
THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

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ARTICLES

Gordon College and the Future of the Ministerial Exception

Peter J. Smith and Robert W. Tuttle

In February 2022, the U.S. Supreme Court denied certiorari in *Gordon College v. DeWeese-Boyd*, a case litigated in the Massachusetts state courts that involved the scope of the “ministerial exception.” The ministerial exception is a judicially crafted, constitutionally grounded exception to the ordinary rules of liability arising out of the employment relationship between religious institutions and their ministers. The ministerial exception clearly applies to clergy and other employees of religious organizations who have distinctively religious duties such as the obligation to lead worship or indoctrinate students in the faith. The Gordon College case, however, involved a claim by a professor of social work who had no such duties but who was expected to infuse faith into her teaching and scholarship. The Massachusetts Supreme Judicial Court (SJC) held that such a responsibility, standing alone, was insufficient to render the plaintiff a minister within the meaning of the ministerial exception. As a consequence, the plaintiff could continue to litigate her claims against the College.

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“Should I Stay or Should I Go”:

The Legal Rights of Stranded International Students

Michael W. Klein

In 2017, scholars of international students warned that “the international student community” was “living in a *precarious world of insecurity*” because international students were “increasingly ... the targets of violence and discrimination based on race, religion, ethnicity, and national origin.” Five years later, the persistent COVID-19 pandemic and Russia’s invasion of Ukraine made the world of international students even more perilous and uncertain, often stranding them abroad. With concerns for their health and safety rising, international students needed to know the laws regarding their rights to stay abroad, their rights to return home, and their rights to continue their education.

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Judicial Deference to Academic Decisions: Evolution of a Controversial Doctrine

Barbara A. Lee

Litigation against colleges and universities, once infrequent, has become ubiquitous, as increasing state and federal regulation and broadened protections for the rights of employees and students have virtually erased any notion that, in the eyes of the law, academic organizations differ substantially from business organizations in most respects. In fact, higher education, as a sector, is more heavily regulated than most, if not all, businesses.

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Prior to the 1970s, most courts deferred to the decisions of colleges and universities, using a form of the business judgment rule that encouraged a judicial “hands off” approach to the decisions of those with superior knowledge and expertise in the ways of academe. The civil rights movement and the demise of the *in loco parentis* doctrine encouraged students to challenge colleges’ decisions made about their behavior, both academic and nonacademic, with, as will be seen, more success in their challenges to discipline on the basis of nonacademic behavior. However, courts were more likely to defer to the judgment of academics for decisions involving hiring, promotion and tenure of faculty, or curriculum, believing that judicial competence to review these issues was inferior to that of the academic decision-makers. This belief was, in part, encouraged by two decisions by the U.S. Supreme Court that ordered deference to a university’s academic judgment about the evaluation of students; but it was even more prevalent when a court was asked to review, and the plaintiff hoped, to reverse, a negative promotion, tenure, or dismissal decision.

A Higher Education Due Process Primer: Resolving Procedural Due Process Inconsistencies in Favor of Greater Procedural Protections

Kristi Patrickus

Over the last two decades, student enrollment at public colleges and universities across the United States increased more than twenty-six percent from 13.2 million to 16.6 million enrolled students. This increase in student enrollment, coupled with the necessary pervasiveness of remote learning caused by the COVID-19 pandemic, this leads to an increase in academic and behavioral student conduct violations on college campuses around the county.

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How should colleges and universities meet this demand of addressing student conduct code violations? Does federal or state law provide any guidance on what process should be afforded to students who do violate the conduct code? If there is a minimally required procedural process, should public colleges and universities exceed those requirements?

BOOK REVIEWS

***Review of Michael Bérubé and Jennifer Ruth's
It's Not Free Speech: Race, Democracy and the Future
of Academic Freedom***

Jonathan R. Alger

Starting with its provocative opening sentence, Michael Bérubé and Jennifer Ruth's new book, *It's Not Free Speech: Race, Democracy, and the Future of Academic Freedom*, makes clear that this volume will be no ordinary recitation of the history or current state of academic freedom. That first sentence asks a simple but loaded question: "Does academic freedom extend to white supremacist professors?"

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The authors' answer to this question is clear: Bérubé and Ruth express a strong belief that academic freedom needs to be rethought so as not to protect professors who espouse perspectives that the authors would characterize as racist and lacking any sort of sound evidentiary basis. The authors take great pains to distinguish academic freedom protections from the constitutional protections of free speech, arguing that judgments about the appropriate exercise of academic freedom should be put squarely in the hands of faculty members, not administrators. Writing in the context of the Black Lives Matter movement and the wave of protests that followed the killing of George Floyd and other Black Americans, Bérubé and Ruth argue that broad free speech principles have too often been used to shield white supremacist professors from consequences for hateful, damaging statements that fail to meet rigorous professional norms.

