

94 *Id.*

determining tenure positions.⁹⁵ The combination of the aforementioned factors may lead researchers to sacrifice their integrity to achieve their goals.

Another source of understanding motivations is the reasoning respondents give to justify or explain their actions. The most common explanation is a lack of understanding of proper citation.⁹⁶ Some respondents claimed others were responsible for the plagiarism⁹⁷ or were bound by time constraints.⁹⁸ While some justifications for plagiarism are unfounded, differences in teaching and citation standards between United States and international institutions pose a substantiated reason that is remediable. Researchers in Carlo Croce's, a well-known cancer researcher, laboratory cited a lack of adequate training and supervision as explanation for allegations of plagiarism and falsification.⁹⁹ One researcher claimed to have never received training in what constituted plagiarism during her education in the United States or her home country of Italy.¹⁰⁰ The NSF has noted that many researchers who plagiarized had earned at least some of their degrees from international institutions.¹⁰¹ This may indicate that plagiarism sometimes occurs not because of deceitful or negligent practice, but rather is a byproduct of second language writing. Ultimately, these cases suggest that both federal agencies and institutions have failed to sufficiently educate researchers. This finding indicates that blame for a lack of understanding of proper citation requirements should be placed on the shortcomings of the research community, rather than on individual researchers, or potentially on both parties.

This discussion of motivational forces could benefit from the discoveries made in other fields. These theories regarding motivation to commit misconduct include differential association, low expectations of success, and loss aversion. Differential association, a popular theory in explaining business fraud, highlights the role peers have on an actor's decision-making.¹⁰² This theory posits that misconduct is learned

95 Based on my interactions with faculty at an R1 institution. The classification of R1 is given to universities that meet criteria of doctoral research conducted and have "very high research activity" according to the Carnegie Classifications of Institutions of Higher Education.

96 Thirty-seven percent of subjects reported not knowing what needed to be quoted, cited, or referenced, and thirty-two percent believed they did cite material appropriately when they did not. See Nat'l Sci. Found. Off. of Inspector Gen., *supra* note 55, at 7.

97 One subject blamed plagiarism on a postdoctoral researcher. Neither the university, nor the NSF were able to find any evidence the postdoc existed. See Off. of Investigations, *Case I-18-0069-O* (Oct. 2, 2020), Nat'l Sci. Found., Off. of Inspector Gen., <https://oig.nsf.gov/investigations/case-closeout-memoranda/i-18-0069-o>.

98 Nat'l Sci. Found. Off. of Inspector Gen., *supra* note 55.

99 Croce has been exonerated of allegations of research misconduct, but one member of his group was found at fault in eleven allegations of research misconduct, including plagiarism. See The Ohio State University, *Final Report of the College of Medicine Investigation Committee Concerning Allegations of Research Misconduct (DIO 7026)*, Retraction Watch (2021), https://retractionwatch.com/wp-content/uploads/2022/07/20211008-Final-Investigation-Report-Garofalo_Redacted-1.pdf.

100 *Id.*

101 Over thirty percent of subjects had been entirely educated outside of the United States. See Nat'l Sci. Found. Off. of Inspector Gen., *supra* note 55.

102 Edwin H. Sutherland, *Principles of Criminology* (4th ed.1939).

through an individual's environment, rather than a personal predisposition to misconduct. Therefore, a research culture prioritizing results and grant awards over integrity would produce less ethical scientists. Researchers' perceptions of grant award fairness may reduce ethical barriers to committing research misconduct. Thirty-nine percent of subjects in NSF plagiarism cases had never received a grant, despite submitting numerous proposals.¹⁰³ If these researchers perceive the system of selection as biased toward certain kinds of proposals, they could feel justified in engaging in research misconduct. Loss aversion may explain why the NSF experiences more cases of plagiarism by faculty than students. People are more likely to take risks to avoid losses than to secure a gain. A professor trying to make tenure may be more willing to take a risk, such as plagiarizing part of a grant application, than a postdoctoral researcher trying to find a faculty position.¹⁰⁴ In this example, both researchers have the same stakes: a faculty position. However, due to loss aversion, the potential to lose something has a greater psychological impact than the potential to gain the same thing.¹⁰⁵ It is important to note that these theories do not serve as excuses for researchers to commit misconduct, but rather as insights into why research misconduct occurs.

II. MODERN PLAGIARISM DETECTION

A. PLAGIARISM SOFTWARE

The widespread availability and use of plagiarism detection software has transformed the ability to identify plagiarism. It has allowed for the twofold discovery of both the breadth of occurrence and the depth of individual cases of plagiarism. NSF's proactive review using plagiarism software of proposals submitted in FY 2011 revealed a 1–1.5% rate of plagiarism in eight thousand funded NSF proposals.¹⁰⁶ Audits of this scale indicate the scope of plagiarism is occurring at a rate that cannot be addressed solely at the regulatory level. Plagiarism software quantifies copied text, allowing investigations to determine how many lines have been plagiarized. Quantitative analysis of individual cases of plagiarism enables agencies to prioritize cases with substantial amounts of plagiarism.

In the past, plagiarism software was predominantly used by professors to review student papers.¹⁰⁷ The first instance of algorithmic detection of duplication was with eTBLAST and the Déjà vu database. Now defunct, eTBLAST was originally created to assist researchers in finding relevant literature by checking submitted text against publications and ranking available literature in Medline by similarity.¹⁰⁸

103 Nat'l Sci. Found. Off. of Inspector Gen., *supra* note 55, at 14.

104 *See Understanding the Causes, supra* note 93.

105 Russell Poldrack, *What Is Loss Aversion*, *Sci. Am.*, July 1, 2016.

106 *See Mervis, supra* note 63. *See also* Parrish, *supra* note 6. Parrish suggested in 2006 using plagiarism software to assess the extent of copied text in grant applications.

107 Parrish, *supra* note 6.

108 Mounir Errami et al. *eTBLAST: A Web Server To Identify Expert Reviewers, Appropriate Journals And Similar Products*, 35 *Nucleic Acids Res* W12 (2007).

Other functions, such as finding applicable journals and expert reviewers, allowed researchers to efficiently interface with Medline.¹⁰⁹ A later study applied eTBLAST's capabilities to determine plagiarized material and entered allegedly plagiarized publications into the Déjà vu database.¹¹⁰ The results of the study indicated that duplicated publications were far more extensive than previously reported, and their occurrence posed a significant issue in research integrity.¹¹¹ The usefulness of eTBLAST has been absorbed by other widely available plagiarism detection software, but it remains an important initiative in understanding plagiarism.

Cases reported by the NSF indicate that some universities implement a plagiarism software review process as a sanction against respondents. For example, one respondent was required to "submit plagiarism detection software results for all proposals before submission."¹¹² The NSF and most reputable institutions use iThenticate Plagiarism-Detection Software, a resource for academics that checks documents against an extensive content database.¹¹³ Six of the nine institutions associated with an ORI plagiarism case¹¹⁴ have access to iThenticate available to students and faculty involved in research.¹¹⁵ These time-consuming cases could have been avoided had the researchers submitted their work to the software before submission for funding or publication. In the cases where the respondent acted recklessly or did not understand what constitutes plagiarism, submission to plagiarism detection software would have highlighted the unacceptable copied text.¹¹⁶ The rate of plagiarism case findings made by the ORI has not increased in the past decade as compared to previous decades. Only two of the eleven cases reported by the ORI mention using plagiarism software. In these cases, the software was used by the publisher or institution to substantiate allegations rather than to outright detect.¹¹⁷ In contrast, the NSF uses plagiarism detection software to identify and substantiate allegations of plagiarism.

The burden of detecting and investigating plagiarism remains on the research institutions and the publishing journals.¹¹⁸ Many journals use plagiarism detection

109 *Id.* at W13–15.

110 Mounir Errami et al., *Déjà vu—A Study of Duplicate Citations in Medline*, 12 *Bioinformatics* 243 (2008).

111 *Id.* at 249.

112 *See, e.g.*, Off. of Investigations, *Case Closeout Memorandum A13050061* (Sept. 12, 2014), Nat'l Sci. Found., Off. of Inspector Gen., <https://oig.nsf.gov/sites/default/files/2021-03/A13050061.pdf>; Off. of Investigations, *Case Closeout Memorandum I-18-0098-O* (Sept. 17, 2021), Nat'l Sci. Found., Off. of Inspector Gen., https://oig.nsf.gov/sites/default/files/case_closeout/2021-09/I-18-0098-O.pdf.

113 *Take Advantage of the iThenticate Plagiarism-Detection Software*, Office of Sponsored Programs, University of Pittsburgh (Aug. 20, 2021), <https://www.osp.pitt.edu/news/take-advantage-ithenticate-plagiarism-detection-software>.

114 *See* discussion in text accompanying note 12, *supra*.

115 Columbia University, not included in the six aforementioned universities, has access to Turnitin, a similar service designed for student assignments.

116 Cases in which the respondent plagiarized knowingly or intentionally would likely not benefit from plagiarism detection software as a teaching tool because they were aware their actions were a significant deviation from accepted practices.

117 *See* Weber, *supra* note 12; Jagannathan, *supra* note 12.

118 *See* Parrish, *supra* note 6.

software.¹¹⁹ For example, the *Journal of Materials Science* uses CrossCheck by iThenticate,¹²⁰ and *Nature Portfolio* is a member of Similarity Check, a service through iThenticate.¹²¹ Using plagiarism software to screen manuscripts before publication can prevent journals from publishing plagiarized work but does not prevent researchers from committing plagiarism. If more universities adopted stricter policies on submitting proposals and manuscripts to plagiarism detection software before publication, researchers would be made aware of duplicate text.¹²²

B. SHORTCOMINGS AND POTENTIAL NEGATIVE EFFECTS

Plagiarism software has made the detection of copied text easier, but barriers remain to eliminating plagiarism. Despite the ability of plagiarism software to screen for copied text, it is not a comprehensive detection method. Authors can circumvent plagiarism software by minimal rewording.¹²³ Increased automation capabilities allow for malicious acts of plagiarism to go undetected. Although able to quantify lines of copied text, the software does not yet detect stolen ideas or processes when the wording is altered.¹²⁴ It also does not check against unpublished work such as in the case of a peer reviewer plagiarizing a paper they reviewed.¹²⁵ Therefore, plagiarism software may be a solution to the most blatant cases of plagiarism, but it does not eliminate stolen content.

Rather than relying on technological advancements to solve for problems created by increased automation, experts in the field have proposed using human-generated qualitative assessments and cooperative initiatives to equip journals with tools to combat misconduct.¹²⁶ These recommendations have been posed

119 The NSF OIG detects plagiarism through two avenues: various sources of research misconduct allegations and proactive reviews of grant applications. Both avenues utilize plagiarism detection software. See Nat'l Sci. Found., Off. of Inspector Gen., *supra* note 55.

120 C. Barry Carter & Christopher F. Blanford, *Plagiarism and Detection*, 51 J. Materials Sci., 7047(2016).

121 *Plagiarism and Duplicate Publication*, Nature, <https://www.nature.com/nature/editorial-policies/plagiarism>.

122 See, e.g., Off. of Investigations, *Case Closeout Memorandum I-16-0108-O* (May 8, 2020), Nat'l Sci. Found., Off. of Inspector Gen., <https://oig.nsf.gov/investigations/case-closeout-memoranda/i-16-0108-o>. In this case, the university required a researcher who plagiarized to submit future work to plagiarism detection software.

123 Chairman Bill Forster and Representative Ed Perlmutter used an online artificial intelligence text generator and minimal rewording to create a fake publication that evaded plagiarism detection software. See Investigations & Oversight Subcomm. Hearing, *Paper Mills and Research Misconduct: Facing the Challenges of Scientific Publishing*, (July 20, 2022) (Statement by Chairman Bill Foster), <https://science.house.gov/hearings/paper-mills-and-research-misconduct-facing-the-challenges-of-scientific-publishing>.

124 Olga D. Baydik & Armen Yuri Gasparyan, *How to Act When Research Misconduct Is Not Detected by Software but Revealed by the Author of the Plagiarized Article*, 31 J. Korean Med. Sci 1508 (2016).

125 See, e.g., Karnik, *supra* note 12.

126 The Investigations & Oversight Subcommittee held a hearing with leading international experts on the issue of paper mills within research misconduct. See Hearing Before the Investigations & Oversight Subcomm., Comm. on Science, Space, & Technology, *Paper Mills and Research Misconduct: Facing the Challenges of Scientific Publishing*, (July 20, 2022), <https://science.house.gov/hearings/paper-mills-and-research-misconduct-facing-the-challenges-of-scientific-publishing>.

to address paper mills but can be extended to plagiarism. Previously suggested solutions of creating better plagiarism detection software to keep pace with advancing text generation technology would practically result in an arms race between those attempting to exploit the proliferation of online journals *and* those attempting to regulate it. Current online platforms like PubPeer share discussions of scientific literature publicly.¹²⁷ This site has exposed low-quality research by allowing for members of the scientific community to post concerns. Increased investment in resources like the STM Integrity Hub allows journals to discuss best practices for publishing quality research.¹²⁸ Efforts to decrease plagiarism are most effective when attempting to address different facets. Both solutions address the inability of current plagiarism detection software to identify uncredited content that has been reworded.

III. EFFECTIVENESS OF RCR TRAINING

A. INSTITUTIONAL REQUIREMENTS FROM THE ORI

The PHS requires institutions to create environments of responsible research conduct through RCR training, prevent research misconduct, and take immediate action against potential misconduct.¹²⁹ RCR training is predominantly given to students when beginning their careers in research, and involves sessions on proper attribution and other conduct. Institutions must file an annual report with the ORI to ensure compliance with the aforementioned policy.¹³⁰ It is unclear to what extent compliance with this requirement is tracked and assessed.

B. INSTITUTIONAL REQUIREMENTS FROM THE NSF

The 2007 America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act¹³¹ was intended to keep America on track with international standards of research.¹³² Section 7009 of the Act establishes an RCR requirement for all grantees of federal funding through the NSF. The NSF enacted its RCR training requirement on January 4, 2010.¹³³ This requirement applies to “undergraduate students, graduate students, and post-doctoral researchers

127 *See Id.* (statements by Brandon Stell PhD).

128 *See Id.* (statements by Chris Graf). The STM Integrity Hub is an online platform facilitating the sharing of research integrity resources between journals.

129 45 C.F.R. § 93.300(c) (2020).

130 45 C.F.R. § 93.302(b) (2020).

131 America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science Act, Pub. L. No. 110-69, 121 Stat. 572 (2007).

132 The America COMPETES Act was updated in 2010, but it does not contain any legislation affecting research integrity. *See* America COMPETES Reauthorization Act of 2010, Pub. L. No. 111-358, 124 Stat. 3982 (2010).

133 Nat’l Sci. Found., *Responsible Conduct of Research (RCR)* (Jan. 4, 2010), https://www.nsf.gov/pubs/policydocs/pappguide/nsf16001/aag_4.jsp#IVB

participating in the proposed research project.”¹³⁴ Although it is important to educate the people working on current research and the future generation of researchers, faculty account for eighty-two percent of findings of plagiarism.¹³⁵ The NSF also requires grantee institutions to designate compliance personnel and verify student compliance with the training.¹³⁶ Guidelines and templates are not currently provided by the NSF, but institutional examples are posted on its website.¹³⁷

Improvements on educational and regulatory fronts would decrease the extent of plagiarism. In 2013, the NSF conducted a review of institutional responses to the RCR requirement.¹³⁸ Their findings indicated that, before NSF’s contact, approximately one-fourth of universities in the survey did not have an RCR training program in place. Between the completion of the survey in 2013 and the publication of the report in 2017, most of the noncompliant universities had created an RCR program, resulting in a ninety-two percent compliance rate. The first implication of this study and subsequent report is the implied lack of RCR training at universities and institutions receiving NSF funding. The NSF surveyed a sample of 53 out of the 1800 universities receiving federal funding to accumulate this data.¹³⁹ Applying the noncompliance rate of contacted universities, four hundred universities could be noncompliant. The second implication is that the NSF should contact the remaining 1747 to improve compliance with RCR training. This poses a simple solution and could provide a measurable increase in the percentage of compliant universities.

IV. DECLINE OF PUBLIC TRUST IN SCIENCE

Universally, the scientific community is facing a crisis of trust, and trust from the public is intrinsic to science’s ability to benefit society.¹⁴⁰ Responses to this crisis must be established on an understanding of its many causes: a combination of politicization and polarization, information overload, disinformation campaigns, and the expansion of public access to the scientific process.¹⁴¹ Although increased public involvement in science can bridge the divide between scientists and other members of the community, availability of research before vetting by the scientific community furthers misinformation. Research misconduct contributes to the growing

134 42 USC § 1862o-1 (2020).

135 Nat’l Sci. Found. Off. of Inspector Gen., *supra* note 55.

136 *Management Challenges for NSF in FY 2017*, *supra* note 75..

137 *Id.*

138 Nat’l Sci. Found. Off. of Inspector Gen., *OIG Review of Institutions’ Implementation of NSF’s Responsible Conduct of Research Requirements* (Jul 25, 2017), https://oig.nsf.gov/sites/default/files/reports/2021-04/RCR_MIR_Final_7-25-17%20%281%29.pdf.

139 <https://www.nsf.gov/about/partners/states/index.jsp#:~:text=National%20Science%20Foundation%20funds%20reach,colleges%2C%20universities%20and%20other%20institutions.>

140 Sudip Parikh, *Why We Must Rebuild Trust in Science*, Pew Charitable Trs., Trend Magazine, Feb. 9, 2021.

141 Boyle, *supra* note 11.

distrust of the scientific community from some members of the public.¹⁴² Plagiarism weakens scientific credibility, and people are less likely to believe in scientific research when they perceive deception in the institutions producing it.¹⁴³

One method of restoring trust in science is to foster connection between science and the communities it serves.¹⁴⁴ Publicizing instances of plagiarism may help to rebuild public trust in science, or it may serve to further demonize scientists by portraying them as not working for the benefit of society.¹⁴⁵ Proving to the public that research misconduct is adequately addressed may dispel perceptions of science as underregulated. Alternatively, making a public display of plagiarists could unintentionally reinforce negative narratives. The effects of increased transparency about plagiarism may be mixed. Regardless, the prevention of plagiarism is an important initiative to rebuilding this trust. By promoting integrity, the scientific community can regain the credibility with funders and the public.¹⁴⁶

V. ELIMINATING PLAGIARISM

A. CONGRESSIONAL EFFORTS

The 2022 update to the America COMPETES Act resolves two current issues in addressing research misconduct: lack of an RCR requirement for faculty and research on research misconduct.¹⁴⁷ The primary focus of the CHIPS and Science Act of 2022¹⁴⁸ is to fund technological research and promote manufacturing of semiconductors in the United States.¹⁴⁹ However, section 10335 contains a renewed effort for NSF grants supporting the institutional investigation of research misconduct. This section enables the NSF to fund and accumulate a greater body of knowledge on research misconduct. Funded research on the causes and solutions of research misconduct is a step in the process of decreasing instances of plagiarism.¹⁵⁰ The paramount section of this bill, in the discussion of plagiarism cases, is the amendment to section 7009 of the America COMPETES Act. The CHIPS

142 *Management Challenges for NSF in FY 2017, supra note 75.*

143 Jonathan Haidt. *Why the Past 10 Years of American Like Have Been Uniquely Stupid.* The Atlantic, Apr. 11, 2022.

144 *See Parikh, supra note 139.*

145 *Id.*

146 *Id.*

147 Originally known as the America COMPETES Act of 2022 in the House of Representatives and the United States Innovation and Competition Act of 2021 in the Senate [hereinafter CHIPS and Science Act of 2022]. *See* Titles—H.R. 4521—117th Congress (2021–22): United States Innovation and Competition Act of 2021, H.R.4521, 117th Cong. (2022).

148 CHIPS and Science Act of 2022, H.R. 4346, 117th Cong., § 10335 (2022).

149 Editorial Board, *Congress's Big China Bill Must Pass—But with Strings Attached*, Wash. Post (July 2, 2022).

150 The need for further research on research misconduct has been made clear by both the National Academies of Sciences, Engineering, and Medicine and the Gallop Organization. *See Understanding the Causes, supra note 93; Gallop Org. for the Off. of Rsch. Integrity, supra note 77.*

Act added faculty and “other senior personnel” to the individuals required to complete RCR training. The amendment also adds a mentorship requirement. The amended section states:

The Director [of the NSF] shall require that each institution that applies for financial assistance from the Foundation for science and engineering research or education describe in its grant proposal a plan to provide appropriate training and oversight in the responsible and ethical conduct of research to undergraduate students, graduate students, postdoctoral researchers, faculty, and other senior personnel participating in the proposed research project, including—

- (1) mentor training and mentorship;
- (2) training to raise awareness of potential research security threats; and
- (3) Federal export control, disclosure, and reporting requirements.¹⁵¹

The addition of an RCR requirement for faculty and mentorship programs addresses the aforementioned issues¹⁵² and follows NSF recommendations discussed below.

B. NSF RECOMMENDATIONS

The NSF OIG recommends a variety of approaches to solve plagiarism at the institutional level, which would assist in eliminating the “tip of the iceberg” issue. These strategies include supporting inexperienced grant writers, strengthening an institutional culture of integrity, including faculty requirements in RCR training, and modifying document submission practices.¹⁵³ Mentorship programs are an opportunity for inexperienced grant writers to be paired with a successful researcher to learn standards and techniques for drafting better proposals.¹⁵⁴ The NSF believes universities play an important role in building a community of ethical researchers. Through establishing norms that promote integrity in research, institutions can decrease rates of misconduct allegations.

C. CREATING EFFECTIVE RCR PROGRAMS

Unlike other forms of research misconduct, simple solutions, such as required RCR training, show a measurable decrease in occurrences of plagiarism.¹⁵⁵ Almost seventy percent of researchers found to have plagiarized cite lack of knowledge

151 See CHIPS and Science Act of 2022, *supra* note 148.

152 As discussed previously, faculty constitute the majority of plagiarism cases. The addition of a RCR requirement for this group of researchers should decrease instances of plagiarism due to carelessness or lack of knowledge.

153 See Nat'l Sci. Found. Off. of Inspector Gen., *supra* note 55.

154 *Id.*

155 Alison McCook, *Do Interventions to Reduce Misconduct Actually Work? Maybe Not, Says New Report*, Retraction Watch (Apr. 12, 2016) <https://retractionwatch.com/2016/04/12/do-interventions-to-reduce-misconduct-actually-work-maybe-not-says-new-report/>.

on adequate citation practices.¹⁵⁶ These statistics demonstrate the need for effective RCR training courses. Improvements can be made by both NSF guidelines and institutional responses to them. Rather than prescribing RCR training only for faculty after a finding of research misconduct has been made, universities should require all faculty to complete training as a part of ongoing learning throughout their careers.¹⁵⁷ This approach may foster more integrity in the research community as a whole, instead of only focusing on cases of misconduct. Effective RCR training, if not a simple solution to a complex issue, will eliminate respondents' abilities to claim lack of knowledge as an explanation for plagiarism.

Not only does plagiarism software have a deterring effect,¹⁵⁸ it can also serve as a tool to teach proper citation.¹⁵⁹ In cases of second language writing and lack of knowledge regarding appropriate citation standards, plagiarism software can highlight discrepancies and provide a teaching moment. RCR training can bolster antiplagiarism courses with a section where the instructor walks through using plagiarism software. This may be more beneficial if researchers taking the course are able to submit their own work to the software during the training and receive feedback on its originality. Using an objective tool, RCR training can address potential cultural differences tactfully.

D. TAILORING SANCTIONS TO DECREASE PLAGIARISM

Rather than focusing on the extent of the plagiarism and whether the respondent had a pattern of similar behavior, sanctions might be enacted based on the environmental factors outside of the respondent's control and their ability to mitigate those factors.¹⁶⁰ For example, a principal investigator may feel pressured by approaching deadlines and other faculty responsibilities to cut corners and plagiarize the background section of a grant application. In this hypothetical case, the researcher had the ability to mitigate some of the external factors, such as prioritizing the grant application well ahead of the deadline, but cannot control an academic system that depends on attracting funding.

VI. CONCLUSION

Plagiarism is a recurrent issue within academic research. Discrepancies in approaches and attitudes toward addressing plagiarism between the two primary federal agencies regulating it has grown exponentially in recent years. Current cases may not reflect the extent of plagiarism that occurs in scientific research, but plagiarism detection software is one mechanism to detect straightforward cases of

156 See Nat'l Sci. Found. Off. of Inspector Gen., *supra* note 55.

157 Epidemiological research suggests that universal risk reduction is more effective in combatting widespread disease risk than only targeting specific high-risk groups. See *Understanding the Causes*, *supra* note 93.

158 Paul Stapleton, *Gauging the Effectiveness of Anti-Plagiarism Software: An Empirical Study of Second Language Graduate Writers*, 11 J. Eng. for Acad. Purposes 125 (2012).

159 Marina Dodigovic, *The Role of Anti-Plagiarism Software in Learning to Paraphrase Effectively* (2013).

160 See Parker & Davies, *supra* note 74.

plagiarism. RCR training, which has shown to be effective in reducing plagiarism but which some institutions apparently are not providing, could also reduce the lack of knowledge regarding proper citation methods. Most significantly, public distrust in science has made addressing research misconduct an important endeavor for the scientific community and must be continually addressed through collaborative efforts.

CALIFORNIA DREAMIN': CAN STATE UNIVERSITIES LEGALLY HIRE NON-WORK AUTHORIZED ALIENS

GEORGE FISHMAN*

ABSTRACT

A notable group of immigration law professors has assured California that it can allow its State universities to hire aliens not authorized to work under federal law, concluding that the Immigration Reform and Control Act of 1986's "prohibition on hiring undocumented persons [known as employer sanctions] does not bind state government entities". They contend that Congress cannot intrude on the States' historic police power to regulate employment without being explicit about doing so, and IRCA does not explicitly spell out that employer sanctions apply to States as employers. The professors also contend that the States' constitutional right to select their elected and non-elected leaders allows them to hire unauthorized aliens as professors, regardless of any congressional command to the contrary.

I conclude that the professors' first argument is incorrect because 1) Congress clearly intended employer sanctions to apply to all employers, 2) Congress had good reason for not spelling out application to the States, 3) Congress can evidence its clear and manifest purpose without the need for such a spelling out, and 4) in any case, employer sanctions are unlikely to be the sort of mandate that require any spelling out in the first place.

I further conclude that the professors' second argument may possibly be correct—to the extent employer sanctions were applied to State policy-making officials. However, the right of State universities to hire unauthorized aliens as professors would have to be extrapolated from Supreme Court rulings that States have the right to impose citizenship tests for positions such as public school teachers. This is a bridge too far. It is not clear that courts would agree to the obverse of the principle—that States have a right to expand eligibility to non-citizens, even to aliens unauthorized to work in the United States. And even if courts were to agree in the context of public school teachers, it is unlikely that they would equate professors with school teachers as performing a role that goes to the heart of representative government.

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INTRODUCTION

On October 19, 2022, Miriam Jordan reported in the *New York Times* that

[A] coalition of undocumented student leaders and some of the nation's top legal scholars is proposing that California... begin employing undocumented students at the 10 University of California campuses.

The proposal... calls for the state to defy current interpretations of a 1986 federal immigration law that prohibits U.S. employers from hiring undocumented immigrants. [A] new legal analysis... argues that the law does not apply to states.

Backed by Erwin Chemerinsky, the dean of the University of California, Berkeley, School of Law; Adam B. Cox of New York University Law School; and constitutional and immigration scholars at Cornell, Stanford and Yale, among other universities, the concept that those in the country unlawfully could be hired for state jobs could have implications for California, where the U.C. system is the third-largest employer, and for the broader population of... undocumented people who live in the United States.¹

The student leaders wrote a letter to Michael Drake, the President of the University of California ("UC"), in which they "request that [he] implement the strategy set forth in this letter to permit the hiring of undocumented students for positions of employment within the University of California—even if they lack explicit authorization to be employed under federal law."² They argued that

UC has a moral and legal obligation to act *now* on behalf of our undocumented graduate and undergraduate students. Critically, hundreds of thousands of undocumented students across the nation already cannot access DACA,³ because

1 Miriam Jordan, *Students, Legal Scholars Push California Universities to Hire Undocumented Students*, N.Y. TIMES, Oct. 19, 2022, <https://www.nytimes.com/2022/10/19/us/daca-dreamers-university-of-california.html>.

2 Letter from Karely Amaya Rios, Co-Chair, IDEAS (Improving Dreams Equity Access and Success) at UCLA '19-22, Co-Chair, Undocumented Student-Led Network (USLN), Master of Public Policy Candidate, University of California, Los Angeles (UCLA); Jeffrey Umaña Muñoz, Retention Director, USLN, Co-Chair, IDEAS at UCLA, Bachelor of Arts Candidate, UCLA; Carlos Alarcon, Co-Chair, USLN, Master of Public Policy Candidate, UCLA; Abraham Cruz Hernandez, Co-Chair, IDEAS at UCLA '19-22, Administrative Director, USLN, Bachelor of Arts Candidate, UCLA; Hiroshi Motomura, Susan Westerberg Prager Distinguished Professor of Law, Faculty Co-Director, Center for Immigration Law and Policy (CILP), UCLA School of Law; Ahilan Arulanantham, Professor from Practice, Faculty Co-Director, CILP, UCLA School of Law; Astghik Hairapetian, Law Fellow, CILP, UCLA School of Law; Kent Wong, Director, Labor Center, UCLA; Victor Narro, Project Director, Labor Center, UCLA, Lecturer in Law, UCLA School of Law; Chris Newman, Lecturer, Labor Studies Department, UCLA; Ju Hong, Director, Dream Resource Center, UCLA Labor Center, and Aidin Castillo Mazantini, Executive Director, UC Immigrant Legal Services Center, to Michael Drake, President, University of California, at 1 (Oct. 2022), <https://docs.google.com/document/d/1VoKC7DPCr-PO414Z-7r8CudhYFirey4DlMnRoRK8etk/edit>.

3 As the U.S. Department of Homeland Security describes the DACA program (Deferred Action for Childhood Arrivals),

they entered the U.S. after the policy's cutoff date—which requires people to have entered the United States prior to June 15, 2007, because they sought to apply after July 2021—when a court order barred the federal government from accepting new applications,⁴ or for other reasons related to ongoing litigation over the program. As a result of these developments, many students already pursuing graduate and undergraduate studies, and the vast majority of undocumented high school graduates this year, cannot access DACA.

At [UC], students who cannot access DACA are being systematically denied opportunities afforded to their classmates. ... This unfair treatment of our undocumented students must end, and the University has legal authority to end it.⁵

On June 15, 2012, then-Secretary of Homeland Security ... Janet Napolitano issued a memorandum providing new guidance for the exercise of prosecutorial discretion with respect to certain young people who came to the United States years earlier as children, who have no current lawful immigration status, and who were already generally low enforcement priorities for removal ... DHS [would] consider granting "deferred action," on a case-by-case basis, for individuals who:

1. Came to the United States under the age of 16;
2. Continuously resided in the United States for at least 5 years preceding June 15, 2012, and were present in the United States on that date;
3. Are in school, have graduated from high school, have obtained a General Education Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
4. Have not been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, or otherwise do not pose a threat to national security or public safety; and
5. Were not above the age of 30 on June 15, 2012.

Individuals who request relief under this policy, meet the criteria above, and pass a background check may be granted deferred action. Deferred action is a longstanding practice by which DHS ... ha[s] exercised their discretion to forbear from or assign lower priority to removal action in certain cases for humanitarian reasons, for reasons of administrative convenience, or on the basis of other reasonable considerations involving the exercise of prosecutorial discretion.

Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53153 (Aug. 30, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-08-30/pdf/2022-18401.pdf>. An alien granted deferred action may apply for work authorization "if the alien establishes an economic necessity for employment." 8 C.F.R. § 274a.12(c)(14) (2022).

4 DHS states on its website that:

On July 16, 2021, the U.S. District Court for the Southern District of Texas held that the DACA policy "is illegal." The Court granted summary judgment on plaintiffs' Administrative Procedure Act (APA) claims; vacated the June 15, 2012 DACA memorandum ... remanded [it] to DHS for further consideration; and issued a permanent injunction prohibiting the government's continued administration of DACA and the reimplementation of DACA without compliance with the APA. The Court, however, temporarily stayed its order vacating the DACA memorandum and its injunction with regard to individuals who obtained DACA on or before July 16, 2021, including those with renewal requests.

DHS, Deferred Action for Childhood Arrivals (DACA): Important Information About DACA Requests, <https://www.dhs.gov/deferred-action-childhood-arrivals-daca> (last visited Apr. 11, 2023). See *Texas v. U.S. and Perez v. New Jersey*, 1:18-CV-00068 (S.D. Tex. July 16, 2021) (order granting permanent injunction), https://www.govinfo.gov/content/pkg/USCOURTS-txsd-1_18-cv-00068/pdf/USCOURTS-txsd-1_18-cv-00068-4.pdf.

5 Letter from Karely Amaya Rios et al., to Michael Drake, *supra* note 2, at 1.

As Ms. Jordan reported

Ahilan Arulanantham, co-director of the Center for Immigration Law and Policy at U.C.L.A., said he began hearing last year from faculty about a worsening problem with the increase in the number of undocumented students without DACA protections—students who could not be paid to work as research assistants or in other campus jobs.

Mr. Arulanantham's team had already concluded that the federal law against hiring undocumented people did not bind states, and they began holding listening sessions with scholars across the country to vet their reasoning.⁶

"This proposal has been hiding in plain sight," Mr. Arulanantham said. "For nearly 40 years, state entities thought they were bound by the federal prohibition against hiring undocumented students when, in fact, they were not."⁷

Who were the law professors and what exactly did they conclude? The twenty-seven professors⁸ have indeed assured the State of California that it can, consistent

6 Jordan, *supra* note 1.

7 *Id.*

8 Sameer Ashar, Clinical Professor of Law, Associate Dean for Equity Initiatives, UC Irvine School of Law; Jennifer M. Chacón, Professor of Law, Stanford Law School; Dean Erwin Chemerinsky, Jesse H. Choper Distinguished Professor of Law, Berkeley Law; Adam B. Cox, Robert A. Kindler Professor of Law, New York University Law School; Ingrid Eagly, Professor of Law, UC, Los Angeles School of Law; Pratheepan Gulasekaram, Professor of Law, Santa Clara University School of Law; Dean Kevin Johnson, Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies, UC Davis School of Law, Michael Kagan, Joyce Mack Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law; Peter Markowitz, Professor of Law, Benjamin N. Cardozo School of Law; Shoba Sivaprasad Wadhia, Associate Dean for Diversity, Equity and Inclusion, Samuel Weiss Faculty Scholar/Clinical Professor of Law, Penn State Law; Michael Wishnie, William O. Douglas Clinical Professor of Law, Yale Law School; Stephen Yale-Loehr, Professor of Immigration Law Practice, Cornell Law School; Victor C. Romero, Maureen B. Cavanaugh Distinguished Faculty Scholar & Professor of Law, Penn State Law-University Park; Stephen Lee, Professor of Law, UC Irvine; Ming Hsu Chen, Professor of Law, Harry & Lillian Hastings Research Chair, Director of the Center on Race, Immigration, Citizenship and Equality, UC Hastings College of the Law; César Cuauhtémoc García Hernández, Gregory Williams Chair in Civil Rights and Civil Liberties, Professor of Law, Ohio State University; Angélica Cházaro, Charles I. Stone Professor of Law, University of Washington School of Law; David Baluarte, Associate Dean for Academic Affairs, Clinical Professor of Law and Director, Immigrant Rights Clinic, Washington and Lee University School of Law; Daniel Kanstroom, Professor of Law, Thomas F. Carney Distinguished Scholar, Faculty Director, Rappaport Center for Law and Public Policy, Co-director, Center for Human Rights and International Justice, Boston College Law School; M Isabel Medina, Ferris Distinguished Professor of Law, Loyola University New Orleans College of Law; Gabriel J. Chin, Edward L. Barrett Jr. Chair and Martin Luther King Jr. Professor of Law, UC Davis School of Law; Angela M. Banks, Charles J. Merriam Distinguished Professor of Law, Sandra Day O'Connor College of Law, Arizona State University; Margaret H. Taylor, Professor of Law, Wake Forest University School of Law; Stella Burch Elias, Professor of Law & Chancellor William Gardiner Hammond Fellow in Law, University of Iowa College of Law; Juliet P. Stumpf, Robert E. Jones Professor of Advocacy and Ethics, Lewis & Clark Law School; Jennifer Gordon, Professor of Law, Fordham University School of Law; Allison Brownell Tirres, Associate Professor and Associate Dean for Academic Affairs and Strategic Initiatives, DePaul University College of Law. *See* Letter from Hiroshi Motomura, Susan Westerberg Prager Distinguished Professor of Law, Faculty

with federal law, grant California State universities the ability to hire and employ aliens not authorized to work in the United States (“unauthorized aliens”). They write to “offer legal analysis of a proposal that representatives of [UC] have recently received...[that] urges [it]...to hire undocumented students for positions within UC even if they lack employment authorization under federal immigration law.”⁹ They conclude that “[i]n our considered view, based on research and analysis of this proposal and more generally on our study of the relevant federal statutory and constitutional provisions over many years, no federal law prohibits UC from hiring undocumented students”, “IRCA’s [the Immigration Reform and Control Act of 1986¹⁰] prohibition on hiring undocumented persons does not bind state government entities,”¹¹ and they “affirm that we believe that the legal foundation for hiring undocumented students within UC... is sound.”¹²

The professors have written a memorandum laying out their legal reasoning.¹³ The memo contends that “IRCA’s prohibition [on hiring unauthorized aliens] *likely* does not bind State government entities.”¹⁴ As indicated by the inclusion of the qualifier likely, the professors hedge their bet in the memo in a way they do not in the letter. Similar qualifiers can also be found elsewhere in the memo, as when the professors are careful to state that “on balance, the evidence *probably favors* a finding that IRCA does not bind States”¹⁵ and “IRCA is *probably* best read to not bind the States.”¹⁶

The first primary argument the professors put forth is that IRCA does not explicitly spell out that its prohibition against knowingly hiring or employing unauthorized aliens applies to States as employers, and that without such a *spelling out*, Congress cannot intrude on the States’ historic police power to regulate employment within their boundaries. The professors’ second primary argument is that since States have a constitutional right to select their elected and nonelected leaders under

Co-Director, Center for Immigration Law and Policy, UC Los Angeles School of Law and Ahilan Arulanantham, Professor from Practice, Faculty Co-Director, Center for Immigration Law & Policy, UC Los Angeles School of Law, to whom it may concern, at 3–6 (Sept. 7, 2022), <https://docs.google.com/document/d/1TDBqeo4MUmHk2mxlwCd0tYvWYLV1xVX4m-jO4CV7-E/edit> (last visited Apr. 11, 2023).

9 *Id.* at 1.

10 Pub. L. No. 99-603, § 101(a), 100 Stat. 3360 (1986) (codified as amended at § 274A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a), <https://www.congress.gov/99/statute/STATUTE-100/STATUTE-100-Pg3445.pdf>).

11 Letter from Hiroshi Motomura and Ahilan Arulanantham to whom it may concern, *supra* note 8, at 2.

12 *Id.*

13 Memorandum from Ahilan Arulanantham, Hiroshi Motomura, and Astghik Hairapetian, UCLA Center for Immigration Law and Policy, *Memo Analyzing Whether IRCA Applies to States* (Oct. 2022), <https://docs.google.com/document/d/1TDBqeo4MUmHk2mxlwCd0tYvWYLV1xVX4m-jO4CV7-E/edit> (last visited Apr. 11, 2023).

14 *Id.* at 7 (emphasis added).

15 *Id.* (emphasis added).

16 *Id.* at 8 (emphasis added).

criteria of their choosing, they consequently have a constitutional right to employ unauthorized aliens as professors at State universities, regardless of any command to the contrary by the U.S. Congress.

The stakes are high because, as Ms. Jordan reports, “[t]he class of young immigrants who grew up in the United States but are not eligible for DACA is expanding at the rate of 100,000 people each year.”¹⁷ The stakes are also high because, as she also reports,

[C]ritics said it would most likely lead to legal challenges, as well as potential conflicts with the federal government. The Biden administration has tried to expand DACA protections and would be unlikely to take enforcement action, but a Republican administration could take a much stricter approach, said Josh Blackman, constitutional law professor at the South Texas College of Law Houston.

“It’s all fun and games with the Biden administration in town,” he said. “But in January 2025, if a Republican president takes office, California could be in for litigation and some ruinous fines.”¹⁸

On May 18, 2023, “[t]he [UC] regents, saying they support an equitable education for all, unanimously agreed . . . to find a pathway to enact a bold policy to hire students who lack legal status and work permits.”¹⁹

Teresa Watanabe reported in the Los Angeles Times that

The [UC] system has been under pressure to challenge a 1986 federal law barring the hiring of immigrants without legal status by asserting that it does not apply to states. . . . The regents voted to form a working group to examine that legal issue, along with practical considerations about how to roll out a policy that is already igniting controversy. But they made clear they are committed to their immigrant students and said the working group would complete its proposed plan by November.