***Review of Colin Diver's
Breaking Ranks: How the Rankings Industry Rules
Higher Education and What to do About it***

Elizabeth Meers

As former Dean of the University of Pennsylvania's law school and former President of Reed College, Colin Diver provides an insightful critique of higher education rankings in his book *Breaking Ranks: How the Rankings Industry Rules Higher Education and What to Do About It* (2022). Diver has first-hand experience with both higher education rankings and the consequences of boycotting them: as a dean, he observed that law schools have been particularly plagued by *U.S. News & World Report* (U.S. News) rankings, while under his predecessor, Reed College famously refused to participate in the U.S. News survey. As his audience is not primarily statisticians, but rather applicants (and their parents, teachers, and counselors) and higher education faculty and administrators, he takes apart higher education rankings in a readily understandable style. He analyzes criteria used by the rankings industry (which he dubs the "rankocracy"), as well as potential criteria (such as student learning and postgraduate life) that the industry ignores. Along the way, he is candid about his personal views (sometimes cynical, sometimes encouraging), while emphasizing his ultimate desire that the rankocracy disappear—or at least be ignored. At the same time, he gives his readers tools to take rankings into account in an informed, not slavish manner.

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GORDON COLLEGE AND THE FUTURE OF THE MINISTERIAL EXCEPTION

PETER J. SMITH* AND ROBERT W. TUTTLE**

Abstract

In Gordon College v. DeWeese-Boyd, a social work professor at a religious college sued after she was denied promotion. The college asserted the “ministerial exception,” a judicially crafted and constitutionally grounded exception to the ordinary rules of liability arising out of the employment relationship between religious institutions and their ministers. Although the plaintiff had no distinctively religious duties, the college expected her (and all other faculty) to integrate the faith into her teaching and scholarship. The Massachusetts Supreme Judicial Court (SJC) held that this obligation, standing alone, was insufficient to qualify the plaintiff as a minister within the meaning of the exception. The U.S. Supreme Court denied the college’s petition for certiorari, but Justice Alito, joined by three other Justices, issued a statement respecting the denial. He criticized the SJC’s view of religious education, suggested that the mere duty to infuse the faith into teaching and scholarship was sufficient to qualify a professor as a minister, and expressed willingness to review the SJC’s decision after a final judgment. Nonetheless, DeWeese-Boyd’s claims may proceed to litigation.

Justice Alito’s statement is significant both for the scope of the ministerial exception—as applied to religious colleges and other employers—and for the future of the relationship between the Constitution’s Religion Clauses. Justice Alito’s capacious understanding of the ministerial exception—and his view that it is grounded primarily in the Free Exercise Clause, rather than the Establishment Clause—will likely leave little room for civil courts to adjudicate claims that assert wrongful treatment by religious institutions of ministerial employees. Equally important, Justice Alito’s view suggests a continued marginalization of the Establishment Clause in ways that will have effects far beyond the world of higher education.

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INTRODUCTION

In February 2022, the U.S. Supreme Court denied certiorari in *Gordon College v. DeWeese-Boyd*,¹ a case litigated in the Massachusetts state courts that involved the scope of the “ministerial exception.” The ministerial exception is a judicially crafted, constitutionally grounded exception to the ordinary rules of liability arising out of the employment relationship between religious institutions and their ministers.² The ministerial exception clearly applies to clergy³ and other employees of religious organizations who have distinctively religious duties such as the obligation to lead worship or indoctrinate students in the faith.⁴ The *Gordon College* case, however, involved a claim by a professor of social work who had no such duties but who was expected to infuse faith into her teaching and scholarship. The Massachusetts Supreme Judicial Court (SJC) held that such a responsibility, standing alone, was insufficient to render the plaintiff a minister within the meaning of the ministerial exception.⁵ As a consequence, the plaintiff could continue to litigate her claims against the College.⁶

Although the Supreme Court denied certiorari, it appears that the Court came as close as possible to granting the petition. Justice Alito, joined by three other Justices, issued a statement respecting the denial of certiorari.⁷ His statement noted procedural issues that made immediate review imprudent,⁸ but suggested that the failure to afford broad protection to the College would invite sympathetic review by the Supreme Court.⁹ Justice Alito asserted that the Massachusetts SJC had

1 142 S. Ct. 952 (2022).