“Absolutely, it is our intention to find a way to allow employment opportunities for all our students, regardless of their immigration status,” said Regent John A. Pérez, one of the key leaders in the effort to push a new policy forward. But he added the university needs time to work through the complex issue.

“This is too important to get wrong,” he said.

UC President Michael V. Drake and Board of Regents Chair Rich Leib also affirmed UC’s commitment to equity. “The University is committed to ensuring that all students, regardless of their immigration status, can pursue

17 Jordan, *supra* note 1.

18 *Id.* California would also be a risk for criminal penalties, primarily for engaging in a pattern or practice of violations of employer sanctions. See *infra* sec. I.

19 Teresa Watanabe, *UC Regents Take Groundbreaking Step Toward Hiring Immigrant Students Without Legal Status*, L.A. Times, May 18, 2023, <https://www.latimes.com/california/story/2023-05-18/uc-students-legal-status-work-permits-daca>.

and attain a world-class UC education. This should include providing enriching student employment opportunities to all students," they said in a joint statement.

UC officials have also weighed the potential for litigation against the university, public backlash and possible legal exposure to faculty and staff who would hire the students. Leib said regents need to make sure they consider the effect on all university members, including campus leaders who will need to implement any new policy.²⁰

In this article, I will evaluate the professors' arguments. As to their first argument, I conclude that it is most likely incorrect for a number of reasons, including that Congress can evidence its *clear and manifest* purpose without the need for a spelling out if a State's policy would produce a result inconsistent with the objective of the federal statute and that IRCA's employer sanctions are unlikely to be the type of provisions that even arguably require such a spelling out.

As to the professors' second argument, it may be correct—to the extent that IRCA's employer sanctions should be applied to State elected and policy-making officials. However, whether States have a constitutional right to hire unauthorized aliens as professors at State universities is a much more tenuous (but still fascinating) claim. Such a right would have to be extrapolated from Supreme Court rulings that States have the right to impose citizenship tests for positions such as police officers and public school teachers. For college professors, this is likely a bridge too far. First, even if federal courts were to equate college professors with public school teachers, it is far from clear that they would agree that States may properly expand employment eligibility to aliens prohibited from employment under federal law—far afield from the principle that States may properly limit eligibility to U.S. citizens. Second, it is most likely that the courts would not equate professors at State universities with public school teachers, for reasons including the unique national purpose in providing youth with a basic education, the compulsory nature of attendance at elementary and secondary school, and the inherent developmental differences between children and adults.

I. EMPLOYER SANCTIONS

The Select Commission on Immigration and Refugee Policy ("Select Commission") concluded in its final report in 1981 that

The Select Commission's determination to enforce the law is no reflection on the character or the ability of those who desperately seek to work and provide for their families. ... But if U.S. immigration policy is to serve this nation's interests, it must be enforced effectively. This nation has a responsibility to its people—citizens and resident aliens—and failure to enforce immigration law means not living up to that responsibility.²¹

20 *Id.*

21 SELECT COMM'N ON IMMIGRATION AND REFUGEE POL'Y, U.S. IMMIGRATION POLICY AND THE NATIONAL

The vast majority of undocumented / illegal aliens are attracted to this country by employment opportunities. ... As long as the possibility of employment exists, men and woman seeking economic opportunities will continue to take great risks to come to the United States, and curing illegal immigration will be extremely difficult. ... [T]he success of any campaign to curb illegal migration is dependent on the introduction of new forms of economic deterrents.²²

Without an enforcement tool to make the hiring of undocumented workers unprofitable, efforts to prevent the[ir] participation... in the labor market will continue to meet with failure. Indeed, the absence of such a law serves as an enticement for foreign workers. ... [S]ome form of employer sanctions is necessary if illegal migration is to be curtailed.²³

The Select Commission was established by Congress in 1978 "to study and evaluate... existing laws, policies, and procedures governing the admission of immigrants and refugees to the United States" and to make "administrative and legislative recommendations."²⁴ Joyce Vialet, a Congressional Research Service ("CRS") Specialist in Immigration Policy, wrote a report at the request of the Senate Judiciary Committee in which she concluded that the Select Commission "was established in part in response to Congress' frustration in dealing with the seemingly intractable undocumented alien issue."²⁵ The Select Commission was chaired by Rev. Theodore Hesburgh, C.S.C., the president of the University of Notre Dame and former Chair of the U.S. Commission on Civil Rights.

In 1981, the Select Commission issued its report. The Commissioners voted 14–2 in favor of employer sanctions.²⁶ However, the Commissioners were "unable to reach a consensus as to the specific type of identification that should be required for verification"²⁷ of employment eligibility.

In 1986, the House Judiciary Committee affirmed the Select Commission's reasoning:

The principle means of... curtailing future illegal immigration... is through employer sanctions...

INTEREST: THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY COMMISSIONERS 12 (1981), <https://babel.hathitrust.org/cgi/pt?id=uc1.31210011018916&view=1up&seq=106>.

22 *Id.* at 59.

23 *Id.* at 62.

24 Pub. L. No. 95-412, § 4(c), 92 Stat. 907 (1978), <https://www.congress.gov/95/statute/STATUTE-92/STATUTE-92-Pg907.pdf>.

25 JOYCE VIALET, CRS, LIBRARY OF CONGRESS, U.S. IMMIGRATION LAW AND POLICY 1952–1986: A REPORT PREPARED FOR THE USE OF THE SUBCOMMITTEE ON IMMIGRATION AND REFUGEE AFFAIRS, COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, S. Print 100–100, at 89 (1988).

26 SELECT COMMISSION, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, *supra* note 21, at 61.

27 *Id.* at 68. The Commissioners voted 9–7 in favor of employer sanctions with an existing form of identification and 8–7–1 (pass) in favor of sanctions with "some system of more secure identification." *Id.* at 61.

Employment is the magnet that attracts aliens here illegally. ... Employers will be deterred by... penalties... from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.

The logic of this approach has been recognized and backed by the past four administrations, and by the Select Commission...

Now, as in the past, the Committee remains convinced that... employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens.²⁸

In that year, employer sanctions were finally enacted into law as a part of IRCA. Senator Alan Simpson stated during Senate floor consideration that the legislation was “the basic work product of [the Select Commission].”²⁹ The Senate passed its version on September 19, 1985, by a vote of 69—30,³⁰ and the House passed its version on October 9, 1986, by voice vote.³¹ A House—Senate conference committee resolved the two bodies’ differences and they agreed to the conference report in October 1986, the House by a vote of 238—173³² and the Senate by a vote of 63—24.³³ President Reagan signed the bill into law on November 6, 1986.

IRCA created a new section 274A of the Immigration and Nationality Act (“INA”) titled Unlawful Employment of Aliens. The new section includes a subsection (a) titled Making Employment of Unauthorized Aliens Unlawful, providing in part that

(1) IN GENERAL.—It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States—

(A) an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) with respect to such employment, or

(B) an individual without complying with the requirements of subsection (b) [involving an employment eligibility verification process in which an employer certifies on an “I-9” form that it has reviewed specified documents demonstrating identity and employment eligibility provided

28 H.R. REP. NO. 99-682, pt. 1, at 46 (1986), <https://advance.lexis.com/r/documentprovider/zssyk/attachment/data?attachmentid=V1,215,38301,13703Hrp682-1From1to222,1&attachmenttype=PDF&attachmentname=OriginalSource&origination=&sequencenumber=&ishotdoc=false&docTitle=Immigration%20Control%20and%20Legalization%20Amendments%20Act%20of%201986&pdmfid=1000516>.

29 132 CONG. REC. 32410 (Oct. 16, 1986), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1986-pt22/pdf/GPO-CRECB-1986-pt22-2-2.pdf>.

30 131 CONG. REC. 24318 (Sept. 19, 1985), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1985-pt18/pdf/GPO-CRECB-1985-pt18-1-2.pdf>.

31 132 CONG. REC. 30102 (Oct. 9, 1986), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1986-pt21/pdf/GPO-CRECB-1986-pt21-1-2.pdf>.

32 132 CONG. REC. 31646 (Oct. 15, 1986).

33 132 CONG. REC. 33245 (Oct. 17, 1986), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1986-pt23/pdf/GPO-CRECB-1986-pt23-1-2.pdf>.

by a new hire and that the documents reasonably appear to be genuine and relate to the individual].

(2) CONTINUING EMPLOYMENT.—It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

(3) DEFENSE.—A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

(4) USE OF LABOR THROUGH CONTRACT.—For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange...to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A).³⁴

Subsection (h)(3) provided that

(3) DEFINITION OF UNAUTHORIZED ALIEN.—As used in this section, the term “unauthorized alien” means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.³⁵

As to enforcement, the new section includes subsections (e), titled Compliance, and (f), titled Criminal Penalties and Injunctions for Pattern or Practice Violations.” Subsection (e) provides in part that

(4) CEASE AND DESIST ORDER WITH CIVIL MONEY PENALTY FOR HIRING, RECRUITING, AND REFERRAL VIOLATIONS.—With respect to a violation of subsection (a)(1)(A) or (a)(2), the order under this subsection—

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of—

(i) not less than \$250 and not more than \$2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred,

(ii) not less than \$2,000 and not more than \$5,000 for each such alien in the case of a person or entity previously subject to one order

34 Pub. L. No. 99-603, § 101(a), 100 Stat. 3360-61 (1986) (codified at INA § 274A(a)(1)–(4), 8 U.S.C. § 1324a(a)(1)–(4)), <https://www.congress.gov/99/statute/STATUTE-100/STATUTE-100-Pg3445.pdf>.

35 Pub. L. No. 99-603, § 101(a), 100 Stat. 3368 (1986) (codified at INA § 274A(h)(3), 8 U.S.C. § 1324a(h)(3)), <https://www.congress.gov/99/statute/STATUTE-100/STATUTE-100-Pg3445.pdf>.

under this paragraph, or

(iii) not less than \$3,000 and not more than \$10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph; and

(B) may require the person or entity—

(i) to comply with the requirements of subsection (b)...with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years, and

(ii) to take such other remedial action as is appropriate...

(5) ENFORCEMENT OF ORDERS.—If a person or entity fails to comply with a final order issued under this subsection against the person or entity, the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States. In any such suit, the validity and appropriateness of the final order shall not be subject to review.³⁶

Subsection (f) provides that

(1) CRIMINAL PENALTY.—Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) shall be fined not more than \$3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

(2) ENJOINING OF PATTERN OR PRACTICE VIOLATIONS.—Whenever the Attorney General has reasonable cause to believe that a person or entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of paragraph (1)(A) or (2) of subsection (a), the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.³⁷

II. THE PROFESSORS' ARGUMENTS

A. ARGUMENT #1: THE IMMIGRATION REFORM AND CONTROL ACT OF 1986'S EMPLOYER SANCTIONS DO NOT APPLY TO STATES BECAUSE THE LEGISLATION CONTAINS NO EXPLICIT CONGRESSIONAL AUTHORIZATION TO INTRUDE ON THE STATES' POLICE POWER TO REGULATE EMPLOYMENT

³⁶ INA § 274A(e)(4), (9); 8 U.S.C. § 1324a(e)(4), (9) (2022).

³⁷ Pub. L. No. 99-603, § 101(a), 100 Stat. 3368 (1986) (codified at INA § 274A(f), 8 U.S.C. § 1324a(f)), <https://www.congress.gov/99/statute/STATUTE-100/STATUTE-100-Pg3445.pdf>.

1. *The Sound of Silence*

The professors argue that

IRCA contains no language declaring that it binds States; in fact it makes no mention of States as actors with obligations. ... Thus, IRCA is best read simply not to apply to States.³⁸

IRCA makes it “unlawful for a person or other entity to hire... for employment in the United States” an unauthorized individual. ... A “person” is either an individual, 8 U.S.C. 1101(b)(3), or an organization defined as “an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects,” 8 U.S.C. 1101(a)(28). “Entity” is not defined as such in the statute, but a 1996 amendment to IRCA enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [“IIRIRA”] specifies that an “entity” “includes an entity in any branch of the Federal Government.” 8 U.S.C. 1324a(a)(7).³⁹ Thus, the statute mentions... various entities, including the Federal Government, as covered by its provisions, but nowhere mentions States.⁴⁰

At the same time that IIRIRA specified that the Federal Government was an “entity” without mentioning States, it added another section to the INA stating that “a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service [“INS”] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.” 8 U.S.C. 1373(a). Thus, the Congress that amended IRCA to specifically bind Federal agencies knew how to specify that State entities were bound by its legislation. Its failure to do so in IRCA’s prohibition against hiring unauthorized individuals provides strong evidence that States are not included in its definition of “entity.”

The argument set forth above applies the *expressio unius est exclusio alterius* canon of statutory interpretation: “the expression of one thing is the exclusion of others[.]” ... [which] is properly applied “when the result to which its application leads is itself logical and sensible.” ... Not only do IRCA’s definitions of “person” and “entity” fail to include State governments, but they manifest a “strong contrast[.]” ... between Federal and State governments, by including only the former.⁴¹

38 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 13.

39 Pub. L. No. 104-208, § 412(d), 110 Stat. 3009-668 (1996) (codified at INA § 274A(a)(7), 8 U.S.C. § 1324a(a)(7)), <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

40 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 8–9 (footnotes omitted).

41 *Id.* at 9 (citations omitted).

The professors conclude that “IRCA’s failure to mention States while specifically mentioning Federal entities...suggests the statute likely does not bind State governments.”⁴²

At first impression, the professors’ argument seems to make eminent sense. Why else would Congress specify that federal government entities are subject to employer sanctions, not say the same about State government entities, and elsewhere in the same legislation specify that federal and State government entities are subject to a separate requirement? It is easy to reach the conclusion that Congress must not have intended for entities within State governments (or local governments, for that matter) to be subject to employer sanctions. However, such a conclusion would be incorrect.

a. Clear and Unambiguous?

First, I will consider whether IRCA’s language—as modified by IIRIRA—that it is “unlawful for a person or other entity...to hire...for employment in the United States an alien knowing the alien is an unauthorized alien” and that an entity, otherwise undefined, “includes an entity in any branch of the Federal Government[.]” is clear and unambiguous. Of course, as the Supreme Court has admonished, “this Court has repeated with some frequency, ‘Where...the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.’”⁴³

Does the term *entity* in INA section 274A clearly and unambiguously include State governments acting as employers? The Supreme Court has stated that “[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning” and then utilized dictionaries in order to determine such meaning.⁴⁴ As to *entity*, Merriam-Webster’s legal definition of the term is “an organization (as a business or *governmental unit*) that has a legal identity which is separate from those of its members.”⁴⁵ The Legal Information Institute (LII), an independently funded project of the Cornell Law School, defines the term as follows

An entity refers to a person or organization possessing separate and distinct legal rights, such as an individual, partnership, or corporation. An entity can, among other things, own property, engage in business, enter into contracts, pay taxes, sue and be sued. An entity is capable of operating legally, suing and making decisions through agents, e.g. a corporation,

42 *Id.* at 7.

43 *Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984)).

44 *Smith v. United States*, 508 U.S. 223, 228 (1993).

45 Legal Definition: Entity (noun), <https://www.merriam-webster.com/dictionary/entity#legalDictionary> (emphasis added) (last visited Apr. 11, 2023).

a state,⁴⁶ or an association.⁴⁷

It seems abundantly clear that the ordinary and natural meaning of entity can include a governmental entity, depending on context.

While entity is not defined in INA section 274A with regard to employer sanctions (except to the extent of the specified inclusion of any branch of the federal government), the manner in which the term is used elsewhere in the INA (as it existed at the time of the enactment of IIRIRA⁴⁸), and in IIRIRA itself, also makes it clear that the term encompasses units and agencies of government.

As the professors point out, 8 U.S.C. section 1373, as added by IIRIRA, refers to “a Federal, State, or local government entity or official.” But, where the term *entity* is used without a specification that it refers to a governmental entity, do the INA, IRCA, and IIRIRA lend themselves to its reading as encompassing governmental units or agencies? The Supreme Court has often pointed out that the “normal rule of statutory construction [is] that ‘identical words used in different parts of the same act are intended to have the same meaning.’”⁴⁹ Elsewhere in the INA, the term *nongovernmental entity*⁵⁰ is used, implying that when the term is used without such a qualifier, it should be read to include a governmental entity (if appropriate in context). Section 274A itself, as created by IRCA, refers to an “entity which has review authority over immigration related matters,”⁵¹ which could only refer to a federal agency. And the INA refers to a “law enforcement entity” (as in “duly recognized law enforcement entity”⁵²), which could only refer to a governmental entity.

46 The LII defines a “state” as follows

A state is a political division of a body of people that occupies a territory defined by frontiers. The state is sovereign in its territory...and has the authority to enforce a system of rules over the people living inside it. That system of rules is commonly composed of a constitution, statutes, regulations, and common law.

The United States as a country is considered a sovereign state before the international community. Furthermore, the United States is divided into fifty sovereign states, as follows...

<https://www.law.cornell.edu/wex/state#:~:text=A%20state%20is%20a%20political,a%20territory%20defined%20by%20frontiers> (last visited Apr. 11, 2023). Thus, the LII would consider both the United States and each individual State as a state.

47 Entity, <https://www.law.cornell.edu/wex/entity> (emphasis added) (last visited Apr. 11, 2023).

48 I should note that subsequent to the enactment of IIRIRA, title 8 was amended to make reference to “an entity that provides dating services,” which presumably does not refer to governmental entities. *See* 8 U.S.C. § 1375a(e)(4)(B)(ii) (2022).

49 *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932), *quoted in Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)). While portions of title 8 of the U.S. Code are not contained within the INA, the Supreme Court has concluded that this rule of statutory construction should also apply to different statutes that “operate together closely.” *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

50 INA § 214(c)(6)(F), 8 U.S.C. § 1184(c)(6)(F) (2022). The INA also makes reference to a “corporate entity.” INA § 214(c)(10), 8 U.S.C. § 1184(c)(10) (2022).

51 Pub. L. No. 99-603, § 101(a), 100 Stat. 3367 (1986) (codified at INA § 274A(e)(7), 8 U.S.C. § 1324a(e)(7) (2022)), <https://www.congress.gov/99/statute/STATUTE-100/STATUTE-100-Pg3445.pdf>.

52 INA § 210(b)(6)(B); 8 U.S.C. § 1160(b)(6)(B) (2022).

What of *expressio unius est exclusio alterius*? It is not an absolute rule, but only an interpretative aid (if that⁵³). The Supreme Court concluded in 2002 that “the canon that expressing one item of a commonly associated group or series excludes another left unmentioned is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives.”⁵⁴ And, a year later, the Court concluded that “[w]e do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.”⁵⁵

In the next two subsections, I will argue that Congress’s failure to specify that States are included within the scope of entity in section 274A was “not meant to signal” their exclusion and that it is not fair to suppose that Congress meant to exclude them. But to the extent that the cannon of *expressio unius est exclusio alterius* may create doubt as to the pellucidity of the applicability of employer sanctions to States as employers, I should note that IRCA’s legislative history amply displays Congress’s intent that employer sanctions apply to all employers. The House Judiciary Committee report stated that “[t]he penalties are universally applied to all employers regardless of the number of employees...”⁵⁶ And the Committee’s *Summary and Explanation* of IRCA, published shortly after enactment, stated that “[a]ll employers are required to comply with the verification procedures for new hires.”⁵⁷ The Senate Judiciary Committee report was even more explicit:

This subsection of the new INA section 274A is intended to be broadly construed with respect to coverage. With the exception of the categories noted, all employers, recruiters, and referrers are covered: individuals, partnerships, corporations and other organizations, nonprofit and profit, private and public, who employ, recruit, or refer persons for employment in the United States.⁵⁸

53 Cass Sunstein contends that “the *expressio unius* principle . . . is a questionable one in light of the dubious reliability of inferring specific intent from silence.” Cass Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2109 n.182 (1990).

54 *United States v. Vonn*, 535 U.S. 55, 65 (2002).

55 *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168–69 (2003).

56 H.R. REP. NO. 99-682, pt. 1, at 56 (1986) (emphasis added), <https://advance.lexis.com/r/documentprovider/zssyk/attachment/data?attachmentid=V1,215,38301,13703Hrp682-1From1to222,1&attachmenttype=PDF&attachmentname=OriginalSource&origination=&sequencenumber=&ishotdoc=false&docTitle=Immigration%20Control%20and%20Legalization%20Amendments%20Act%20of%201986&pdmfid=1000516>.

57 STAFF OF H. COMM. ON THE JUDICIARY, 99TH CONG., THE “IMMIGRATION REFORM AND CONTROL ACT OF 1986” (P.L. 99-603): A SUMMARY AND EXPLANATION at 8 (Comm. Print Ser. 14 1986) (emphasis added), <https://babel.hathitrust.org/cgi/pt?id=pst.000011995135&view=1up&seq=1>.

58 S. REP. NO. 99-132, at 232 (1985) (emphasis added), <https://advance.lexis.com/r/documentprovider/zssyk/attachment/data?attachmentid=V1,215,38301,13621Srp132From1to114,1&attachmenttype=PDF&attachmentname=OriginalSource&origination=&sequencenumber=&ishotdoc=false&docTitle=Immigration%20Reform%20and%20Control%20Act%20of%201985&pdmfid=1000516>.

b. States Were Not the Problem

The drafters of IRCA did not feel the need to specifically state the obvious, that States (when acting as employers) would be subject to employer sanctions just as would be any other employers. States at the time were simply not interested in employing unauthorized aliens. In fact, a score of them had passed laws penalizing employers for doing such. In 1980, the U.S. General Accounting Office (“GAO”) reported that

States that have enacted employer sanctions legislation include California (1971), Connecticut (1972), Delaware (1976), Florida (1977), Kansas (1973), Maine (1977), Massachusetts (1976), Montana (1977), New Hampshire (1976), Vermont (1977), and Virginia (1977). The central theme of these laws is that “no employer shall knowingly employ an alien who is not entitled to lawful residence in the United States...” California and Delaware have added the condition:... “if such employment would have an adverse effect on lawful resident workers.”...The penalties for violation range up to a maximum of \$1,000 per offense and /or confinement of 1 year per offense. ...To our knowledge, only Kansas has successfully prosecuted a case to date and imposed a fine of \$250...⁵⁹

[T]he remaining States are not planning enforcement of their ... legislation. The reasons vary: the illegal alien problem is not significant in those States; prosecution is up to the local officials; additional funds have not been allocated; and/or the States are awaiting pending Federal legislation.⁶⁰

Congress was not faced with having to rein in what it believed to be rogue States seeking to hire unauthorized aliens (or otherwise thwart enforcement of federal immigration laws). As such, I would contend that Congress felt no need to divert drafting resources for that purpose. As to IIRIRA’s provision prohibiting a government entity / official from preventing a government entity / official from sending to, or receiving from, the INS information regarding the citizenship or immigration status of any individual, that provision specified State entities precisely because its goal was in part to rein in rogue State sanctuary jurisdictions. The House Judiciary Committee’s report stated that “This section is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS.”⁶¹ There was no such imperative in the context of employer sanctions to specify State

59 THE COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFF., PAD-80-22, REPORT TO THE CONGRESS OF THE UNITED STATES, ILLEGAL ALIENS: ESTIMATING THEIR IMPACT ON THE UNITED STATES at 45, 47 (1980), <https://www.gao.gov/assets/pad-80-22.pdf>. California had itself set in motion this State legislative gold rush. As the GAO noted, “[m]ost of the States enacted their employer sanctions legislation after the U.S. Supreme Court ruled [in *De Canas v. Bica*, 424 U.S. 351 (1976)] that California’s legislation... was constitutional.” THE COMPTROLLER GENERAL at 45.

60 *Id.* at 47.

61 H.R. REP. NO. 104-469, pt. 1, at 277 (1996), <https://www.congress.gov/104/crpt/hrpt469/CRPT-104hrpt469-pt1.pdf>.

entities, as the States were not a catalyzing agent for sanctions.

c. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996's Clarification of the Meaning of Entity

If IRCA was clear that the term *entity* in INA section 274A refers to governmental and nongovernmental entities alike, a conclusion that the INS quickly memorialized in implementing regulations,⁶² why did Congress feel the need ten years later to specify that the term included any governmental entities? And why did it feel the need to specify that it included an entity in any branch of the Federal Government?

As I will explain below, the answer has to do with the mechanism to verify the identity and work eligibility of new hires, not employer sanctions per se. IIRIRA amended section 274A to specify that the federal government is included within the ambit of the term *entity* in a *belt-and-suspenders* effort to ensure that federal agencies would have to participate in IIRIRA's employment eligibility verification pilot programs. As the Supreme Court has concluded, such "redundancies are common in statutory drafting—sometimes in a congressional effort to be doubly sure",⁶³ and as the Seventh Circuit has concluded, "Congress may choose a belt-and-suspenders approach to promote its policy objectives".⁶⁴ Congress did not feel the need to specify in IIRIRA that State agencies were entities for purposes of section 274A because Congress in IIRIRA chose not to mandate State participation in the pilot programs. IIRIRA's failure to mention States simply does not demonstrate any congressional intent to exclude States from the employer sanctions regime.

In order to support my claim, I need to make recourse to IIRIRA's legislative history. Lamar Smith, Chairman of the House Judiciary Committee's Immigration and Claims Subcommittee and author of H.R. 2202, the House foundation for IIRIRA, explained (along with then-Subcommittee counsel, and my then-colleague, Edward Grant⁶⁵), that

The enforcement centerpiece of the IRCA—sanctions against employers who hire illegal alien— failed to include any system whereby employers could reasonably verify the status of their new employees. A booming market in fraudulent documents soon developed.⁶⁶

Unfortunately, the easy availability of counterfeit documents...has made a mockery of the law. Fake documents were produced in mass quantities.

62 The INS promulgated regulations that defined an entity for purposes of section 274A as "any legal entity, including but not limited to, a corporation, partnership, joint venture, *governmental body*, agency, proprietorship, or association." Control of Employment of Aliens, 52 Fed. Reg. 16216, 16221 (May 1, 1987) (emphasis added) (codified at 8 C.F.R. § 274a.1(b)), <https://www.govinfo.gov/content/pkg/FR-1987-05-01/pdf/FR-1987-05-01.pdf>.

63 *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020).

64 *McEvoy v. IEI Barge Servs.*, 622 F.3d 671, 677 (7th Cir. 2010).

65 I worked for Chairman Smith at the time as a counsel on the House Judiciary Committee's Subcommittee on Immigration and Claims.

66 Lamar Smith & Edward Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883, 890 n.22 (1996–1997).

...As a result, even the vast majority of employers who wanted to obey the law had no reliable means of identifying illegal aliens; and...such employers actually risked being found guilty of discrimination on the basis of national origin if they asked for additional documents. At the other extreme, rogue employers could easily collude with illegal alien employees to avoid the provisions of IRCA... comfortable in the knowledge that they were presented with "genuine" documents.⁶⁷

What to do? As then House Judiciary Committee Member F. James Sensenbrenner, Jr., stated during House floor consideration of H.R. 2202, "President Clinton organized a Commission headed by the late Barbara Jordan to study our immigration policies, to see if the current system is working, and to make recommendations if it is not."⁶⁸ In 1994, Jordan's Commission, the U.S. Commission on Immigration Reform, recommended to Congress that

A better system for verifying work authorization is central to the effective enforcement of employer sanctions.

The Commission recommends development and implementation of a simpler, more fraud-resistant system for verifying work authorization ...

In examining the options for improving verification the Commission believes that the most promising option for secure, non-discriminatory verification is a computerized registry using data provided by the Social Security Administration ... and the INS.⁶⁹

The Commission recommends that the President immediately initiate and evaluate pilot programs using the proposed computerized verification system in the five states with the highest levels of illegal immigration as well as several less affected states.⁷⁰

67 *Id.* at 923–24.

68 142 CONG. REC. H2382 (Mar. 19, 1996), <https://www.govinfo.gov/content/pkg/CREC-1996-03-19/pdf/CREC-1996-03-19-house.pdf>.

69 U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY; A REPORT TO CONGRESS 12 (1994) (emphasis deleted), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015032200704&view=1up&seq=26>.

70 *Id.* at 13 (emphasis deleted).

At a minimum, the President should issue an Executive Order requiring federal agencies to abide by the [employer sanctions] procedures required of other employers. Alternatively, legislation should stipulate that federal agencies follow the verification procedures required of other employers...⁷¹

Chairman Smith drafted H.R. 2202 to reflect the Commission's recommendations, stating during House floor consideration that "this legislation implements the recommendations of the Commission on Immigration Reform,"⁷² and Mr. Sensenbrenner stated that it "contains over 80 percent of th[e Jordan Commission's] recommendations."⁷³

IIRIRA created three employment eligibility verification pilot programs, one of which (the basic pilot program) was later rebranded as the current E-Verify system.⁷⁴ The House Judiciary Committee's report stated that

[T]here must be an authoritative check of the veracity of the documents provided by new employees. Such a verification mechanism will be instituted on a pilot basis, using existing databases of the SSA and the INS. Every person in America authorized to work receives a social security number. Aliens legally in this country (and many illegal aliens) have alien identification numbers issued by the INS. If a verification mechanism could compare the social security (and, for a noncitizen, alien) number provided by new employees against the existing databases, individuals presenting fictitious numbers and counterfeit documents, or who are not authorized to be employed, would be identified...

[The bill] will institute pilot projects testing this verification mechanism in at least five of the seven states with the highest estimated populations of illegal aliens.⁷⁵

As Smith and Grant wrote, "IIRIRA was [in part] enacted to fulfill the promise of the IRCA and significantly weaken the job magnet...IIRIRA creates three employment eligibility verification pilot programs designed to make fraudulent documents useless. ... These pilots will give employers the tools they need to hire legal workers."⁷⁶

IIRIRA, as enacted, generally made the pilot programs voluntary, but provided that

71 *Id.* at 20 (emphasis deleted).

72 142 CONG. REC. H2380 (Mar. 19, 1996), <https://www.govinfo.gov/content/pkg/CREC-1996-03-19/pdf/CREC-1996-03-19-house.pdf>.

73 142 CONG. REC. H2382 (Mar. 19, 1996), <https://www.govinfo.gov/content/pkg/CREC-1996-03-19/pdf/CREC-1996-03-19-house.pdf>.

74 Pub. L. No. 104-208, subtitle A of title IV of division C, <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

75 H.R. REP. NO. 104-469, pt. 1, at 166-67 (1996), <https://www.congress.gov/104/crpt/hrpt469/CRPT-104hrpt469-pt1.pdf>.

76 Smith & Grant, *supra* note 66, at 924.

Each [Executive] Department of the Federal Government shall elect to participate in a pilot program and shall comply with the terms and conditions of such an election.⁷⁷

Each Member of Congress, each officer of Congress, and the head of each agency of the legislative branch, that conducts hiring in a State in which a pilot program is operating shall elect to participate in a pilot program, may specify which pilot program or programs ... in which the Member, officer, or agency will participate, and shall comply with the terms and conditions of such an election.⁷⁸

H.R. 2202, as it had originally passed the House, used slightly different language, providing that "Each entity of the Federal Government that is subject to the requirements of section 274A of the [INA] (including the Legislative and Executive Branches of the Federal Government) shall participate in the pilot program under this section and shall comply with the terms and conditions of such an election."⁷⁹

Rep. Smith wanted to require the participation of federal agencies in the pilot programs. Since, pursuant to the text of the bill under consideration on the House floor, the federal entities that would have to participate were those "subject to the requirements of section 274A,"⁸⁰ he had strong motivation to ensure that the universe of federal entities subject to section 274A included all those he wanted to participate in the pilot programs. This was the reason why the House included such language. It turns out that the specification was no longer strictly necessary in the enacted legislation, since participation by federal agencies was no longer triggered by their being subject to section 274A. The specification was to become a vestigial organ, the appendix of IIRIRA.

Consistent with this analysis, the clarification of *entity* was not contained in H.R. 2202 as introduced,⁸¹ nor was it contained in the bill as reported by the Judiciary Committee.⁸² Rep. Smith at those stages had no reason to include the specification—because in both those versions of the bill, participation in the pilot programs was already *mandatory for all employers* in a State in which a pilot program was operating.⁸³ There was thus no need to create a subset of employers required

77 Pub. L. No. 104-208, § 402(e)(1)(A), 110 Stat. 3009-658 (1996), <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

78 Pub. L. No. 104-208, § 402(e)(1)(B), 110 Stat. 3009-659 (1996), <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

79 H.R. 2202, 104th Cong., § 401(e)(1) (as passed by House, Mar. 21, 1996), <https://www.congress.gov/104/bills/hr2202/BILLS-104hr2202eh.pdf>.

80 H.R. REP. NO. 104-483, at 11 (1996), <https://www.congress.gov/104/crpt/hrpt483/CRPT-104hrpt483.pdf>.

81 H.R. 2202, 104th Cong. (as introduced in the House, Aug. 4, 1995), <https://www.congress.gov/104/bills/hr2202/BILLS-104hr2202ih.pdf>.

82 H.R. 2202, 104th Cong. (as reported by H. Comm. on the Judiciary, March 4, 1996), <https://www.congress.gov/104/bills/hr2202/BILLS-104hr2202rh.pdf>.

83 "[T]he Attorney General shall undertake ... pilot projects for all employers, in at least 5 of the 7 States with the highest estimated population of unauthorized aliens ..." H.R. 2202, 104th Cong.,

to participate in the pilot programs and no need to ensure that federal agencies were contained within that subset.

However, there was a large measure of opposition by many House Republicans at the time to making participation in a pilot program mandatory, generated by the specter of *Big Brother* and opposition by business groups.⁸⁴ To get H.R. 2202 to the floor, Lamar Smith agreed to make the pilot programs voluntary along with a separate floor vote on an amendment to convert them back to mandatory. A deal was reached, the bill went to the floor, the Elton Gallegly amendment to make the pilots mandatory was defeated,⁸⁵ and IIRIRA was eventually enacted into law after a conference with the Senate and postconference negotiations with the Clinton administration.⁸⁶

In any event, in preparation for the bill to go to the House floor, the House Rules Committee modified it through a self-executing amendment that made the pilot programs generally voluntary but required the participation of federal agencies and made the clarification regarding the meaning of entity.⁸⁷ Opaque? Sure. But because the provision was added as a self-executing amendment, there was no need for debate on the House floor.

2. *Preemptive Strike*

The professors argue that

“[A] clear statement principle of statutory construction...applies when Congress intends to pre-empt the historic powers of the States *or* when it legislates in traditionally sensitive areas that affect the federal balance.”⁸⁸

IRCA regulates employment, which is a traditional area of state control, as the Supreme Court decided *in an immigration case* a decade before IRCA's passage. [This] strongly suggest[s] that Congress would have had to speak clearly to bind State government entities in IRCA, notwithstanding the fact that the statute involves federal immigration regulation.⁸⁹

§ 403(e)(2)(B) (as introduced); H.R. 2202, 104th Cong., § 403(b)(3) (as reported by H. Comm. on the Judiciary). By October 1999, the pilot programs would be phased out and (in the bill as introduced) replaced with a permanent nationwide confirmation system. H.R. 2202, 104th Cong., § 403(e)(2)(A) (as introduced); H.R. 2202, 104th Cong., § 403(b)(3) (as reported by H. Comm. on the Judiciary).

84 See JAMES G. GIMPEL & JAMES R. EDWARDS, JR., *THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM* 235 (1999).

85 142 CONG. REC. H2518 (Mar. 20, 1996), <https://www.govinfo.gov/content/pkg/CREC-1996-03-20/pdf/CREC-1996-03-20-house.pdf>.

86 See GIMPEL & EDWARDS, JR., *supra* note 84, at 282–83.

87 H.R. REP. NO. 104-483, at 2 (1996), <https://www.congress.gov/104/crpt/hrpt483/CRPT-104hrpt483.pdf>.

88 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 19 (quoting *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 543 (2002)) (emphasis in original) (internal citations omitted).

89 *Id.* at 18 (emphasis in original).

[Some] may argue that even if States have power over employment generally, that power is limited in this area because “[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.”

However, state hiring does not concern *immigration* as such; it concerns the State’s power to employ people *already here*. In matters ancillary to the core federal power to exclude and deport, the federal courts have long recognized a role for state-level policymaking.⁹⁰

a. *Hoffman Plastic, the National Labor Relations Act and the Fair Labor Standards Act*

I find it startling that immigration law scholars would argue that “state hiring does not concern *immigration* as such; it concerns the State’s power to employ people *already here*.” They well know that control over the ability to employ unlawfully present aliens *already here* is hardly ancillary, but rather central, to Congress’s plenary power over immigration matters.⁹¹ In 2002, the Supreme Court concluded in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*⁹² that

IRCA [is] a comprehensive scheme prohibiting the employment of illegal aliens in the United States ... IRCA “forcefully” made combating the employment of illegal aliens central to “[t]he policy of immigration law.” ... It did so by establishing an extensive “employment verification system[.]” ... designed to deny employment to aliens [not authorized to work]. ... This verification system is critical to the IRCA regime.⁹³

As to the matters in contention in *Hoffman*, the Court explained that

[T]he [National Labor Relation] Board’s [“NLRB”] discretion to select and fashion remedies for violations of the [National Labor Relations Act] NLRA, though generally broad ... is not unlimited. ... Since the Board’s inception, we have consistently set aside awards of reinstatement or backpay to employees

90 *Id.* at 23 (quoting *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875)) (emphasis in original).

91 As the Republican and Democrat Leaders of the House Judiciary Committee jointly explained to the United States Trade Representative

Article 1, section 8, clause 4 of the Constitution provides that Congress shall have power to “establish a uniform Rule of Naturalization.” The Supreme Court has long found that this ... grants Congress plenary power over immigration policy. As the Court found in *Galvan v. Press*, 347 U.S. 522, 531 (1954), “the formulation of policies [pertaining to the entry of aliens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”

Letter from F. James Sensenbrenner, Jr., Chairman, H. Comm. on the Judiciary, and John Conyers, Ranking Member, H. Comm. on the Judiciary, to Robert B. Zoelick, Ambassador, United States Trade Representative 1 (July 10, 2003), reprinted in H.R. REP. NO. 108-225, pt. 2, at 19 (2003), <https://www.congress.gov/108/crpt/hrpt225/CRPT-108hrpt225-pt2.pdf>.

92 535 U.S. 137 (2002).

93 *Id.* at 147 (emphasis added) (citations and footnote omitted).

found guilty of serious illegal conduct in connection with their employment.⁹⁴

[Even when an] employer had committed serious violations of the NLRA, the Board had no discretion to remedy those violations by awarding reinstatement with backpay to employees who themselves had committed serious criminal acts.⁹⁵

Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations. ... We find ... that awarding backpay to illegal aliens runs counter to policies underlying IRCA. ... [T]he award lies beyond the bounds of the Board's remedial discretion.⁹⁶

We ... conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.⁹⁷

The Court did point out that “[l]ack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed other significant sanctions against Hoffman ...”⁹⁸

Hoffman involved an employer that had complied with its obligations under the employment eligibility verification system mandated by IRCA and that did not know that the worker at issue was unauthorized to work. The NLRB and federal appellate courts have since extended *Hoffman*'s ruling to encompass employers who knowingly hire or continue to employ unauthorized workers.⁹⁹ As the U.S. District Court for the Southern District of New York concluded in *Colon v. Major Perry Street Corp.* in 2013, “this extension necessarily follows from *Hoffman*'s original logic.”¹⁰⁰

However, post-*Hoffman*, lower federal and State courts have almost universally ruled that *Hoffman* does not prevent the federal or State governments from requiring employers to provide back pay to unauthorized aliens under the Fair Labor Standards Act (“FLSA”) and similar State laws. The court in *Colon* noted that “[d]espite employers’ repeated attempts to import the NLRA’s limitations into FLSA cases, courts have

94 *Id.* at 142–43 (citations omitted).

95 *Id.* at 143.

96 *Id.* at 148–49.

97 *Id.* at 151.

98 *Id.* at 152 (citation omitted).

99 *See* *Palma v. Nat’l Lab. Relations Bd.*, 723 F.3d 176, 180 (2d Cir. 2013).

100 987 F. Supp. 2d 451, 457 (S.D.N.Y. 2013).

consistently and overwhelmingly distinguished NLRA precedents from FLSA doctrine."¹⁰¹ The court explained that

[The FLSA] provides, without exception, that “[a]ny employer who violates the [minimum wage or overtime] provisions... shall be liable... in the amount of... unpaid minimum wages...” ...

...FLSA provides several exceptions to [its] definition [of employee], but undocumented workers are not among the exceptions. ... [T]he Supreme Court has articulated skepticism toward finding additional exceptions by implication:

The [FLSA] declared its purposes in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality. ... Where exceptions were made, they were narrow and specific. It ... list[ed] *exemptions of specific classes of employees* ... Such specificity in stating exemptions strengthens the implication that employees not thus exempted ... remain within the Act.¹⁰²

... Contemporary courts ... have continued to conclude that “FLSA’s sweeping definitions of ... ‘employee’ unambiguously encompass unauthorized aliens.”¹⁰³

The court in *Colon* then emphasized that IRCA itself had not repealed FLSA’s protections for unauthorized workers, but rather “specifically authorized the appropriation of additional funds for increased FLSA enforcement on behalf of undocumented aliens. ... This provision would make little sense if Congress had intended the IRCA to repeal the FLSA’s coverage of undocumented aliens.”¹⁰⁴ The court cited the House Education and Labor Committee’s 1986 report:

[T]he committee does not intend that any provision of [IRCA] would limit the powers of State or Federal labor standards agencies... to remedy unfair practices committed against undocumented employees ... To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.¹⁰⁵

101 *Id.* at 453. The District Court for the Eastern District of New York collected such cases in *Solis v. SCA Restaurant Corp.*, 938 F. Supp. 2d 380, 400 (E.D.N.Y. 2013). Only one federal court seems to have reached the opposite conclusion. *See Renteria v. Italia Foods, Inc.*, 2003 U.S. Dist. LEXIS 14698 at 19 (N.D. Ill. 2003) (“Defendants argue that an award of back pay, front pay, or compensatory damages for a violation of the FLSA likewise would trench on the policies expressed in the IRCA. With regard to back pay and front pay, the Court agrees.”).

102 *Colon*, 987 F. Supp. 2d at 453–54 (quoting *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 516–17 (1950)) (citations omitted by *Colon*) (emphasis in *Powell*).

103 *Id.* at 454 (quoting *Lucas v. Jerusalem Café, LLC*, 721 F.3d 927, 934 (8th Cir. 2013)).

104 *Id.* (quoting *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988)) (footnote omitted).

105 *Id.* at 455 (quoting H.R. REP. NO. 99-682, pt. 2, at 8–9 (1986), <https://advance.lexis.com/r/documentprovider/zssyk/attachment/data?attachmentid=V1,215,38301,13703Hrp682-2From1to52,1&attachmenttype=PDF&attachmentname=OriginalSource&origination=&sequencenumber=&ishotdoc=false&docTitle=Immigration%20Control%20and%20Legalization%20Amendments%20Act%20of%201986&pdmfid=1000516>).

The court contrasted the broad choice of remedies available to the NLRB and the few options available under the FLSA:

The *Hoffman* Court...emphasized the availability and adequacy of alternative remedies under the NLRA... stress[ing] that “[I]ack of authority to award backpay does not mean that the employer gets off scot-free.” ... FLSA, in contrast, provides very few alternative remedies. ... [I]f backpay were not available, many first-time offenders would “get[] off scot-free” and the purpose of FLSA would not be served.¹⁰⁶

The court quoted the Eleventh Circuit:

[N]o administrative body or court is vested with discretion to fashion an appropriate remedy under the FLSA. Instead, the Act unequivocally provides that any employer who violates its minimum wage or overtime provisions “shall be liable to the employee or employees affected in the amount of their unpaid minimum wages ...”¹⁰⁷

The court in *Colon* concluded that “FLSA’s mandatory language leaves no discretion for courts to alter the statute’s remedial scheme based on an employee’s immigration status.”¹⁰⁸

The court then explained that, in contrast to the NLRA, the FLSA has no equivalent “statute-specific line of cases limiting the NLRB’s remedial discretion where organizing activity dovetails with ‘serious illegal conduct.’”¹⁰⁹ It stated that

The NLRA regulates labor organizing—a field of activity in which employee dissatisfaction is collectively expressed, often through civil disobedience. The NLRA forces employers to compensate workers for engaging in disruptive activities that are often at odds with the employers’ interests; in contrast, FLSA merely forces employers to compensate workers for doing their work. ... Courts reviewing NLRB awards had to isolate protected dissidence from impermissible forms of protest ...

[T]he Supreme Court has regulated the fault line dividing the “collective power” protected by the NLRA from unlawful and unprotected forms of organizing.¹¹⁰

This line of [Supreme Court] cases curtailed the NLRB’s discretion to provide remedies that would reward and promote unlawful forms of organized protest ...

The *Hoffman* Court placed its decision squarely within this line of cases.¹¹¹

106 *Id.* at 459 (citations and footnotes omitted).

107 *Id.* at 458 (quoting *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1307 (11th Cir. 2013)).

108 *Id.* at 459.

109 *Id.* (citations omitted).

110 *Id.* at 459–60 (footnote omitted).

111 *Id.* at 460 (citation omitted).

The court in *Colon* then found that “[a] third basis for distinguishing FLSA from the NLRA lies in the distinction between the retrospective backpay sought under FLSA and the post-termination backpay awarded under the NLRA.”¹¹² A magistrate judge in the Southern District of New York later concluded in *Rosas v. Alice’s Tea Cup, LLC*¹¹³ that

[C]ourts distinguish between “undocumented workers seeking backpay for wages actually earned,” as in FLSA wage and hour violations, and “those seeking backpay for work not performed,” as in a termination in violation of the NLRA. ... This is because denying undocumented workers the protection of the FLSA would “permit[] abusive exploitation of workers” and “create[] an unacceptable economic incentive to hire undocumented workers by permitting employers to underpay them,” in violation of the spirit of the IRCA. ... This distinction was clear before *Hoffman* and has been reiterated since.¹¹⁴

Finally, the court in *Colon* found that “[s]everal courts have observed that awarding FLSA backpay to undocumented workers supports the policy goals expressed in IRCA” and that it is actually a “harmonious arrangement.”¹¹⁵ The court quoted the Eleventh Circuit:

FLSA’s coverage of undocumented aliens goes hand in hand with the policies behind the IRCA. Congress enacted the IRCA to reduce illegal immigration by eliminating employers’ economic *incentive* to hire undocumented aliens ... The FLSA’s coverage of undocumented workers... offsets what is perhaps the most attractive feature of such workers—their willingness to work for less than the minimum wage. If the FLSA did not cover undocumented aliens, employers would have an incentive to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under the IRCA.¹¹⁶

I do question one aspect of the rationale undergirding these decisions regarding the availability of backpay for unauthorized workers under the FLSA. The court in *Colon* concluded that “[t]he *Hoffman* Court placed its decision squarely within th[e] line of cases” that “curtailed the NLRB’s discretion to provide remedies that would reward and promote unlawful forms of organized protest.”¹¹⁷ However, the “serious criminal conduct” for the Supreme Court in *Hoffman* had nothing to do with “unlawful forms of organized protest”. Rather, it was the quotidian proffering of false documents by an unauthorized alien seeking to defeat IRCA’s verification process, a fraud that has likely been perpetrated millions of times. The Court considered this fraud serious precisely because it “subverts the cornerstone of IRCA’s enforcement mechanism.”¹¹⁸

112 *Id.*

113 127 F. Supp. 3d 4 (S.D.N.Y. 2015).

114 *Id.* at 9 (citations omitted).

115 987 F. Supp. 2d at 462.

116 *Id.* (quoting *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988)) (emphasis in original).

117 *Id.* at 460.

118 *Hoffman Plastic Compounds, Inc. v. Nat’l Lab. Relations Bd.*, 535 U.S. 137, 148 (2002).

What the Court in *Hoffman* understood itself to be doing was not “plac[ing] its decision squarely within th[e] line of cases” that “curtailed the NLRB’s discretion to provide remedies that would reward and promote unlawful forms of organized protest.” Rather, what it understood itself to be doing was placing its decision squarely within the line of cases that “established that where the [NLRB’s] chosen remedy trenches upon a federal statute or policy outside the Board’s competence to administer, the Board’s remedy may be required to yield.”¹¹⁹ The Court found that was “precisely the situation today. ... IRCA ‘forcefully’ made combating the employment of illegal aliens central to ‘the policy of immigration law.’”¹²⁰ One of the ways in which the Court batted away the NLRB’s attempt to characterize another Supreme Court decision “as authority for awarding backpay to employees who violate federal laws”¹²¹ was to note that in that case, “the challenged order did not implicate federal statutes or policies administered by other federal agencies, a ‘most delicate area’ in which the Board must be ‘particularly careful in its choice of remedy.’”¹²²

The Supreme Court in *Hoffman* concluded that

The [NLRB] asks that we ... allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud. We find, however, that awarding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer.¹²³

I should point out that two of these three factors cited by the Supreme Court—the award of backpay to an unauthorized alien for (1) wages that could not lawfully have been earned and (2) a job obtained in the first instance by a criminal fraud—apply in the FLSA context to the same extent as they do in the NLRA context. The Court went on to emphasize that

What matters here ... is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer’s unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities. Far from “accommodating” IRCA, the Board’s position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it.¹²⁴

To reiterate, the motivating issue for the *Hoffman* Court was not curtailing the NLRB’s discretion to provide remedies rewarding and promoting unlawful forms of organized protest, but rather curtailing the NLRB’s discretion to provide remedies subverting IRCA.

119 *Id.* at 147.

120 *Id.* (quoting *INS v. Nat’l Ctr. for Immigrants’ Rts., Inc.*, 502 U.S. 183, 194, 194 n.8 (1991)).

121 *Hoffman*, 535 U.S. at 145.

122 *Id.* at 146 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172 (1962)).

123 *Id.* at 148–49.

124 *Id.* at 149–50 (footnote omitted).

Given that lower federal courts like *Colon* have misconstrued the reasoning of the Supreme Court in *Hoffman*, it is entirely possible that should the Supreme Court ever consider the propriety of awarding backpay to unauthorized aliens as FLSA remedies, the Court would bar such awards as “subverting” IRCA, just as it did in *Hoffman*.

b. Congress Has Brought Regulation of the Employment of Aliens Within the INA’s Framework for Regulation of Immigration

In 2007, the District Court for the Middle District of Pennsylvania in *Lozano v. City of Hazleton*¹²⁵ invalidated a town ordinance that, among other things, made it unlawful for businesses to recruit, hire, or employ workers not authorized to be employed, and required employers to collect identification documents and provide them to the town in order for it to verify work authorization with the federal government. The court concluded that

IRCA is a comprehensive scheme. It leaves no room for State regulation.¹²⁶

Immigration is a national issue. The United States Congress has provided complete and thorough regulations with regard to the employment of unauthorized aliens including anti-immigration discrimination provisions.¹²⁷

I certainly don’t remember many immigration law professors at the time arguing that the district court got it wrong and that the Hazleton ordinance should have been affirmed since it only dealt with an “ancillary” issue.

In 2011, the Obama administration argued to the Supreme Court in an amicus brief in *Chamber of Commerce of the United States v. Whiting*¹²⁸ that

Congress concluded in IRCA that the INA must prescribe measures to combat the employment of unauthorized aliens, because the availability of such employment undermines the INA’s mission of regulating entry into the United States. ... Congress therefore enacted Section [274A]. ... Congress thus has brought regulation of the employment of aliens within the INA’s framework for regulation of immigration—traditionally an area of exclusive federal, not state or local, authority.¹²⁹

Similarly, in 2012, the AFL-CIO argued to the Supreme Court in an amicus brief in *Arizona v. United States*¹³⁰ that

125 496 F. Supp. 2d 477 (M.D. Pa. 2007).

126 *Id.* at 523.

127 *Id.*

128 563 U.S. 582 (2011).

129 Brief for the United States as Amicus Curiae Supporting Petitioners at 26, *Whiting* (No. 09-115) (emphasis added), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/28/commercebr_sctmerits.pdf.

130 567 U.S. 387 (2012).

Together, the purpose of the IRCA and [the Immigration Act of 1990] amendments was to make regulation of the employment of aliens part and parcel of the INA's overall purpose of regulating "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country."¹³¹

The AFL-CIO also argued that Arizona's imposition of a criminal penalty on unauthorized aliens who were employed was "directed at 'deter[ring] the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States,' ...not regulating employment relationships within the State."¹³² A policy of allowing the UC system to hire and employ unauthorized aliens can with equal justification be said to be directed at encouraging and enabling the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States rather than regulating employment relationships within the State.

To conclude, the hiring and employment of unauthorized aliens does indeed clearly concern immigration as such. Now, it may be argued that the decisions I have cited reflect the state of precedent following the enactment of IRCA, not its prior state before Congress had "forcefully" made combating the employment of unauthorized aliens central to "[t]he policy of immigration law." But this would miss the point. The fact that Congress could, at a time of its choosing, make combating the employment of unauthorized aliens central to the policy of immigration law is made possible by Congress's constitutionally based plenary power. Combating such employment is hardly *ancillary* to the core federal immigration power, even when dormant. In its 1972 decision in *Kleindienst v. Mandel*,¹³³ the Supreme Court approvingly quoted the Court's statement in its 1895 decision in *Lem Moon Sing v. United States*¹³⁴ that

*The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.*¹³⁵

Of course, such *terms and conditions* include whether any alien shall be permitted to work in the United States. Aliens who are within the period of their admission or parole into the United States but who have not been granted work authorization are just as much *unauthorized aliens* under section 274A(h)(3) as are those who entered illegally or overstayed their visas.

131 Brief of the Am. Fed'n of Lab. and Congress of Industrial Orgs. as Amicus Curiae in Support of Respondent, *Arizona* (No. 11-182), at 9 (quoting *Whiting*, 563 U.S. at 587), <https://www.nilc.org/wp-content/uploads/2016/04/US-v-AZ-SCOTUS-11-182-amicus-AFL-CIO.pdf>.

132 *Id.* (citation omitted).

133 408 U.S. 753, 766 (1972).

134 158 U.S. 538 (1895).

135 *Id.* at 547 (emphasis added). See also *De Canas v. Bica*, 424 U.S. 351, 355 (1976) (The "regulation of immigration ... is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.").

c. Traditionally Sensitive Area

The professors state

Where Congress “legislate[s] in [a] traditionally sensitive area[] that affect[s] the federal balance,”...courts will not presume it intended to bind States unless it uses “unmistakably clear” language indicating this intention. ... [B]ecause IRCA’s prohibition does not mention States...its language comes nowhere near what would be required to provide such a clear statement. Therefore, it is best read to not bind States.¹³⁶

I in no way dispute this clarity principle when Congress legislates in a traditionally sensitive area that affects the federal balance. In fact, I would additionally point to the Supreme Court’s conclusion in *Apex Hosiery Co. v. Leader*¹³⁷ in 1940 that “The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress.”¹³⁸

And I would point to the Supreme Court’s 1971 ruling in *United States v. Bass*¹³⁹ that

[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. ... In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.¹⁴⁰

And I would point to the Supreme Court’s clarification of this principle in its 1947 decision in *Rice v. Santa Fe Elevator Corp.*:¹⁴¹

[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Such a purpose may be evidenced in several ways... [one of which being that] the state policy may produce a result inconsistent with the objective of the federal statute.¹⁴²

In 1989, the Supreme Court approvingly cited *Rice*, concluding in *Will v. Michigan Department of State Police* that “Congress should make its intention ‘clear

136 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 24 (quoting *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002) and citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

137 310 U.S. 469 (1940).

138 *Id.* at 513.

139 404 U.S. 336 (1971).

140 *Id.* at 349 (footnotes omitted).

141 331 U.S. 218 (1947).

142 *Id.* at 230.

and manifest' if it intends to pre-empt the historic powers of the States [citing *Rice*] or if it intends to impose a condition on the grant of federal moneys"¹⁴³ Even in *Raygor v. Regents of University of Minnesota*, highlighted by the professors, the Court approvingly cited *Will*, which approvingly cited *Rice*.¹⁴⁴

As the Court concluded in *Rice*, one of the ways in which Congress can evidence a "clear and manifest" purpose is if "the state policy may produce a result inconsistent with the objective of the federal statute."¹⁴⁵ A State policy authorizing its entities to employ unauthorized aliens would certainly be inconsistent with IRCA's objective of, as the House Judiciary Committee put it, "deter[ing] employers from hiring undocumented aliens, and thus...cut[ting] off the magnet of employment."¹⁴⁶ And as the district court concluded in *Lozano*, "[a]llowing States or local governments to legislate with regard to the employment of unauthorized aliens would interfere with Congressional objectives."¹⁴⁷ Thus, regardless of whether IRCA's employer sanctions provisions specifically mention States, Congress's objective for employer sanctions evidences a clear and manifest desire to apply employer sanctions to the States.

The professors contend that

[In its 1976 *De Canas v. Bica*¹⁴⁸ decision], [t]he Supreme Court held... that a state law regulating the employment of *non-citizens* operated in an area of traditional state power, and therefore was not impliedly preempted by the federal government's immigration power, even though the "power to regulate immigration is unquestionably exclusively a federal power."... As the... Court explained in [*Arizona*, "a]s initially enacted, the INA did not prohibit the employment of illegal aliens, and this Court held that federal law left room for the States to regulate in this field."... While Congress later displaced such state laws when it passed IRCA, that statute obviously did not change the background rule that employment regulation is a traditional matter of state concern. ... All regulations concerning the hiring of undocumented immigrants... fall squarely within the States' traditional powers in the first instance, rather than within the federal government's power over immigration.¹⁴⁹

But in *De Canas* itself, the Court concluded that

143 491 U.S. 58, 65 (1989).

144 534 U.S. 533, 543–44 (2002). Just last summer, the Sixth Circuit approvingly cited *Rice* in *Adkisson v. Jacobs Eng'g Grp.*, 35 F.4th 421, 434 (6th Cir. 2022).

145 331 U.S. at 230.

146 STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 57, at 6, <https://babel.hathitrust.org/cgi/pt?id=pst.000011995135&view=1up&seq=1>.

147 *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477, 523–24 (M.D. Pa. 2007).

148 424 U.S. 351 (1976).

149 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 23–24 (emphasis in original) (citations and footnote omitted).

*States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. ... California's attempt ... to prohibit the knowing employment by California employers of persons not entitled ... to work here, is certainly within the mainstream of such police power regulation. Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions ... In attempting to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens ... [the law] focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils.*¹⁵⁰

Congress' failure to enact ... general sanctions [criminalizing the knowing employment of unauthorized aliens] reinforces the inference that may be drawn from other congressional action that Congress believes this problem does not yet require uniform national rules and is appropriately addressed by the States as a local matter.¹⁵¹

[Regarding two prior decisions in which the Supreme Court had struck down State statutes as preempted by Federal immigration law,] to the extent those cases were based on the predominance of federal interest in the fields of immigration and foreign affairs, *there would not appear to be a similar federal interest* in a situation in which the state law is fashioned to remedy local problems, and operates only on local employers, and only with respect to individuals whom the Federal Government has already declared cannot work in this country.¹⁵²

[W]e will not presume that Congress ... intended to oust state authority to regulate the employment relationship covered by [the law] ... in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was “the clear and manifest purpose of Congress” would justify that conclusion. ... Respondents ... fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude *even harmonious state regulation touching on aliens in general, or the employment of illegal aliens* in particular.¹⁵³

150 424 U.S. at 356–57 (emphasis added) (citations omitted).

151 *Id.* at 360 n.9.

152 *Id.* at 363 (emphasis added).

153 *Id.* at 357–58 (emphasis added) (citations omitted).

[A]bsent congressional action, ... [the law] would not be an invalid state incursion on federal power.¹⁵⁴

California desiring to itself employ unauthorized aliens is a quite different situation than is the California of an earlier era desiring to prohibit the employment of such aliens. The latter-day California (should it decide to ratify the decision of the UC system) would not be acting to protect the workers of California, which is what the Court in *De Canas* concluded that States possess broad authority to do under their police powers through the regulation of employment relationships. Far from it. Per the AFL-CIO, California's possible decision to allow for the employment of unauthorized workers might not even be considered a regulation of employment relationships, but rather an attempt to change immigration policy. And the latter-day California would not be seeking to prohibit the employment of those whom the federal government has already declared unable to work in the United States, but rather would be seeking the exact opposite result. One should not assume that the Court in 1976 would have been approving of a State law *authorizing* the employment of such aliens. California would neither be acting *in a manner consistent with pertinent federal laws* nor implementing a *harmonious* State regulation.

Further, in *Plyler v. Doe*,¹⁵⁵ decided six years after *De Canas* but four years prior to the enactment of IRCA, the Supreme Court explained that

The States enjoy no power with respect to the classification of aliens ... This power is "committed to the political branches of the Federal Government." ... Although it is "a routine and normally legitimate part" of the business of the Federal Government to classify on the basis of alien status ... and to "take into account the character of the relationship between the alien and this country," ... only rarely are such matters relevant to legislation by a State ...

As we recognized in *De Canas* ... *States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.* In *De Canas*, the State's program reflected Congress' intention to bar from employment all aliens except those possessing a grant of permission to work in this country. ... In contrast, there is no indication that the disability imposed by [the Texas law] corresponds to any identifiable congressional policy. ... More importantly, the classification reflected in [the Texas statute] does not operate harmoniously within the federal program.¹⁵⁶

The Court in *Plyler* intentionally cast grave doubt on any State authority to act with respect to unlawfully present aliens where such action conflicts with federal objectives. California State universities' hypothetical employment of unauthorized aliens neither corresponds to any identifiable congressional policy nor operate[s] harmoniously within the federal program. In fact, it would clearly conflict with

154 *Id.* at 356 (citation omitted).

155 457 U.S. 202 (1982).

156 *Id.* at 225-26 (emphasis added) (citations omitted).

the congressional policy undergirding IRCA “of deter[ring] aliens from entering illegally or violating their status in search of employment.”¹⁵⁷

In addition, just because a State’s power to prohibit the knowing employment of persons not entitled to work here is *within the mainstream* of State police powers, and just because, pre-IRCA, Congress did not believe the problem of the employment of unauthorized aliens “require[d] uniform national rules,” does not mean that Congress’s eventual recognition of the need for such rules made this a sensitive area that affects the federal balance. I posit that it is not—and thus that the clear statement rule would not even apply.

First, I should note that State employment laws related to aliens have long been subject to constitutional constraints and were regularly invalidated by the Supreme Court. As the Court explained in *Ambach v. Norwick*¹⁵⁸ in 1979,

State regulation of the employment of aliens long has been subject to constitutional constraints. ... In [1886 in] *Yick Wo v. Hopkins*,¹⁵⁹ [we] struck down an ordinance which was applied to prevent aliens from running laundries, and in [1915 in] *Truax v. Raich*,¹⁶⁰ a law requiring at least 80% of the employees of certain businesses to be citizens was held to be an unconstitutional infringement of an alien’s “right to work for a living in the common occupations of the community ...”¹⁶¹

[In 1948 in *Takahashi v. Fish & Game Commission*,¹⁶² we] held that the “ownership” a State exercises over fish found in its territorial waters “is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so.” ... [In our 1971 decision in] *Graham v. Richardson*¹⁶³ ... [we] for the first time treated classifications based on alienage as “inherently suspect and subject to close judicial scrutiny.” ... Applying *Graham*, [we have] held invalid statutes that prevented aliens from entering a State’s classified civil service,¹⁶⁴ ... practicing law¹⁶⁵ ... [and] working as an engineer¹⁶⁶ ...¹⁶⁷

157 H.R. REP. NO. 99-682, pt. 1, *supra* note 28 at 46.

158 441 U.S. 68 (1979).

159 118 U.S. 356 (1886).

160 239 U.S. 33 (1915).

161 *Ambach*, 441 U.S. at 72 (quoting *Truax v. Raich*, 239 U.S. at 41).

162 334 U.S. 410, 421 (1948).

163 403 U.S. 365, 372 (1971).

164 The Court cited *Sugarman v. Dougall*, 413 U.S. 634 (1973).

165 The Court cited *In re Griffiths*, 413 U.S. 717 (1973).

166 The Court cited *Examining Board of Engineers, Architects & Surveyors v. Flores De Otero*, 426 U.S. 572 (1976).

167 *Ambach v. Norwick*, 441 U.S. 68, 73 (1979).

Second, that a State's power to prohibit knowing employment is within the mainstream of State police powers does not mean it would be within the mainstream for a State to actually authorize such knowing employment. And States were on notice that Congress might someday decide that the employment of unauthorized aliens, in particular, required uniform national rules.

Third, in 2014, in *Bond v. United States*,¹⁶⁸ the Supreme Court explained that

[It] is [a] well-established principle that “it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides” the “usual constitutional balance of federal and state powers.”¹⁶⁹ To quote [Supreme Court Justice Felix] Frankfurter . . . if the Federal Government would “radically readjust[] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit” about it.¹⁷⁰ Or as explained by Justice [Thurgood] Marshall, when legislation “affect[s] the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.”¹⁷¹ . . .

We have applied this background principle when construing federal statutes that touched on several areas of traditional state responsibility. [The examples the Court gave were qualifications for state officers,¹⁷² titles to real estate,¹⁷³ and land and water use.¹⁷⁴] Perhaps the clearest example of traditional state authority is the punishment of local criminal activity.¹⁷⁵ Thus, “we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.”¹⁷⁶

Tellingly, the Court failed to indicate that it had ever applied the principle to a federal immigration statute or that any federal immigration statute touched on an area of traditional state responsibility.

A federal statute implementing employer sanctions, and the application of such sanctions to States when acting as employers, would hardly seem to radically readjust the balance of State and national authority.

168 572 U.S. 844 (2014).

169 The Court quoted *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

170 The Court quoted *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544 (1994) (quoting Justice Frankfurter’s “famous essay on statutory interpretation” *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539–40) (second alteration in original).

171 The Court quoted *United States v. Bass*, 404 U.S. 336, 349 (1971).

172 The Court cited *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

173 The Court cited *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994).

174 The Court cited *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 174 (2001).

175 The Court cited *United States v. Morrison*, 529 U.S. 598, 618 (2000).

176 *Bond v. United States*, 572 U.S. 844, 858–59 (2014) (quoting *Bass*, 404 U.S. at 349).

3. *Warning -- Explicit Content*

The professors argue that

The language of statutes that *do* bind State governments provides the strongest support for the view that IRCA does not apply to States. These statutes—without exception—explicitly mention State governments.¹⁷⁷

[I]n 1985—the year before IRCA’s enactment—the Supreme Court held that Congress must use “unmistakably clear” language to signal its intent to abrogate State Eleventh Amendment sovereign immunity [against lawsuit in Federal court], because the ... Amendment “serves to maintain” the “constitutionally mandated balance of power between the States and the Federal Government.”¹⁷⁸

I will now examine the statutes the professors cite.

a. **Title VII of the Civil Rights Act**¹⁷⁹

The professors state that Title VII “explicitly includes States in its definition of employer” and that “in 1972, Congress amended the definition of ‘person’ to include ‘governments, governmental agencies, [and] political subdivisions,’ and also amended the definition of ‘employee’ to include ‘employees subject to the civil service laws of a State government, governmental agency or political subdivision.’”¹⁸⁰

Title VII is inapposite because the preamendment Title VII specifically *excluded* States: “The term ‘employer’ ... does not include ... a State or political subdivision thereof. ...”¹⁸¹ Obviously, if Congress wants to amend a statute that specifically excludes States in order to include them, prudence would call for it to specify that States shall be included. If a statute specifically excludes nonprofits, prudence would similarly call for Congress to specify that nonprofits shall be included. Of course, there was no preexisting exclusion of States in the context of IRCA.

b. **The Fair Labor Standards Act**¹⁸²

The professors state that “Congress explicitly mentioned” certain State entities in the FLSA and that while it at first “excluded States as employers,” it was “amended

177 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 10 (emphasis in original).

178 *Id.* at 18 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (internal citations omitted).

179 Pub.L.No.88-352,78Stat.241(1964),<https://www.govinfo.gov/content/pkg/STATUTE-78/pdf/STATUTE-78-Pg241.pdf>.

180 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 10 (citation omitted).

181 Pub. L. No. 88-352, § 701(b), 78 Stat. 253 (1964), <https://www.govinfo.gov/content/pkg/STATUTE-78/pdf/STATUTE-78-Pg241.pdf>.

182 Pub. L. No. 75-718, 52 Stat. 1060 (1938), <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/52/STATUTE-52-Pg1060.pdf>.

in 1966 to cover certain State hospitals and schools” and then further amended in 1974 to include “a ‘public agency’ which includes ‘the government of a State or political subdivision thereof’.”¹⁸³

This is inapposite, because the preamendment FLSA specifically excluded States: “Employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include ... any State or political subdivision of a State ...”¹⁸⁴

c. The Age Discrimination in Employment Act¹⁸⁵

The professors state that the Age Discrimination in Employment Act (“ADEA”) “explicitly covers States” and that while it first “excluded the States” from the definition of employer, it was amended to “include ‘a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State ...”¹⁸⁶

This is inapposite because the preamendment ADEA specifically excluded States: “The term ‘employer’ ... does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof.”¹⁸⁷

d. The Rehabilitation Act¹⁸⁸

The professors state that the Rehabilitation Act of 1973 “explicitly lists States and State entities as bound by its anti-discrimination prohibitions” and that under the Act “[p]rogram or activity’ includes ‘a department, agency, special purpose district, or other instrumentality of a State or of a local government ...”¹⁸⁹

However, placing the Act in context, Congress was on notice during its drafting of the need to specifically state that it was stripping the States’ Eleventh Amendment sovereign immunity. In *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*,¹⁹⁰ decided just months before Congress passed the Rehabilitation Act, the Supreme Court concluded that

It would also be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity ... without] indicating in some way by clear language that the constitutional immunity was swept away. It

183 Arulanantham, Motomura, and Hairapetin, *supra* note 13, at 11 (citation omitted).

184 Pub. L. No. 75-718, § 3(d), 52 Stat. 1060 (1938), <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/52/STATUTE-52-Pg1060.pdf>.

185 Pub. L. No. 90-202, 81 Stat. 602 (1967), <https://www.govinfo.gov/content/pkg/STATUTE-81/pdf/STATUTE-81-Pg602.pdf>.

186 Arulanantham, Motomura, and Hairapetin, *supra* note 13, at 12 (citation omitted).

187 Pub. L. No. 90-202, § 11(b), 81 Stat. 605, <https://www.govinfo.gov/content/pkg/STATUTE-81/pdf/STATUTE-81-Pg602.pdf>.

188 Pub. L. No. 93-112, 87 Stat. 355 (1973), <https://www.congress.gov/93/statute/STATUTE-87/STATUTE-87-Pg355.pdf>.

189 Arulanantham, Motomura, and Hairapetin, *supra* note 13, at 11 (citation omitted).

190 411 U.S. 279 (1973).

is not easy to infer that Congress in legislating pursuant to the Commerce Clause ... desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution.¹⁹¹

As the Court explained in *Pennhurst State School v. Halderman*¹⁹² in 1984,

[A]lthough Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, ... we have required an unequivocal expression of congressional intent to “overturn the constitutionally guaranteed immunity of the several States.” ... Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system.¹⁹³

IRCA involved neither the stripping of States of an immunity they have long enjoyed under another part of the Constitution nor a similar express command of the Supreme Court. The example of the Rehabilitation Act is inapposite.

e. The Individuals with Disabilities Education Act¹⁹⁴

The professors state that the Individuals with Disabilities Education Act, which conditions federal school funding on States meeting certain requirements, “explicitly binds States.”¹⁹⁵ This is inapposite as it is another Eleventh Amendment sovereign immunity case and because it involves congressional gifts. As the Third Circuit explained in *M.A. v. State-Operated School District of the City of Newark*¹⁹⁶ in 2003,

Congress [may] bestow[] a gift or gratuity, to which the state is not otherwise entitled, with the condition that the state waive its Eleventh Amendment immunity. ... As is often the case ... the gift or gratuity at issue is federal funds disbursed by Congress pursuant to its Article I spending powers.¹⁹⁷

[T]hree requirements must be met before a court may determine that a state has waived its sovereign immunity by accepting a Congressional gift or gratuity [including that] Congress must state in clear and unambiguous terms that waiver of sovereign immunity is a condition of receiving the gift or gratuity ...¹⁹⁸

191 *Id.* at 285.

192 465 U.S. 89 (1984).

193 *Id.* at 99.

194 Pub. L. No. 101-476, 104 Stat. 1103 (1990) (originally named the “Education of the Handicapped Act Amendments of 1990”), <https://www.congress.gov/101/statute/STATUTE-104/STATUTE-104-Pg1103.pdf>.

195 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 12.

196 344 F.3d 335 (3d Cir. 2003).

197 *Id.* at 345–46.

198 *Id.* at 346.

f. The Family and Medical Leave Act¹⁹⁹

The professors state that the Family and Medical Leave Act “explicitly binds States” and that it “defines ‘employer’ to include ...[‘]the government of a State or political subdivision thereof; [or] any agency of ...a State, or a political subdivision of a State[’] ...”²⁰⁰

This is inapposite as it is yet another Eleventh Amendment sovereign immunity case.²⁰¹

In conclusion, while the professors state that “[t]he language of statutes that *do* bind State governments provides the strongest support for the view that IRCA does not apply to States,” I believe this to be their weakest argument.

B. ARGUMENT #2: STATES HAVE A CONSTITUTIONAL RIGHT TO EMPLOY IN CERTAIN OCCUPATIONS ALIENS NOT AUTORIZED TO WORK UNDER FEDERAL LAW

The professors’ second primary argument is their strongest and the most intriguing. They argue that—even assuming for the sake of argument that IRCA’s employer sanctions apply to the States—the States may very well have a constitutional right as States to hire and employ unauthorized aliens as professors at State universities. The professors write that

If IRCA bound State government entities, it would at the very least alter the Federal-State balance by intruding into an area of traditional State authority: the States’ power to dictate the qualifications of their own officials. A State has the “broad power to define its political community” ...[and the right] to determine the qualifications for State positions “rest[s] firmly within a State’s constitutional prerogatives [citing the 1973 Supreme Court decision in *Sugarman v. Dougall*²⁰²].” The Supreme Court has long recognized this power as foundational to the structure of the nation’s federalist system. “It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers ... should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.” Because “each State has the power to prescribe the qualifications of its officers ... [and] it is a power reserved to the States under the Tenth

199 Pub. L. No. 103-3, 107 Stat. 6 (1993), <https://www.congress.gov/103/statute/STATUTE-107/STATUTE-107-Pg6.pdf>.

200 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 13 (citation omitted).

201 In 2003, the Supreme Court concluded in *Nevada Department of Human Resources v. Hibbs* that in enacting the FMLA, Congress relied on two of the powers vested in it by the Constitution: its Article I commerce power and its power under § 5 of the Fourteenth Amendment to enforce that Amendment’s guarantees. Congress may not abrogate the States’ sovereign immunity pursuant to its Article I power over commerce...Congress may, however, abrogate States’ sovereign immunity through a valid exercise of its § 5 power...

538 U.S. 721, 727–27 (2003).

202 413 U.S. 634, 648 (1973).

Amendment," application of IRCA's prohibition to at least some State employment decisions could well be unconstitutional.²⁰³

1. *Sugarman v. Dougall*

In *Sugarman*, the Supreme Court ruled unconstitutional a New York law generally providing that "no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States."²⁰⁴ New York State's competitive class apparently "reache[d] various positions in nearly the full range of work tasks ... all the way from the menial to the policy making."²⁰⁵ The Court noted its precedent declaring aliens as a class to be "a prime example of a 'discrete and insular' minority" ... and classifications based on alienage 'subject to close judicial scrutiny' []." ²⁰⁶ While the Court "recognize[d] a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community[']" and a "State's broad power to define its political community," "in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose."²⁰⁷

The Court concluded that

[New York's law is] neither narrowly confined nor precise in its application. Its imposed ineligibility may apply to the "sanitation man, class B," ... to the typist, and to the office worker, as well as to the person who directly participates in the formulation and execution of important state policy. The citizenship restriction sweeps indiscriminately. ... [In contrast, sections of New York law] relating generally to persons holding elective and high appointive offices, contain no citizenship restrictions.²⁰⁸

The Court ruled "that the statute does not withstand close judicial scrutiny"²⁰⁹ and "violate[d] the Fourteenth Amendment's equal protection guarantee."²¹⁰ Importantly, however, the Court clarified that

[W]e do not hold that, on the basis of an individualized determination, an alien may not be refused, or discharged from, public employment ... on the basis of noncitizenship, if ... rest[ing] on legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee. We hold only that a flat ban on the employment of aliens

203 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 19 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 462–63 (1991)) (citations omitted).

204 413 U.S. at 635.

205 *Id.* at 640.

206 *Id.* at 642 (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)) (citation omitted).

207 *Id.* at 642–43 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)).

208 *Id.* at 643 (citations omitted).

209 *Id.*

210 *Id.* at 646 (footnote omitted).

in positions that have little, if any, relation to a State's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment.

Neither do we hold that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office. Just as "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections,"²¹¹... "each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen."²¹² Such power inheres in the State by virtue of its obligation, already noted above, "to preserve the basic conception of a political community."²¹³... *And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government. There... is "where citizenship bears some rational relationship to the special demands of the particular position."*²¹⁴

[S]uch state action, particularly with respect to voter qualifications, is not wholly immune from scrutiny under the Equal Protection Clause. ... But our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives. ... *This is no more than a recognition of a State's historical power to exclude aliens from participation in its democratic political institutions... and a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders. ... This Court has never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause. Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights. ... A restriction on the employment of noncitizens, narrowly confined, could have particular relevance to this important state responsibility, for alienage itself is a factor that reasonably could be employed in defining "political community."*²¹⁵

Could it be the case that IRCA is unconstitutional to the degree that it prohibits States from allowing unauthorized aliens to be State "officers"? And even if the answer is yes, would college professors (and possibly teaching assistants) at State universities be considered such State officers?

I should first note that *Sugarman* is an Equal Protection Clause case. The Fourteenth Amendment provides that "[no] State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the

211 The Court quoted *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970) (opinion of Black, J.) (footnote and citations omitted).

212 The Court quoted *Boyd v. Thayer*, 143 U.S. 135, 161 (1892).

213 The Court quoted *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972).

214 The Court quoted the district court's decision below, *Dougall v. Sugarman*, 339 F. Supp. 906, 911 (S.D.N.Y. 1971) (Lumbard, concurring).

215 *Sugarman*, 413 U.S. at 646-49 (emphasis added) (citations omitted).

equal protection of the laws."²¹⁶ So are the post-*Sugarman* cases I will consider below. However, this article is not analyzing the States' right to employ unauthorized aliens as college professors through the lens of rights possessed by such aliens under the Equal Protection Clause. Rather, it is addressing whether States have the right, pursuant to the constitutional balance of power between States and the federal government, not to comply with a federal law *requiring* them to so deny employment. However, the Fourteenth Amendment cases will certainly be instructive in the analysis.

The Supreme Court has ruled that all persons residing within a State, including aliens unlawfully present within the United States, are protected by the Equal Protection Clause. In 1982, the Court ruled in *Plyler* that

[Texas] argue[s] at the outset that undocumented aliens, because of their immigration status, are not "persons within the jurisdiction" of the State of Texas, and that they therefore have no right to the equal protection of Texas law. We reject this argument. ... Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments.²¹⁷

To permit a State to employ the phrase "within its jurisdiction" in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment... [which was] to work nothing less than the abolition of all caste-based and invidious class-based legislation.²¹⁸

[T]he protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory. That a person's initial entry into ... the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. ... [U]ntil he leaves the jurisdiction—either voluntarily, or involuntarily...—he is entitled to the equal protection of the laws that a State may choose to establish.²¹⁹

As to the standard of review, the Court explained that "[i]n applying the Equal Protection Clause to most forms of state action, we... seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose [the "rational relation" test]."²²⁰ Generally, "[u]ndocumented aliens cannot be treated as a suspect class [requiring the highest standard of review of "strict

216 U.S. Const. amend XIV, § 1 (emphasis added).

217 *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (citing *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953), *Wong Wing v. United States*, 163 U.S. 228, 238 (1896), and *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

218 *Plyler*, 457 U.S. at 213.

219 *Id.* at 215.

220 *Id.* at 216.

scrutiny"] because their presence in this country in violation of federal law is not a "constitutional irrelevancy."²²¹

Returning to the question at hand, are IRCA's employer sanctions unconstitutional to the degree that they prohibit States from allowing unauthorized aliens to be State *officers*? The answer is very possibly yes. However, the answer is also very possibly no. As the professors acknowledge,

[Some] may argue that *Sugarman* and the cases following it give States some discretion to *exclude* certain people from the "political community" and thus public office, but not to *include* people excluded under federal law ... *Ambach* [states that] "It is because of th[e] special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in *limiting* the participation of noncitizens." ...²²²

Ultimately, the fact that the Court's prior cases on this issue concern limitations on the political community makes it impossible to know whether a future decision might draw such a distinction.²²³

In *Ambach*, the Supreme Court ruled that

The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. The Constitution itself refers to the distinction no less than 11 times. ... [T]he status of citizenship was meant to have significance in the structure of our government. ... *It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the*

221 *Id.* at 223. The Court in *Plyler* decided to apply an intermediate standard of review because of the case's "special constitutional sensitivity." *Id.* at 226. The Court stated that

Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants.

Id. at 219 (emphasis in original). But as the Court later explained in *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988),

Th[e] standard of review [used in Plyler]...less demanding than "strict scrutiny" but more demanding than the standard rational relation test, has generally been applied only in cases that involved discriminatory classifications based on sex or illegitimacy. In Plyler, which did not fit this pattern, the State of Texas had denied to the children of illegal aliens the free public education that it made available to other residents. Applying a heightened level of equal protection scrutiny, the Court concluded that the State had failed to show that its classification advanced a substantial state interest. ... We have not extended this holding beyond the "unique circumstances," ... that provoked [Plyler's] "unique confluence of theories and rationales[.]"