2 See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n v. EEOC*, 565 U.S. 171 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); see generally Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 *FORDHAM L. REV.* 1847 (2018); Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v EEOC*, 20 *LEWIS & CLARK L. REV.* 1265 (2017); Caroline Mala Corbin, *The Irony of Hosanna-Tabor*, 106 *NW. U. L. REV.* 951 (2012); Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 *HARV. J.L. & PUB. POL’Y* 821 (2012); Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 *N.C. L. REV.* 1 (2011).

3 See, e.g., *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

4 See, e.g., *Rayburn v. Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (applying ministerial exception in suit by “associate in pastoral care” at a church); *EEOC v. Roman Cath. Diocese of Raleigh*, 213 F. 3d 795 (4th Cir. 2000) (applying ministerial exception in suit by director music ministry at a church).

5 *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1002–03, 1018 (Mass. 2021).

6 *DeWeese-Boyd* alleged that the College denied her application for promotion because of her support for LGBTQ+ rights at the College. She claimed that, in doing so, the College discriminated against her based on gender and then unlawfully retaliated against her after she filed a complaint. 163 N.E.3d at 1003.

7 *Gordon College v. DeWeese-Boyd*, 142 S. Ct. 952 (2022) (Alito, J., respecting the denial of certiorari) (joined by Justices Thomas, Kavanaugh, and Barrett).

8 *Id.* at 952 (“I concur in the denial of the petition for a writ of certiorari because the preliminary posture of the litigation would complicate our review.”); *id.* at 955 (stating that the “interlocutory posture” of the case “would complicate our review”).

9 *Id.* at 954–55 (stating that “the state court’s understanding of religious education is troubling”).

advanced a “troubling and narrow view of religious education,”¹⁰ and he strongly suggested that the mere obligation to integrate faith into teaching and scholarship is sufficient to bring a teacher within the reach of the ministerial exception.¹¹ This understanding of the ministerial exception goes beyond the Court’s two prior decisions on the topic and would have broad practical and jurisprudential implications.

As the SJC noted, such an approach could bring all teachers at religious schools within the scope of the ministerial exception, thus depriving them of significant employment protections imposed by neutral and generally applicable laws.¹² To be sure, religious schools already enjoy protection from antidiscrimination claims through express statutory exemptions for religious institutions from prohibitions on religious discrimination.¹³ As a consequence, religious schools can lawfully select, supervise, and retain employees using religious criteria. These statutory religious exemptions, however, differ substantially from the ministerial exception. To avoid liability for claims asserting discrimination based on protected, nonreligious characteristics, a school must show that its action was instead based on the employer’s religious norms.¹⁴ Under the ministerial exception, in contrast, a school merely needs to demonstrate that the employee’s duties render her a minister; upon such a showing, a court will conduct no further scrutiny of the specific reasons for any adverse job action.¹⁵

The broader jurisprudential implications of an expanded ministerial exception would be equally significant. As the Court explained in *Hosanna-Tabor Evangelical*

10 *Id.* at 954.

11 *Id.* at 955 (expressing “doubts about the state court’s understanding of religious education and, accordingly, its application of the ministerial exception”).

12 *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1002–03, 1017 (Mass. 2021). (“The integration of religious faith and belief with daily life and work is a common requirement in many, if not all, religious institutions. As a result, the breadth of this expansion of the ministerial exception and its eclipsing and elimination of civil law protection against discrimination would be enormous.”).

13 *See, e.g.*, 42 U.S.C. § 2000e-1 (2012) (“This subchapter [Title VII] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”).

14 In the context of a nonministerial employee, the employee would assert a claim of adverse employment action based on a protected class (such as race), the employer might offer a religious justification for the employment action, and the employee would then argue that the offered justification is a pretext for unlawful discrimination. *See, e.g.*, *Cline v. Catholic Diocese*, 206 F.3d 651 (6th Cir. 1999) (addressing claim by teacher at religious school who was terminated for premarital pregnancy, which violated moral code prohibiting nonmarital sex, and granting trial on question whether the policy was applied equally to male and female employees); *Redhead v. Conf. of Seventh-Day Adventists*, 440 F. Supp. 211 (E.D.N.Y. 2006) (same, and rejecting employer’s argument that employee was a minister within the ministerial exception).

15 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n v. EEOC*, 565 U.S. 171, 190 (2012); *see id.* at 195 (“The purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical,’—is the church’s alone.” (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 119 (1952))).

Lutheran Church & School v. Equal Employment Opportunity Commission v. EEOC,¹⁶ the first Supreme Court decision to recognize the ministerial exception, the exception has deep historical roots and is grounded in both Religion Clauses. A prohibition on state intervention in the choice of clergy implicates the Establishment Clause because a hallmark of an established church is state control over church leadership. In addition, Establishment Clause doctrine recognizes that civil courts are not competent to resolve strictly religious questions, and the question whether a minister should continue to serve a religious institution is (or risks implicating) such a question. The exception also implicates the Free Exercise Clause; the freedom to choose a faith community is inseparable from the freedom to choose who will serve as the community's minister.