Kadrmas, 487 U.S. at 459 (citations omitted).

222 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 21 (citations omitted) (emphasis added by memo).

223 *Id.* at 22.

*participation of noncitizens.*²²⁴

And as the Supreme Court concluded in *Foley v. Connelie* in 1978, “[t]he essence of our holdings to date is that ... the right to govern is reserved to citizens”²²⁵—not reserved to citizens and those noncitizens of a State’s choosing, but to citizens.

Thus, while it is certainly *impossible to know* whether the Supreme Court in the future will find IRCA’s employer sanctions unconstitutional to the degree that they prohibit States from allowing unauthorized aliens to be State “officers”, there is a very strong possibility that the Court will not, considering its prior focus on the right of States to *limit* the participation of noncitizens based upon the distinction between citizens and aliens being fundamental to the definition and governance of a State.

2. *Public School Teachers versus University Professors*

Assuming for the sake of argument that IRCA’s employer sanctions would be unconstitutional if applied to State “officers,” would the Supreme Court consider college professors at State universities to be such officers? Are they *persons holding State elective or important nonelective executive, legislative, and judicial positions*? As the professors state, “[o]pponents of [our] view may argue that States’ power to dictate their employees’ qualifications is reserved only for the “most important government officials.”²²⁶

The professors’ response is that “[u]nder *Sugarman* and its progeny, the Court has defined the category of ‘important government officials’ quite broadly, to include police officers and public school teachers.”²²⁷ As to police officers, in 1978 the Supreme Court ruled in *Foley* that

To effectuate th[e] result [that the right to govern is reserved to citizens], we must necessarily examine each position in question to determine whether it involves discretionary decision making, or execution of policy, which substantially affects members of the political community.²²⁸

The police function fulfills a most fundamental obligation of government to its constituency. Police officers in the ranks do not formulate policy, *per se*, but they are clothed with authority to exercise an almost infinite variety of discretionary powers. ... [which] affects members of the public significantly and often in the most sensitive areas of daily life. ... An arrest ... is a serious matter for any person even when no prosecution follows or when an acquittal is obtained. Most arrests are without prior judicial authority, as when an officer observes a criminal act in progress or

224 *Ambach v. Norwick*, 441 U.S. 68, 75 (1979) (emphasis added) (citations and footnotes omitted).

225 435 U.S. 291, 297 (1978) (emphasis added).

226 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 19 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991)) (citation omitted).

227 *Id.* at 20 (citations omitted).

228 *Foley*, 435 U.S. at 296 (footnote omitted).

suspects that felonious activity is afoot. ...

Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals. ... A policeman ... is not to be equated with a private person engaged in routine public employment or other "common occupations of the community". ...

[I]t would be ... anomalous to conclude that citizens may be subjected to the broad discretionary powers of noncitizen police officers. ... Police officers very clearly fall within the category of "important nonelective ... officers who participate directly in the ... execution ... of broad public policy." ... [C]itizenship bears a rational relationship to the special demands of the particular position. A State may, therefore, consonant with the Constitution, confine the performance of this important public responsibility to citizens of the United States.²²⁹

So, it is within the realm of possibility that the Court would find that States have a constitutional right to hire unauthorized aliens as police officers. However, again, as the professors acknowledge, just because the Court found that States have the right to impose a citizenship requirement on police officers does not necessarily mean that the Court would also find that States have the right to hire noncitizens as officers (should federal law ever bar noncitizen eligibility), or even the right to hire as officers aliens already barred by federal law from employment.

As the Court stated, "the right to govern is reserved to citizens" and "it would be ... anomalous to conclude that citizens may be subjected to the broad discretionary powers of noncitizen police officers." Furthermore, "citizenship bears a rational relationship to the special demands of the particular position." And, as the Court stated in 1982 in *Toll v. Moreno*, "Our cases do recognize ... that a State, in the course of defining its political community, may, in appropriate circumstances, limit the participation of noncitizens in the States' political and governmental functions."²³⁰ The cases do not recognize that States can *expand* the participation of noncitizens in their political and governmental functions in contravention of federal law.

In any event, what about public school teachers? The Court concluded in *Ambach* that

[New York] forbids certification as a public school teacher of any person who is not a citizen ... unless that person has manifested an intention to apply for citizenship [with exemptions possible].²³¹

[S]ome state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of

229 *Id.* at 297–300 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)) (emphasis in original) (footnotes and citation omitted).

230 458 U.S. 1, 12 n.17 (1982) (citing *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982), *Ambach v. Norwick*, 441 U.S. 68, 72, 75 (1979), *Foley*, 435 U.S. at 295–96, and *Sugarman*, 413 U.S. at 646–49)).

231 441 U.S. at 69–70 (footnote and citation omitted).

all persons who have not become part of the process of self-government. In *Sugarman*, we recognized that a State could, "in an appropriately defined class of positions, require citizenship as a qualification for office."²³²

*In determining whether, for purposes of equal protection analysis, teaching in public schools constitutes a governmental function, we look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role. ... Each of these considerations supports the conclusion that public school teachers may be regarded as performing a task "that [goes] to the heart of representative government."*²³³

Public education ... "fulfills a most fundamental obligation of government to its constituency."²³⁴ The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions:

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." [quoting the Court's decision in *Brown v. Board of Education*.²³⁵]

... Other authorities have perceived public schools as an "assimilative force" by which diverse and conflicting elements in our society are brought together on a broad but common ground. ... These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.

Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. ... [T]eachers are in direct, day-to-day contact with students. ... They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. ... [and] serve[] as a role model for ... students, exerting a subtle but important influence over their perceptions and values. ... [A] teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's

232 *Id.* at 73–74.

233 The Court quoted *Sugarman*, 413 U.S. at 647 (footnote and citation omitted).

234 The Court quoted *Foley*, 435 U.S. at 297.

235 347 U.S. 483, 493 (1954).

social responsibilities. This influence is crucial to the continued good health of a democracy.

...[W]e think it clear that public school teachers come well within the “governmental function” principle recognized in *Sugarman* and *Foley*. Accordingly, the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bear a rational relationship to a legitimate state interest.²³⁶

At first blush, it might be presumed that the Court would analyze the right of a State to hire professors at State universities in the same manner as it would a State’s right to hire public school teachers. However, the analysis of the Supreme Court (as well as federal appellate courts) in other cases points to the opposite conclusion. Below I consider federal courts’ views of the fundamental roles of primary/secondary education compared to their views of the role of higher education. I also consider their views of the attributes of minor children attending school as compared to adults attending college.

I should first point out that in *Ambach* itself, Justice Blackmun wrote in dissent that “[w]e are concerned here with elementary and secondary education in the public schools of New York State. We are not concerned with teaching at the college or graduate levels.”²³⁷

a. Public Education = Basic Education

In *Ambach*, the majority cited a number of cases in addition to *Brown* for the proposition that “[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests,” and none of them involve higher education.²³⁸

Additionally, the Supreme Court has continually focused on the importance of *basic education* for *young minds*. In 1952, it found in *Adler v. Board of Education*²³⁹ that

A teacher ... in a schoolroom ... shapes the attitude of *young minds* towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.²⁴⁰

In 1972, the Court concluded in *Wisconsin v. Yoder* that “There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of *basic education*

236 *Ambach*, 441 U.S. at 75–80 (emphasis added) (citations and footnotes omitted).

237 *Id.* at 84 (Blackmun, J., dissenting).

238 *Id.* at 76–77.

239 342 U.S. 485 (1952).

240 *Id.* at 493 (emphasis added).

[citing its 1925 decision in *Pierce v. Society of Sisters*²⁴¹]. Providing public schools ranks at the very apex of the function of a State."²⁴² In 1982, the Court concluded in *Plyler* that "[b]y denying these [unlawfully present alien] children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."²⁴³ The *Plyler* Court went on to explain that

The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.²⁴⁴

It seems clear that the Supreme Court is referring to public primary and secondary education when referring to public education—and not to public higher education.

b. Moral Development of Youth

In *Plyler*, the Court further explained that

We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government,"²⁴⁵ and as the primary vehicle for transmitting "the values on which our society rests."²⁴⁶ "[As] ... pointed out early in our history, ... some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."²⁴⁷

The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained.²⁴⁸

Four years later, in 1986, the Court stated in *Bethel School District v. Fraser*²⁴⁹ that

The role and purpose of the American public school system were well described

241 268 U.S. 510, 534 (1925).

242 406 U.S. 205, 213 (1972) (emphasis added).

243 *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982) (emphasis added).

244 *Id.* at 222 (emphasis added) (footnote omitted).

245 The Court quoted *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

246 The Court quoted *Ambach v. Norwick*, 441 U.S. 68, 72, 76 (1979).

247 *Plyler*, 457 U.S. at 221. The Court quoted *Yoder*, 406 U.S. at 221.

248 *Plyler*, 457 U.S. at 222 n.20.

249 478 U.S. 675 (1986).

by two historians, who stated: “[Public] education must prepare pupils for citizenship in the Republic. ... It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”²⁵⁰

And as the District Court for the District of Massachusetts concluded in *Parker v. Hurley*²⁵¹ in 2007,

The reason for the constitutional concern regarding *young school children* for Establishment Clause purposes does not apply to plaintiffs' substantive due process and Free Exercise Clause claims in this case. The Establishment Clause prohibits government conduct that has the effect of endorsing religion. ... However, the very purpose of schools is the “preparation of individuals for participation as citizens’ [and, therefore,] local education officials may attempt ‘to promote civic virtues’ ‘that awake[n] the child to cultural values.’”²⁵² Schools are expected to transmit civic values.²⁵³ ... In essence, the Supreme Court has made clear that while the state may not expressly or indirectly endorse a particular religion or suggest that religious beliefs are officially preferred over other beliefs, the state is expected to teach civic values as part of its preparation of students for citizenship.²⁵⁴

Federal courts have not described the purpose of higher education in this fashion, as preparing students to be U.S. citizens and imparting shared values. In fact, as I will discuss below, they have ascribed a wholly different role to higher education.

c. The Distinct Role of Higher Education

In 2008, the Third Circuit concluded in *DeJohn v. Temple University*,²⁵⁵ that

[T]here is a difference between the extent that a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school.²⁵⁶

... Certain speech ... which *cannot* be prohibited to adults *may* be prohibited to public elementary and high school students.²⁵⁷

... [A]dministrators are granted *less leeway* in regulating student speech than are public elementary or high school administrators.²⁵⁸

250 *Id.* at 681 (citation omitted).

251 474 F. Supp. 2d 261 (D. Mass. 2007).

252 The court quoted *Board of Education v. Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring).

253 The court cited *Plyler*, 457 U.S. at 221 and *Ambach v. Norwick*, 441 U.S. 68, 72, 76 (1979).

254 *Parker*, 474 F. Supp. 2d at 271–72 (emphasis added).

255 537 F.3d 301 (3d Cir. 2008).

256 *Id.* at 315.

257 *Id.* (emphasis in original) (citation omitted).

258 *Id.* at 316 (emphasis in original).

The court explained that

[O]n public university campuses throughout this country... free speech is of critical importance because it is the lifeblood of academic freedom. As the Supreme Court... explained, "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. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"²⁵⁹

It is well recognized that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas[.]'"²⁶⁰

And in 2010, the Third Circuit in *McCauley v. University of the Virgin Islands*²⁶¹ explained that "'[d]iscussion by adult students in a college classroom should not be restricted,'"²⁶² "based solely on rationales propounded specifically for the restriction of speech in public elementary and high schools..."²⁶³ The Third Circuit reiterated its *DeJohn* ruling: "Public universities have significantly less leeway in regulating student speech than public elementary or high schools."²⁶⁴ It explained that

We reach this conclusion in light of [1] the differing pedagogical goals of each institution, [2] the *in loco parentis* role of public elementary and high school administrators, [3] the special needs of school discipline in public elementary and high schools, [4] the maturity of the students, and, finally, [5] the fact that many university students reside on campus and thus are subject to university rules at almost all times.²⁶⁵

i. The Distinct Role: Pedagogical Differences

As to the differing pedagogical goals of each institution, the Third Circuit in *McCauley* explained that

[T]he pedagogical missions of public universities and public elementary and high schools are undeniably different. ... [T]he former encourages inquiry and challenging a priori assumptions whereas the latter prioritizes the inculcation of societal values. Public universities encourage teachers and students to launch new inquiries into our understanding of the world. ... The university atmosphere of speculation, experiment, and creation is essential to the quality of higher

259 *Id.* at 314 (quoting *Healy v. James*, 408 U.S. 169, 180 (1972)) (citation omitted). See generally Henry J. Hyde & George Fishman, *The Collegiate Speech Protection Act of 1991: A Response to the New Intolerance in the Academy*, 37 Wayne L. Rev. 1469 (1991).

260 *Id.* 315 (quoting *Healy*, 408 U.S. at 180).

261 618 F.3d 232 (3d Cir. 2010).

262 *Id.* at 242 (quoting *DeJohn*, 537 F.3d at 315).

263 *Id.* (citing *DeJohn*, 537 F.3d at 315) (citation omitted).

264 *Id.* at 247.

265 *Id.* at 242–43.

education. Our public universities require great latitude in expression and inquiry to flourish. ...*Free speech "is the lifeblood of academic freedom."*²⁶⁶ ...Public elementary and high schools, on the other hand, are tasked with inculcating a "child [with] cultural values, [to] prepar[e] him for later professional training, and [to] help[] him to adjust normally to his environment."²⁶⁷ ... "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."²⁶⁸ As a result, "teachers—and indeed the older students—[must] demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class."²⁶⁹ ...School attendance exposes students to "role models" who are to provide "essential lessons of civil, mature conduct."²⁷⁰ ...*Public elementary and high school education is as much about learning how to be a good citizen as it is about multiplication tables and United States history.*²⁷¹

ii. *The Distinct Role: In Loco Parentis*

As to the *in loco parentis* role of public elementary and high school administrators, the court in *McCauley* explained that

"[P]ublic elementary and high school administrators," unlike their counterparts at public universities, "have the unique responsibility to act *in loco parentis*."²⁷² ... "[B]road authority to control the conduct of [public elementary and high school] students granted to school officials permits a good deal of latitude in determining which policies will best serve educational and disciplinary goals."²⁷³

*Public university administrators, officials, and professors do not hold the same power over students.*²⁷⁴

The court explained that this has not always been so, but rather is a modern development. It concluded that "[t]he idea that public universities exercise strict control over students via an *in loco parentis* relationship has decayed to the point of irrelevance."²⁷⁵

266 The court quoted *DeJohn*, 537 F.3d at 314 (emphasis added).

267 The court quoted *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (emphasis added) (citation omitted).

268 The court quoted *Bethel School District v. Fraser*, 478 U.S. 675, 683 (1986).

269 *Id.*

270 *Id.*

271 *McCauley*, 618 F.3d at 243 (emphasis added) (citations omitted).

272 The court quoted *DeJohn v. Temple University*, 537 F.3d 301, 315 (3d Cir. 2008).

273 The court quoted *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243, 260 (2002).

274 *McCauley*, 618 F.3d at 243–44 (emphasis added) (citations omitted).

275 *Id.* at 245 (citations omitted). The court then provided some historical context:

Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students. ...[R]ights formerly possessed by college administrations

iii. *The Distinct Role: School Discipline*

As to the special needs of school discipline in public elementary and high schools, the Supreme Court concluded *Vernonia School District v. Acton*²⁷⁶ in 1995 that

In [N.J. v.] T. L. O. . . . [we] did not deny, but indeed emphasized, that *the nature of [public schools'] power [over students] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."*²⁷⁷ . . . [W]e have acknowledged that for many purposes "school authorities act in loco parentis,"²⁷⁸ with the power and indeed the duty to "inculcate the habits and manners of civility,"²⁷⁹ . . . Thus, while children assuredly do not "shed their constitutional rights . . . at the schoolhouse gate,"²⁸⁰ *the nature of those rights is what is appropriate for children in school. . . .*

*Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children.*²⁸¹

The Third Circuit in *McCauley* explained that

have been transferred to students. College students today are no longer minors; they are now regarded as adults in almost every phase of community life. . . . [E]ighteen year old students are now identified with an expansive bundle of individual and social interests and possess discrete rights not held by college students from decades past. There was a time when college administrators and faculties assumed a role In loco parentis. . . . The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights. In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country. These movements, taking place almost simultaneously with legislation and case law lowering the age of majority, produced fundamental changes in our society. A dramatic reapportionment of responsibilities and social interests of general security took place. Regulation by the college of student life on and off campus has become limited. Adult students now demand and receive expanded rights of privacy in their college life including, for example, liberal, if not unlimited, partial visiting hours. College administrators no longer control the broad arena of general morals. At one time, exercising their rights and duties In loco parentis, colleges were able to impose strict regulations. But today students vigorously claim the right to define and regulate their own lives.

Id. at 244–45 (quoting *Bradshaw v. Rawlings*, 612 F.2d 135, 138–40 (3d Cir. 1979)) (footnotes omitted).

276 515 U.S. 646 (1995).

277 The Court quoted *N.J. v. T. L. O.*, 469 U.S. 325, 339 (1985) (emphasis added).

278 The Court quoted *Bethel School District v. Fraser*, 478 U.S. 675, 684 (1986)..

279 The Court quoted *Bethel*, 478 U.S. at 681 (internal quotation marks omitted by *Vernonia*).

280 The Court quoted *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969) (emphasis added).

281 *Veronica*, 515 U.S. at 655–56 (emphasis added) (citations omitted).

Closely related to the *in loco parentis* issue is...that public elementary and high schools must be empowered to address the “special needs of school discipline” unique to those environs.²⁸² In [N.J. v.] T.L.O., the Supreme Court, in discussing the scope of a public high school student’s Fourth Amendment rights, stated that teachers and administrators in public high schools have a substantial interest in “maintaining discipline in the classroom and on school grounds”: “Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.”²⁸³ ...“Compulsory attendance laws automatically inhibit the liberty interest afforded public school students, as the law compels students to attend school in the first place [and o]nce under the control of the school, students’ movement and location are subject to the ordering and direction of teachers and administrators.”²⁸⁴ Unlike the strictly controlled, smaller environments of public elementary and high schools, where a student’s course schedule, class times, lunch time, and curriculum are determined by school administrators, *public universities operate in a manner that gives students great latitude*: for example, university students routinely (and unwisely) skip class; they are often entrusted to responsibly use laptops in the classroom; they bring snacks and drinks into class; and they choose their own classes. In short, *public university students are given opportunities to acquit themselves as adults. Those same opportunities are not afforded to public elementary and high school students.*²⁸⁵

iv. The Distinct Role: Emotional Maturity

As to the maturity of elementary and secondary school students as compared to those in higher education, the court in *McCauley* explained that

*[P]ublic elementary and high school administrators “must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.”*²⁸⁶ ...*Considerations of maturity are not nearly as important for university students, most of whom are already over the age of 18 and entrusted with a panoply of rights and responsibilities as legal adults. ...“University students are...young adults [and] are less impressionable*

282 The court quoted *DeJohn v. Temple University*, 537 F.3d 301, 315–16 (3d Cir. 2008).

283 The court quoted *T.L.O.*, 469 U.S. at 339.

284 The court quoted *Shuman v. Penn Manor School District*, 422 F.3d 141, 149 (3d Cir. 2005) (emphasis added) (internal citations and quotation marks omitted).

285 *McCauley v. University of the Virgin Is.*, 618 F.3d 232, 245–46 (3d Cir. 2010). (emphasis added) (citations omitted).

286 The court quoted *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (emphasis added). The court also quoted *Bethel School District v. Fraser*, 478 U.S. 675, 683 (1986) (“The speech [at issue] could well be seriously damaging to its less mature audience.”) and *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (“[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”).

than younger students[.]”²⁸⁷

In 1987, the Supreme Court found in *Edwards v. Aguillard* that “Students in [elementary and secondary schools] are impressionable and their attendance is involuntary. . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure.”²⁸⁸

Finally, in 2006, the Ninth Circuit in *Harper v. Poway Unified School District*²⁸⁹ explained that its decision to affirm a district court’s denial of a preliminary injunction sought by a high school student who sued school officials over their decision to keep him out of class for wearing a T-shirt with a religious message that condemned homosexuality “is based not only on the type and degree of injury the speech involved causes to impressionable young people, but on the locale in which it takes place. . . . [S]tudent rights must be construed ‘in light of the special characteristics of the school environment’”[.].²⁹⁰

The Ninth Circuit then emphasized that

[The precedent we are setting] is *limited to conduct that occurs in public high schools (and in elementary schools). As young students acquire more strength and maturity, and specifically as they reach college age, they become adequately equipped emotionally and intellectually to deal with the type of verbal assaults that may be prohibited during their earlier years. Accordingly, we do not condone the use in public colleges or other public institutions of higher learning of restrictions similar to those permitted here.*²⁹¹

v. The Distinct Role: Compulsory Attendance

In *Abington School District v. Schempp*,²⁹² Justice Brennan wrote in a concurring opinion that

In *Hamilton v. Regents of the University of California*²⁹³ . . . the question was that of the power of a State to compel students at the State University to participate in military training instruction against their religious convictions.

287 618 F.3d at 246 (emphasis added) (citations and footnote omitted). The court quoted *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981). In *Bethel*, the Supreme Court explained that

This Court’s First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children. . . . *These cases recognize the obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.*

478 U.S. at 684 (emphasis added) (citations omitted).

288 482 U.S. 578, 584 (1987) (citations and footnote omitted).

289 445 F.3d 1166 (9th Cir. 2006), *vacated and remanded on other grounds*, 549 U.S. 1262 (2007).

290 *Id.* at 1183 (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

291 *Id.* (emphasis added).

292 374 U.S. 203 (1963).

293 293 U.S. 245 (1934).

The validity of the statute was sustained against claims based upon the First Amendment. But the decision rested on a very narrow principle: since there was neither a constitutional right nor a legal obligation to attend the State University, the obligation to participate in military training courses, reflecting a legitimate state interest, might properly be imposed upon those who chose to attend. ...

...[I]f *Hamilton* retains any vitality with respect to higher education, we recognized its inapplicability to cognate questions in the public primary and secondary schools when we held in *West Virginia Board of Education v. Barnette*²⁹⁴ ... that a State had no power to expel from public schools students who refused on religious grounds to comply with a daily flag salute requirement. ... The key to the holding that such a requirement abridged rights of free exercise lay in the fact that attendance at school was not voluntary but compulsory. The Court [in *Barnette*] said:

... "In the present case attendance is not optional."²⁹⁵

The different results of those cases are attributable only in part to a difference in the strength of the particular state interests which the respective statutes were designed to serve. Far more significant is the fact that *Hamilton* dealt with the voluntary attendance at college of young adults, while *Barnette* involved the compelled attendance of young children at elementary and secondary schools. *This distinction warrants a difference in constitutional results.*²⁹⁶

In *Edwards*, the Supreme Court approvingly quoted Justice Brennan's conclusion: "Students in [elementary and secondary schools] are impressionable and their attendance is involuntary."²⁹⁷ *The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.*²⁹⁸ And in the related footnote, the Court quoted from Justice Brennan's concurrence: "The potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses. *This distinction warrants a difference in constitutional results.*"²⁹⁹

vi. The Distinct Role: On-Campus Residence

The Third Circuit in *McCauley* concluded that

[U]niversity students, unlike public elementary and high school students,

294 319 U.S. 624 (1943).

295 *Schempp*, 374 U.S. at 250–52 (Brennan, J., concurring) (quoting *Barnette*, 319 U.S. at 631–32) (citations omitted).

296 *Id.* at 252–53 (Brennan, J., concurring) (emphasis added) (footnote omitted).

297 482 U.S. 578, 584 (1987) (citing a number of cases including Justice Brennan's concurrence in *Schempp*).

298 *Id.* (citing a number of cases including Justice Brennan's concurrence in *Schempp*) (emphasis added) (citations and footnote omitted).

299 *Id.* at n.5 (quoting *Schempp*, 374 U.S. at 253 (Brennan, J., concurring)).

often reside in dormitories on campus, so they remain subject to university rules at almost all hours of the day. The concept of the “schoolhouse gate,” and the idea that students may lose some aspects of their First Amendment right to freedom of speech while in school, does not translate well to an environment where the student is constantly within the confines of the schoolhouse.³⁰⁰

In summation, the factors that led the Supreme Court in *Ambach* to conclude that public school teachers perform a task “that [goes] to the heart of representative government”—most decisively that they have the responsibility of preparing children for future participation as citizens in self-government and the responsibility to preserve the values on which our society rests—are factors that federal courts have found to be largely absent with regard to professors and administrators in the dramatically different context of higher education. It may be doubted that the citizenship or immigration status of a professor will materially impact the encouragement of free inquiry and the challenging of ingrained assumptions. Additionally, among other factors, the adults attending college have a higher level of emotional maturity and are attending school on a voluntary basis. Thus, it may be doubted that the Supreme Court would find that States have a right to impose a citizenship requirement on State university professors. However, as discussed, even if the Court did find States to have this right, this does not necessarily mean that the Court would also find them to have the right to hire noncitizen professors (should federal law bar noncitizen eligibility), or even the right to hire unauthorized alien professors.

III. CONCLUSION

If the Regents of the University of California do authorize the UC system to employ aliens not authorized to work under federal law, and the federal government challenges the decision, (1) IRCA’s employer sanctions regime will likely be found to apply to UC; and (2) UC will likely not be found to have a constitutional right to hire unauthorized aliens as professors. Unless the California State government officially authorizes such action, however, the UC system would not even have available the police power or constitutional defenses put forward by the professors, and could only rely on the argument that IRCA’s employer sanctions do not apply to any State entity acting as an employer because of Congress’s failure to spell out their application to States. I would thus presume that the UC system would implore the California legislature to pass, and the governor to sign, legislation providing official authorization. In any event, if California or any other State desires to allow its State universities to employ unauthorized aliens, I would suggest it should seek a statutory exemption from Congress.

300 McCauley v. Univ. of the Virgin Is., 618 F.3d 232, 247 (3d Cir. 2010) (citation omitted).

SECTION 504 AT FIFTY
DISABILITY POLICY AND PRACTICE
IN HIGHER EDUCATION
WHY 504 AND THE ADA REMAIN
RELEVANT AND IMPORTANT

LAURA ROTHSTEIN*

Abstract

The article provides an overview of the history and current status of federal disability discrimination law as it applies to institutions of higher education. It sets out the major issues of attention historically and provides a perspective on issues that most require current and focused attention because they are complex, changing, and high profile. It urges an approach that is proactive and encourages institutions not to just comply with the legal mandates, but to consider what actions can be done and should be done by balancing a range of concerns.

Appreciation is expressed to Barbara Lee and Maxine Idakus for their exceptional editorial work on the article.

* Professor of Law and Distinguished University Scholar Emeritus, University of Louisville, Louis D. Brandeis School of Law. B.A., University of Kansas; J.D., Georgetown University Law Center. Professor Rothstein's experience in higher education spans 46½ years at five law schools and includes several years of administrative leadership experience (including service as Dean of the Brandeis School of Law at the University of Louisville). She served as the first law school faculty editor of the *Journal of College and University Law* from 1980 to 1986 and currently serves on its editorial board. She published many of the earliest works on disability and higher education and K-12 education. She has retired but continues to publish and serve as a consultant on higher education disability rights issues.

She continues biannual updates for *Disabilities and the Law* (Thomson Reuters) coauthored with Julia Irzyk (first published in 1984 and now in its fourth). A fifth edition (also to be cumulatively updated twice a year is being planned for 2024 or 2025 publication. She is in the process of writing the seventh edition of *Disability Law* (with Ann McGinley and D'Andra Millsap Shu) for fall 2024 publication by Carolina Academic Press and the seventh edition of *Special Education Law* (with Scott Johnson) for fall 2025 publication with Sage Publishers.

This article is adapted from presentations given at the Association of American Law Schools annual meeting on January 6, 2023, and the Stetson Conference on Higher Education and Policy on March 4, 2023. It also incorporates the framework of coverage of these issues from *A Primer on Disability Discrimination in Higher Education* (cited later in this article).

This article is dedicated to the late Professor Michael Olivas. The article also acknowledges Gordon Gee Each of them played a significant role in my career focus on higher education and disability issues.

Michael Olivas died in April 2022. He had retired from the law faculty at the University of Houston. I first knew Michael through our attendance at AALS Education Law Section programs, beginning in about 1981 (when I was the Faculty Editor of the *Journal of College & University Law (JCUL)*). We were both interested in higher education policy issues, and I invited him to write an article for *JCUL*. Since then, he has written several articles for *JCUL* (beginning in 1984) and wrote broadly on higher education topics, which is reflected in his textbook on higher education law. He recruited my husband, Mark, and me to the University of Houston where we became colleagues. Michael and I team-taught higher education law several times. He was always a wise counsel as a colleague and friend on numerous higher education issues. He is an icon in higher education and recognition of that came when he was selected as the first recipient of the William Kaplin Award in 2009 by Stetson University Center for Higher Education and Institution Policy which “recognizes scholars who have published works on education law that embrace the intersection of law and policy.” When I was Faculty Editor of *JCUL*, he often provided advice that was always just right. I miss his wise counsel.

Gordon Gee (now President of West Virginia University (WVU)) opened the door for me to build a lifetime of commitment to issues of higher education and disability law. He was the Dean of WVU College of Law in 1980 when I was appointed to the faculty. WVU Law School had just been invited to serve as the editorial home for *JCUL*, and he asked me to serve as the first Faculty Editor, which I did for six years. This was at the same time I became interested in a newly emerging area of disability law. Gordon also allowed me to create a course at WVU in disability law. Gordon’s opening these two doors allowed me to see the intersection of higher education and disability law at a very early stage. Gordon also has a casebook on higher education law and has served as President at five universities. He was also a recipient of the William Kaplin Award (in 2018).

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I. PERSPECTIVE

The goal of this article is to reach college and university attorneys who are in a position not just to “defend” the institutions of higher education (IHEs) they represent, but also to persuade leadership at those institutions to take a proactive approach to disability issues on campus in a way that goes beyond “risk management” and “compliance check-offs.”¹ The article intends to highlight the benefit—beyond avoiding the use of scarce resources on litigation and other dispute resolution—of raising key leadership awareness about the advantages of taking a positive and inclusive approach to disability discrimination issues. The article provides a starting place for what institutions *must* do within the legal mandates—the basic legal mandates for the major issues of disability discrimination that have arisen in the past fifty years. It also encourages institutions to develop approaches where they also consider what *can* be done—for example, where IHEs have the discretion to go beyond what the law requires, while taking into account considerations of fairness and resources limitations in deciding what *should* be done.

Individuals at IHEs affected by disability discrimination requirements include students, staff, and faculty. Others affected include visitors (sports and entertainment event attendees); applicants for admission; health care clinic and hospital patients; those served in other clinical programs; employers interviewing on campus; and individuals visiting food services programs, stores, libraries, or museums on campus. University counsel can guide institutional policy makers how to consider a very wide range of issues in planning for proactive approaches.

The “style” of this article—written after forty-three years of thinking about the connection between higher education and disability is more personal than previous articles.² It references³ detailed citations and synthesis on many topics, but unlike most of my previous scholarly work, it is written as a “commentary” narrative with the intent to persuade. It draws not only on my scholarship on these

1 Presidents seek more training on a range of areas, including diversity, equity and inclusion (DEI), legal issues, technology planning, and crisis management. These all have implications for disability law. Audrey Williams June, *Here Are the Parts of the Job for Which Presidents Want More Training*, CHRON. HIGHER EDUC. (Apr. 14, 2023), https://www.chronicle.com/article/here-are-the-parts-of-their-job-for-which-presidents-want-more-training?utm_source=Iterable&utm_medium=email&utm_campaign=campaign_6613795_nl_Academe-Today_date_20230414&cid=at&source=&sourceid=&cid2=gen_login_refresh.

2 This is the ninth article I have published in *JCUL*, for which I served as Faculty Editor while at West Virginia University College of Law (1980–1986) and for which I currently serve as an advisory board member. I began writing and teaching about disability law also in 1980 and saw the connections between higher education and disability law at that point. See Appendix A.

3 The footnotes guide the reader to more detailed citations of cases and other material on each topic. They provide some detail on a few key cases. The treatise that is cited throughout was written in its first edition during the five years I served on the faculty at West Virginia University and included even then a chapter devoted solely to higher education issues, before there was much case law or even regulatory guidance on the topic. Published in its first edition in 1984, it is now in its fourth edition, but is updated cumulatively every six months, which attests to the dynamic evolution of disability discrimination law. It is now coauthored. See LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* (2014) [hereinafter *DISABILITIES AND THE LAW*]. A revised edition is planned for 2024.

issues, but also on my experience as a faculty member⁴ and administrator,⁵ active participant in national legal and higher education programming,⁶ and presenter on individual campuses and at national conferences.⁷ This knowledge and these experiences reinforce my approach to legal issues, which has been to be proactive (in planning for and anticipating issues), to resolve the issue without unnecessary and costly disputes, and to “do the right thing.” This approach recognizes that resources are not unlimited and that institutions have an obligation to fairness and that there is a duty to protect the public by ensuring that graduates of professional programming are competent. It considers the hidden cost of negative media attention (including through social media) when a campus policy or practice is not thoughtful. It also recognizes that while it is not my belief that higher education institutions intentionally exclude individuals with disabilities, from the perspective of many, the way that IHEs are built and operate can seem “ableist” to individuals with disabilities in many settings.⁸

The article reflects on the fifty years since disability rights became an issue for IHEs. It does not attempt to provide in-depth analysis of all issues. Instead, it provides a basic overview of most of the major issues that arise in the higher education context (including a perspective on areas that benefit from proactive planning) and the status of those issues today. In addition, the article provides a more focused analysis of current and crystal ball or evolving topics. Finally, it suggests and encourages a framework for university counsel to present to leadership to encourage policies, practices, and procedures that not only avoid costly disputes, but also avoid negative high-profile and embarrassing media attention, and a proposed administrative structure to make that approach more effective.

While the basic substantive provisions are the same for all federal disability nondiscrimination statutes (section 504)⁹ and Titles I, II, and III of the Americans

4 My legal education service began in 1986 and included service at five different law schools (one private religiously affiliated and four state public university) in five different states.

5 My law school administrative experience includes Director of Admissions (at Ohio Northern University) for one year; Associate Dean for Students (1986–1993) and Associate Dean for Graduate Programs (1999–2000) at University of Houston, and Dean (2000–2005) at University of Louisville Louis D. Brandeis School of Law.

6 Major service included membership on the Law School Admissions Council (LSAC) Board of Trustees, committee and task force membership in Association of American Law Schools (AALS), American Bar Association (ABA) Council of Legal Education and Admission to the Bar, and service on ABA/AALS accreditation/membership reviews for eight law schools.

7 The national conferences span a wide range of perspectives, including, National Association of College and University Attorneys, Education Law Association, Association of Higher Education and Disabilities, American Council on Education, Southeastern Association of Law Schools, AALS, ABA, and LSAC. Presentations at major higher education policy conferences have been given frequently at the Stetson Conference and the Vermont Conference. Many invited lectures were for community college leadership at institutions in New York, Pennsylvania, Texas, California, Indiana, and Kentucky. Many of my lectures have been invited talks to key leadership, including deans, associate deans, presidents, and provosts.

8 See JAY T. DELMAGE, *ACADEMIC ABLEISM: DISABILITY AND HIGHER EDUCATION* (2017) (now available on open access).

9 29 U.S.C. § 794, enacted as part of the Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355.

with Disabilities Act (ADA),¹⁰ the remedies and procedures vary depending on what setting the individual with a disability is in.¹¹ Section 504 of the Rehabilitation Act applies to all programs receiving federal financial assistance and would thus affect student, faculty, staff, and visitors. Title I of the ADA applies to employment. Title II applies to all aspects (most courts also apply it to employment) of a state or local governmental program (e.g., a state university). Title III applies to *private* providers of twelve categories of accommodations (including education programs) open to the public (e.g., a private university). Title III does not apply to employment. Because of the limited damages, remedies under Title III, section 504, remains a “safety net” in higher education, which could be critical if the Supreme Court erodes the application of the ADA in any way. It also provides the avenue for the Department of Education (ED) Office for Civil Rights (OCR)¹² investigations that “incentivize” compliance with disability discrimination requirements in higher education. Section 504 also provides the vehicle for funding programs such as mental health treatment in higher education institutions.¹³

In the world of federal disability regulatory law, universities and colleges are unique in at least two ways. First, they have had longer experience with disability rights issues¹⁴ because most were covered by section 504 since 1973 and have addressed these issues in a variety of settings for decades. Second, a campus setting usually includes a range of affected individuals (students (and applicants), faculty and staff, alums, and visitors) in a very wide range of settings (housing, transportation, sports and performance venues, classrooms, food services, museums and other display areas, libraries, clinics, labs, programs abroad, alumni activities, hospitals and other health care settings). This makes it challenging to develop policies, practices, and procedures that consider those different settings and that ensure a means of communicating access issues to the wide range of constituents and to train those who are on the front lines of serving students and visitors and others.

II. OVERVIEW

Section 504 of the Rehabilitation Act (hereinafter section 504)¹⁵ was enacted in 1973 with little fanfare or publicity and little legislative history. The first major federal civil rights statute for individuals with disabilities provides that entities receiving federal financial assistance may not discriminate on the basis of disability

10 42 U.S.C. &§ 12101- 12212, Pub. L. No. 101-336, 104 Stat. 327.

11 For more detailed discussion, see *DISABILITIES AND THE LAW*, *supra*, note 3, ch. 3.

12 For the website of the federal Department of Education, see <https://www.ed.gov/>.

13 See, e.g., <https://www.ed.gov/news/press-releases/us-department-education-announces-intent-strengthen-and-protect-rights-students-disabilities-amending-regulations-implementing-section-504>.

14 The only other major institutions that have had somewhat similar lengths of experience are health care entities, such as hospitals, which receive substantial federal funding for grants and health care coverage. It is not a surprise that many of the early disability discrimination cases in higher education also involved health care programs directly or indirectly.

15 29 U.S.C. § 794.

(originally “handicap”). Its regulatory scheme was slow to evolve,¹⁶ but once in place, it provided an important basic framework that was interpreted by the courts and later included as statutory language in the framework for the ADA.¹⁷ Between 1973 and 1990, the Education for All Handicapped Children Act of 1975 (now Individuals with Disabilities Education Act) of 1975¹⁸ provided a comprehensive statutory and regulatory framework that resulted in a gradual but eventually fairly significant increase in the number of students with disabilities on campus. This gradual infusion of students with disabilities into higher education, the lack of regulations until 1977, and the limited public attention given to section 504 when it was enacted are all factors in why there is almost no judicial attention to these issues before 1980.

Because higher education was one of the major societal recipients of federal financial assistance, higher education became an early laboratory for developing many of the judicial interpretations of its provisions, including the first Supreme Court case that framed the meaning of “otherwise qualified” in *Southeastern Community College v. Davis*¹⁹ in 1979. Case law on what was required for reasonable accommodations also developed earliest in the higher education context. Except for the issue of learning disabilities, there were few judicial decisions addressing whether the individual complaining of discrimination met the definition of “disabled” until the ADA was enacted in 1990.²⁰

The ADA brought most employers into the sphere of entities obligated to comply, and the private-sector defendants began to bring motions to dismiss on the basis that the complainant did not meet the definition for protection. The 1999 *Sutton* Supreme Court trilogy of employment cases²¹ was a “backlash” reaction to the 1990

16 This year also marks the passing of disability rights icon, Judy Heumann, whose advocacy leadership was a key factor in the promulgation of regulations under section 504. Alex Traub, *Judy Heumann, Who Led the Fight for Disability Rights, Dies at 75*, NEW YORK TIMES (Mar. 5, 2023), <https://www.nytimes.com/2023/03/05/obituaries/judy-heumann-dead.html>.

17 42 U.S.C. § 12101.

18 20 U.S.C. § 1400, Pub. L. 91-230, title VI, §601. See DISABILITIES AND THE LAW, *supra* note 3, § 1:25 and ch. 2. Beginning in 1975, the framework existed for a child to be identified as eligible for special education and related services. A kindergarten-age child so identified in 1976 would reach college age about 1990, and because of IDEA, these individuals would be much more likely to be otherwise qualified to do college level work. Students with learning disabilities are probably the most significant population for which that was the case.

19 442 U.S. 397 (1979). For context and background of the case, see Laura Rothstein, *The Story of Southeastern Community College v. Davis: The Prequel to the Television Series “ER,”* in MICHAEL A. OLIVAS & RONNA GREFF SCHNEIDER, EDUCATION LAW STORIES ch. 7 (2008).