Hosanna-Tabor involved a religious schoolteacher with specifically religious responsibilities: teaching religious doctrine and leading students in worship. It is not difficult to see both the Establishment and Free Exercise concerns with a court's adjudicating claims by such teachers that they were impermissibly terminated. Such claims inevitably will raise the question whether the teachers properly fulfilled their responsibilities; but under the Establishment Clause, civil courts are not competent to determine whether the teacher properly taught religious doctrine. The resulting interference with the school's relationship with those people it has selected to impart its doctrine, moreover, would interfere with the school's freedom to define and share its faith.

It matters that the ministerial exception sounds in both Religion Clauses. Grounding the exception in both clauses gives constitutional weight to the exception but also, crucially, imposes a limit on its scope. Because a primary justification for the exception is that civil courts lack authority to adjudicate strictly religious questions, the exception ought to apply only in those cases that actually involve religious activity. As a consequence, whether an employee is a "minister" should be determined by inquiring whether the person is responsible for engaging in specifically religious activity. To make this limit meaningful, secular courts must have authority to determine what constitutes religious activity within the meaning of the Establishment Clause.

Yet Justice Alito's opinion for the Court in *Our Lady of Guadalupe School v. Morrissey-Berru*,¹⁷ the Supreme Court's other case applying the ministerial exception, hints at a more expansive ministerial exception, one that slips its tether in Establishment Clause doctrine and instead is anchored solely to the Free Exercise Clause. Justice Alito asserted that the ministerial exception derives from a doctrine of church autonomy, which guarantees the "independence of religious institutions in matters of 'faith and doctrine'" and "matters of church government."¹⁸ On this view, "[j]udicial review of the way in which religious schools" select and supervise teachers who educate impermissibly "undermine[s] the independence of religious

16 565 U.S. 171.

17 140 S. Ct. 2049 (2020).

18 *Id.* at 2060 (quoting *Hosanna-Tabor*, 565 U.S. at 186 (internal quotations omitted)).

institutions.”¹⁹ Justice Alito’s statement respecting the denial of certiorari in the Gordon College case builds on this view and sends a strong signal that, in cases involving the relationship between secular courts and religious institutions, the Free Exercise Clause now dominates an increasingly irrelevant Establishment Clause.²⁰

In suits by employees of religious organizations, the likely consequence is that there will be little room for civil courts to adjudicate claims that assert wrongful treatment by their employers. Whereas an Establishment Clause–based ministerial exception would permit secular courts to determine, in the first instance, the boundaries of the category of minister for purposes of adjudicating employment-based claims, a Free Exercise Clause–based doctrine leaves the boundaries of the category principally to the religious employer and its assertion about who counts as a minister. To be sure, Justice Alito’s position does not appear to be as deferential as Justice Thomas’s approach in *Hosanna-Tabor*, which would “require civil courts . . . to defer to a religious organization’s good-faith understanding of who qualifies as its minister.”²¹ But in practice, the difference is modest at best. Under Justice Thomas’s view, a religious school or organization’s sincere claim that an employee is a minister must be accepted by a reviewing court; under Justice Alito’s view, a sincere claim that an employee is a minister is entitled to substantial (yet undefined) deference.

If the ministerial exception rests entirely on the Free Exercise Clause, then the limits imposed by the Establishment Clause on its scope are beside the point. In this sense, ministerial exception doctrine appears to be following the same trend as other apparent conflicts between the Religion Clauses in recent decisions. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*,²² *Espinoza v. Montana Department of Revenue*,²³ *Carson as Next Friend of O.C. v. Makin*,²⁴ *Kennedy v. Bremerton School District*,²⁵ and other recent cases,²⁶ the Court looked only at Free Exercise Clause interests and either downplayed or ignored potential Establishment Clause concerns. Increasingly, Religion Clause doctrine focuses on the freedom of the religious from constraints imposed on secular actors while simultaneously demanding

19 140 S. Ct. at 2055.

20 See *infra* notes 169–207 and accompanying text.

21 565 U.S. at 197 (Thomas, J., concurring).

22 137 S. Ct. 2012 (2017) (holding that Missouri’s exclusion of churches from a funding program for playground resurfacing violated the Free Exercise Clause).

23 140 S. Ct. 2246 (2020) (holding that Montana’s exclusion of religious schools from state scholarship program violated Free Exercise Clause).

24 142 S. Ct. 1987 (2022) (holding that Maine school voucher program in rural districts violated the rights of students and religious schools because it excluded “sectarian” schools from the program).

25 142 S. Ct. 2407 (2022) (holding that public high school coach has a right to engage in private prayer at conclusion of football games, notwithstanding school district’s concern that it would be deemed responsible for the coach’s religious activity in violation of the Establishment Clause).

26 See *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (holding that city’s refusal to contract with Catholic adoption agency unless the agency placed children with same-sex couples violated the Free Exercise Clause notwithstanding Employment Division, Department of Human Resources of *Oregon v. Smith*, 494 U.S. 872 (1990), which held that neutral and generally applicable laws that incidentally burden religion are not subject to heightened scrutiny under the Free Exercise Clause).

equal treatment of religious actors in the distribution of government benefits. Long-standing concerns about government monitoring of or support for religion have been subordinated to Free Exercise interests.

In Part I, we describe the origins and current status of the ministerial exception, focusing particularly on the definition of those considered ministers. Part II turns to *DeWeese-Boyd v. Gordon College*, which has justifiably received significant attention as it made its way through the Massachusetts courts to the U.S. Supreme Court on a petition for a writ of certiorari. Part III addresses the implications of the Gordon College case for religious institutions of higher education and the status of their faculty members, including the extent to which antidiscrimination and other employment protections will continue to apply to decisions at those institutions, especially at schools that require faculty to infuse the faith into their teaching and scholarship. In Part IV, we explore broader implications of the case, and especially the possibility that the ministerial exception will cease to have any meaningful connection to the Establishment Clause. In our view, this is a serious mistake. As with the Court's other decisions that ignore Establishment Clause values, an anchoring of the ministerial exception solely in the Free Exercise Clause will increase the immunity of religious organizations from general law, invite broader government funding of religion, and potentially disable courts from drawing any meaningful line between church and state.

I. The Ministerial Exception

In the 1970s, the lower federal courts confronted a series of employment law claims by those who worked for religious institutions. In an increasing number of these cases, the institutions defended by asserting a "ministerial exception" to antidiscrimination and other laws that protect employees. Title VII and other workplace protections exempt religious organizations from claims of religious discrimination in employment, but they do not exempt religious organizations from other types of discrimination claims such as those based on race or sex.²⁷

In *McClure v. Salvation Army*,²⁸ however, the U.S. Court of Appeals for the Fifth Circuit held that Title VII should be construed to exempt from the protections of the Act ministers employed by religious organizations.²⁹ Accordingly, the court rejected the claim of the plaintiff, who was an officer and ordained minister of the Salvation Army, that she had been terminated because of her sex.³⁰ The court

27 See 42 U.S.C. § 2000e-1 (2012) ("This subchapter shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."); see also, e.g., D.C. CODE § 2-1402.11 (2017) (defining unlawful discriminatory employment practices); MD CODE ANN., STATE GOV'T § 20-606 (West 2017) (same). Accordingly, an avowed atheist cannot recover under Title VII for religious discrimination when a church refuses to hire him, even if the position is not one that involves leading worship, religious education, or any other religious activity. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

28 460 F.2d 553 (5th Cir. 1972).

29 *Id.* at 560–61

30 *Id.* at 555.

construed Title VII in light of constitutional concerns about government intrusion into religious organizations' decisions about their leaders.³¹ In particular, the Fifth Circuit relied on a series of decisions in which the Supreme Court held that the Religion Clauses require the government to limit its involvement in disputes over the control of religious entities.³²

In the decades that followed, other courts recognized and elaborated on the scope of this "ministerial exception."³³ Those courts applied the exception to all the class-based protections under Title VII,³⁴ to claims under other federal antidiscrimination statutes,³⁵ and to some state law claims.³⁶ In addition, they applied the exception in cases involving employees who were not ordained as ministers but whose duties entailed specifically religious activities.³⁷

The Supreme Court first recognized the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*.³⁸ The Court concluded that its prior decisions "confirm that it is impermissible for the government to contradict a church's determination of who can act as its ministers."³⁹

The specific question in *Hosanna-Tabor* was whether the plaintiff, who taught predominantly secular subjects at a religious school and had only limited

31 *Id.* at 558–61.

32 *See id.* at 559–60 (citing *Watson v. Jones*, 80 U.S. 679 (1971), *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969)); *see infra* notes 130–60 and accompanying text.

33 *See, e.g.*, *Rayburn v. Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *EEOC v. Roman Cath. Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000).