20 DISABILITIES AND THE LAW, *supra* note 3, §§ 3:1–3:3.

21 *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (individuals with vision corrected with eyeglasses or contact lenses were not disabled); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999) (individual with high blood pressure controlled by medication was not disabled); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (truck driver with correctable monocular vision was not disabled). The same day that these cases were decided, the Court also remanded a case related to higher education regarding whether an individual with a learning disability was disabled under the ADA. The case involved an individual seeking accommodations for the New York bar exam. *Bartlett v. N.Y. State Bd. of L. Exam’rs*, 970 F. Supp. 1094, 1119 (S.D.N.Y. 1997), *aff’d in part, vacated in part on other grounds*, 156 F.3d 321 (2d Cir. 1998) *cert. granted, judgment vacated*, 527 U.S. 1031 (1999) and *aff’d in part*,

enactment of the ADA and its much greater application to most employment settings. Although it took almost a decade after those decisions, Congress responded by enacting the ADA Amendments Act of 2008,²² which clarified the definitional coverage.

This article provides a brief overview of the history of the legislative, regulatory, and judicial developments related to disability discrimination in higher education since 1973. It briefly reviews some of the key issues under section 504/ADA that higher education has faced in the past fifty years.²³ It highlights major issues that are being faced in the disability context by higher education in 2023, fifty years after section 504 was passed.

Of most importance is that this article will emphasize the value and benefits for higher education leaders and policy makers to take a proactive approach to disability discrimination issues, one that does not seek to “get out of” liability, but rather one that takes a holistic approach, using the current legal framework as a starting point. My approach is one based on my own experience as a higher education administrator and my experience in fielding questions and hypotheticals on not only the campuses where I have served as a faculty member, but also from colleagues across the country.²⁴ My views on this approach have been consistent in my presentations at conferences and for higher education programs and publications on this topic since 1979. This approach encourages leaders in higher education to consider a framework for what institutions *must* do (what is legally required), what they *can* do (the value of going beyond mere compliance), and what they *should* do (balancing a range of considerations for whether the institution should go beyond legal compliance). This section provides a framework for that approach, including the importance of “training” and “cultural competence” for higher education administrators, faculty, and staff—not just those who provide student services and disability resources on campus. It also encourages those institutions that have not created an administrative position that coordinates all disability issues on campus—such as an ADA coordinator—to consider doing so.

This article recognizes the increased activism of individuals with disabilities (especially students) within IHEs. It urges recognition of the advocacy of these individuals to go beyond compliance and move to full inclusion and equity (seeking not just what *must* be done but what *can* be done),²⁵ while balancing this activism

vacated in part on other grounds, 226 F.3d 69, 10 A.D. Cas. (BNA) 1687 (2d Cir. 2000) (no presumption one way or the other should be given to the treating physician’s evaluation of a learning disability).

22 ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. For an overview of the history of these developments, see *DISABILITIES AND THE LAW*, *supra* note 3, §§ 1:1, 1:2, and 1:6.

23 For more detailed history, see articles cited in *DISABILITIES AND THE LAW*, *supra* note 3, chs. 1, 3, and 4, and § 10:7 (which includes discussion of many medical school and health care professional education program judicial decisions).

24 Frequently colleagues and others (including university attorneys) will contact me for informal ad hoc input on a range of issues. Additional situations are brought to my attention during Q&A at my presentations at conferences and institutions.

25 Brenda K. Smith et al., *Activism Among College Students with Disabilities and the Move Beyond Compliance to Full Inclusion*, 16 REV. DISABILITY STUDS. (2020), <https://rdsjournal.org/index.php/journal/article/view/950/2318>. See also Janell Marie Salanga, *New Generation of Disabled UC Students Revives Activism* (Sept 23, 2021); <https://calmatters.org/education/higher-education/college-beat-higher->

with the realities of resources and structures and the different situations within different IHEs. My approach advocates considering fairness to the individual with a disability, others in the community, and the institution itself—to implement what *should* be done. A small community college may have much more limited staffing to provide accommodations than a large statewide public university or a private university with significant private endowment resources. Building connections and contacts, however, may facilitate better responses.

III. HISTORY OF SECTION 504 AND THE ADA IN HIGHER EDUCATION

This section provides a brief overview of the key statutes and the regulatory oversight for higher education and disabilities rights beginning in 1973. It does not provide in-depth detail, but it does provide references to sources for more extensive detail.

Both section 504 of the Rehabilitation Act and the ADA prohibit discrimination against otherwise qualified individuals with disabilities. They also both require reasonable accommodations (which can include auxiliary aids and services and modification of policies). To be protected, an individual must be *substantially impaired in one or more major life activities, be regarded as substantially impaired, or have a record of such an impairment*.²⁶ The person must be *otherwise qualified* to carry out the essential requirements of the program with or without reasonable accommodations (including not posing a direct threat).²⁷ The 1979 *Southeastern Community College v.*

education/2021/09/university-of-california-disabled-student-activism/. A starting point for disability justice <https://journals.shareok.org/jcscore/article/view/96> (2020) (focusing on disabled students of color), 6 DISABILITY JUSTICE RACE & EDUCATION (2020); <https://ndlsa.org/> (law students with disabilities national organization).

26 29 U.S.C.A. § 706(8)(D); 42 U.S.C.A. § 12102(1). 34 C.F.R. § 104.3(k)(3) (2017). See DISABILITIES AND THE LAW, *supra* note 3, § 3:2.

27 34 C.F.R. § 104.3(k)(3) (2017). See DISABILITIES AND THE LAW, *supra* note 3, § 3:3. Title II regulations provide the following regarding direct threat:

Direct threat means a significant risk to the health or safety of *others* that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services as provided in § 35.139.

28 C.F.R. § 35.104 (2016) (definitions).

The determination of direct threat is to be based on an individualized assessment based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures or the provision of auxiliary aids or services will mitigate the risk.

28 C.F.R. § 35.139(b) (2010).

Title I regulations applicable to employment, however, allow direct threat as a defense when the individual poses a direct threat to the health or safety of *the individual* or others in the workplace. See 29 §§ 1630.2(4) (2016) and 1630.15(b)(2) (2016).

The statutory language of the ADA does not define direct threat. The Equal Employment Opportunity Commission (EEOC) regulation has been upheld by the Supreme Court as being valid and within the scope of the statute. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002). The Title II regulation (which is part of the regulations issued in 2010) has not been subjected to clarifying judicial review.

*Davis*²⁸ Supreme Court decision sets the standard for what it means to be otherwise qualified. The Court held that an individual who is covered by section 504 is “one who is able to meet all of a program’s requirements in spite of his handicap.”²⁹

Included in the standard for some situations is whether the individual poses a direct threat to others.³⁰ Unresolved is whether a student whose threat is to “self” only can be treated differently based on that threat. While earlier ED opinion is that it would be impermissible to do so, this advisory guidance has been considered by many IHEs to be problematic and presents difficulty in how to deal with students who are self-injurious or suicidal. Will such agency “guidance” even be given judicial deference going forward? Many in higher education have raised concerns about how the Title II regulation (not considering threat to “self”) will be applied to actions toward students with suicidal tendencies or who have other self-destructive behaviors. Recent Department of Justice (DOJ) guidance on direct threat does not yet provide definitive answers for how institutions should handle these cases. This lack of clarity highlights the importance of training for faculty and staff regarding responding to behavior of concern.

The person must also “make known” the disability to be entitled to accommodations,³¹ although in some settings, it might be apparent. Courts are generally consistent in requiring an *individualized* and *interactive process* in resolving accommodation issues. Numerous cases find that institutions are not required to excuse misconduct or deficient academic or other performance requirements.³²

Historically courts have given substantial deference to educational institutions regarding their academic programming and what constitutes essential aspects of the program and what might be a fundamental alteration. Recent cases, however, demonstrate less judicial deference when such decisions are not thoughtfully justified and not carried out through an interactive process.

While the basic substantive provisions are the same for both section 504 and the ADA, the remedies and procedures vary depending on what setting the individual with a disability is in. Section 504 of the Rehabilitation Act applies to all programs receiving federal financial assistance and would thus affect student, faculty, staff, and visitors. Title I of the ADA applies to most employers. This would include students engaged in work-study employment. Title II applies to all aspects (most courts apply it to employment) of a state or local governmental program (e.g., a state university). Title III applies to *private* providers of twelve categories of accommodations (including education programs) open to the public (e.g., a private university).³³ Title III does not apply to employment. Enforcement in the higher education context includes complaints to the ED OCR under section 504.

28 442 U.S. 397 (1979).

29 *Id.* at 407.

30 DISABILITIES AND THE LAW, *supra* note 3, §§ 3:3, 3:24.

31 *Id.* § 3:22 n. 15.

32 *Id.* § 3:3.

33 Private clubs and religious entities are exempt to some extent under Title III, and that might affect a particular activity. 42 U.S.C. § 12187.

Universities are somewhat different from most other entities covered by section 504/ADA in at least two ways. First, they have had longer experience with disability rights issues because most were covered by section 504 since 1973 and have addressed these issues in a range of settings for decades. Second, a campus setting usually includes a range of affected individuals (students (and applicants), faculty and staff, and visitors) in a very wide range of settings (housing, transportation, sports and performance venues, classrooms, libraries, clinics, labs, programs abroad, hospitals and other health care settings). This makes it challenging to develop policies, practices, and procedures that take into account those different settings and to ensure a means of communicating access issues to the wide range of constituents and to train faculty and staff members who are on the front lines of serving students and visitors.

There are a few key Supreme Court decisions in the higher education context that are important to framing any disability issue in higher education.³⁴ There were other key Supreme Court decisions decided in other contexts that affected higher education.³⁵ On some occasions, these holdings were responded to by Congressional action. One lower court case stands out as having the stature of a Supreme Court decision. That case involved the burden on the parties for demonstrating that a requested accommodations was reasonable or not.³⁶

Beyond the judicial interpretations, higher education leaders must be mindful of the great impact of the enforcement of section 504 by the ED OCR. The ED came into existence in 1980, when the Department of Health Education and Welfare (HEW) was divided into ED and the Department of Health and Human Services (HHS). The responsibility for oversight of section 504 activities in education settings currently falls to ED. This includes complaints regarding discrimination and promulgation of regulations applicable to higher education institutions receiving federal financial assistance (which is almost all of them). In addition to the initial section 504 regulations promulgated in 1977,³⁷ ED has also initiated regulations (pursuant to both section 504 and the ADA) on a wide range of topics of significant impact on campus.³⁸ Other agencies have also issued regulations or provided guidance applicable to an array of settings that are also relevant to higher education.³⁹ How the requirements of these agencies interact is complex, and the

34 See *DISABILITIES AND THE LAW*, *supra* note 3, § 1:6. These include *Grove City Community College v. Bell*, 465 U.S. 555 (1984) (program specificity); *University of Texas v. Camenisch*, 451 U.S. 390 (1981) (payment for services by university); *County of Los Angeles v. Kling*, 474 U.S. 936 (1985) (holding that Crohn's disease was not a disability in the context of a nursing student claiming discrimination on that basis); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (not a violation of the First Amendment Establishment Clause to provide vocational rehabilitation aid to a blind student seeking religious training at a Christian college)).

35 See *DISABILITIES AND THE LAW*, *supra* note 3, §§ 1:7–1.9. This section includes a chart listing all Supreme Court decisions, major statutes, and other significant developments as far back as 1935 that had relevance to disability discrimination).

36 *Wynne v. Tufts Univ.*, 932 F.2d 19, 26 (1st Cir. 1991). See *infra* Part IV for more on this decision.

37 34 C.F.R. pt.104, <https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html>.

38 *W. Va. v. EPA*, 597 U.S. 2587 (2022).

39 For example, see ADA Department of Justice Regulations about service and emotional support animals (<https://www.ada.gov/resources/service-animals-2010-requirements/>); EEOC Department of

specific discussion is beyond the scope of this article, but it is particularly important to recognize that section 504 creates a regulatory agency enforcement mechanism with outcomes that are not always apparent, which goes beyond litigation by individual complainants. This multiple agency regulatory role highlights the interplay of section 504 and the ADA in higher education.

There are some signals from the Trump-appointed Supreme Court justices that signal a different approach to any area of society that is subject to administrative and regulatory oversight. The 2022 Supreme Court decision in *West Virginia v. EPA*,⁴⁰ sent signals that the Court is less deferential to statutory frameworks that depend on regulatory guidance, even regulations that have gone through notice and public comment. The Court has also been noted as being less deferential to long-standing precedent, as has been discussed following the *Dobbs v. Jackson Women's Health Organization*⁴¹ decision that called into question the 1973 Supreme Court precedent in *Roe v. Wade*.⁴² These signals raise concerns about how future Supreme Court decisions might change long-standing doctrines and even call into question the constitutionality of statutes such as section 504 and the ADA, despite decades of reliance on these statutes and their impact in a broad array of settings, including in higher education.⁴³ Of greatest concern may be the potential for the Supreme Court to revisit the issue of disparate impact under disability discrimination laws.⁴⁴

Labor regulations on employment (<https://www.eeoc.gov/regulations-related-disability-discrimination/>); and housing regulations issues by the Department of Housing and Urban Development (https://www.hud.gov/program_offices/fair_housing_equal_opp/disability_overview/); Health and Human Services regulations for a range of health issues (<https://www.hhs.gov/civil-rights/for-individuals/disability/laws-guidance/index.html>). For a comprehensive overview of federal agency regulation on disability issues, see <https://www.ada.gov/resources/disability-rights-guide/>.

40 142 S. Ct. 2587.

41 142 S. Ct. 2228 (2022).

42 410 U.S. 113 (1973). This case was decided the same year that section 504 of the Rehabilitation Act was passed.

43 For example, the application of section 504 (and other civil rights statutes) to all aspects of an entity if one aspect receives federal financial assistance was established in the Civil Rights Restoration Act of 1987, 29 U.S.C.A. § 706(8)(D), Pub. L. 93-112, 87 Stat. 355.

44 This could affect issues such as website access and other conduct that is not intentionally discriminatory (which for disability issues that is often the case). Potential holdings could undermine the entire purpose of both section 504 and the ADA. See e.g., *Payan v. L.A. Cmty. Coll. Dist.*, 114 F.4th 729 (9th Cir. 2021). In that decision, the Ninth Circuit Court of Appeals recognized a private right to bring disparate impact claim under Title II of ADA and Rehabilitation Act; recognizing disparate impact in case involving website access and teaching materials accessible to student with visual disabilities; applies equally to both statutes in spite of Supreme Court holding in *Alexander v. Sandoval*, 553 U.S. 275 (2001). In this case, the community college chose not to appeal. But it is possible that the issue could reach the Supreme Court in the future, with the possibility that the underlying goal of disability discrimination laws (which almost always address unintentional discrimination) would be defeated.

IV. OVERVIEW OF JUDICIAL ATTENTION TO ISSUES IN HIGHER EDUCATION

In the first decade after section 504 was enacted, there was very little judicial attention to this statute in any setting. The first Supreme Court decision on disability discrimination under section 504, however, directly involved higher education and became the framework for important issues that continues today.⁴⁵

Many of the earliest court decisions in higher education involved procedural issues, but after regulations were promulgated in 1978 and more disabled students⁴⁶ came to campus, courts began to address several substantive issues. Many of these issues remain important and current today, and this section reviews the major categories addressed by the courts.

The following sections do not attempt to provide extensive detailed analysis of all higher education and disability-related topics relevant to IHEs. Rather, they provide a brief overview of what is involved in these ongoing and recurring topics, some examples of cases on these topics, and reference to more detailed listings of cases and other developments. While most of the following sections focus primarily on student issues, there is also relevance to employees (both faculty and staff) and campus visitors.

A. *Who Is Protected—Meeting the Definition of “Disabled” and Being “Otherwise Qualified”*⁴⁷

1. *Definition of Coverage*

Regardless of the setting—student, faculty, staff, or visitor to campus— an individual is only protected from discrimination under section 504 and the ADA if that individual is substantially limited to one or more major life activities, has a record of such an impairment, or is regarded as⁴⁸ having such an impairment.

⁴⁵ In *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), the Court established the definition of “otherwise qualified” in the context of a deaf nursing student. It set out the basic requirement that to be otherwise qualified one must meet the essential requirements of the program with or without reasonable accommodation. It is the framework for all subsequent decisions on this issue, not only in higher education contexts, but in areas such as employment.

⁴⁶ The term “disabled person” (identity first) is generally used throughout this article rather than what was at one time the preferred “people first” terminology (“person with a disability”). The preference for which type of terminology has changed over the years. Because my work focuses specifically on the issues related to the disability, I think it is appropriate to use the identity-first language, but I understand that others may not.

⁴⁷ For a more detailed analysis and extensive case citations on this topic, see *DISABILITIES AND THE LAW*, *supra* note 3, §§ 3:2 and 3:3.

⁴⁸ Interesting higher education cases on this issue include *Davis v. University of North Carolina*, 263 F.3d 95 (4th Cir. 2001) (student with multiple personality disorder was not disabled because she was not perceived as unable to perform broad range of jobs); *Widomski v. State University of New York (SUNY) at Orange*, 933 F. Supp. 2d 534 (S.D.N.Y. 2013), *judgment aff'd*, 748 F.3d 471 (2d Cir. 2014) (granting university’s motion for summary judgment in claim by student that he was perceived as disabled because of hand shaking that occurred during the phlebotomy clinical program, which was required for graduation; handshaking only affected one particular job; court found that he was not protected as disabled).

There is additional protection from discrimination in employment settings for those who are associated with an individual who meets the definition of disability.⁴⁹ Transitory impairments are not considered to be disabilities, and this issue is likely to become a source of debate going forward for conditions related to COVID.⁵⁰

Early litigation in higher education settings did not focus on the issue of whether someone met the definition of having a protected disability, with some exceptions for learning disabilities.⁵¹ After the Supreme Court narrowed the definition of coverage in 1999 and 2001, Congress amended the ADA (and indirectly the Rehabilitation Act because it is intended to be interpreted consistently with the ADA) in 2008, to more clearly apply to a wide range of learning disabilities, mental impairments, and some health conditions (such as being HIV positive).⁵² One of the issues frequently raised is whether test anxiety is a major life activity. There are a few post-2008 amendments that give some sense of how courts are interpreting this, conditions related to neurodiversity, and similar issues.⁵³

One of the few issues that has been quite clearly interpreted by the courts is that an institution must “know” of the impairment to be found to have discriminated against an individual.⁵⁴ There is also substantial precedent that an entity is not required to give an individual a second chance if the disability is identified and made known after that individual’s failure to meet the requirements of the program.⁵⁵ In situations where the individual might not know of the disability (it was not diagnosed for a range of reasons), the institutions might decide that it *can* give a second chance, and many institutions have done exactly that. Whether a

49 See, e.g., *Ballard v. Jackson State Univ.*, 62 F. Supp. 3d 549 (S.D. Miss. 2014) (no claim for associational discrimination by university compliance officer who claimed his advocacy on behalf of students with disabilities was reason for his termination; not deciding whether Fifth Circuit even recognizes associational discrimination claims, but determining that this was not basis for adverse employment action).

50 42 U.S.C.A. § 12102(4)(D), Pub. L. 101-336, 104 Stat. 327. A transitory impairment is an impairment with an actual or expected duration of six months or less.

51 See, e.g., *DISABILITIES AND THE LAW*, *supra* note 3, § 3:22 n.7.

52 *Id.* § 3:2.

53 See, e.g., *Doe v. Samuel Merritt Univ.*, 921 F. Supp. 2d 958 (N.D. Cal. 2013). In that case, a student with *anxiety disorders* claimed the right for additional opportunities to take medical licensing exam. The case was allowed to go forward on issues of whether *test-taking is a major life activity* and whether limit on taking exams was entitled to deference. See also *Singh v. George Washington Univ. Sch. of Med. and Health Scis.*, 597 F. Supp. 2d 89, *judgment aff’d*, 667 F.3d 1 (D.C. Cir. 2011) (holding that a medical student did not establish that her difficulty in taking timed tests was a disability under the ADA).

54 *DISABILITIES AND THE LAW*, *supra* note 3, § 3:22 n.15.

55 See, e.g., *Maples v. Univ. of Tex. Med. I Branch at Galveston*, 901 F. Supp. 2d 874 (S.D. Tex. 2012), *aff’d*, 524 Fed. App’x 93 (5th Cir. 2013) “second chance;” not a reasonable accommodation; would fundamentally alter the program after medical school student with ADHD and depression was dismissed academically; court discussed causation factors—ADA prohibits exclusion “by reason of disability”; *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 17 A.D. Cas. (BNA) 465, 201 Ed. Law Rep. 889. (D.D.C. 2005) (no misapplication of the second chance doctrine where student requested accommodation after she was dismissed); *DePaul Univ.*, 4 Nat’l Disability L. Rep. ¶ 157 (May 18, 1993); *Ferrell v. Howard Univ.*, 1999 WL 1290834 (D.D.C. 1999) (university not required to reconsider dismissal after student was diagnosed with ADHD after failing a licensing exam).

second chance *should* be given, however, will depend on an individualized assessment of whether that is fair and/or opens the door or floodgates to others.

Less clearly established is the status of the application of disparate impact to some types of discrimination that are likely to arise in the IHE setting.⁵⁶ The most obvious example is to have a built environment that only has stairs to enter a building. Such a design is not “intended” to exclude wheelchair users, but its impact/effect is to do so. With respect to the physical built environment, federal agencies early on established detailed regulations and design standards involving physical space design to clarify what is required of entities regarding architectural design. There is, however, the potential that the Supreme Court (or even some lower courts) could determine that other types of policies and conduct do not violate 504/ADA because these statutes do not reach conduct that has a disparate impact. While that may seem unlikely, a recent case involving a college’s policy and practice regarding teaching materials that were not accessible to individuals with visual impairments raises that issue. That case was resolved at the federal circuit court level, but there is some concern should the Supreme Court decide to address that issue. A holding that disparate impact does not apply to disability rights cases would fly in the face of the fact that much disability discrimination is not the result of discriminatory intent but results from unintentional creation of barriers that prevent equitable access.⁵⁷

2. *Otherwise Qualified*

One is only entitled to protection from discrimination if the individual is otherwise qualified to carry out the essential requirements of the program with or without reasonable accommodations.⁵⁸ This requirement contemplates an analysis of what is an essential function. Cases are consistent that meeting the academic requirements of a program is an essential function.⁵⁹ Perhaps the most difficult issue within this requirement is the issue of “direct threat.” An individual is not

56 The key case that established that not all actions that have disparate impact are violations of section 504, but that neither is intent required to demonstrate a violation. *See Alexander v. Choate*, 469 U.S. 287 (1985). *See also* DISABILITIES AND THE LAW, *supra* note 3, § 10:2.

57 *See Payan v. L.A. Cmty. Coll. Dist.*, 114 F.4th 729 (9th Cir. 2021). (private right to bring disparate impact claim under Title II of ADA and Rehabilitation Act; recognizing disparate impact in case involving website access and teaching materials accessible to student with visual disabilities; applies equally to both statutes in spite of Supreme Court holding in *Alexander v. Sandoval*, 553 U.S. 275 (2001)).

58 *Se. Cmty. Coll. v. Davis*, 442 U.S.397 (1979).

59 *See, e.g., Villanueva v. Columbia Univ.*, 916 F.2d 709 (2d Cir. 1990) (student twice failed qualifying exams); *Buck v. Thomas M. Cooley L. Sch.*, 597 F.3d 812 (6th Cir. 2010) (affirming dismissal of ADA claim by law student dismissed for poor academic performance; student with generalized anxiety disorder had received additional time on exams but was denied reduced course load; after academic performance did not improve, she was dismissed); *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432 (6th Cir. 1998) (graduate student with ADHD did not meet academic requirements); *Anderson v. Univ. of Wis.*, 841 F.2d 737 (7th Cir. 1988) (expelled law student with alcoholism did not meet academic standards to continue); *Schuler v. Univ. of Minn.*, 788 F.2d 510 (8th Cir. 1986) (graduate student dismissed because she failed oral exams); *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999) (learning disabled medical student did not meet academic standards); *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974 (10th Cir. 1998) (student dismissed because of marginal grades).

protected if the individual presents a direct threat to others.⁶⁰ What is less clear is whether a direct threat to “self” is also disqualifying in contexts other than employment. Because that issue is one that continues to be subject to judicial interpretation, it is expanded on in Part V.

The burden of documentation to demonstrate a disability is another issue expanded on in Part V. That is because of the difficulty of balancing the high cost of documentation in some settings and the concerns about fairness and resource issues.

As noted previously, the early litigation on meeting the definition in higher education focused on the issue of learning (and related) disabilities⁶¹ and later HIV status and some health conditions⁶² and mental health situations.⁶³ While these are impairments that occasionally still raise the issue of whether they are protected disabilities, the most significant issue in the next decade is likely to be a myriad of COVID-related issues and mental health concerns (some of which are related to COVID). With respect to COVID, the following are likely to be definitional disputes: is long COVID a protected disability; is being immunocompromised a condition that might require some level of protection in the workplace from COVID exposure; and are individuals who are associated with vulnerable individuals entitled to protection? The stress related to COVID and other current stressors also raise a new level of concern about mental health status as a disability. These are addressed in greater detail in Part V.

B. Reasonable Accommodations—Academic Modifications and Auxiliary Aids and Services⁶⁴

Federal disability discrimination statutes are somewhat different from most other discrimination laws⁶⁵ because they mandate not only nondiscrimination, but also reasonable accommodation. Such accommodations are expected not to be unduly burdensome, taking into account both financial and administrative burden. Consideration of reasonable accommodations is intertwined with the determination of whether an individual is “otherwise qualified.” It expects individualized assessment and an interactive process for review.

The framework for determining if something is reasonable is generally found within the judicial discussion in a case that is not a Supreme Court decision, but which has taken on the stature of such a decision, because it has been followed by so many courts. The standard came from the *Wynne v. Tufts University*⁶⁶ case involving the initial refusal of a medical school to allow a student to take tests in a format other

60 See *DISABILITIES AND THE LAW*, *supra* note 3, § 3:24.

61 See *id.* § 3:22.

62 See *id.* § 3:25.

63 See *id.* § 3:24.

64 See *id.* §§ 3:8–3:15.

65 There are aspects of discrimination statutes based on religion and pregnancy that incorporate some accommodation expectations.

66 932 F.2d 19 (1st Cir. 1991). For expanded discussion of this case, see *DISABILITIES AND THE LAW*, *supra* note 3, § 3:9.

than multiple choice. The First Circuit required the medical school to engage in a process that ensured careful consideration of a request. The standard that is currently applied by most courts places the burden of proof regarding reasonable accommodations on the institution and requires that

relevant officials within the institution considered *alternative means, their feasibility, cost, and effect* on the program, and came to a *rationaly justifiable conclusion* that the alternatives would either *lower academic standards or require substantial program alteration*.⁶⁷

After the Tufts University Medical School reconsidered the decision applying this standard, the First Circuit on reconsideration upheld the denial of giving the multiple-choice test in a different format.

Too often administrators responding to requests for accommodations by conflating several issues and reaching a conclusion without going through the appropriate steps. These steps include addressing the issue of documentation of the disability. Sometimes the issues of whether the individual has a disability (documented or not) is conflated with whether an accommodation should be provided. How much consideration is required depends on the situation. A colleague who has been a leader in Association of Higher Education and Disabilities described at a conference that he uses the following broad “standard”—the greater the accommodation request, the more documentation that might be required.⁶⁸ In my conference presentations on this topic, I use this extreme example: “if you request the accommodation of being allowed to park in the university president’s parking space, I’m going to want a lot of documentation.” I also add that I believe that unlimited time for exams or assignments is never going to be required as a reasonable accommodation. Although this has not been tested in court, my reasoning is that an institution cannot plan for unlimited time, and in life, no one is given unlimited time to complete required work.

The two categories of accommodations are auxiliary aids and services and modification of policies. Each of these categories requires proactive attention.

1. *Auxiliary Aids and Services*

Initially section 504 regulations provided definitions for what auxiliary aids and services were expected. These regulatory provisions were substantially incorporated into the ADA language itself in the 2008 Amendments, which also added additional specifics about auxiliary aids and services.

The costliest individually provided auxiliary aid is probably interpreter services and transcription service for individuals with hearing impairments. Early judicial decisions provided some guidance on what is required, but as higher education budgets shrink and state vocational educational agencies have begun providing less service, this is becoming of greater concern. Technology that allows for real time auditory transcription (and other artificial intelligence (AI) developments)

67 *Wynne*, 932 F. 2d at 26 (emphasis added).

68 34 C.F.R. pt.104 (2017). See *DISABILITIES AND THE LAW*, *supra* note 3, § 3:10 for detailed citations.

may reduce that cost, but this is an issue that has the potential for universities to consider an undue cost burden to be raised. While the expectation that such services are provided for classroom work and major events such as graduation, whether such services must be provided in a range of social and extracurricular settings (including for faculty and committee meetings and for individual meetings with students) is unaddressed by the courts.

Technology changes have made access to written materials much easier to provide. In 1973, a hard copy textbook might have to be turned over for recording on tape or even transfer to Braille. This meant that a university needed substantial notice to have these materials available at the beginning of a semester. Later, the evolution of Kurzweil machines and the ability of computers to “read” content has reduced the time lag for making those materials available. In recent years, most books can be “read” using technology programs. There is not much judicial guidance on this issue, but as technology evolves, it will be an issue for planning attention.

The provision of tutors is not generally required as a reasonable accommodation, although if an IHE provides tutoring programs, those programs must be accessible. There is very little judicial attention to this issue.⁶⁹

It is clear that institutions are not required to provide auxiliary aids and services of a personal nature.⁷⁰ This has not been an issue subject to much dispute.

2. *Modifications of Policies, Practices, and Procedures*

The regulations for section 504 (and now applicable to the ADA) also require reasonable modification of policies, practices, and procedures to allow access for protected individuals. In the early years of higher education response to disability rights requirements, the primary issue receiving judicial attention involved additional time for exam taking, primarily for individuals with learning disabilities.⁷¹ This same issue was often raised in the setting of professional licensing exams.⁷² Later cases⁷³ also addressed issues such as reduced courseloads and waiver of required courses such as foreign languages or mathematics. Policies receiving more recent attention include those relating to test taking in alternate formats, mandating food plans on campus, and permission to have animals on campus in various settings. Courts have been consistent in not requiring IHEs to give a second chance by waiving performance or conduct requirements where students had not given notice of the disability before the deficiency occurred.

Most IHEs now have in place a process for evaluating the documentation of individuals with disabilities to justify the modification and to determine the appropriate

69 One of the few cases to specifically address this issue is *Sellers v. University of Rio Grande*, 838 F. Supp. 2d 677 (S.D. Ohio 2012) (holding that although ordinarily tutors are not required, where services are provided to general population, they must be provided).

70 34 C.F.R. § 104.44(d)(2) (2017). An example would be personal assistance in dressing, eating, handling of materials in a classroom setting, or even providing assistance with a service animal.

71 *DISABILITIES AND THE LAW*, *supra* note 3, § 3:22.

72 *Id.* § 5:7.

73 For citations to cases on these modifications, see *id.* § 3:9.

accommodation such as the amount of additional time. Granting additional time to take an exam and administering exams in a distraction-free space have begun to raise cost issues, particularly as more students (often with mental health conditions or neurodiverse issues) are requesting these accommodations. Granting such requests can require additional staff for proctoring and an added cost to the disability service office budget. Location of physical space can also be problematic during end of the semester exams. These additional pressures may be a factor explaining why IHE documentation requirements are sometimes becoming more rigorous. Modifications regarding animals on campus raise the issue of the impact on others in a setting who might have allergies or animal phobias.⁷⁴

Very little judicial attention has been given to date to the issue of cost, probably because IHEs do not want to have the university budget opened to scrutiny in litigation, so any disputes that might have resulted in litigation have been resolved before they reach a formal court decision.

The other modification issue of high impact as a result of COVID is the issue of attendance or presence for both students and employees (faculty and staff). Establishing that attendance or presence is an “essential requirement” is of critical importance, and the caselaw on this issue is in a state of evolution. It is an issue relevant to students (who want to have attendance requirements waived or to be provided classroom work remotely on a continuous basis), staff (many of whom have jobs that do not necessarily require physical presence), faculty (whose employment expectations often include contact with students in the classroom and during office hours), and administrators (whose work might include meeting with individuals for fundraising and other purposes). The issues that must be addressed for proactive planning for this modification consideration include whether the individual is “disabled” under the statute and whether the accommodations being requested is reasonable. Because of the probability that this will have great impact on campus planning for the foreseeable future, it is treated in greater depth later in this article as a “hot topic.”⁷⁵

3. *Campus Design and Other Physical and Virtual Barrier Issues*⁷⁶

Navigating physical space requires attention to accessible design, barrier removal,

74 See *infra* Part V. In recent years, the modification of policies as an accommodation requirement has received the greatest attention in the context of animals on campus and attendance. The animals on campus issue benefited greatly from the DOJ 2010 regulations providing clarity about what animals would be allowed and in what settings. Because campus life can include such a wide range of activities, it is essential for planners to understand that the Title II and Title III regulations about service animals in settings such as classrooms, libraries, laboratories, social settings, and other public spaces are not directly applicable to settings of employment and housing. These settings allow animals other than dogs (and miniature horses) but also allow the program to require more documentation of the justification for the presence of not just service animals but also emotional support animals. During 2020 and early 2021, when most campuses went to remote education, the issue of animals on campus was not significant. During the “stay at home” months, many individuals adopted pets for companionship, and the slippery slope of their wanting to bring them to campus has required renewed attention to policy modifications of what most campuses mandate—no animals on campus.

75 See *infra* Part V.

76 DISABILITIES AND THE LAW, *supra* note 3, §§ 3:17–3:20.

and signage. There is not a great deal of judicial attention to these issues. This is probably because, unlike some other disability discrimination issues, there are specific design standards that provide guidance for college campuses. These have been in place for several years, unlike some other disability access regulations that are more recent.⁷⁷ The regulations promulgated under section 504 required programs to engage in a self-evaluation and to implement a plan for barrier removal. A similar requirement was put in place for programs subject to Title II of the ADA. What is particularly challenging for higher education planners is the complex spectrum of programs and activities on a college campus and the array of types of individuals seeking to access those programs and the spectrum of disabilities for individuals in each setting. Many campus facilities have been renovated since 1973, and while new construction is generally likely to include accessibility design, it is less certain that renovations do so. An example of litigation that highlights the importance of anticipating access issues in renovation is the dispute about how the Chicago Cubs stadium was renovated and moved accessible seating to a much less desirable location. The \$500 million renovation highlights the importance of this and ensuring that unique facilities (such as stadiums) have included addressing location of seating and sightlines. These renovations resulted in a lawsuit by the DOJ.⁷⁸

While most planners tend to think about the student using a wheelchair, consideration of not just access issues for students, but also faculty, staff, and visitors to campus is critical. Physical design issues (including signage and messaging) affect individuals with sensory impairments. A range of other conditions can become relevant to physical space access, for example, those needing a distraction-free environment for certain activities, or, at the other extreme, those who need to have a view should be considered in some settings. Allergies and sensitivities to chemicals in the environment or those who are immunocompromised might need assurance of ventilation. It is not possible to anticipate everything, but good faith efforts and inclusion of individuals with disabilities in planning can avoid conflict and retrofitting in many situations.

A typical college student who lives on campus will encounter physical access in housing; classroom settings including labs; libraries; food service; social activities; spectator sports; internship placements; and parking and transportation facilities. Colleges also have numerous employees, including faculty members whose job requirements are unique in many ways requiring them to have a faculty office, to teach in classrooms or labs, to supervise students in clinical settings, to do research in laboratories and other spaces, and to attend meetings. Visitors to campus include alums, attendees at sports and entertainment events, visitors to campus museums, patients and clients accessing clinical service programs facilitated by the university,

77 A major set of regulations in 2010 from the DOJ provided guidance on a range of issues that affected campuses, most importantly animal accommodations, but also for accessible physical design. For regulations under the ADA regarding accessible design, including housing on campuses (for Title II covered entities), see generally <https://www.ada.gov/law-and-regs/design-standards/2010-stds/>.

78 See <https://www.justice.gov/usao-ndil/pr/us-attorney-s-office-files-suit-against-chicago-cubs-alleging-wrigley-field-renovations>. See also https://www.bisnow.com/chicago/news/commercial-real-estate/chicago-cubs-fend-off-charges-of-ada-violations-as-trial-opens-118494?utm_source=outbound_pub_20&utm_campaign=outbound_issue_66561&utm_content=outbound_link_13&utm_medium=email.

applicants for admission, employers interviewing students on campus, health care patients in university hospitals and those visiting these patients. And in each of these situations, the disability could include a mobility impairment or a sensory impairment affecting hearing or vision.

In addition to the buildings themselves, transportation programs operated by or facilitated by an IHE are a key aspect to ensuring access. Physical campus features between buildings, including signage, can also present barriers.

In a campus setting, it is not going to be enough to make sure the door widths meet design standards, that there are accessible restroom stalls, and that the slopes on the ramps into buildings are not too steep. It is essential to consider how various individuals use and access physical space throughout the day. Sometimes safety and privacy concerns must be balanced with accessibility issues. While the required self-evaluations and new construction requirements have gone a long way to ensure such access, they are not a guarantee. As uses of various spaces are changed, it is important to consider how new users of that space might be affected by design barriers.

All of these considerations incorporate the backdrop of an expectation of integration. This means avoiding separate spaces, entrances, and other features that can be stigmatizing and not inclusive as much as possible.

Related to physical space access is virtual space access, which includes websites that provide the invitation to apply for admission, to attend events, and notice of where to park and how to participate. Technology-related access was not an issue in 1973, when section 504 was passed, but it now has increasing importance and requires greater attention.

Finally, activities abroad can present unanticipated issues.⁷⁹ Institutions that host or facilitate study abroad programs must anticipate whether the space where students are housed, attend classes, and participate in enrichment tours and other activities will be accommodated in the physical environment in a foreign country. Even alumni offices that facilitate university “sponsored” cruises or other tours abroad must consider whether and how to ensure accommodations, often in countries where barrier removal is not a government policy or practice.

Although there are a number of judicial decisions over the years that have addressed these issues in a wide variety of settings,⁸⁰ it is important to bear in mind that some of these disputes are addressed through complaints to the ED OCR.⁸¹ In addition, many disputes are settled, and often the terms of such settlements

79 See, e.g., *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015 (9th Cir. 2002) (student with mobility impairment sought accommodations in an overseas program; unsuccessful in ADA Title III case; numerous accommodations had been provided including hiring two helpers, paying for student to fly when others took alternate transportation; providing alternative lodgings as needed).

80 DISABILITIES AND THE LAW, *supra* note 3, §§ 3:17–3:20.

81 The OCR opinions in these cases do not generally provide an individual remedy for the complainant but are instead intended to take action against an entity receiving federal funding regarding its access issues. These opinion letters and resolutions are not always easily accessed and publicized documents in the way that judicial decisions are.

are not made public.⁸² While the vast majority of judicial decisions addressing disability issues in higher education respond to issues other than physical design access, the high cost of such disputes should signal the importance of paying close attention.⁸³ Once a complainant seeks resolution to a particular barrier on campus, it is not unusual for that person to seek redress for all barriers faced on campus, which can result in a court issuing a timetable for remedying the situation, rather than allowing the university to set its own schedule.

C. *Technology*

The existence of e-mail and websites and other major technology issues was not on anyone's radar screen in 1973. The technology simply did not exist or was in its infancy.⁸⁴ In 1979, the *Southeastern Community College v. Davis*⁸⁵ decision, however, recognized that evolving technology should be considered in determining whether someone was "otherwise qualified."⁸⁶ That issue, however, has received little judicial attention. The evolution of technology has had an impact on a range of issues, including teaching materials and communications within and outside a campus, and might affect course materials and communications to those outside the university and within the university. Technology issues were not a major focus on judicial attention in early years.

When 2020 COVID campus shutdowns resulted in most college campuses providing course content virtually, it became more critical to be proactive and responsive to technology issues. While not the earliest judicially addressed issues under section 504 on campus, recent judicial attention has been paid to access to technology relating to websites, teaching materials and educational platforms, signage in public spaces, and communications on jumbotrons and similar platforms on campus. Because this is a "hot topic," it is addressed in more detail later.⁸⁷

D. *Faculty and Staff Employment Issues*

Most disability discrimination issues within higher education focus on student issues. There has been some judicial attention paid to issues of visitors on campus and alumni events,⁸⁸ but it is important that those responsible for policy making give

82 There are a few exceptions involving highly publicized issues such as animal accommodations, food issues, and adverse treatment of students with mental health concerns.

83 For example, in a case involving an accessible restroom at a student center at a public state university, the litigation extended over several years, and the court admonished the counsel representing the university about this protracted litigation in awarding a high amount of attorney fees. See *Covington v. McNeese State Univ.*, 118 So. 3d 343 (La. 2013) (reversing some of the attorney fee awards and holding that district court decisions on the amounts was not an abuse of discretion); *Covington v. McNeese State Univ.*, 98 So. 3d 414 (La. Ct. App. 3d Cir. 2012), *writ granted*, 104 So. 3d 427 (La. 2012), *rev'd*, 118 So. 3d 343 (La. 2013), *writ denied*, 130 So. 3d 338 (La. 2014) (awarding approximately \$1.8 million in attorneys' fees in case involving student using wheelchair who brought action for lack of accessible restrooms in student union and lack of transition plan; case took ten years to resolve).