34 *See, e.g.*, *Rweyemamu v. Cote*, 520 F.3d 198, 204–09 (2d Cir. 2008) (applying ministerial exception in case asserting race discrimination claim); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–07 (3d Cir. 2006) (sex discrimination); *Lishu Yin v. Columbia Int'l Univ.*, 335 F. Supp. 3d 803 (D.S.C. 2018) (national origin). *But cf.* *Ira C. Lupu & Robert W. Tuttle, #MeToo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment's Religion Clauses*, 25 WM. & MARY J. RACE, GENDER, AND SOCIAL JUSTICE 259 (2019) (arguing that ministerial exception should not apply in cases involving sexual harassment claims, and citing federal and state court decisions that have adopted that rule); *Rachel Casper, When Harassment at Work Is Harassment at Church: Hostile Work Environments and the Ministerial Exception*, 25 U. PA. J.L. SOC. & CHANGE 11 (2021) (hostile work environment claims).

35 *See, e.g.*, *Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036, 1039–40 (7th Cir. 2006) (applying the ministerial exception to a claim by a church music director under the Age Discrimination in Employment Act).

36 *See, e.g.*, *Natal v. Christian and Missionary All.*, 878 F.2d 1575, 1578 (1st Cir. 1989) (applying ministerial exception in case involving breach of contract claim).

37 *Rayburn v. Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (applying ministerial exception to employee who was not an ordained minister but who was an "associate in pastoral care" at a church); *EEOC v. Roman Cath. Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000) (holding that director of music ministry at a church was a minister within the meaning of the ministerial exception).

38 565 U.S. 171 (2012).

39 *Id.* at 185 (citing *Watson v. Jones*, 80 U.S. 679 (1971), *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich*, 426 U.S. 696 (1976)); *see infra* notes 130–60 and accompanying text.

religious duties, was properly considered a minister.⁴⁰ The Court concluded that she counted as a minister for purposes of the exception.⁴¹ Although the Court expressly declined to announce a specific test for defining ministers,⁴² its conclusion identified a mix of characteristics and factors.⁴³

Cheryl Perich served as a “commissioned” teacher, which meant that she received special religious training and was “called” to her position by the congregation.⁴⁴ Perich identified herself as a minister for purposes of the “parsonage exemption” under the Federal Income Tax Code.⁴⁵ As the Court noted, part of her role as a fourth-grade teacher included specifically religious activities: “She also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service. Perich led the chapel service herself about twice a year.”⁴⁶

Eight members of the Court agreed that defining ministers for purposes of the exception is a task properly performed by courts reviewing claims within the reach of the exception.⁴⁷ Those eight Justices implicitly rejected Justice Thomas’s suggestion that the mere invocation of the exception by a religious organization precludes further judicial inquiry.⁴⁸

40 565 U.S. at 177–78, 190–92.

41 *Id.* at 190–95.

42 *Id.* at 190.

43 The Court described Cheryl Perich’s responsibilities as follows:

Respondent Cheryl Perich was first employed by Hosanna-Tabor as a lay teacher in 1999. After Perich completed her colloquy later that school year, Hosanna-Tabor asked her to become a called teacher. Perich accepted the call and received a diploma of vocation designating her a commissioned minister.

Perich taught kindergarten during her first four years at Hosanna-Tabor and fourth grade during the 2003–2004 school year. She taught math, language arts, social studies, science, gym, art, and music. She also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service. Perich led the chapel service herself about twice a year.

Id. at 178. The Court relied on several features of Perich’s position in concluding that she was a minister: “the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church.” *Id.* at 192.

44 *Id.* at 177–78.

45 *Id.* at 191–92.

46 *Id.* at 192.

47 *Id.* at 190–95 (considering the employee’s responsibilities and determining whether she was properly considered a minister for purposes of the exception); *id.* at 204 (Alito, J., concurring) (concluding that the employee was a minister for purposes of the exception because she “played an important role as an instrument of her church’s religious message and as a leader of its worship activities”). The Court concluded, however, that courts should not consider whether the religious institution’s justification for the adverse employment action was sincerely religious or instead pretextual. *Id.* at 194–95 (majority opinion). For an explanation of this conclusion, see Lupu & Tuttle, *supra* note 2, at 1279–80.