84 Email was invented in 1971 and websites became a "thing" in 1991.

85 442 U.S. 397 (1979).

86 *Id.* at 412–13.

87 See *infra* Part V.

88 See, e.g., *DISABILITIES AND THE LAW*, *supra* note 3, § 3:20. *Alumni Cruises, LLC v. Carnival Corp.*,

attention to employment issues, especially those unique to higher education (faculty and coaches).⁸⁹ It is beyond the scope of this article to provide an in-depth analysis or synthesis on how the courts and policy makers have addressed these issues.

Two major factors should be considered, however, in anticipating likely concerns going forward. One is related to COVID. The other involves aging professors who are not subject to mandatory retirement. For both issues, whether the individual is “disabled” will be a possible area of dispute. The faculty member who is immunocompromised or is associated with someone who has health concerns or who has long COVID may seek protection under section 504/ADA.⁹⁰ The faculty member whose performance is affected by the normal issues of aging may also seek accommodations. For individuals in both groups, the issue of whether they are “otherwise qualified” will often be a factor for evaluation. Issues of attendance and presence will continue to be raised. The faculty member with “brain fog” from COVID might seek adjustments to teaching loads, performance evaluations, and other issues. An in-depth discussion of these issues is beyond the scope of this article, but policy makers and counsel who represent institutions should be alert to these issues.

E. Other Issues

As noted previously, little attention was paid by the courts, regulatory agencies, or the institutions themselves to disability discrimination issues on campus for the five to ten years after section 504 was passed. Early attention after that time was primarily focused on student life issues, sometimes including physical plant issues that affected others. The early issues (some of which still arise as topics of concern) included admissions and standardized testing,⁹¹ athletics programs on campus (student athletes with disabilities),⁹² Greek life on campus,⁹³ food allergy issues on campus,⁹⁴ transportation services on campus,⁹⁵ and study abroad programs.⁹⁶ While cases involving these areas still arise from time to time, they are not frequently the topic of dispute. Nevertheless, university counsel would benefit from proactive consideration of possible areas for policy attention. The next part highlights the areas where a spotlight is more likely to shine or where the spotlight that shines is likely

987 F. Supp. 2d 1290 (S.D. Fla. 2013) (allowing issues to be tried on whether cruise line had made reasonable modifications).

89 See, e.g., *DISABILITIES AND THE LAW*, *supra* note 3, § 3:26. For more cases on employment generally, see, e.g., *id.* ch. 4.

90 See *infra* Part V.

91 *DISABILITIES AND THE LAW*, *supra* note 6, § 3:6; see also *id.* § 5:7.

92 *Id.* § 3:11.

93 Although fraternities and sororities might generally seem to be exempt from Title III of the ADA as private clubs, and also not recipients of federal financial assistance, on some campuses the housing is owned or operated by the university, or the student organization membership is regulated by the institution, which is covered by section 504 and/or Title II and/or Title III of the ADA. *Id.* § 3:15.

94 *DISABILITIES AND THE LAW*, *supra* note 6 § 3:8.

95 *Id.* § 3:19.

96 *Id.* § 3:20.

to be brighter or more intense (from media attention of resource litigation costs).

V. HOT TOPICS AND CRYSTAL BALL TOPICS IN HIGHER EDUCATION TODAY

This part focuses on “hot topics.” They are not necessarily topics currently receiving attention in the courts or by regulators. In some ways they are “crystal ball” topics meriting proactive thinking by university leaders and the legal counsel who represent these IHEs.

These topics are selected for greater attention in this overview for the following reasons.

- **They are costly.**
These include physical structures that are much more costly to retrofit than to make accessible when first built. Technology has vast cost issues, including the cost of staff to remain current on accessible technology. Auxiliary aids and services and some accommodations, such as interpreters, can be costly. Increasingly, requests for separate distraction-free testing and even single residence hall housing can be costly in terms of physical space and staffing. Failure to respond or be proactive can result in costly litigation.
- **They are receiving current enforcement or litigation attention.**
Areas of recent significant litigation or regulatory enforcement include discipline of individuals with mental health conditions, technology-related issues, and even some animal accommodation issues.
- **They are extremely challenging.**
Probably the most challenging issue for higher education involves individuals on campus with a range of mental health conditions—from depression to dangerous (to self and / or others) behavior resulting from mental illness. Individuals who are neurodiverse are often not well understood, and handling situations involving such individuals requires knowledge and sensitivity.
- **They are evolving and changing.**
Changes in technology continue to evolve, but the most challenging issues are those related to COVID aftermath (and potentially new epidemics). What is known about how COVID is transmitted and how to prevent others from being affected is in a constant state of flux, and there is frequently new information. In some situations, it requires a university to respond quickly.
- **They are confusing.**
Legal expectations about what it means to be otherwise qualified in various settings can be confusing. So, too, are issues about appropriate reasonable accommodations for learning disabilities and neurodiverse conditions. What is permissible to require for documentation of a disability can also be confusing.

COVID issues are not only changing, they are confusing.

- **They raise concerns about safety and qualifications of professionals receiving degrees and where the educational program is connected to professional licensing.**

Higher education professional programs are the pathway into a number of professions such as law and health care professions. These concerns raise questions about whether it is permissible in the admissions process or later to consider certain attributes that may affect admission to be licensed to practice in the profession.

- **They have become the topic of focus for advocates.**

The issue of neurodiversity has received increasing attention because of the increase in the population of neurodiverse students enrolled in higher education. There have been recent national movements by students and others for IHEs to be more welcoming and sensitive to issues or neurodiversity. Claims of “ableism” come from this population as well as from others with disabilities.

- **They would benefit from greater proactive attention.**

While little litigation has involved issues of community colleges and transition services and dual credit programs, these issues would benefit from a more proactive approach by those responsible for policies, practices, and procedures on campus.

Proactive planning to respond to the “greying” of the faculty, especially in light of COVID and related issues, is recommended.

A. Mental Health Issues on Campus

A primary focus of this section is the relevance of section 504 and the ADA to mental health in higher education. COVID-related issues exacerbated mental health concerns, and the need for more mental health services and awareness in college settings. Student suicides and other self-harming behavior and campus violence against others on campus bring additional attention to this issue. While this section focuses primarily on students and mental health,⁹⁷ employees (faculty and staff) should also be considered.

The following are some examples of student behavior that might raise concerns.⁹⁸

- A faculty member notices a student in class whose behavior has recently become distressed.

⁹⁷ *Id.* § 3:24. See also *id.* § 3:23.

⁹⁸ These are taken from attendee suggestions at a Webinar Presentation for the Campus Suicide Prevention Program on September 22, 2022. Students Who Are Depressed, Distressed or Disruptive: A Proactive Approach Within Disability Discrimination Law, Webinar for the Campus Suicide Prevention Center of Virginia, <https://www.campusuicidepreventionva.org/> (last visited 6/14/23).

See also How Disability Law Impacts Voluntary and Involuntary Student Leaves Related to Harm-to-Self and Harm-to-Others (June 11, 2021), <https://www.jdsupra.com/legalnews/how-disability-law-impacts-voluntary-9325706/> (last visited June 14, 2023), prepared by Strategic Risk Management Solutions provided as tip to the National Association for Behavioral Intervention and Threat Assessment (NATIBA). The “tip sheet” recognizes the lack of a cohesive due process roadmap by courts and government agencies.

- A student tells her residence hall advisor that she has become extremely depressed and just does not think she can “go on.”
- A student tells his residence hall advisor that his roommate watches violent videos until late hours, and it is disturbing to his ability to concentrate.
- A student is reported as stalking a classmate by following her around campus (it is suspected that the “stalking student” is on the autism spectrum).
- A student expresses serious self-harming conduct or threats.

One can imagine similar scenarios involving faculty and staff where coworkers notice unusual behavior.

Mental health concerns manifest themselves in different ways, and it is important to understand the differences in considering policies related to them. At one extreme are those who are violent (such as the student at Virginia Tech).⁹⁹ Others have depression or anxiety that may result in self-harming in a variety of ways, including simply not engaging in academic work by not turning in assignments, not attending classes, or other behaviors. There are those with mental illness, such as bipolar disorder, that may not have been diagnosed or that may result in problematic behavior because of medication or other issues. There are those with mental health issues or neurodiversity conditions (addressed further below), who are disruptive (not dangerous) in a variety of ways.

High-profile incidents of shootings and violence on campus raised questions about how to deal with students with mental health challenges. Suicides on campus also receive media attention. While a long-standing area of concern, the isolation and other stressors resulting from the COVID pandemic on campus make this an even more important priority. Students and others with mental health concerns exhibit a range of behaviors that might raise concerns (e.g., depressed, disruptive, different, dangerous), but some university policies do not differentiate treatment of these concerns.

This topic could and has received more detailed discussion.¹⁰⁰ For purposes of this overview article, however, policy makers should consider whether there are current policies and training in place, and that policies and resources are communicated appropriately for a number of legal issues. This assessment should consider, how and to whom the behavior or status of concern presents itself. It is important to recognize that not all students with mental health concerns will be “registered” for services within the disability services office or known to a faculty or staff member (or even another student or roommate or housing counselor). That

99 Virginia Tech was the first major recent event on campus, but there have been others that highlight the importance of this issue. Of particular concern are events where a student was the perpetrator. PBS Newshour, *What Data Analysis Shows About Campus Shootings*, February 14, 2023. <https://www.pbs.org/newshour/nation/what-data-analysis-shows-about-campus-shootings>.

100 It is critical to note that not all individuals with mental health problems are violent and to be careful about taking actions based on such assumptions. Gary Pavela’s work on this issue continues to provide important insights. GARY PAVELA, *DISMISSAL OF STUDENTS WITH MENTAL DISORDERS: LEGAL ISSUES, POLICY CONSIDERATIONS AND, ALTERNATIVE RESPONSES* (1985).

may be because the condition does not (at least initially) require accommodations. It may also be because the condition manifests itself after initial enrollment or is one that has not been diagnosed before a student entered college.¹⁰¹

1. *Is the Individual “Disabled”?*

First, is the issue of whether the individual is “disabled” within the definition of section 504/ADA. While the courts have been consistent in finding that exam anxiety and similar conditions are not themselves protected disabilities,¹⁰² they may be symptoms of a substantial limitation. And even if a condition does not rise to the level of a disability, an institution should consider whether a response “can” and “should” be made, even if it is not required under disability discrimination law. For example, it is likely that a faculty member would allow a student a leave of absence or an extension of turning in an assignment if the student had a death in the family. Whether someone has a disability can also become questionable when behavior of concern arises with a student who is not already registered with appropriate documentation to receive services as accommodations such as additional time on exams. Understandingly, however, the increase in the number of students requesting separate distraction-free exam rooms, can raise the issue of whether the student is “entitled” to the service, which can result in greater scrutiny of documentation.

2. *Is the Individual “Otherwise Qualified”?*

Many of the judicial decisions involving individuals with mental health conditions result in a finding that whether the person’s condition rose to the level of a statutory disability, the individual was not “otherwise qualified.”¹⁰³ This might be because the student or faculty member failed to perform adequately or that the conduct violated campus codes of conduct, and removal from the campus setting was merited and was not “because of” discrimination.

The discussions of this issue are quite fact dependent, and many of the cases address issues of whether there is a “direct threat.” Whether the individual is a direct threat to self has been the subject of much unresolved debate. While the Supreme Court has recognized that direct threat to self is relevant to determining whether an individual is otherwise qualified,¹⁰⁴ it remains unsettled whether threat to self (such as self-harming or suicidal behavior) can be the basis for a university taking action such as removing a student from campus.¹⁰⁵ When the ED released a

101 For example, bipolar disorder is a condition that often manifests itself during college age years. Ross J. Baldesserini et al., *Age at Onset Versus Family History and Clinical Outcomes in 1,665 International Bipolar-I Disorder Patients*, 11 *WORLD PSYCH.* 40 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3266753/>; see also <https://www.mayoclinic.org/diseases-conditions/bipolar-disorder/symptoms-causes/syc-20355955>.

102 G.E. Zuriff, *Accommodations for Test Anxiety Under the ADA?* 25 *J. AM. ACAD. PSYCH. AND THE L.* 197 (1997), <https://pubmed.ncbi.nlm.nih.gov/9213292/>.

103 *DISABILITIES AND THE LAW*, *supra* note 3, § 3:24 n.5.

104 The Campus Suicide Prevention Center of Virginia website is www.campusuicideprevention.org, and the legal page is found at <http://www.campusuicidepreventionva.org/legal-csp.php>.

105 Dear Colleague Letters issued in 2011 and 2021 (<https://www2.ed.gov/about/offices/list/>

“Dear Colleague” letter of guidance to universities in 2011, it was met with much consternation on campuses. More recent (2022) issuance of an ED position on the issue does not resolve how courts will respond to such cases. An example of the dilemma for campus administrators is a student who exhibits self-harming behavior who will be remaining in university housing during holidays. This leaves an institution to identify specific conduct that is disruptive to others in violation of campus rules in some way, because acting based on concern for the particular student might be viewed as a violation of 504/ADA.

While the university can act based on a direct threat to others (perhaps even disruption to other students and administrators), administrators are challenged about how to handle such situations without running afoul of disability discrimination law. Withdrawing and removing individuals based on mental health concerns requires entities to engage in a thoughtful and careful process in order to balance concerns for the individual, concerns for others in the community, and compliance with legal mandates (particularly when they are not entirely clear). It is strongly suggested that universities be proactive, not reactive, in developing policies, practices, and procedures that respond to a range of situations involving mental health concerns. Given the flux in the mental health status of any individual, such planning will need to include appropriate training for staff and faculty members to be alert to conduct of concern and a means of raising those concerns to administrators or others who can respond appropriately.

A part of the challenge regarding mental health concerns for students is that for some professional education programs (law and medicine), the institution may be asked by the professional licensing agency for admission to practice law or medicine, to report whether a student has been diagnosed or been treated for a range of mental health conditions. Such requirements have been demonstrated to deter students from seeking treatment, and have been criticized extensively,¹⁰⁶ and the judicial response to this is varied.¹⁰⁷ I suggest that such entities (and the institutions themselves) should act based on behavior and conduct, not diagnosis and treatment.

Practices of threat assessment teams and red-flagging students based on statements made in their applications should be carefully considered before being implemented. Knowledge of suicide response practices in advance of such a situation on a campus as well as practices that seek to avoid suicide are important in planning.

It is important that student and employee conduct requirements be established and communicated, if the IHEs seek to rely on behavior and conduct, rather than status, as the basis for taking adverse action. It is also critical that such requirements are known to key administrators and communication lines within universities are established

ocr/correspondence/stakeholders/educator-202110-students-suicide-risk.pdf) provided confusing guidance. The ADA website currently provides general guidance, which has not been subject to much judicial review. *Supporting and Protecting the Rights of Students at Risk of Self Harm in the Era of Covid-19*, https://archive.ada.gov/students_self-harm_fact_sheet.pdf (last visited May 11, 2023).

106 David Jaffe et al., “It’s OK Not to Be OK”: *The 2021 Survey of Law Student Well-Being*, 60 UNIV. LOUISVILLE L. REV. 438 (2022), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=3142&context=facsch_lawrev.

107 See DISABILITIES AND THE LAW, *supra* note 3, § 5:8 n.1.

and maintained. As noted, previously, giving second chances is not generally required where there has been misconduct. That does not mean, however, that an IHE could not choose to grant readmission or another second chance in an appropriate situation. For example, a student may engage in disruptive (not dangerous or violent) behavior that justifies removal (or other adverse action such as removal from university housing), and then is diagnosed with a condition such as bipolar disorder, and then seeks readmission. Whether to grant the request is less a legal issue than a question of what can and should the university do in such a situation. This might include return to campus with very specific conditions attached and placed in the student record for future reference.

3. Privacy Concerns

Like the other issues in this section, a detailed synthesis and analysis of the legal requirements relating to privacy and confidentiality of student (or employee) mental health conditions is not provided here. Policy makers should, however, consult with their counsel regarding how their campus interprets and implements FERPA (Family Educational Rights and Privacy Act) and HIPAA (Health Insurance Portability and Accountability Act) mandates.¹⁰⁸

While certain records are private and confidential, there are often situations where a student can “waive” access to these records (such as in the professional licensing board reporting process). These should be thought through carefully to reach the appropriate balance of protecting the student and the public.

4. Mental Health Services—Challenges for the IHE

In light of the increase in mental health stress on campus, particularly in response to COVID isolation and return to campus, the question of what obligation a campus has to provide mental health services is raised.¹⁰⁹ While it is unlikely that an IHE is obligated to provide mental health services, most have recognized the benefit in offering some level of service. The issues of cost and wait times and crisis level counseling are all part of the challenge. Will a university be found negligent in not providing counseling? It is unlikely that it will. The high-profile publicity surrounding a campus suicide prompts IHEs to seek to have mental health services made available on campus. Challenges of resources, however, remain. Even if there is an unlimited budget, finding enough counselors to provide such services may be a barrier. Issues of privacy should also be planned for in providing only in-person counseling by appointment.

B. Neurodiversity as a Disability in Higher Education, and Impact on Faculty and Students

Neurodiversity refers to a range of conditions including autism spectrum disorder, developmental language disorder, Tic disorders (including Tourette’s Syndrome),

108 See DISABILITIES AND THE LAW, *supra* note 3, § 3:21.

109 See generally Zara Abrams, *Student Mental Health Is in Crisis: Campuses Are Rethinking Their Approach*, 53 AM. PSYCH. ASSN. 60 (Oct. 21, 2022), <https://www.apa.org/monitor/2022/10/mental-health-campus-care>.

intellectual disability, attention deficit/hyperactivity disorder (ADHD), attention deficit disorder (ADD), developmental coordination disorder, dyslexia, and dyscalculia.¹¹⁰ Before 1975, many individuals with such conditions were often not provided public education for much of their school age years. The passage of the Individuals with Disabilities Education Act (IDEA)¹¹¹ and the implementation of inclusion over the years, resulted in a substantial increase in the presence of students with such disabilities in higher education.¹¹² Faculty members also present with neurodiversity.¹¹³ It is difficult to quantify how many students on campus present with neurodiverse conditions, but it has been estimated that it is probably between fifteen and twenty percent.¹¹⁴ It is even more difficult to obtain data on faculty and staff.¹¹⁵

The impact on a campus requires faculty members who serve students with disabilities and those providing students services, in addition to university attorneys and the leaders on campus to have a basic understanding of the range of disability discrimination issues that might arise from this increased presence.

Before this increased presence, disability service officers had long provided additional time for exams, but the increased presence of those with neurodiverse conditions is almost surely the reason that more disability service offices are faced with an increase in the number of requests for distraction-free exam-taking environments, usually requiring separate rooms. Related to that are the increased requests for single rooms in campus housing. Such an increase requires a careful

110 Lynn Crowder et. AL., *Neurodiversity in Higher Education: A Narrative Synthesis*, 80 HIGHER EDUC. 757 (2020).

111 Students with specific learning disabilities are defined as those who have a disorder in one or more basic psychological processes in language or math, such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and development aphasia. The Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400 et seq., Pub. L. 91-230, 122 Stat. 3553, title VI, § 601 specifies that a learning disability is a disability making the student eligible for special education. A *learning disability* is defined as follows:

The term “children with specific learning disabilities” means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

20 U.S.C.A. § 1401(30).

112 Emily V. Rasch, *The Lights Are Too Loud: Neurodivergence in the Student Affairs Profession*, 43 VT. CONNECTION (2022), <https://scholarworks.uvm.edu/tvc/vol43/iss1/19>.

Sabina Conditt, *Neurodiversity in the College Setting: A Basic Overview for Fostering Success*, April 22, 2020. See <https://storymaps.arcgis.com/stories/dd1f45e1f2da4ec38f60852226e68928>.

113 Bradley J. Irish, *How to Make Room for Neurodiverse Faculty Members*, CHRON. HIGHER EDUC. (Mar. 2, 2023), <https://www.chronicle.com/article/how-to-make-room-for-neurodivergent-professors>; Rebekka McClellan, *How Disabled and Neurodivergent Faculty Live* (June 17, 2022), <https://www.insidehighered.com/views/2022/06/17/how-disabled-and-neurodivergent-faculty-live-opinion>.

114 Irish, *supra* note 114; McClennan, *supra*, note 114.

115 Irish, *supra* note 114; McClennan, *supra*, note 114.

consideration of documentation requirements for such accommodations. Documentation can be costly to these students, but the administrative and financial cost of this increased demand may justify such requests. It creates a situation where initially with a few such requests, the disability service office may have been willing to provide the separate rooms, but as these requests increase, it becomes necessary to consider whether this is something that should be done. It is important that the legal approach for what must be done uses the same steps of assessing whether the individual meets the statutory definition of disability; then whether the individual is otherwise qualified; and, finally, whether a requested accommodation is reasonable. Considering whether to provide an accommodation that is not legally required requires each institution to make an assessment about the implications of doing so considering existing resources and setting precedent for others in the same situation.

C. Attendance/Presence as an Essential Requirement

Traditionally, courts have been deferential to IHEs regarding essential requirements for participation as students or in work settings. Some disciplines (such as law) mandated a certain level of student attendance for accreditation purposes. Professors were generally given deference in all disciplines about their attendance and participation expectations for students. While students and employees within the discipline were to be engaged in an interactive process where they requested a waiver of attendance requirements, when a disability affected that, there were few reported disputes addressing the issue in the context of higher education.¹¹⁶ Perhaps that was because the issue did not arise often or perhaps disputes were resolved informally.

COVID brought new challenges to the issue of both attendance and presence. In spring 2020, when most IHEs went into hybrid/remote coursework almost overnight, students and faculty learned quickly how to use remote platforms (both synchronous and asynchronous) for learning and teaching. A great deal of flexibility was granted by accreditors and administrators during that first semester because of the abrupt way in which remote learning became essential. Remote work for other employees was also flexible for those first months. By fall 2020, when guidelines about masking and social distancing had been implemented, there was a gradual return to in-person work, but there was still much flexibility regarding

116 Neal v. East Carolina Univ., 53 F.4th 130 (4th Cir. 2022) (dismissal upheld when based in part on attendance record of graduate student; court noting deference to professional program in determining qualifications including conduct); Ladwig v. Bd. of Supervisors of La. State Univ. and Agric. and Mech. Coll., 481 Fed. App'x 239 (5th Cir. 2012) (doctoral student with depression and anxiety did not make Title I or Title II case; student did not make case that she was qualified to perform essential functions of graduate assistantship; student did not adequately request accommodations for head injury excusing her from attendance; university had provided accommodations by providing letters supporting absences); Toledo v. Sanchez, 454 F.3d 24 (1st Cir. 2006) (student with mental health issues not barred by Eleventh Amendment immunity; student requested accommodations to his class attendance deficiencies; attendance expectations had been applied to all students similarly situated). This can also apply to faculty members. See, e.g., Silk v. Bd. of Trs., Moraine Valley Cmty. Coll., Dist. No. 524, 795 F.3d 698 (7th Cir. 2015) (adjunct professor with heart condition requiring triple bypass surgery terminated because of his work, including problems with poor attendance in courses).

this. Remote classes were a benefit to some individuals with disabilities—those with mobility impairments, for example. But for some, technology could be a barrier to the communication in the classroom. Remote work became a stressor for some, exacerbating or creating mental health issues for some.

By spring 2021 (with the implementation of vaccines regimens), there began to be more tension about whether returning to in-person classes should be mandatory. On many campuses, administrators believed that it was essential to give students an in-person experience and a return to the classroom became mandatory. This was even more so by fall 2021. For students, faculty, and staff, this shift from prohibiting in-person work and classes to prohibiting remote work created tension. This issue raised particular concerns for those with disabilities in different ways. As with all issues addressed in this article, planners and responders to questions about attendance should apply the framework of what *must*, *can*, and *should* be done regarding making exceptions to in-person presence.

There is an emerging body of case law on the issue of attendance and presence, due to COVID response.¹¹⁷ It is beyond the scope of this article to provide a detailed and in-depth analysis and synthesis of that guidance to date. However, some basic concepts are available. Legally, the individual seeking an exception must meet the definition of having a disability. Many of those seeking not to do their coursework or employment work in person are requesting this due to good faith concerns about close family members whose health conditions make that individual vulnerable to COVID. Legally, neither the ADA nor section 504 require accommodation for an individual who is associated with someone with a disability. But for cases where the individual has a health condition or where the individual claims stress from returning to the classroom or work, that individual must meet the definition of having a disability.

The next step is the *Wynne* test,¹¹⁸ requiring that

relevant officials within the institution considered alternative means, their feasibility, cost, and effect on the program, and came to a rationally justifiable conclusion that the alternatives would either lower academic standards or require substantial program alteration.

The burden is on the institution, and ideally, policy decisions should be made in a way that is thoughtful, not reactive, especially when making decisions that apply across the board. Global policies should provide a transparent process through which individual exceptions can be requested, and such a process should be interactive. The challenge for universities in making these calculations is that in some instances, it is not a problem to make one or two exceptions, but this can result in a slippery slope that can cause substantial program alteration or administrative or financial burdens. This is more likely to apply in faculty and other employment settings. If a small academic department has only fifteen faculty members, many of whom teach core courses, and that university is seeking to ensure a substantial

117 See, e.g., Ellen M. Babbitt & Claire E. Hawley, *Remote Work as a Reasonable Accommodation, Implications for Colleges and Universities*, 48 J. COLL. & U.L. 1 (2023), [babbitt-and-hawley-vol-48-issue-1.pdf](#).

118 *Wynne v. Tufts Univ.*, 932 F.2d 19, 26 (1st Cir. 1991) (emphasis added).

in-person experience for students, it may be feasible to allow one faculty member to teach remotely. But that could open the door for others seeking to do so, and it may be difficult to anticipate how many others would seek the same accommodation. And this can be different from semester to semester. On the other hand, while in-person office hours might be preferable from a student service perspective, allowing Zoom meetings instead might be a feasible alternative without harming the experience. Universities are difficult settings in which to plan and implement attendance issues, given the many different types of programs, but it is nevertheless incumbent on them to really think this through. For example, large lecture classes operate differently than a small seminar class where a group project is part of the course requirement.¹¹⁹ Learning from other students through classroom discussion is a different experience when some or all students are attending remotely.

In considering what IHEs *can* do, consideration should be given to whether strict attendance rules for students are a good idea. If a student is feeling ill, must that student provide documentation of a *disability* before being allowed to miss one more class than the attendance policy for that professor allows? What if it is more than one more class? Administrators should be thoughtful in thinking through these policies and communicating them.

When planning for what IHEs *should* do in this regard, it is again useful to think through the various scenarios of what would happen if the burden for documentation of a disability were lowered for individual cases. Could this result in a “slippery slope” of requests not to attend?

D. Documentation

As noted previously, an individual seeking an accommodation or claiming discriminatory treatment, must make the disability “known.”¹²⁰ This can require that the individual provide documentation of the disability. There have been judicial decisions and some high-profile settlements involving documentation to provide guidance.¹²¹ There are a few cases that address which professionals are qualified to

119 I know this from my own personal experience of teaching hybrid, in-person, and totally remote between fall 2020 and fall 2022, in which I taught large first-year property law classes of about sixty students and small seminar classes of about fifteen students, including one class in which groups of five students were required to present a group solution (in written form and in a classroom presentation) to a systemic poverty and health situation. I was on sabbatical in spring 2020, when COVID began, so I was able to benefit from the experience of others and did not have to quickly learn how to teach remotely. During those five semesters of evolving return to full-time presence for everyone all the time, the additional issue of “mandatory masking” was raised. If IHEs require in person attendance, and a student is immunocompromised, is it a reasonable accommodation to require all class members to wear masks in that class? Or is it a better practice to allow that student to attend and participate remotely? *See also* Maggie Levantovskaya, *What College Masking Policies Tell People with Disabilities* (Nov. 14, 2022), <https://www.pestemag.com/lost-to-follow-up/collegemaskingpolicies>.

120 *See supra* Part IV.

121 *See* DOJ settlement with the law school admission council, addressing both flagging and documentation issues (May 20, 2014), <https://www.justice.gov/opa/pr/law-school-admission-council-agrees-systemic-reforms-and-773-million-payment-settle-justice>. For some best practices guidance on this, see Association for Higher Education and Disabilities: Supporting Accommodation

provide such documentation, how recently the evaluation for the documentation must have been made, and what deference should be paid to the individual's treating professional or the IHE's professional.¹²²

The financial burden on students (and employees) to document health conditions and learning disabilities and other neurodiversity issues has been an issue for some time, but it has become a more significant issue in recent years due to the increase in students with neurodiverse disabilities requesting accommodations. The challenge is to balance the issues of cost to the student with fairness to others who might believe unfair advantages are being given to those without a justification for the accommodation. In addition, there is the concern about the "cumulative" effect of granting exceptions to documentation that can lead to slippery slope requests. And there is a recognition of the disparate impact on low-income students who may not be able to afford the tests necessary for documentation to justify accommodations.

Burdensome documentation of a disability seems unnecessary for granting a minor exception to an attendance requirement. But students requesting separate exam rooms (not necessarily additional time) might raise other concerns. One can imagine a student who is in a situational stress situation (due to a family death) requesting a distraction-free room to take an exam. An academic unit might allow that whether the student has a disability or not. But would/could that open the door to others seeking such an "accommodation"? Is this a policy or practice that could be adapted as circumstances evolve?

Whatever policies, practices, and procedures are put into place should be transparent and communicated. Reasonable time to provide documentation and for the institution to evaluate and respond to it should be provided for, and that will depend on the situation.¹²³

Requests: Guidance on Documentation Practices, <https://www.ahead.org/professional-resources/accommodations/documentation> (last visited May 12, 2023).

122 See generally *DISABILITIES AND THE LAW*, *supra* note 3, § 3:22. Many of the documentation cases arise in the context of learning disabilities. One of the earliest judicial decisions on this issue was *Guckenberger v. Boston University*, 974 F. Supp. 106, 134–40 (D. Mass. 1997) in which the court found that the requirement that documentation be created within the past three years imposes significant additional burdens on disabled students. The court held that a waiver of the three-year standard must be allowed where qualified professional deems retesting not necessary. The court further held that evaluations for retesting for learning disability can be made by trained, experienced professionals who need not have doctorate degrees but that reevaluations of ADD and ADHD were subject to a more stringent currency standards and must be made by evaluator with a Ph.D. or an M.D. See also *Bartlett v. N.Y. State Bd. of Law Exam'rs*, 970 F. Supp. 1094, 1119 (S.D.N.Y. 1997), *aff'd in part, vacated in part on other grounds*, 156 F.3d 321 (2d Cir. 1998) (*abrogated by*, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, (1999)) and *cert. granted, judgment vacated*, 527 U.S. 1031 (1999) and *aff'd in part, vacated in part on other grounds*, 226 F.3d 69 (2d Cir. 2000) (No presumption one way or the other should be given to the treating physician's evaluation of a learning disability.).

123 In my six years as Associate Dean for Students at the University of Houston Law Center (1986–1993), I developed a "handbook" for Applicants and Students with Disabilities. The framework for the handbook includes information on deadlines for requesting accommodations for exams, the documentation requirements, and other specifics. I brought that Handbook to the University of Louisville Brandeis School of Law where I was dean from 2000 to 2005. It has been adapted at many other law schools, and I assume it is also updated and reviewed each year at those institutions that use it. See <https://louisville.edu/law/experiences/student-life/disabilities/disabilities-handbook> (dated 2019).

Also important for administrators handling documentation are issues of confidentiality and privacy. Consideration for who is allowed to see this documentation is critical. Where it is to be filed is also important. For employment, the disability information must be kept in a separate file. There is no such requirement for student records. Again, it is beyond the scope of this article to provide a detailed synthesis and analysis of the legal requirements and interpretations on this issue. But recognizing it as an important issue for planning is essential.

E. *Technology*¹²⁴

There are several technology-related issues that affect individuals with disabilities in higher education.¹²⁵ Because of the speed of technology development, it is difficult to keep up with changes. It is beneficial, however, to be alert to issues that affect IHEs with respect to the use of technology and individuals with disabilities.

Of greatest importance is the delivery of coursework to students. While remote coursework existed in higher education before spring 2020,¹²⁶ the almost immediate turn to only remote work in March 2020 at almost all IHEs highlighted the importance of understanding the benefits and barriers of remote teaching and learning for both students and faculty with disabilities. For those with visual impairments, the use of a computer mouse as the only means of accessing computer-generated material creates an almost insurmountable barrier. For those with hearing impairments requiring some type of interpreter service in a remote setting can create new challenges.¹²⁷ The stress of isolation due to remote classes had an impact on mental health. Students who were immunocompromised, however, benefited from not being required to attend classes in person. While most IHEs already had some experience with remote teaching and learning, the sudden mandate that everything must be remote put a huge demand for technology staff support on IHEs. While many students had some experience prior to March 2020 with an occasional remote class (but those were usually elected, not mandated), in March 2020, all faculty members were suddenly required to learn and understand how to teach remotely, how to use the “chat” feature, how to record classes on platforms such as Blackboard. Disability service providers, tech support offices, and faculty members all needed to be aware of how students with a range of disabilities might require new types of accommodations to a wide range of disabilities when learning

Institutions providing such guidance should tailor them to the particular department and issue involved.

124 The landmark decision in *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979), recognized that technology might have an impact on whether an individual met the definition of being otherwise qualified. The Court noted that technology over time might result in a situation where an individual could be accommodated to ensure that the individual was otherwise qualified.

125 See generally DISABILITIES AND THE LAW, *supra* note 3, §§ 3:8 and 3:16.

126 Massive open online courses (MOOCs) began being offered broadly around 2008. For a history of MOOCs, see John Daniel, *MOOCs and Online Education: Evolution or Revolution*, OXFORD UNIVERSITY PRESS (Apr. 26, 2016), <https://blog.oup.com/2016/04/moocs-higher-education/>.

127 While many platforms provide for real-time closed captioning, not all do, and it is the obligation of the instructor to know if that is a concern. It may require some lead time to ensure that this has been checked out. If a remote student is trying to hear students speaking in a classroom with masks on, the ability to comprehend what is being said can be adversely affected.

was occurring only in a remote setting. While most campuses returned primarily to in-person learning by fall 2020 (initially and for about a year with guidance about social distancing and masking in the classroom), there were still those who could not return, and the expectation of technology support to enable faculty members and students with some disabilities to continue their coursework remotely meant that attention to technology and accommodation issues continued. For example, a faculty member who taught a class by Zoom might need to ensure that the auto captioning feature was available for students with hearing impairments.

It was the return to in-person learning that has made attention to technology an emerging “crystal ball” issue. The accommodation of one or two students or one faculty member places different burdens on technology support staffs, and this has the potential for universities to raise the undue burden defense to the request for technology accommodations. Do they have the funds to pay for staff? Even if they do, are there enough people with the needed skills available to fill funded positions?

Related to the instructor delivery of the course substance is the issue of the materials themselves. While technology has made it possible for published books to be placed into an accessible format much more quickly than in the past,¹²⁸ instructors often provide their own materials and handouts and links to articles or YouTube videos without thought as to access issues. That may not be a problem when there are no students with accommodation needs, but it can be for those with such needs. The delay in obtaining access to materials in settings where instructors assign initially inaccessible materials can be harmful to the student learning experience, which can give rise to frustration and sometimes ultimately complaints to the ED or litigation.¹²⁹ Related to all of this are power points frequently used by faculty members during a class, which are then placed on the course platform for access. Must there be descriptors for images in the documents stored on Blackboard or other platforms? Some universities have made recorded classes and other materials to be open access without thought about what that might mean. A faculty member who does not have any students with disabilities for which accommodations are necessary may not take the extra steps of ensuring that those modifications are made, but once those materials are available to the public, this raises the necessity of anticipating that there may be users who need such modifications.

An example of a technology challenge is a course taught in real time as a hybrid course—students in the room and students attending remotely. What if the

128 The Chafee amendment to the copyright law provides that reproducing textbooks in an accessible format for individuals who are blind is fair use and not a violation of copyright. 17 U.S.C. § 121.

129 See *Payan v. L.A. Cmty. Coll. Dist.*, 114 F.4th 729 (9th Cir. 2021) (private right to bring disparate impact claim under Title II of ADA and Rehabilitation Act; recognizing disparate impact in case involving website access and teaching materials accessible to student with visual disabilities and applies to both section 504 and the ADA in spite of Supreme Court holding in *Alexander v. Sandoval*, 553 U.S. 275 (2001). If the Supreme Court reached that issue now, there is a real concern that it would overrule the *Alexander v. Choate* 1985 precedent recognizing disparate impact can be used to challenge some (but not all) actions. This Supreme Court could strike down all disparate impact situations where they have not been specifically codified into the statute. Even “codification” through federal regulations that have gone through notice and public comments are at risk. See *West Virginia v. EPA*, 597 U.S. 2587 (2022), requiring that Congress demonstrate clear authority, especially when large financial implications are affected—the “major questions doctrine.”

classroom is not set up so that remote attendees can hear both the instructor and others in the room engage in classroom discussion? What needs to be anticipated in ensuring that someone is monitoring the “chat” feature so that remote attendees are fully included?¹³⁰

Higher education institutions that provide programs (such as conferences and symposia)¹³¹ to the public or audiences beyond students will need to anticipate those issues as well. Other issues of concern related to course delivery can include mandating or making available accessible technology and allowing use of certain computer platforms (such as JAWS) for exam purposes.¹³²

Website issues can have a significant impact on IHEs.¹³³ There are several unsettled issues related to websites. These include whether websites themselves are subject to ADA Title II or Title III or section 504 and under what circumstances. Beyond that is what content on a website must be accessible or provide information about access.¹³⁴ The issue of standing to bring a complaint involving websites is being addressed by the Supreme Court.¹³⁵ One of the major challenges for all website settings is not having specific design standards for different types of institutions. While design standards for federal agencies have been in place for some time,¹³⁶ the DOJ standards now being considered¹³⁷ might not be upheld by the federal courts given the recent trend of federal judges not to give deference to federal agencies in some regulatory settings.

130 This perspective comes from first-hand experience when I taught law school classes (both large classes of sixty to seventy-five and smaller classes of ten to twenty) recorded on Blackboard for those who could not attend. It was challenging for me to monitor the “chat” while engaging in the discussion in the room. This was due primarily to my own vision limitations. It was much easier to monitor and include when everyone was remote. There are certainly ways to plan for that, but these issues should be anticipated and planned for to the extent feasible. It is important to be inclusive even if only one student is affected.

131 This may require having speakers provide PowerPoints and other materials in accessible formats, if they are to be shared beyond the room in which they are presented. Such materials ideally should be accessible in any case.

132 See *DISABILITIES AND THE LAW*, *supra* note 3, § 5:7 n.13.

133 See *DISABILITIES AND THE LAW*, *supra* note 3, § 9:5.

The November 22, 2022, DOJ Consent Decree with Berkeley has the potential to answer many of these questions, at least with respect to publicly available website information. Its impact will depend on the precedential value placed on such a settlement. The consent decree addresses a very broad range of issues that remind universities of what they should consider. These issues include faculty hosted webpages and podcasts, student and student group hosted web information, information over ten years old on websites, training issues, tips for creating new websites, and references to other digital access information. This settlement provides information about training and other matters relevant to online information provided by universities and by individuals and organizations within institutions. See <https://technology.berkeley.edu/DAP/FAQ>.

134 *DISABILITIES AND THE LAW*, *supra* note 3, § 9:5 n.7.

135 *Acheson Hotels v. Laufer*, *cert granted*, S. Ct. Mar. 26, 2023.

136 29 U.S.C.A. § 794d. Access Board’s current rules for web accessibility are found at 36 C.F.R. pt. 1194 (2017), for section § 508 of the Rehabilitation Act.

137 Guidance issued in March 2022, <https://www.justice.gov/opa/pr/justice-department-issues-web-accessibility-guidance-under-americans-disabilities-act>; <https://www.ada.gov/resources/web-guidance/> (March 18, 2022).

A few additional unanswered questions arise in the context of websites, with potential unintended consequences if answered in certain ways. For example, many universities have archived documents available through websites. The PDFs of photocopied original handwritten documents of historical figures are examples. Must those documents be put into accessible format? If so, how quickly? If the answer is too burdensome, a university may simply decide to remove those documents from archives, with the unintended consequence that no one can access them. Another example is inclusion of the curriculum vita (CV) for faculty members, which most universities have on their webpages for academic departments. While it might seem obvious that the CV itself should be in an accessible format, what about the links to articles written by that faculty member that are listed in the CV?

While not yet tested in the courts, in May 2023, the DOJ and ED issued a joint Dear Colleague Letter that provides guidance on web issues.¹³⁸ The guidance reminded colleges, universities, and other postsecondary institutions to ensure that their online services, programs, and activities are accessible to people with disabilities. Many colleges, universities, and other postsecondary institutions increasingly rely on their websites and third-party online platforms to provide services, programs, and activities to members of the public. This includes courses on learning platforms as well as podcasts and videos on social media and third-party platforms like YouTube, Spotify, and Apple Podcasts. This joint letter reiterates that Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act require colleges, universities, and other postsecondary institutions to provide equal opportunities to people with disabilities in all their operations. The letter also highlights recent web accessibility enforcement activities and technical assistance from the Justice Department's Civil Rights Division and the Department of Education's Office for Civil Rights.

The guidance does not directly apply to private universities, although most receive federal financial assistance and would be subject to section 504.

Technology issues are also raised in the context of public information provided in large venues, particularly sports arenas.¹³⁹ Policy makers and purchasing departments should consider these issues with respect to access to spoken announcements and play description at sports events, and providing that same information on jumbotrons in the arena and whether television monitors in areas serving the arena (e.g., food vendors) should be required to turn on the closed captioning devices on screens where the fan buys pizza and beer.

Finally, the rise of AI, a fast emerging and evolving technology, requires attention by IHEs.¹⁴⁰ There are concerns that have already arisen in the broader employment

138 See <https://www.justice.gov/crt/case/dear-colleague-letter-online-accessibility-postsecondary-institutions> (May 19, 2023).

139 See e.g., *Innes v. Bd. of Regents of Univ. Sys. of Md.*, 29 F. Supp. 3d 566 (D. Md. 2014) (preliminary rulings in ADA/504 claims by deaf spectators that university did not provide effective communication at athletic events and on sports websites).

140 Derek Newton, *From Teaching to Grading: AI Is Infiltrating Higher Education*, HECHINGER REP. (Apr. 26, 2021), <https://hechingerreport.org/from-admissions-to-teaching-to-grading-ai-is-infiltrating-higher-education/>; Mark Stanberry et al., *In an AI World, Let Disability Access Lead the Way*, INSIDE HIGHER EDUC.

context about screening out applicants based on factors that might be discriminatory.¹⁴¹ It is not hard to imagine university admissions offices creating templates that consider a range of data and even personal statements to identify students at risk in a variety of ways that could be discriminatory. The temptation to identify the applicant who might have mental health problems (including self-harm) or who is at risk of not completing college for other reasons could lead to a decision not to admit at the outset. A more positive use could be to anticipate the need for certain services, such as how much mental health counseling might be needed for an incoming freshman class. The danger is that the same information could be used in ways that discriminate inappropriately. These issues should be considered before the adoption of such systems.

F. Professional Education and Relationship to Licensing

There is increased awareness that for professional education programs that connect to licensing (primarily law and medicine, but also other health care professional programs), there are potential issues relating to whether admission of a student should be tied to whether the student is likely to be licensed in the program. For the individual student, the stakes are high. These students invest substantial time and money to achieve a goal of becoming a doctor or lawyer or other professional. For the programs themselves, the cost and investment are high—particularly for medical school education.¹⁴²

While programs can make accommodations for a range of disabilities for some academic aspects of the program, in some instances, such accommodations are not feasible or reasonable for the clinical part of the program. Coursework that requires the ability to perform certain physical tasks (such as surgery), that requires quick reading and processing of information (such as emergency room medical care or a trial attorney), or that requires interaction with patients or clients or coworkers (such as a physician interacting with a nurse or a medical student), can create challenges. Awareness of these issues and proactive consideration (that might include an accessible and transparent process for obtaining accommodations at all levels) can help to avoid some complex and protracted dispute resolution. Thoughtful communications between licensing boards and educational programs can facilitate good practices that are beneficial to all parties. Related to this issue is the practice of reporting mental health treatment and diagnosis by educational programs to licensing boards. Such reporting has been demonstrated to deter individuals from seeking treatment.¹⁴³

(Feb. 28, 2023), <https://www.insidehighered.com/views/2023/03/01/prioritize-universal-access-ai-policy-response-opinion>.

141 US Warns of Discrimination in using AI in Employment Screening, NPR (May 12, 2022), <https://www.npr.org/2022/05/12/1098601458/artificial-intelligence-job-discrimination-disabilities>.

142 Laura Rothstein, *Medical Education and Individuals with Disabilities: Revisiting Policies, Practices, and Procedures in Light of Lessons Learned from Litigation*, 46 J. COLL. & U.L. 258 (2021), <https://www.nacua.org/resource-library/resources-by-type/journal-of-college-university-law/index-by-volume/jcul-by-volume-landing-page/volume-46-number-2>. See also Ellen Babbitt & Barbara A. Lee, *Accommodating Students with Disabilities in Clinical and Professional Programs: New Challenges and New Strategies*, 42 J. COLL. & U.L. 119 (2016).

143 David Jaffe et al., *"It's OK Not to Be OK": The 2021 Survey of Law Student Well-Being*, 60 U.

There is some judicial guidance on handling these issues,¹⁴⁴ but this is an area that would benefit greatly from more proactive creation of policies, practices, and procedures that anticipate and avoid unnecessary disputes.

G. Transition from K-12 to Higher Education

Because of IDEA, there are many more students with disabilities who are college ready today than in 1973, when section 504 of the Rehabilitation Act was passed. The transition from K-12 to the college level can present challenges in expectations and changes in rights and support. Although IDEA requires that schools develop a “transition plan” for students with disabilities (at least those who were receiving special education), in reality, many students who need accommodations in postsecondary settings did not receive such a related service and enter higher education unprepared for college expectations. For K-12 students with 504 plans (e.g., receiving accommodations but not special education),¹⁴⁵ the transition may be less stark, but K-12 students with 504 plans have them because of the existence of IDEA and special education in the K-12 setting. In some cases, the students and their parents do not recognize those changes, which can result in tension between the student and the IHE.

There are several major differences from K-12 to IHE. Being aware of those can be an opportunity for IHEs to be proactive in their policies, practices, and procedures. In K-12, the burden is on the school to identify (and usually to pay for documentation) a disability for students. Also, in K-12, the student’s disability may result in the entitlement to special education and related services, which can go beyond what is required under section 504’s reasonable accommodation requirement. For example, in K-12, a student with a learning disability may receive tutoring as a related service. The student may receive additional time on exams or on assignments that goes beyond what a reasonable accommodation might require. Some students with neurodivergent conditions, such as students with autism who are academically high performing and were not receiving special education may have difficulty navigating the social expectations and independence of a college environment.¹⁴⁶ Some behaviors may be seen as “stalking” and result in campus discipline if the student is not aware of the expectations for college student conduct.

Anticipating some of these issues at the IHE level can allow avoidance of some conflict. For example, communications with newly admitted students can provide links to resources on campus for support. As in previous sections, a full discussion of these issues is beyond the scope of this article, but IHEs are

LOUISVILLE L. REV. 438 (2022), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=3142&context=facsch_lawrev.

144 DISABILITIES AND THE LAW, *supra* note 3, §§ 5:9 and 10:7.

145 DISABILITIES AND THE LAW, *supra* note 3, §§ 2:53–2:55.

146 Patrick Dwyer et al., *Building Neurodiversity-Inclusive Postsecondary Campuses: Recommendations for Leaders in Higher Education*, 10 AUTISM ADULTHOOD 1 (2023) (written by students with neurodiverse conditions), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10024274/>. See also Lee Burdette Williams, Director of Higher Education Training and Development, College Autism Network, PowerPoint on *Students on the Autism Spectrum: Responding to a Growing Population* (Feb. 2018), <https://collegeautismnetwork.org/wp-content/uploads/2018/02/ASCA2018-PreCon-ASD-and-Student-Conduct.pdf>.

urged to anticipate these concerns and plan for them in the policies, practices, and procedures, including training of front-line faculty members and other administrators. Community colleges may be most likely to have students in this category present in “open admissions” settings and have parents who expect an individual education plan (IEP) or 504 plan at the college level. Sometimes these parents expect to “speak for their child” who is now an adult. While training and preparation at the community college setting is important, these institutions often have the fewest resources available to respond.

One issue for IHEs to be aware of related to transition services is the issue of dual credit courses. These are often offered in urban areas where a college or university enters into an agreement where a high school student can take a course on campus and receive advanced placement credit. The instructor in the course may have no idea that a student in the class has an IEP or 504 plan, and even if the instructor does, they may not be amenable to allowing extra time on exams or other individualized supports that go beyond reasonable accommodations. Universities would be wise to plan for this in their memoranda of understanding (MOUs) to avoid conflict, especially when there is little judicial or other guidance on what is required in these settings.¹⁴⁷

H. COVID-Related Issues in Higher Education

The pandemic hit college campuses abruptly in March 2020. The NCAA (National Collegiate Athletic Association) basketball tournament’s sudden halt was probably the first realization that COVID was going to change everything for everyone immediately. Everyone was sent home. Colleges scrambled quickly to figure out how to continue teaching and learning through technology platforms. Housing on campus was immediately affected. Over the next twelve to eighteen months, life on campus gradually returned to some semblance of what it was before. But it is unlikely that campus life will ever be totally unaffected by the pandemic. There are several public health and disability related issues explaining why that is the case.

By fall 2022, the pandemic was considered in many ways at least temporarily “under control,” which meant that the need for everyone to be masked and socially distanced all the time no longer existed. There are treatments and more efficient access to COVID testing (compared to the long lines and systems created on campus in fall 2020). Vaccinations are available, but although these are an enormous benefit to avoiding serious illness and death, they do not prevent becoming infected and spreading COVID. Those who are immunocompromised and those in close contact with them have a greater need than most people to avoid contracting COVID. Much has been learned about how much learning, teaching, and other campus work can take place outside of in-person settings.

The return to campus for most necessitates an appreciation for how disability discrimination issues affect the in-person learning and work in higher education

¹⁴⁷ See e.g., *Bradley v. Jefferson Cnty. Pub. Schs.*, 598 F. Supp. 3d 552 (W.D. Ky. 2022). This case highlights the challenges of implementing a free appropriate public education in dual credit and dual enrollment courses and how it is often difficult to define the obligation of a university to provide accommodations for students enrolled in such courses. It is one of the few judicial decisions to even begin to address this issue.

settings that now exists nationwide.¹⁴⁸ Because about three percent of the population are immunocompromised¹⁴⁹ there is still a concern about how to protect those individuals who seek to avoid in-person contact as much as possible. Because COVID can be transmitted even by those vaccinated, there are many others who live with or who have close contact with individuals who are immunocompromised who may also wish to avoid in-person contact. For that reason, there are several disability discrimination issues to consider in planning what *must* be done, what *can* be done, and what *should* be done.

Although not discussed in depth in this article, IHEs should consider in their planning and policies the following legal questions.

1. Is long COVID a disability? Is being immunocompromised a disability? What kind of documentation should an institution require from individuals with these conditions in order to consider whether reasonable accommodations (such as remote work or learning) are legally required.
2. Are those who are associated with someone who has long COVID or who is immunocompromised protected under section 504 or the ADA? Although they are probably protected from discrimination (e.g., being fired or removed or demoted) by the institution, they are not entitled to receive reasonable accommodations related to attendance. This is a prime example of where an IHE might consider not just whether they *must* act in a certain way, but whether they *can* and *should* grant accommodations that are not legally required.
3. Is attendance or presence an essential requirement? For example, if a professor allows only a certain number of absences, and no exceptions are made for illness, there is a risk that students with COVID symptoms or illness will attend, exposing others to COVID. But if the professor is too lax in granting excused absences, there may be a floodgate concern?
4. What reasonable accommodations are required for remote work? Must all classes be made available through distance learning platforms? How does an institution argue that it is not reasonable to allow remote work, when it mandated only remote work for several months? What about reasonable accommodations related to the stress of in-person learning for some with mental health concerns (some of which may be a result of COVID concerns)?
5. What does it mean to be otherwise qualified? Mandatory vaccinations on campus will be an ongoing issue, particularly for those in health care situations (e.g., campus health offices, medical schools, and university hospitals).

148 For an interesting discussion of the challenge of balancing flexibility with manageability in post-COVID settings on campus, see Becky Supiano, *Course Correction: Students Expect Total Flexibility in the Pandemic-Era Classroom, But Is That Really What They Need*, CHRON HIGHER EDUC. (Feb. 13, 2023), https://www.chronicle.com/article/course-correction?utm_source=Iterable&utm_medium=email&utm_campaign=campaign_6883363_nl_Academe-Today_date_20230523&cid=at&source=&sourceid=&sra=true.

149 “Seen through a COVID-19 lens, about three percent of the population in the United States is considered moderately-to-severely immunocompromised, making them more at risk for serious illness if they contract COVID-19, even after vaccination. This is because their immune systems do not mount a strong response to the vaccines”; see <https://www.yalemedicine.org/news/what-does-immunocompromised-mean>.

6. What about masking issues going forward? If the instructor or a member of a class requests that everyone be masked because that person is immunocompromised, can that be required? On some campuses, in fall 2022, the mandates went out that faculty members could not require class members to be masked. The courts are addressing a similar issue in the context of K-12 education regarding mandates about no masking.

The failure to consider these issues is an example of “ableism” and campus policy makers and administrators and front-line providers of education and services must think these through before being dismissive and assuming that only a few people are affected, and these people are “on their own.”

I. Faculty Issues

While this issue was highlighted in the section on ongoing disability issues,¹⁵⁰ it is receiving “crystal ball” attention in this section as well. The reason reflects two major developments since the 1970s. First, the greying of the academy in times of economic instability makes it less predictable when and how faculty members will choose to retire. Second, the issue of COVID raises some unique disability considerations to faculty members—who is protected? How can they teach, or how must they teach?

The combination of the economy, the aging professorate, and the pandemic highlights the importance of not just focusing on student issues, but also ensuring that that leaders (deans, provosts, academic departmental chairs, human resources departments) are aware of potential disability issues relevant to faculty employment.¹⁵¹ As noted in 1993,¹⁵² the elimination of mandatory retirement for faculty members means that institutions should have been paying greater attention to ongoing assessments about whether all faculty members are “otherwise qualified” to perform the requirements that may only be vaguely defined or described in the initial letter of appointment. While many institutions implemented systems of posttenure review and other detailed performance evaluations, these and annual evaluation practices may be subject to challenge by a faculty member whose health or impaired condition raises concerns. Employment remains the anchor for access to health care, so faculty members may be more concerned about that than the salary income itself.

Higher education faculty members benefit from a range of employment supports found in few other professional positions—access to travel and research support, access to technology support, an office in which to work, clerical and other administrative support, companionship from interacting with colleagues, and the admiration and respect of new students year after year. It is no wonder that many university faculty do not want to retire.¹⁵³ Those assumptions, however,

150 See *supra* Part IV.D.

151 DISABILITIES AND THE LAW, *supra* note 3, § 3:26.

152 Laura Rothstein, *The End of Forced Retirement: A Dream or a Nightmare for Legal Education?* ABA SYLLABUS (Jan. 1993).

153 Michael Nietzel, *Pandemic Toll More Than Half of College Faculty Have Considered a Career Change or Early Retirement*, FORBES (Feb. 26, 2021), <https://www.forbes.com/sites/michaelnietzel/2021/02/26/pandemic-toll-more-than-half-of-college-faculty-have-considered-a-career-change-or-early-retirement/>

changed with the pandemic, which resulted in faculty burnout, demoralization, and disengagement.¹⁵⁴ To ensure that faculty who do not want to retire remain qualified, attention to accommodation and other issues is key. The issue of presence and attendance as an essential function for teaching, student office hours, and faculty meetings is important to think about proactively. Having sufficient information technology (IT) support to assist faculty members who are older and less adept at online platforms, monitoring “chats,” and other technology that may be second nature to younger faculty members incorporates the issue of “reasonable accommodation.”

While there is not a large body of recent judicial guidance on these issues, it is likely that many disputes are being resolved without litigation. Such disputes even at preliminary stages, however, might be avoided by proactive attention to anticipating issues, particularly those recently raised due to the pandemic and postpandemic return to a requirement of attendance and presence for faculty members. This is an area where it will be particularly important to implement interactive discussions about accommodations.

J. Facilitated, “Layered,” and Licensed/Leased Premises Activities—Who Is Responsible?

While not the only institutions with complex operations, universities are somewhat unique in how they carry out the multidimensional provision of programming and services. The primary role of a university is to provide educational programming to students, traditionally in classrooms with supporting services of libraries and laboratories. There are, however, a great many activities beyond traditional educational programming that involve collaborations or contracts with other entities to carry out the services and programs. No other entities subject to disability discrimination law have housing (and sometimes transportation) intertwined with the program itself. Each of these entities are probably themselves subject to disability discrimination laws, making it important to consider in advance the relative obligations of responsibility for disability access (including making reasonable accommodations and ensuring accessible physical facilities), and how this shared responsibility may be treated when there are disputes. This suggests the importance of clear MOUs or other contractual arrangements that while perhaps not immunizing the university entity from liability, might ensure indemnification if damages are awarded for an activity found to be discriminatory.

These activities fall into several categories. In almost none of them is clear guidance available about ultimate liability for compliance with section 504/ADA. Planning through MOUs, contract terms (including indemnification), and including people with disabilities in the planning can be valuable in avoiding costly and frustrating conflict and mistakes.

The first type of activity is a contractual arrangement where the university is the licensor/landlord for activities on campus. Liability or response by the IHE may turn

early-retirement./ In 2021, the fatigue and stress from the pandemic caused burnout and a significant increase in interest in retirement or a career change.

154 Doug Lederman, *Turnout, Burnout, and Demoralization in Higher Education*, INSIDE HIGHER ED (May 3, 2022), <https://www.insidehighered.com/news/2022/05/04/turnover-burnout-and-demoralization-higher-ed>.

on whether the arrangement is a lease or a license. Examples include bookstores within student centers; food vendors at campus-operated sports arenas; and hosting public events, such as speakers or concerts, on campus that are run by other entities (such as a musical performance concert at a university-owned stadium). Who is liable if the private company operating the beer and pizza sales does not ensure closed captioning on the television set above the bar? If the private bookstore operating on campus does not have an accessible website, is the university responsible for that? Hosting continuing education and other speaker events sponsored by others (sometimes in collaboration with the university) on campus has the potential for access issues to arise.

Second is where the IHE is the licensee/tenant in providing programming or services. Examples include a university contracting to host its basketball games or graduation ceremony in a sports arena or large performance or conference space operated off campus. One can imagine a stage that all students walk across at graduation that has no ramp or the ramp is not ADA compliant or is otherwise not accessible. If a voting site for elections is on campus and does not meet accessibility requirements, who is responsible or liable?

A third type of activity involves contractually provided arrangements through which a university “facilitates” the program of a private provider. The most common example is probably off-campus private housing. If the university promotes or advertises such housing to newly admitted students, is it responsible to ensure that the housing meets disability discrimination standards—ranging from architectural design to how service and emotional support animals are permitted in such housing? While fraternities and sororities may seem to be private clubs, with universities having no responsibility for them and these Greek organizations being exempt,¹⁵⁵ because such organizations may have housing on campus owned or leased property or because the university may play a role in facilitating sorority/fraternity rush or in recognizing them as official campus organizations, there may be some obligation for their ADA/section 504 compliance. The fraternity may not be liable, but the university that recognizes or facilitates it may be liable, if there is notice of discrimination and the university fails to respond appropriately. Similarly, many campuses facilitate private campus bus shuttle services or contract with others to do so.

A fourth type of activity involves IHEs that host or collaborate on the provision of various broadcast activities.¹⁵⁶ Similar issues might arise where a faculty member’s website links to a blog or a video lecture that may not meet design standards for audio or video descriptors.

Fifth are activities related to providing coursework remotely beyond students at the entity from where they originate. As noted previously, universities that provide MOOCs or open access coursework should think through whose obligation it is to ensure access for these programs. For example, if a professor teaches a remote or

155 DISABILITIES AND THE LAW, *supra* note 3, § 3:15. *See, e.g.*, *Entine v. Lissner*, 2017 WL 5507619 (S.D. Ohio 2017) (granting preliminary injunction against university seeking to remove service dog from sorority).

156 *Yelapi v. DeSantis*, 525 F. Supp. 3d 1371 (N.D. Fla. 2021) (preliminary rulings in claim by deaf Florida residents and advocacy group regarding Florida State University television channels that broadcast governor’s press briefings; claiming failure to provide in-frame American Sign Language interpreters violated ADA and 504).

hybrid course to students at their own institution, but students at other institutions are allowed to enroll simultaneously, who is responsible for ensuring that interpreters or exam accommodations are provided—the faculty member’s employer or the university allowing the student to receive credit for the remote course?

Sixth are programs in foreign countries. There is not clear guidance on responsibility when a university hosts a summer program in Spain for its students. While some have argued that because there is no jurisdiction over programs operated outside of the United States,¹⁵⁷ surely the university bears some responsibility for at least ensuring that such a program has accessible housing and classes are conducted in accessible locations or at the very least publicizing the degree of access should the university grant credit or operate such programs abroad. Related to programs operating outside of the United States are alumni travel (such as river cruises) facilitated through university-operated alumni offices.¹⁵⁸

Seventh are dual enrollment courses where high school students take college courses on campus that provide completion of high school graduation requirements and also can count toward college credit at some institutions.¹⁵⁹ While the IHE faculty member may not be responsible for implementing the special education expectations for a student’s IEP, it may be obligated to ensure that reasonable accommodations are provided to such students appropriate to a college level course.

An eighth area for attention involves university-sponsored or supported or facilitated student placements. These range from colleges of education requiring student teacher placements, law school students working for credit at programs such as Legal Aid or government agencies, and medical or pharmacy students working in clinical placements as part of their education. The issue that can arise in these settings is whose responsibility it is to ensure (and possibly pay for) reasonable accommodations. For example, if a law student with a hearing impairment that requires signing or other interpreting service is working at a law school–approved internship placement, is it the law school or the employer who is responsible for providing that service? What if the employment setting is not accessible for a student who uses a wheelchair? Must the university remove that placement from its list of possible placements? Does it matter if the internship opportunities when viewed in their entirety are in accessible locations? An unintended consequence of requiring the intern-sponsoring employer to pay for the accommodations might be that the employer simply declines to participate in the future, making that internship unavailable to any student. How should a law school handle a situation where a law student with mental health concerns that are accommodated in the academic settings raises concerns if that student is to represent clients under supervision of a supporting internship or clinic program sponsored by another entity such as the public defender’s office? Is there a privilege to disclose these concerns? How should that work?

157 A.S. Kanter, *The Presumption Against Extraterritoriality as Applied to Disability Discrimination Laws: Where Does It Leave Students with Disabilities Studying Abroad?*, 14 *STANFORD L. & POL’Y REV.* 291 (2003).

158 *Alumni Cruises, LLC v. Carnival Corp.*, 987 F. Supp. 2d 1290 (S.D. Fla. 2013) (allowing issues to be tried on whether cruise line had made reasonable modifications; organization allowed to have standing to bring these claims).

159 *See supra* Part V.G.

It is not the purpose of this section to analyze or synthesize legal guidance on these issues. There are not many judicial decisions to review, so clear guidance on many of the issues does not exist. The purpose, instead, is to encourage university policy makers to be aware of the importance of proactively anticipating potential liability or responsibility for compliance (which is a challenge where it is not certain in many of these settings what substantively is required). Higher education institutions should nevertheless anticipate these issues, work outside of silos, and engage in individualized and interactive resolution.

K. Documentation of Disabilities

Before the 2008 ADA amendments, many disputes in higher education and testing contexts raised a range of issues involving what documentation would be required for an individual to demonstrate that they had a disability and or that the requested accommodation related to that disability. Cases in this context sometimes address the issue of requiring the institution to “know” (actually or constructively) of the disability before it can be found to have violated. While this is not a new issue, the crystal ball consideration of this arises from the increasing pressure for advocacy groups to reduce the burden of documentation due to its high cost.¹⁶⁰

The high cost of documentation for some disabilities (neurodiversity and mental health impairments) is a barrier for many students seeking accommodations. Responding to the cost issue, however, should consider that some individuals can “game” the system by submitting questionable documentation or that loosening documentation requirements could open the floodgates of accommodation requests. Issues of documentation are particularly complex with respect to having emotional support animals in campus housing and employment, where greater documentation can be required as compared to service animals where public accommodation and public service providers are much more limited in the documentation requirements.¹⁶¹

L. Cumulative Accommodation Concerns—Slippery Slopes and Floodgate Concerns: Where to Draw Lines?

In applying the must / can / should analysis to granting accommodation requests, IHEs should anticipate the possibility of opening the floodgates or slippery slopes when granting accommodation requests that are not required, but that are discretionary and manageable, at least initially. Faculty members and administrators grant exceptions to deadlines and other requirements regularly. For example, a student who calls a professor to say that she was just in a car accident and requests an extension on a research paper draft assignment would likely be granted that request, usually without documentation. The student who requests to take an exam on a different day than scheduled because of a death in the family might be asked to show some documentation. It is not feasible or wise to have strict rules on every possibility and every setting. Reasonable discretion and common sense still apply.

¹⁶⁰ For a discussion of this issue, see Robert L. Mapou, *Have We Loosened the Definition of Disability? The Effects of Changes in the Law and Its Interpretation on Clinical Practice*, 15 PSYCH. INJ. & L. 307 (2022).

¹⁶¹ Laura Rothstein, *Puppies, Ponies, Pigs, and Parrots—Policies, Practices and Procedures in Pads, Pubs, Planes, and Professions—Where We Live, Work, and Play, and How We Get There—Animals in Public Places, Housing, Employment, and Transportation*, 24 ANIMAL L. REV. 13 (2018).

For students who request accommodations that impact resources—staff supervision or physical space—such as separate exam rooms to avoid distraction for a student with ADD or additional time for a student with a learning disability, the documentation expectations become more important to examine. One student requesting a separate exam room (regardless of whether it is for a disability reason or because the student has experienced a recent trauma such as a death in the family) does not usually implicate resources. One student asking for additional time to take breaks during an exam due to a recent illness (not rising to the level of a disability) does not burden an institution. But slippery slopes can occur, particularly when students learn that administrators or faculty members are more flexible than law requires. These situations can also raise issues of fairness, particularly where additional time or assignment extensions are requested.

The same issue arises for faculty members requesting to teach remotely in the “postpandemic” era (e.g., as universities returned to full-time, in-person classes throughout fall 2020 and spring 2021). Academic programs (such as law schools) that require a certain amount of coursework to be taught in person may be able to grant one or two faculty members in a small department the request to teach remotely but might not be able to do so for everyone who wants or prefers remote teaching. This “cumulative” effect of accommodation granting can result in an undue administrative or financial burden, one not always easy to plan for or anticipate. It will be increasingly necessary for higher education programs, however, to consider how they will go about granting such requests, and only doing so as a disability accommodation for which documentation is required.¹⁶²

The point of this section is to remind those who participate in making policies and implementing practices and procedures on campus that care should be taken in how to implement requests for accommodations in situations where it may be difficult to demonstrate at the front end that an accommodation request is burdensome without knowing how many similar accommodations might be sought.

VI. APPROACH FOR UNIVERSITY LEADERS AND UNIVERSITY COUNSEL —ESTABLISHING OR ENHANCING AN ADA COORDINATOR ROLE

A. *Planning—Proactive and Reactive*

The discussion of the wide-ranging disability issues on campus—both those that

162 See, e.g., *Gati v. W. Ky. Univ.*, 762 Fed. App'x 246 (6th Cir. 2019) (requiring judicial deference to determination by university that it cannot accommodate student by offering specific course remotely without jeopardizing academic integrity of program; student in mental health counseling program could not sit for more than one hour at a time affecting ability to commute to take required programming; denial was based on faculty conclusion that interactive television not possible for mental health counseling program that is experiential and required classroom interaction between students and instructor; instructor shortage prevented offering course at satellite campus; accreditation standards affected how many courses an instructor could teach); *Dobyns v. Univ. of La. Sys.*, 275 So. 3d 911 (La. Ct. App. 1st Cir. 2019), *writ denied*, 278 So. 3d 977 (La. 2019) (judgment for professor in claim for disability discrimination through disability-based harassment and denial of accommodations; professor who had been employed since 1992 requested and received accommodations in 2008 for her compromised immune system of alternative scheduling and distance education during December through February; when administration changed in 2011, those accommodations were no longer granted).

are ongoing since 1973 and those that are more recent or emerging—may be eye-opening to the new administrator or university counsel. Some issues may surprise even seasoned higher education professionals. From my viewpoint both as a scholar whose work focuses on these issues and as an administrator and faculty member who has put these expectations into practice for over four decades, I strongly encourage a proactive approach to these issues as well as planning to respond to or react to situations that arise suddenly. The proactive approach includes training and a plan for ongoing assessment and reassessment of a wide range of activities. While such a plan is no guarantee that a university will not be sued or subject to an OCR investigation or negative media attention or major liability after dispute resolution, I believe that such an approach will greatly reduce the potential for such negative outcomes.

One means of doing comprehensive preparation is to create an ADA coordinator position on campus, one that reports directly to the president or provost or a key vice president. Increasingly IHEs are recognizing the value of doing this. The following section sets out a possible framework for such a position. It is important to clarify that this role is distinct from the human resources (HR) 504 officer who handles employment issues or the disability student services officer who primarily administers the provision of accommodations on campus. The position would not involve direct provision of services or direct formal dispute resolution. Instead, it would allow for coordination and facilitation of such programs and more.

Over the past two decades of speaking at higher education law and policy conferences, I have seen an increase in the number of campuses that have created such a position. While each campus is different in how such a position works, having someone with a broad portfolio for planning and reacting (not dispute resolution or implementation of services) can be of great value on campus. At the University of Louisville, I was part of advocating for such a position. It was created, and the first person began in that role in 2016–2017. While that role has evolved, I believe that it has been a means of addressing issues ranging from parking for special events to animals on campus policies to facilitating discussions of postpandemic accommodations. The following section describes a framework for what someone in this role might do (depending on the campus) and other aspects of the position that can be useful.

B. ADA Coordinator

1. The “Why”

The twenty-fifth anniversary of the ADA was 2015, and, at my suggestion, the annual Stetson Conference on Higher Education Law and Policy, allowed me to present a full-day program reflecting on the twenty-fifth anniversary. Because I had worked with the Association of Higher Education and Disability (AHEAD)¹⁶³

163 See <https://www.ahead.org/home>. Founded in 1977,

AHEAD is the leading professional membership association for individuals committed to equity for persons with disabilities in higher education. Since 1977, AHEAD has offered an unparalleled member experience to disability resource professionals, student affairs personnel, ADA coordinators, diversity officers, AT/IT staff, faculty and other instructional personnel,

on many occasions, including making presentations at their national and regional conferences, and knew many people from the principal higher education disability services organization, I thought it would be beneficial to include a co-presenter from the AHEAD leadership. Jim Kessler was my co-presenter, and the full-day program was so well received that the Stetson conference continued with full-day programs on disability issues every year after that until 2020 (when a half-day program was presented instead), with co-presentations each year. One of the concepts that was discussed and evolved throughout those years was the idea of an ADA coordinator, with a broad portfolio of responsibilities and connections.

The following framework for such a position was reflected in the 2018 *A Primer on Disability Discrimination in Higher Education*,¹⁶⁴ which has been adapted and updated for various audiences primarily for conference presentations. This also incorporates and reflects the 2021 research about disability services and oversight personnel on campus and the evolution of those responsibilities.¹⁶⁵

The *Primer* reflects what has only become more apparent, which is that

Having effective policies, practices, and procedures (and personnel) for addressing proactively, reactively, and interactively the implementation of disability law on campus may benefit from ... personnel who are in a position to facilitate such policies. A thoughtful approach to this may be of value before federal agencies (Office for Civil Rights) contact a campus about a complaint. The value is not only to avoid liability, but also to gain positive public relations and to avoid unnecessary negative media attention. It is critical to note initially that this role is not intended to be a “check off” compliance officer (although there may be connection with those who engage in that role). The person filling this role is not expected to have all the answers, but they would be someone who knows where to find the answers, someone who works outside of silos, and someone who has good judgment.¹⁶⁶

While most higher education institutions have a student services coordinator for disability issues and a “504”/HR person to address faculty and staff issues, many (most?) do not have a single person responsible for coordinating and addressing *all* the ADA/504 issues that might arise. Models exist for this on many campuses.

and colleagues who are invested in creating welcoming higher education experiences for disabled individuals.

164 Laura Rothstein, *A Primer on Disability Discrimination in Higher Education*, 7 LAW & HIGHER EDUC. (2018), <https://www.mdpi.com/2075-471X/7/3/25/htm>. Conference Report published by *Laws* (ISSN 2075-471X), adapted for numerous conference presentations in 2018 and 2019, and revised and incorporated into subsequent conference outlines. This is an open-source document.

165 See <https://www.ahead.org/about-ahead/about-overview/knowledge-and-practice-communities/ada-coordinators> For a discussion of the shift in the evolution of administrative attention to disability issues on campus, see Sally Scott & Carol Marchetti, *A Review of the Biannual AHEAD Surveys: Trends and Changes in the Demographics and Work of Disability Resource Professionals*, 34 J. POSTSECONDARY EDUC. & DISABILITY 107 (2021), <https://files.eric.ed.gov/fulltext/EJ1319174.pdf>. This article describes a survey of practices since 2008 and notes that “the day to day work of disability resource offices on college campuses has undergone significant changes in this time period, potentially requiring new technical skills, expanded content knowledge, and increasingly complex professional judgement.”

166 Rothstein, *Primer*, *supra* note 164, at 26.

They vary depending on the size and type of institution, the resources available for staffing, and several other factors. Some of them are part of a joint position as ADA/Title IX coordinator. Others are responsible only for ADA/504 issues. There are many benefits of having such a coordinator.

2. *The “What”*

The following is taken and adapted from the *Primer* (which is published as an open access document).¹⁶⁷ Issues that should be considered for attention in creating or adapting such a position include what is the job title and responsibility of the ADA coordinator, what oversight will that individual have over proactive development and review of policies, practices, and procedures, and how that individual will interact with other key administrators and others on campus. The issues will be resolved differently on different campuses. The following is a framework for thinking through what this administrator would do.

a. Personnel

The first question is to whom should disability questions be referred? Should the title of the person be “ADA coordinator”? How is this distinguished on campus from other similar positions? How will stakeholders know to contact this person? What should the weblink say to describe the role of the “ADA coordinator”? What administrative offices on campus should be “connected” to this position? For example, should there be a reporting or other communication line to personnel in student services, housing, transportation, campus discipline, human resources, and so forth?

b. Policies and Procedures

Is there already in place a position such as this with a different name? Most campuses already have administrative offices to handle disability student services and HR/employment issues (often referred to as the 504 officer, often combined with the Title IX officer).¹⁶⁸ Until recently, however, administrators in these positions were not engaged in proactive comprehensive disability policy with oversight for *all* campus activities affecting those with disabilities. The proposal for an “ADA coordinator” in this article is something broader than what is in place on many campuses, which is a noncentralized means of addressing disability issues. Is there a specific office that coordinates policies and procedures for everything from student admissions to housing, to food services, to classroom activities, to the health services, to sports and athletics, to new construction, to parking?¹⁶⁹ Or are all these issues being handled in silos? A centralized ADA coordinator office can do global and appropriately periodic evaluations and reviews of everything from architectural

¹⁶⁷ *Id.* at 26–29.

¹⁶⁸ College campuses are already required to have a section 504 officer designated. For Department of Education regulations, see 34 C.F.R. subpt. E; for EEOC regulations applicable to employment on campus, see <https://www.ada.gov/resources/disability-rights-guide/#rehabilitation-act>.

¹⁶⁹ Offices (such as grievance offices) that resolve individual disputes would not be included in this position. It should not be designed to resolve disputes (rather to address concerns or situations), although if there are issues that are frequently disputed, the ADA coordinator could be involved to consider whether a change in policy, practice, or procedure could avoid future disputes.

barriers to procurement of technology equipment. That office can see the interconnection of issues, such as animals on campus, that may be treated differently in housing, employment, the campus library or classroom, or in a university-operated hospital. This is a “big picture” office that would look at all policies, practices, and procedures, identify where coordination is needed, prioritize issues that require renewed attention, and do so across programs as appropriate.

c. Preparation

In addition to ensuring that thoughtful disability policies and procedures exist and that they are transparent and communicated to key people (both those providing service and those with disabilities who are seeking the service), an ADA coordinator office can be involved in developing, recommending, or facilitating a wide range of training activities. Coordination of disability issues on campus can provide a vehicle for ensuring that appropriate training includes who to train,¹⁷⁰ how often to provide training,¹⁷¹ and what content the training should include for a wide range of activities,¹⁷² and in what format.¹⁷³

3. *The “How”*

In thinking through not only “whether” such a position would be of value, but also “how” the office would work, the following are issues to be addressed in creating or changing such a position.

a. To Whom Does Person Report?

- President
- Provost
- Vice president
- HR
- Other, for example, student services, faculty senate, student senate, etc.

There is a significant benefit to having the reporting line be to the president or provost or other senior vice president. The reason is that when a memo about a

170 It is not just leadership (deans, chairs, department heads) who should be trained, but those with front-line contact (faculty and staff and even contract vendors).

171 Changes in faculty and staff occur frequently. Adjunct faculty, who may only be on campus for a year or semester can be particularly challenging.

172 It is important to keep in mind that there are an increasing number of “trainings” that universities are providing. These include Title IX (sexual harassment), campus violence/active shooter, natural occurrence (fire, tornado, earthquake), emergency health care (such as cardio-pulmonary resuscitation (CPR)), student records privacy (FERPA) and related confidentiality training, human subjects, and conflict of interest training for research faculty. Whether these are optional or required varies widely. Whether they are in person or through remote programs also varies.

173 On-line trainings through asynchronous means can be used given the number of issues for which a campus employee may need to be trained. These include responding to mental health conduct, active shooter situations, CPR training, evacuation procedures for tornadoes, etc.. There is no perfect system of training, so the ADA coordinator should be the person to assess how best to conduct trainings with the awareness that personnel change periodically (including adjunct faculty), policies and practices change, and that everyone has limited time.

particularly important issue (such as attendance for students with disabilities during a pandemic) goes out to campus leadership (deans, department chairs, program officials) and faculty and staff, it is likely to carry more weight if it comes from the president, vice president, or provost “on behalf of the ADA coordinator” than if it comes from the ADA coordinator.

b. Who Are Key Parties for Regular Connection and Communication?

- Senior leadership (deans, department chairs, programmatic heads)
- Dean of students and other student service offices
- Disability services office
- Faculty and staff governance bodies
- Athletics directors
- Housing
- Food service programs
- Libraries
- Parking
- Transportation
- Physical plant—new construction, renovations, repairs
- Technology
- Purchasing
- Campus security
- Student discipline office
- Health care programs—including university hospitals and clinics and campus health service providers for students (including for mental health)
- Museum or display venues
- Alumni offices
- Events offices—for concerts and events to which the public is invited (including graduation)
- Campus bookstore
- Student organizations (including fraternities and sororities that have differing relationships to university administrations)
- HR offices
- IT offices (including those with oversight over web design, teaching platforms, other technology systems)
- International activities offices (including study abroad and alumni tours programs)

While some of those listed above are obvious, others are less so. There are varying levels of knowledge and involvement with disability issues, but individuals in each office should at least have a general awareness about disability issues and know how to contact the ADA coordinator as a starting place with an issue. The failure to at

least have some sense of how certain activities might affect those with disabilities is sometimes referred to as “ableism.” For example, it is not unusual for snow removal or temporary work repairs to adversely affect accessible parking or pathways. While those responsible for the snow pile in the designated parking space might respond that it was only once or it was only temporary, from the perspective of the individual who needed that parking (perhaps just before taking an exam), that is an inadequate response. Hosting a special major event on campus (such as televised “College Game Day” may mean that the regular parking spots will be closed off—perhaps only for a few hours, perhaps only on a weekend, but the failure to communicate that to a staff member who works on Saturday and to arrange for alternate parking and to do so without reasonable notice is a problem.

c. What Is the Authority?

Ideally, the ADA coordinator is there to break down silos, to be a resource about new and emerging issues (such as animals on campus or food allergy issues), rather than to be the place where disputes are addressed. It should be where problems can be headed off. Information can be shared. While it is essential that this individual have open lines of communication with university counsel, ideally, they should not “report to” university counsel. Care should be taken to communicate to those who might contact the ADA coordinator about the limitations of confidentiality. This can allow the ADA coordinator to give university counsel a “heads up” when a recurring issue comes to the coordinator’s attention, in order for university counsel to take proactive steps to address the situation. For example, if the ADA coordinator learned that an officially recognized student organization was hosting a social event in an inaccessible facility or that a continuing education program was being held in an inaccessible conference facility, the coordinator could advise the university counsel about that concern. The role of the ADA coordinator should not be to give legal advice, but to facilitate resolution when potential legal liability comes to light.

For these reasons, the following potential roles should be considered and included (or not) in planning for the position description:

- **Dispute resolution**

Ideally the ADA coordinator should not have the responsibility for addressing grievances or official complaints, but rather identify chronic issues or potential situations that could become grievances or official complaints. For example, a student could raise a question about the lack of choice of accessible seating at the football arena or whether peanuts should be sold in a closed basketball arena. Informal resolution or response to the issue could head off an OCR complaint, a lawsuit, or a media story that places the university in a bad light.