48 *Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring) (“[I]n my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization’s good-faith understanding of who qualifies as its minister.”). Justice Thomas reasoned “the Religion Clauses

The Court based its recognition of the ministerial exception on both the Free Exercise and Establishment Clauses. The Court explained,

By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.⁴⁹

The Court repeatedly stated that the ministerial exception is "grounded in the Religion Clauses of the First Amendment."⁵⁰

The Court elaborated on the scope of the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru*.⁵¹ The case involved a parochial school teacher who alleged that her termination was based on her age in violation of the Age Discrimination of Employment Act.⁵² Although the school asserted that it had a legitimate, nondiscriminatory reason for terminating the plaintiff, it invoked the ministerial exception to dispose of the case on an expedited motion for summary judgment.⁵³ The district court granted the school's motion, but the court of appeals reversed, reasoning that "Morrissey-Berru did not have the formal title of 'minister,' had limited formal religious training, and 'did not hold herself out to the public as a religious leader or minister.'" ⁵⁴ The Supreme Court granted the school's petition for certiorari and reversed.⁵⁵

Justice Alito wrote the opinion for the Court and was joined by six other Justices. The Court began by holding that an employee need not satisfy all the factors identified in *Hosanna-Tabor* to fall within the ministerial exception.⁵⁶ Instead,

guarantee religious organizations autonomy in matters of internal governance, including the selection of those who will minister the faith. A religious organization's right to choose its ministers would be hollow, however, if secular courts could second-guess the organization's sincere determination that a given employee is a 'minister' under the organization's theological tenets." *Id.* at 196–97.

49 *Id.* at 188–89 (majority opinion).

50 *Id.* at 190; *see id.* at 181 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."); *id.* at 189 ("We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."); *id.* at 194 ("The EEOC and Perich originally sought an order reinstating Perich to her former position as a called teacher. By requiring the Church to accept a minister it did not want, such an order would have plainly violated the Church's freedom under the Religion Clauses to select its own ministers.").

51 140 S. Ct. 2049 (2020).

52 *Id.* at 2058. The Supreme Court consolidated *Morrissey-Berru*'s case with a similar case filed by the estate of Kristen Biel, a Catholic school teacher who claimed that she had been fired in violation of the Americans with Disabilities Act when the school denied her request for a leave of absence to obtain treatment for breast cancer. *Id.* at 2059.

53 *Id.* at 2058.

54 *Id.* (quoting *Morrissey-Berru v. Our Lady of Guadalupe School*, 769 F. App'x 460, 461 (9th Cir. 2019)).

55 *Our Lady of Guadalupe*, 140 S. Ct. at 2060, 2069.

56 *Id.* at 2063 ("[O]ur recognition of the significance of those factors in [*Hosanna-Tabor*] did not

the Court reasoned, the inquiry should be functional, and thus does not depend on any one factor.⁵⁷ Although Morrissey-Berru did not carry the title “minister,” she nonetheless performed specifically religious activities.⁵⁸ As the Court explained, she was responsible for teaching the basic doctrines of the faith and testing the students on their understanding of those doctrines.⁵⁹ In addition, she was responsible for preparing the students to participate in the liturgy of the church and “was expected to take her students to Mass once a week and on certain feast days . . . , and to take them to confession and to pray the Stations of the Cross.”⁶⁰ In light of Morrissey-Berru’s responsibility to teach and lead students in the practice of religion, she more clearly performed specifically religious activities than did Perich in *Hosanna-Tabor*.

These duties were more than sufficient for the Court to conclude that the court of appeals erred and to reinstate the district court’s grant of summary judgment in favor of the school. The Court, however, did not end its inquiry with the judgment that the plaintiff performed specifically and unambiguously religious activities. Instead, the Court also noted that the plaintiff was evaluated based on whether “Catholic values were infused through all subject areas” of her teaching.⁶¹ We find it less obvious that a requirement to infuse elements of the faith into ordinary teaching would constitute specifically religious activity in the same way that teaching doctrine or leading worship would. Indeed, the Court did not say whether this requirement alone would be a sufficient basis for a finding that the employee falls within the scope of the ministerial exception.⁶²

As in *Hosanna-Tabor*, the Court’s opinion in *Our Lady of Guadalupe* anchored the ministerial exception in both Religion Clauses.⁶³ As we read Justice Alito’s opinion, however, it subtly shifts the focus from traditional Establishment Clause concerns to Free Exercise concerns. An approach dominated by Establishment Clause

mean that they must be met—or even that they are necessarily important—in all other cases.”).

57 *Id.* at 2064 (“What matters, at bottom, is what an employee does.”).

58 *Id.* at 2066 (“There is abundant record evidence that they both performed vital religious duties.”).

59 *Id.* (“Educating and forming students in the Catholic faith lay at the core of the mission of the schools where they taught, and their employment agreements and faculty handbooks specified in no uncertain terms that they were expected to help the schools carry out this mission and that their work would be evaluated to ensure that they were fulfilling that responsibility.”).

60 *Id.* at 2057; *see also id.* at 2066.

61 *Id.* at 2057.