- **Ombudsperson**

Again, ideally, the ADA coordinator should not be an official “ombudsperson” to formally resolve disputes. The AD coordinator, however, could be able to initially steer someone to the ombudsperson or a dispute resolution office.

- **Policy development**

The ADA coordinator office is an ideal place to facilitate development of policies that may be needed to address new situations. For example,

e-scooters on campus can raise safety concerns and disability access concerns.¹⁷⁴ Having an office on campus to have a thoughtful response to the issue, taking into account many factors, can result in a policy that makes sense for that campus and may be something short of banning scooters.¹⁷⁵ Another issue every campus has had to deal with is animals on campus, which now has renewed attention because of the number of individuals who adopted pets during the pandemic and who would now like to bring them to campus (or at least to their housing). While other offices have probably attended to most employment accommodation issues, there will be those that arise that cut across a range of programs—students, faculty, staff, and the public. Animals on campus is a good example of where policy development (or at least facilitation of the discussion) can be of value to a range of offices—food services, housing, library, university health care settings, etc.

Another example would be universities that host dual enrollment courses, through which high school students come to campus and are enrolled in college courses. High school students with disabilities may not have an IEP or even a 504 plan, but participation in a college class may raise the need for accommodations that the student did know to seek out from the college instructor. Extension of time for tests or assignments or tutoring might be something the student receives in other high school classes, but the college instructor with no awareness of that would not grant or have a system to consider such a request.

- **Coordinator**

Given that the proposed title of the position is ADA “coordinator,” the role of “coordination” would certainly be an aspect of this administrator’s zone of responsibility. Coordination might mean opening lines of communication (breaking down silos) so that various administrators coordinate their actions. For example, a student with autism exhibiting stalking behaviors might “present” at a campus conduct disciplinary office or even with law enforcement. If lines of communication are coordinated for such situations between student services and others, a plan of action, such as communicating with the student about the behavior, setting boundaries, ensuring appropriate records of the behavior, are in appropriate offices. Many IHEs with 504 coordinators (or even ADA coordinators) have a position that is more “compliance” driven. Sometimes such positions are combined with Title IX coordination. While that is not ideal, resources are scarce at some universities, so it is better to have a combined position than not having the position at all.

174 Safiha Abdulahi, *Scooters Spark Safety Concerns Across Campus*, <https://www.insidehighered.com/news/2022/12/16/e-scooters-spark-safety-concerns-across-campus>.

175 There are benefits to allowing scooters for those with disabilities. Gus Elexio, *Scooters Often Hired by Disabled Riders to Combat Pain and Fatigue*, <https://www.forbes.com/sites/gusalexio/2023/04/16/e-scooters-often-hired-by-disabled-riders-to-combat-pain-and-fatigue-survey-shows/?sh=35860f364a42>.

4. *Some Details on the "How and What"*

For universities that want to create or adapt such a position, the following are suggested as areas where new or renewed coordination could be of value. What is often envisioned initially is focus on student services and employment issues and perhaps some physical facility issues. What the list below suggests is that a broader area of programmatic oversight is beneficial. Possible areas of oversight could include

- Students (including student organization activities)
- Faculty
- Staff
- Physical plant operations (including parking and sidewalks)
- Facilities planning (including new construction, alterations, renovations, and repairs)
- Food services
- Health services (including mental health services)
- Housing (both owned and facilitated)
- Access areas (libraries, sports and performance arenas, student centers)
- Alumni events
- Visitors to campus (for sporting and performance events, hosted conferences or speakers or workshops, patients or clients in clinics or hospitals, admissions applicants, employers for on-campus interviews)
- Transportation systems on campus
- Programs abroad
- Placement of students in externships, internships, clinics, and other academically related student learning settings
- Athletics (both intercollegiate and intramural)
- Health care programs (university-operated hospitals and clinics)
- Technology (including websites and open-source documents provided by faculty and others)
- Fraternities and sororities (special issues of "private clubs" require attention)
- Purchasing

When thinking through the array of disability issues that fall into these categories and what role the ADA coordinator would have on those issues, there are a number of activities that could be carried out (or coordinated) by this office. These include training and engaging in a self-evaluation (or developing a program of periodic self-evaluation) that is feasible. Most IHEs engage in a self-evaluation of physical plant issues pursuant to section 504 compliance and later for ADA Title II compliance. As new programs are added, programs are relocated to different space, buildings are renovated, and other major changes occur; having someone assess the impact of such changes on disability access is of great benefit to the institution. An ADA coordinator can act as a sounding board for some changes. For

example, if a large parking lot is being removed due to construction of a building, what impact might that have on accessibility?

There are several skills and qualities that are key for an ADA coordinator. These include the following:

- **Knowledge of law**—The individual need not have a law degree, but does need to have a basic understanding of the provisions of section 504 and the ADA and how they apply to a range of campus situations including students, employment, and architectural access. The individual should have a good working relationship and communications system with university counsel.
- **Knowledge of disability issues**—The individual should be someone who has awareness that disability issues on campus are much broader than ensuring that students with disabilities receive services and that the buildings need to have ramps or signage to where the accessible entrances are. There is no specific professional degree or training for that.
- **Communications skills**—The individual should have a record of sound judgment in communicating in a range of ways. For example, the individual would need to appreciate the impact of a campus-wide message on a sensitive issue (such as vaccinations or masking). This individual will need to communicate internally (with other administrators) and externally (with students, faculty, staff). When and how to communicate with the media is also key.
- **Ability to multitask**—Individuals in all leadership positions on campus must multitask, but the ADA coordinator will need to have the ability to prioritize what tasks are time sensitive and important and how to ensure that those with less urgency or importance do not get lost in the cracks.

Some IHEs that have an ADA coordinator have recognized the value of having an advisory committee for the position. While the advisory committee could have regularly scheduled or as-needed meetings, the role of members should be advisory only, not decision making.¹⁷⁶ The benefits of having such a committee are that it can provide an opportunity to discuss issues at a preliminary stage. Who is on the committee can impact the value of such consultation, and it should include representation from students and the most critical areas (such as disability services, HR, IT, and physical plant). Representatives from various areas could be invited on an ad hoc basis to discuss policy issues under consideration. For example, if an animals-on-campus policy is being discussed, having representation from student housing would be key for that discussion. Having the committee as a consultant or advisory only is recommended rather than decision making. While not every type of disability can be included without making the size of the committee too cumbersome, it is important not to just include issues of mobility and sensory impairments. Neurodiversity and mental disabilities (e.g., depression),

¹⁷⁶ Initially after the University of Louisville adopted an ADA coordinator (combined with Title IX) position, an advisory committee that addressed ADA issues was created.

environmental sensitivities (food, scent, etc.) should also be considered. Thought should be given to the pros and cons of having reports or minutes of meetings for all discussions or whether that might chill open brainstorming. If such reports or minutes are prepared, thought should be given to whether those are “open records” or confidential records shared with university counsel or others.

Following are suggestions for some areas where new (or renewed) proactive policy would benefit from an ADA coordinator–facilitated discussion:

- Animals on campus (including all settings—housing, classrooms, employment settings, eating areas, etc.)
- Documentation to receive accommodations
- Dispute resolution—students, staff, faculty
- Technology (particularly website issues)
- Housing
- Faculty evaluation and appointment
- Mental health issues

Facilitation of appropriate training for various parties on campus is challenging because everyone has limited time, there are frequent changes of personnel in some offices, and other factors. The following should be prioritized in developing the range of training programs valuable to a proactive approach:

- Student services professionals
- Faculty (deans, associate deans, department chairs)
- Heads of key areas—housing, libraries, athletics, alumni, etc.

In facilitating the range of training activities, consideration should be given to the following:

- How often (recognizing limited time and change of personnel)
- In what format? On line? In person?
- Content?

When new policies are developed, it is important to consider how the ADA coordinator (or another administrator) will distribute them. Unfortunately, it is not unusual for university administrators who have never been teaching faculty not to realize that getting the attention of a faculty member during exam period or the beginning of a semester is not the best time. During those times, faculty members have planning, assessing, or preparing overload.

For those involved in faculty appointments and promotion and tenure and discipline (including provosts, deans, and department chairs), the following might be considered in light of disability issues:¹⁷⁷

¹⁷⁷ See *Accommodating Faculty Members Who Have Disabilities*, AAUP (Jan. 2012) <https://www.aaup.org/NR/rdonlyres/49CCE979-73DF-4AF4-96A2-10B2F111EFBA/0/Disabilities.pdf>. I was invited to provide input to the development of this document. It is a document that provides a much more detailed framework for faculty issues than can be set out in my article.

- Letter of appointment—essential functions (at the outset)
- Annual and other review processes
- HR policies on accommodation requests
- Ensuring compliance with privacy and confidentiality of information—challenge in committee review process
- Interactive process in considering reasonable accommodations
- Internal disciplinary and dismissal procedures
- Ensuring consistency for all similarly situated faculty in providing accommodations for situations other than disabilities
- Notice and due process
- Providing retirement and other human resources counseling and planning
- Ensuring that the interview process considers disability issues (inviting the applicant to identify any accommodation requests when being invited to campus for an interview; sharing the culture of expectations for the process)¹⁷⁸

In implementing section 504/ADA policies, practices, and procedures for all areas, the following are guiding principles:

- Be interactive
- Be proactive
- Be consistent
- Individualized approach as appropriate
- Ensure access to procedures (websites, etc.)
- Avoid “overaccommodation” (to ensure that policies can be implemented fairly and consistently)
- Be holistic (avoid silos)
- Ensure transparency and good communication to all stakeholders

VII. SUMMARY AND CONCLUSION

This article incorporates elements of the *Primer* on the status of legal interpretation of section 504 and the ADA for IHEs with a big picture review on the occasion of the fiftieth anniversary of major federal application of disability discrimination law to higher education. It provides a basic overview of the history, the major judicial developments (and regulatory application) on the issues that have received attention, and a focus on areas where it is likely that there will be increased attention. Finally, it sets out and encourages university counsel to encourage a proactive approach to the legal issues affecting disability issues on campus. Knowing the evolving areas provides several ways to avoid liability, protracted dispute resolution, wasted resources of

¹⁷⁸ For example, if faculty candidates ordinarily stand when doing a “job talk,” this can be a barrier for not only those who use wheelchairs, but also for individuals with health impairments that make standing for long periods of time difficult.

time and money, and even damaging media or other public attention. I strongly encourage IHEs to consider developing or adapting a position of an “ADA coordinator.”

The article is intended to be a starting place with reference to more detailed information that analyzes the legal issues and provides a strategy for providing thoughtful and comprehensive proactive means for responding to a dynamic, complex, and challenging (but important) area of law. I have been privileged to have made higher education disability issues a focus in my scholarship and administrative and other service work since 1980. My knowledge of the broad scope of responsibilities for university counsel is the reason I target these messages to that audience. There are also many university leaders (presidents, provosts, and deans) who have law degrees, who may also appreciate the encouragement to develop a set of policies, practices, and procedures (and a “position” of ADA coordinator) to do what is often difficult in higher education—to work outside of silos proactively, rather than reactively.

Having an approach of not just doing what is legally required, but rather considering how disability issues can be addressed by what can and should be done will be likely to reduce costs to higher education institutions and will place them in a positive public perception position.

APPENDIX A: SCHOLARSHIP ON HIGHER EDUCATION AND DISABILITY DISCRIMINATION BY LAURA ROTHSTEIN

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*Review of Will Bunch's***AFTER THE IVORY TOWER FALLS:
HOW COLLEGE BROKE THE
AMERICAN DREAM AND BLEW UP
OUR POLITICS—AND HOW TO FIX IT¹***MADLYN WESSEL**

Notwithstanding the provocative title, Will Bunch's book does not actually demonstrate that America's colleges and universities are responsible for what he views as a total breakdown in the social compact and disintegration of our state of politics since the protests of the 1960s. Nor, despite some trying, does he make a convincing case that higher education owns what he views as the regrettable rise of Donald Trump and MAGA politics. In fact, *After the Ivory Tower Falls* focuses only peripherally on what higher education has actually accomplished in this country and certainly not at all on what it gets profoundly right for hundreds of thousands of people every year. Lacking a particularly balanced perspective on what higher education is doing and where it is indeed falling short, renders Bunch's broad indictments unconvincing and, at times, profoundly frustrating. Yet, his overarching chronicle of a country in which public higher education was once apolitically supported and prized, was largely affordable to low- and middle-income families, and has come to be lost, has reality and resonance, and some of Bunch's analyses and proposed solutions are worth hearing.

Let us begin then, as he does, with the small family-owned private, for-profit college established by his grandmother and presented as an "ideal" community-serving institution: Midstate College in Peoria, Illinois. Bunch's grandmother (who never went to college) and her husband, bought a small, struggling secretarial school in 1966 and renamed it Midstate College. Bunch's grandparents built the college, eventually obtaining accreditation to offer bachelor's degrees. How did they succeed, Bunch asks?

Partly, I think, because Arline and Midstate clung to the notion—then popular, now quaint—that education was a tool of self-betterment and not just rote career training. Students training to become executive assistants didn't just

* Senior Counsel, Hogan Lovells US LLP [opinions expressed are personal to the author and do not represent the firm.]

¹ WILL BUNCH, *AFTER THE IVORY TOWER FALLS: HOW COLLEGE BROKE THE AMERICAN DREAM AND BLEW UP OUR POLITICS—AND HOW TO FIX IT* (2022).

learn typing and shorthand but were required to take a general education, even a course in how to comport one's self in the world of business.²

Contrast this with the blight he believes has descended on higher education today and you will begin to get a sense of the book's, at times, rampant generalizations:

More than half a century after the baby booms and economic booms and the atomic booms of the 1950s and 1960s, we are still clinging to the fast-melting permafrost of a now no-longer-new idea that college is the American Dream. So much so that we are refusing to admit that somewhere in the middle of a long stormy postindustrial night, the dream has morphed into a nightmare. That a ladder greased with a snake oil called meritocracy has changed from joyous kids climbing higher than their parents to a panicked desperation to hand on to the slippery middle rungs. And even at the polluted top, neither bewildered parents nor stressed-out graduates are quite sure what they've just bought for all that cash (or, increasingly, a mountain of debt).³

Bunch goes on to blame the eventual regulation of for-profit colleges and universities in the 2000s for Midstate's ultimate demise:

When faith in the American way of college began to wane after years of runaway tuition, Wall Street smelled blood in the water. The growing pressure on the nation's working classes for a credential to earn a living wage created a huge opportunity for grift. It was filled with an avaricious new breed of for-profit college chains, backed by big-time financial equity. In the 2000s these sharks competed for students, and when Washington tried to impose new rules to crack down on the abuses (which left hordes of young people deep in debt, for often worthless diplomas), the good guys like Midstate suffered every bit as much as the bad guys.⁴

However, Bunch never explains why the new regulations (presumably those establishing standards for credit hour, state authorization, and gainful employment?) were so onerous as to force Midstate to close. And, his pronouncement that his grandmother's "seemingly ancient notions about the power of higher education, and the unexpected pathways it could open, and not just for country-club heirs"⁵ has been jettisoned, is neither substantiated nor convincing. Certainly, one need only glance at *Inside Higher Education* or the *Chronicle of Higher Education* in these "post" pandemic months to find numerous articles discussing a diminution in public confidence in higher education and profound concerns about its expense. However, that is a far cry from demonstration that the country has utterly lost confidence in the power of higher education or its value over the course of a lifetime—which emerge as equally strong themes in polling and other studies.

2 *Id.* at 8.

3 *Id.* at 4–5.

4 *Id.* at 9.

5 *Id.* at 9–10.

Bunch's first foray is to engage with what he clearly believes would be Midstate's polar opposite midwestern institution, Kenyon College. Bunch pillories Kenyon's affluent study body where "one of every five students strolling across the campus green in ripped jeans hails from the top 1 percent of the wealthiest families and, and where 60 percent of students are from the top 20 percent of income."⁶ He cynically suggests that the college's decision to accept donor funds to build a new west quad (including a modern library and new admissions office) will "help the elite school impress kids and their parents, and entice them to pay \$75,000 a year—without which Kenyon would be unable to service the bonds that cover the rest of the \$150 million project."⁷ Yet, despite Kenyon's accomplished student body and illustrious faculty, somehow the college community apparently remains just dumbfounded at the success of Donald Trump in the surrounding community. They certainly cannot comprehend the locals' antagonistic attitude toward slogan-chanting faculty and students who marched in protest of the Trump Administration's policies "while their *bete noire* circle around them ominously in pickup trucks with massive Trump flags."⁸ Meanwhile, Bunch zeros in on several students of color at Kenyon, focusing on their sense of alienation from both their affluent campus peers and the surrounding communities.

Bunch perhaps correctly sees the demographic polarities both within Kenyon and without. The college, a symbol to Bunch of elite college education, certainly inhabits a different world than the surrounding impoverished hills of blue-collar Ohio, increasingly bereft of jobs due to departed industries. And, the disparities in wealth within the student community may also be emblematic of the fragilities of campus diversity efforts and the many ways the country has seemingly splintered along race, economics, and class. Nonetheless, what Bunch's focus on Kenyon as a symbol of all that has seemingly "gone wrong" does not actually do is fairly examine what the college also is doing to educate and lift its students, nor the likelihood that the vast majority of Kenyon graduates both rich and poor, have substantially benefited from the education they received there. Posted proudly on Kenyon's website⁹ are, for example, the following data: Kenyon is a top producer nationally of Fulbright Fellows, Kenyon ranks 8th in the country "(ahead of every Ivy)" in the proportion of STEM grad to earn a doctorate in a STEM field, ninety-eight percent of students applying to graduate school are accepted into one of their top three choices, one hundred percent of young alumni "say they learned to write better" at Kenyon, two hundred industries are represented by Kenyon's global network of alumni and parent career mentors, "who will connect you with job shadows, resume reviews, internships and interviews." Further, Kenyon commits to meeting one hundred percent of demonstrated financial need for its students for all four years. While Bunch recounts stories of the surrounding community's occasional kindnesses toward Kenyon students, and the ways both the college and the community have sought to find common ground, he apparently sees little continuity between those efforts and an earlier time in the postwar period "when

6 *Id.* at 12.

7 *Id.*

8 *Id.* at 15.

9 See <https://www.kenyon.edu/kenyon-in-numbers/>.

college in American was widely seen as a uniter, not a divider."¹⁰ Like much of Bunch's book, his bleak presentation of Kenyon as an example of what's "wrong" in American higher education feels quite unfair and therefore falls flat.

Bunch dedicates a substantial subsequent portion of his book to documentation of the postwar period, the institution of the G.I. Bill's education benefits, and the ways he believes the civil rights and antiwar movements of the 1960s undermined support for free public higher education under the banner of one former governor of California and future president, Ronald Reagan. His driving thesis is that the country squandered a postwar opportunity to statutorily enshrine free public education as a public good before the turbulent 1960's and '70s. His narrative commences in 1944.

So what exactly was the 1944 G.I. Bill? Politically, and perhaps psychologically as well, it was a bridge between the federal intervention of the New Deal, which beat back the worst of the Great Depression, and the last hurrah of the American welfare state that would be Lyndon Johnson's Great Society. Its enactment was very much in step with the dominant political worldview of the United States at the mid-twentieth century—that a benevolent government and technocratic know-how could prevent both the problems caused by unfettered capitalism and also stem ideologies like communism and fascism.¹¹

Interestingly, the leaders of two of the nation's most elite institutions, the University of Chicago and Harvard University, opposed the bill. "'Hobo jungles' was the alarming and offensive prediction from University of Chicago President and G.I. Bill opponent Robert Hutchins, who believed that campuses would be overrun by unqualified, uninterested young grunts who were only there to collect the months stipend." Harvard's then-president concurred: "the G.I. Bill failed 'to distinguish between those who can profit most from advanced education and those who cannot.'"¹² However, the snobbery of such elitists notwithstanding, the bill was "a surprise, runaway hit ... and its impact was revolutionary."¹³

There are the statistics—the staggering 450,000 engineers and 91,000 scientists, filling job categories that has been barely a blip in the U.S. economy prior to the war, not to mention 230,000 teachers to handle all the boom-babies now in the pipeline. But most histories are anchored by personal narratives of human pluck, showing how the sons (because they were overwhelmingly sons) of unschooled factory workers and farmers became innovators and inventors in one generation, with that adrenaline shot from the American taxpayer.¹⁴

Bunch's documentation of the impact of the G.I. Bill and the era that followed it is quite interesting and the numbers speak for themselves. "The bottom line is that by World War II, just 5 percent of U.S. adults had earned a bachelor's degree—a tiny

10 BUNCH, *supra* note 1, at 41.

11 *Id.* at 44–45.

12 *Id.* at 48.

13 *Id.* at 50.

14 *Id.*

fraction of today's figure of 37 percent."¹⁵ Bunch notes that the bill largely left women behind and that it was implemented in a racist manner by regional Veterans Administration bureaucrats who were authorized to steer applicants and did—sending many Black veterans to vocational programs or HBCUs, which were denied much of the tax support that enabled majority public institutions to benefit and grow after the war.¹⁶

Soon after the war, President Truman appointed a Commission on Higher Education to assess the state of higher education in the country and to recommend the proper role of the federal government within it. The report emphasized the importance of a liberal education: "The commission's report placed less emphasis on more down-to-earth workforce development and instead stressed lofty ideals of 'general education' which, it argued, would be 'the means to a more abundant personal life and a stronger, freer social order.'"¹⁷

A more practical set of purposes also drove the investment in postsecondary education:

America's leaders wanted to avoid World War III—but they also wanted to make sure that if it came, their side was equipped to win it. Strohl's research shows that a key motivator of the Truman administration's education push was military research conducted at the height of the just-concluded war. It showed that college graduates performed better on an array of tasks than soldiers lacking higher education. ... Now Pentagon planners started to envision winning the world's next great war in the classrooms of the University of Michigan or Berkeley.¹⁸

Amidst this boom in federal attention to and support of higher education, Bunch launches a critique that animates his thesis—the federal government's unfortunate failure (in his view) to take "on a broader role in directly mandating or even overseeing research on campus."¹⁹ This complaint reappears and resonates throughout his book, becomes even the motivating theme of his work, without any cause and effect logic ever really being established:

While this era would lead to the creation of the National Science Foundation in 1950 as a government vehicle for advancing research, the federal government declined to take on a broader role ... This happened for a variety of reasons—Truman's personal aversion to a heavy-handed federal role, concern among educators about maintaining the diversity of America's various colleges, and typically bureaucratic concerns about who would control research dollars. But the broader consequence was one of many blown opportunities to establish higher education as a public good.²⁰

15 *Id.* at 47.

16 *Id.* at 51-52.

17 *Id.* at 53-54.

18 *Id.* at 54.

19 *Id.* at 55.

20 *Id.*

However, it seems fair to ask why Bunch believes direct federal control over research at U.S. institutions (beyond the compelling power of the purse afforded the National Science Foundation and later federal funding agencies, such as the National Institutes of Health, to set direction and establish priorities) would have been tolerated by faculty, let alone enable the extraordinary innovation that led to U.S. dominance for generations in research across the world? And also, why does Bunch believe that Truman's wise aversion to heavy-handed federal control engendered a national failure to "establish higher education as a public good"²¹? What's the connection here? And another also, which is why, given Bunch's thesis that civil rights and antiwar protestors ("Yuppies, Dittoheads, and a 'Big Sort'" is the relevant coming chapter²²) engendered conservative backlash, unleashed Ronald Reagan and Rush Limbaugh, led to Donald Trump, and ultimately gutted public financial support for colleges and universities. Well, how would it have made any difference?

Involving less of a logical leap but invoking a dream that cannot have been entirely realistic even in the "more optimistic era of the late 1940s"²³ is Bunch's additional critique:

An explicit commitment to make universal higher education a human right, backed both legally and financially by the federal government, might have rivaled other programs of the last century—such as Social Security, Medicare, or the Affordable Care Act—in rewriting the American social contract, to the benefit of millions. Has there been such legislation in the more optimistic era of the late 1940s, the pathologies of the twenty-first century—sky-high tuition, the student debt crisis, and the political divide between cosmopolitan college grads and those struggling small towns lacking access to high ed—might have been averted. But no such bill passed.²⁴

First, one must question the view Bunch presents of the United States in the 1940s and 1950s. The nation may have been in the midst of an extraordinary postwar optimism and economic boom, but it was also a country tolerating the lynching of Black people throughout the South, segregated schools, discriminatory banking and housing practices, profound marginalization of women in the workforce, and the rampaging cruelties of McCarthyism. Bunch notes these forces but does not incorporate their realities into his positing of a lost opportunity to permanently establish free public higher education for all. But, would political leadership in such a profoundly complicated nation, one that tolerated such brutalities and inequalities *really* have been likely to fund free higher education for all?

Further, for a very long time, many of the great institutions of higher education, including the extraordinary University of California system—fed by both federal research and state tax dollars—were able to keep tuition and fees at a very minimal level. That the U.S. obsession with the Cold War (and enormous infusion of defense

21 *Id.*

22 *Id.* at 103.

23 *Id.* at 57.

24 *Id.*

research dollars into many prominent institutions) kept the money flowing for decades, also did not hurt major institutions. The federal government also began to think about providing other forms of funding for college and university students during this period. The National Defense Education Act of 1958 not only boosted campus research but also contained a new provision for student loans, per Bunch, however, containing one fatal flaw. Assuaging House conservatives who apparently called money for college education “socialism,” the Act provided for loans, not student grants, and set in motion a future where non wealthy students and their families would be expected to take out loans to pay for college.²⁵

At the same time, colleges and universities were becoming vastly more diverse, bringing in students whose life experiences and moral perspectives, per Bunch, soon came to clash with that of university leaders: “The experience on the ground of undergraduates majoring in sociology, spending summers in poor Mexican villages or writing diatribes against racial segregation was largely missed by the university presidents flying at 37,000 feet while their campuses bathed in money from the Pentagon or big-money foundations.”²⁶

Bunch sees University of California’s (UC’s) Clark Kerr as embodying all that was right and also all that was wrong with the 1960s belief in meritocracy. “the Clark Kerrs of the world embraced the notion of merit in higher education without irony or concern.”²⁷ In April of 1963, Kerr gave a series of lectures at Harvard framing his concept of the modern “Multiversity,” describing college leaders as “wise mediators between a ‘delicate balance of interests’ involving not just the students and faculty on campus but a plethora of politicians, donors, and corporations.”²⁸ But according to Bunch, Kerr’s vision was already tottering. “Kerr’s frictionless world of savvy compromise was crumbling ... the politicization of college in America was about to begin. Clark Kerr’s machine was already making odd rumbling noises, but the explosion was still a year off.”²⁹ The title of Bunch’s next chapter says it all: “Why the Kent State Massacre Raised Your Tuition.”³⁰

Seemingly, if we want to understand the country’s political polarization and the gradual defunding of affordable public education, we just need to look at Students for a Democratic Society’s Port Huron Statement, the Berkeley Free Speech movement, the Anti-Vietnam War protests, the Civil Rights movement, the Sexual Revolution, and every other progressive political or social movement that grew out of America’s increasingly diverse, liberal, and empowered university populations in the 1960s and ’70s. And the voice for this new anti-university perspective was one California gubernatorial candidate named Ronald Reagan.

25 *Id.* at 59-60.

26 *Id.* at 64.

27 *Id.* at 67.

28 *Id.* at 68.

29 *Id.*

30 *Id.* at 70.

Asking, “What in heaven’s name does academic freedom have to do with rioting, with anarchy, with attempts to destroy the primary purpose of the university which is to educate our young people?” Reagan called for public hearings into what he called communism and sexual promiscuity at UC and a clean sweep of its leadership Reagan’s election [as Governor of California] in many ways ended the post–World War consensus that higher education should be liberal in outlook and accessible to everyone.³¹

Reagan’s first act as California’s governor was to propose imposition of tuition at the UC system. UC’s lobbyists were able to kill the proposal, but Reagan “got creative, spending the next eight years in office eating away at the UC system with ever higher student registration fees.”³² According to Bunch, enraged (and threatened) by student protests, a conservative backlash against higher education grew that included future President Richard Nixon; the Nobel prize winning economist James McGill Buchanan (who advised the Koch brothers); and, surprising to this reviewer, future U.S. Supreme Court Justice Lewis Powell, whose political actions and writings engendered, Bunch believes, a fundamental turn in American support for higher education.

In 1971, Powell, then a prominent Richmond, Virginia, attorney, was asked by the leaders of the U.S. Chamber of Commerce to assemble a document called “An Attack on (the) American Free Enterprise System,” later known as the Powell Memorandum. Although the memo was intended to be confidential, it was leaked after Nixon appointed Powell to the Supreme Court in 1971. The memo calls the campus-based “New Left” the “single most dynamic source” of an assault on capitalism and runs through “a now-familiar litany of conservative indictments of the college environment at the dawn of the 1970s, but also complains about the growing impact in the wider American society as graduates ‘seek opportunities to change a system which they have been taught to distrust’—as journalists, or by working in education, or by entering government or elective politics.”³³ According to Bunch, while the impact of the Powell Memorandum continues to be debated by academics, “a quick look at the twenty-first century landscape—populated by the Heritage Foundation, Limbaugh, Fox News, the flow of cash from the Koch brothers to the economics department at Florida State—suggests the seeds planted then by Buchanan, Powell and their allies bore bitter fruit.”³⁴

The leaps Bunch asks us to take with him unfold as follows: The Left movements of the 1960s and ’70s led to the birth of powerful conservative forces aligned against taxpayer funding of public institutions. Elitist notions of a “meritocracy” embodied by America’s most prestigious (and increasingly expensive) institutions, led to a cultural revolt against higher education in its entirety. That revolt generated the polarities of the country today and the rise of politicians such as Donald Trump.

31 *Id.* at 87.

32 *Id.* at 88.

33 *Id.* at 95.

34 *Id.* at 95–96.

The American Dream of college—as reinvented in the 1940s, '50s and '60s—hadn't changed in most households, but the tectonic plates beneath were shifting, powerfully. It took roughly forty years for the idealism of higher education as a tool for molding smarter citizens committed to liberal democracy and international understanding to instead become the rough show-us-your-papers demand for clinging to the middle class. For the millions who still dreamed, this transformation brought a willingness to borrow whatever it took—even from the increasingly privatized loan sharks who began circling in the Reagan years—to complete this paper chase. But millions of others began to internalize that America in the college age was now a “meritocracy,” and that their failures to keep up weren't because the deck was stacked against them, but because of the arrogant eggheads who didn't know how to screw in a lightbulb telling them they lacked “merit.” And the smart elites who promoted this myth of a meritocracy apparently weren't bright enough to see that that resentment would become the driving political force of the twenty-first century.³⁵

Bunch goes on to decry the disastrous mountain of debt assumed by so many American families (\$1.7 trillion)³⁶ and the fact that many graduates of less prestigious (or utterly corrupt private for-profit) institutions have had a terrible time finding decent jobs, let alone repaying their debt. He pillories elite institutions that accepted unqualified legacy and rich kids and that got side-whacked by the Varsity Blues scandals. Hillary Clinton's failed presidential campaign becomes the veritable embodiment of elite obliviousness to the “deplorables' ” frustrations regarding a lack of access to good jobs and a decent education. But a problem with Bunch's ultimate conclusions is not that any given point is entirely without merit, but that the generalizations and giant causal leaps he makes sound too often like demagoguery rather than astute analysis. And, even when his narrative appears a bit more balanced, he is not really talking about what happens at America's “Ivory Tower” institutions, *but instead what people on the outside apparently think they know (and despise) about them.*

Thus, there is no acknowledgment of the extraordinary teaching and profoundly important research coming out of U.S. institutions today, nor their increasing dedication to economic and racial inclusion, nor the fact that college graduates still have a far greater earning potential than their non-educated peers, nor that American higher education remains the envy of the rest of the world. Bunch's praise for higher education in countries like Germany where tuition is very low is almost comical in missing the fact that a much smaller percentage of Germans can ever dream of access to university (having been sorted in the fifth grade into academic or nonacademic track schools), nor that most German universities “specialize” in classes in the hundreds and shed substantial numbers of disappointed university students without their obtaining degrees, nor that Germans and other Europeans (and Asians, and Africans) come to this country in droves for undergraduate

35 *Id.* at 101.

36 *Id.* at 201.

and graduate and postgraduate education because we have many of the best institutions in the world.

Says Bunch: “It didn’t have to be this way. Higher education could have flourished as a public good—instead of a fake meritocracy rigged to make half of America hate it.”³⁷ But, the brilliant students and faculty who work and learn across the country at great institutions large and small, are not a “fake meritocracy” (or at least Bunch has not given us actual reasons for believing them to be so). Yes, some may have been admitted for reasons that unduly rewarded parental wealth, legacy, or other non merit-based factors. But there is little to no evidence in this book to support Bunch’s ruthless criticisms of the American academy as a whole. Bunch’s book is not a valid critique of what America’s “Ivory Towers” have been or have achieved, but instead a chronicle of how talented politicians have been able to turn many Americans against them as a result of culture wars, illiberalism, and the frightening fluctuations of our economy after the years of postwar growth began to wane and the industrial backbone of the U.S. economy was shipped overseas.

We missed the moment, Bunch says, to make higher education a public trust that would benefit all American society through economic invention, civic engagement and general enlightenment. Instead, we privatized college and called it a meritocracy so that it could be rigged for the winners while the perceived losers are mocked and ridiculed. Liberal education was mostly overrun by the business majors who invented the financial instruments to saddle the generations that came after them with bottomless debt. The social order grew weaker, and also less free. The deep democracy thinkers of 1947 feared these outcomes if the United States didn’t make higher education accessible to all—but only in vague, general terms. It took three generations and finally the *annus horribilis* of 2020 to see what the American nightmare these postwar visionaries feared would look like—the world’s formerly most powerful nation paralyzed by climate inaction, lacking news literacy to separate fact from fiction, refusing to trust science as a virus devoured the countryside, and coming within 55,000 votes in three states of handing a second term to a president who lied 30,573 times during the first one, for the sole purpose of owning the college libs.³⁸

Bunch is making a mountain’s worth of logical leaps in the lines above, and the load of culpability he deems fair to dump on institutions of higher education and their graduates seems profoundly disassociated from reality. It is a lengthy and impassioned extended diatribe, but is there really any evidence, for example, that had public education been more securely funded in the 1940s, the same conservative forces inflamed by the student protests of the 1960s and ’70s would not have taken action to defund them? Or that—no matter how affordable a college education might have remained—the many forces that sent factory jobs overseas, or led to other economic changes that left so many Americans behind, would not have engendered profound polarities and resentments in this country?

37 *Id.* at 235.

38 *Id.* at 241.

Or can he possibly believe that those movements of the 1960s and '70s should have been squelched? How about the diversification of colleges and universities that led to the integration of Jewish students, women, and racial minorities previously excluded, and that caused some people to think the "wrong" people were now on campus? Bunch is quick to broadly condemn higher education for becoming a focal point for populist rage, but with few exceptions far from the heart of the academic enterprise (yes, he fairly pillories posh high-rise dorms, student centers that operate like amusement parks, cafeterias serving expensive gourmet foods, and public institutions' excessive recruitment of out-of-state and international students to fill their tuition coffers with concomitant displacement of state residents), he does not actually talk about what the academy could or should have done differently to save the country from itself. And could it have done?

Bunch suggests (in what he acknowledges to be a "gross generalization about one of the most diverse nations on planet earth"³⁹) there are now "four people you meet in today's America," which is also part of the title of one of the book's chapters.⁴⁰ He believes that a person's age coupled with their attitude toward college, is critical to shaping their gravitation toward one or another of these cohorts.

If you turned eighteen in the United States before 1990 (today age fifty or older), the odds are that you either (a) attended a university when college was affordable and popular ... the perfect embodiment of the American dream⁴¹ or (b) believed that anyone, regardless of education, could succeed in this nation ... right up to the moment that was no longer true.⁴² If you turned eighteen after 1990, it's likely that (c) despite high pressure, high tuition, and—for most families—high debt, college remained the only roll of the dice to get somewhere in life⁴³ or (d) you were increasingly disconnected from middle-class dreams or civic life, in a world of low-paying McJobs fueled by various opiates of the masses, from YouTube radicalization to actual opioids.⁴⁴

With the partial exception of the Left Perplexed cohort (paradigmatically represented by Hillary Clinton voters), Bunch sees all four groups as subject to debt, social and economic desolation, substance abuse, "deaths of despair," and growing alignment with illiberal forces of the extreme right. What, then, are Bunch's proposals to address the fractures in our country, our politics (and peripherally, the mess he perceives at our colleges and universities)?

Bunch commences his solutions with a laudatory description of the Williamson College of the Trades, located outside of Philadelphia. Founded by a Quaker who made a fortune in the dry goods business, Williamson is a very rich, very small, men's

39 *Id.* at 157.

40 *Id.*

41 The "Left Perplexed" *id.* at 158.

42 The "Left Behind" *id.* at 159.

43 The "Left Broke" *id.* at 158.

44 The "Left Out" *id.* at 159; quotation, *id.* at 157.

trades school, “military-strict” in its student life expectations (Bunch meets some students while they are mopping down dorm floors and cleaning bathrooms), dedicated to providing its graduates with strong vocational credentials. Williamson’s original endowment was larger than that of Harvard or Yale at the time, and it continues to generate enough revenue to render itself tuition free. Bunch admits that there are few, if any, schools in America like Williamson, but that “doesn’t mean we shouldn’t be thinking about how to clone it. It blends a concept that’s popular with Democrats—a free trade school—with classes that adhere to an arguably conservative worldview on morality, and that’s a recipe that working for both a small sliver of the millions of young Americans who don’t want a conventional college—let alone the debt—but desire a demanding career, and for employers who insist it’s hard to find applicants like these.”⁴⁵ Bunch asks, “Would the college’s model work if the program were funded by U.S. taxpayers instead of the discipline-minded executors of a millionaire’s trust?”⁴⁶ But, apart from the unlikely possibility of government funding of a massive number of small, intensively residential, vocational, free colleges like Williamson, this is obviously a question for which there is simply no answer. Further, Bunch’s rather fleeting treatment of the scores of community colleges across the country whose tuition is reasonably affordable and who are aiming to provide just this type of training, suggests he is more interested in cluster-bombing higher education than crediting the good work being done to address the many valid problems he diagnoses.⁴⁷

In any event, solution number one is his proposal for a new Truman Commission, which would take a look at the state of higher education. “Any true fix for ‘the college problem’ needs a strong set of moral governing principles, or a strategy, to be carried out before we embark down the roadmap of policies, or tactics. America owes its young citizens these foundational principles.”⁴⁸ He hopes that such conversations would support a reasoned move towards some vision of “universal higher education” for all.⁴⁹

Solution number two is expansive student loan debt relief. Bunch feels that development of free higher education must go hand in hand with relief for the millions of Americans saddled with crippling debt as well. “We will remain an unfair and grossly unequal nation if we find a way to provide mostly free education to today’s college-age youth yet continue to saddle adults – but especially people of color and women – with hundreds of dollars in monthly payments that will weight them down, possibly for the rest of their lives.”⁵⁰

Solution number three is a national recommitment to a liberal education, although Bunch fails to acknowledge the tensions between this proposal and his idealization

45 *Id.* at 244.

46 *Id.* at 249

47 In fairness, Bunch does approvingly reference the Biden administration’s plans for free community college. *Id.* at 270.

48 *Id.* at 253.

49 *Id.*

50 *Id.* at 258.

of Williamson as providing the kind of career-focused or vocational education employers actually need.

Solution number four is development of a program of universal national service, a program that could require the young of America to contribute along the lines of the World War II generation and reward them with something like the G.I. bill:

Could America somehow rekindle the spirit of that immediate postwar era—the fleeting moment of unity, when the battle-tested sons of factory workers thrived in college classrooms alongside Boston brahmins and main line bluebloods? Could the United States somehow draft its young people—morally if not with an actual induction board—for a national crusade that would offer the benefit of winning as war, without all the carnage?⁵¹

Bunch acknowledges the similarly minded programs initiated by Presidents Kennedy and Clinton (Peace Corps, VISTA, AmeriCorps, and the later nongovernmental Teach for America). But, “Republicans like Ronald Reagan, who saw such programs as needless government social engineering slashed the Peace Corps or VISTA to the bone.”⁵² And, “Clinton’s push to find shared national purpose, after all, came during a 1990s marked by Rush Limbaugh and the ascent of angry talk radio, by the partisan impeachment that almost took down his presidency, and by the recognition of ‘red states’ and ‘blue states.’”⁵³ But again, one must ask whether today’s—if anything—radically more polarized politics would be susceptible to the type of extraordinarily expensive national service and free education program Bunch envisions? Is there actual hope of broad student loan forgiveness, when Biden’s limited plan to forgive some student debt was met instantly with Republican opposition and lawsuits?

In the end, Bunch is an idealist and a polemicist with a passionate heart. He does advance some fair critiques and has some important ideas. Had he written a less inflammatory and better balanced book, more people might have been willing to listen to him.

51 *Id.* at 281.

52 *Id.* at 286.

53 *Id.*