62 Instead, the Court viewed the plaintiff’s duties as a whole, noting that she was responsible both for “[e]ducating and forming students in the Catholic faith” *Id.* at 2066; *accord id.* (“[N]ot only [were the plaintiffs] obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith.”).

63 *Id.* at 2060 (“[T]he Religion Clauses protect the right of churches and other religious institutions to decide matters “of faith and doctrine” without government intrusion. State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion.”) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n v. EEOC*, *Hosanna-Tabor*, 565 U.S. 171, 186 (2012), in turn quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952) (internal quotations omitted)).

concerns would focus on a teacher's required involvement in specifically religious activities. Such an understanding of the ministerial exception rests on secular courts' limited competence to determine who is qualified to perform specifically religious activities. An approach anchored primarily in the Free Exercise Clause, in contrast, will focus on the freedom of religious schools to integrate faith into all aspects of their educational mission.

Justice Alito's opinion stated that the relevant religious duties of teachers extended beyond instruction in doctrine and leading students in worship. He observed that the plaintiffs "not only [were] obligated to provide instruction about the Catholic faith," but also were "expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith."⁶⁴ Justice Alito suggested that such duties matter in determining whether a teacher is a minister because of the importance of preserving the autonomy of religious schools.⁶⁵ Such autonomy, on this view, requires courts to defer to religious entities' characterization of the role at issue. And indeed, Justice Alito emphasized that the school "expressly saw [the teacher] as a vital part in carrying out the mission of the Church," and that the school's "definition and explanation of [her role] in the life of the religion ... is important."⁶⁶

II. The Gordon College Case

Margaret DeWeese-Boyd was a tenured associate professor of social work at Gordon College, an "evangelical Christian undergraduate and graduate college" in Massachusetts.⁶⁷ The College's current governing documents state that the mission of the College is to "provide a college education in the liberal arts and sciences to qualified persons; to provide training for the professions; to provide instruction in the Bible and other subjects; [and] to prepare men and women for the work of foreign and home missions, for the duties of the Christian ministry and other special forms of Christian work[.]"⁶⁸

The faculty handbook establishes criteria for teachers, which include adherence to the College's religious mission: "Gordon College approaches its educational task from within the fixed reference points of biblical theism, which provides a coherent perspective on life in the world."⁶⁹ All faculty members "are expected to be fully prepared in all facets of their tasks as Christian teachers and advisors, both

64 *Id.* at 2066.

65 *Id.* at 2069 ("When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.").

66 *Id.* at 2066.

67 *DeWeese-Boyd v. Gordon College*, 2020 Mass. Super. LEXIS 73, at *4 (2020).

68 *Id.* at *5 (citation omitted). The original Mission Statement stated that the College strives "to graduate men and women distinguished by intellectual maturity and Christian character, committed to lives of services and prepared for leadership worldwide." *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1004 (Mass. 2021). More recent statements of the College's purpose tend to highlight the evangelical Christian aspects of the College's educational program. *Id.* (noting that the Colleges revised By-Laws state that the College is dedicated to the "historic, evangelical, biblical faith" *Id.*

69 *De-Weese-Boyd*, 2020 Mass. Super. Lexis 73, at *8.

inside and outside the classroom,” and “[t]hey are expected to strive to engage students in their respective disciplines from the perspectives of the Christian faith and to teach with accuracy and integrity.”⁷⁰ In addition, all applicants for employment at the College must affirm “personal agreement with the Statement of Faith” and “the Statement of Life and Conduct at Gordon College.”⁷¹

The Statement of Faith is characteristically evangelical Protestant in its commitment to biblical inerrancy and salvation from damnation only by personal experience of God’s saving grace.⁷² The Statement of Life and Conduct requires commitment to the evangelical mission of the College, reflected in personal faith and conformity with “Behavioral Standards” based on “words and actions which are expressly forbidden in Scripture.”⁷³

The handbook provides that faculty members are expected to “promote understanding of their disciplines from the perspectives of the Christian faith.”⁷⁴ Similarly, teaching is evaluated in part based on the faculty member’s “integration” of personal faith and Christian doctrine into the subject matter of the course in a way that “encourages students to develop morally responsible ways of living in the world informed by Biblical principles and Christian reflection.”⁷⁵ An additional component of this infusion of faith into all aspects of their work is the requirement that faculty members submit “an integration paper” at the end of their third year of appointment to “detail how they integrate faith and learning.”⁷⁶ The President of the College asserted that, at the institution, “there are no nonsacred disciplines Every subject matter that we pursue is informed by, shaped by the Christian tradition.”⁷⁷ Faculty members, however, do not have specifically religious responsibilities of participating in worship services or leading prayer.⁷⁸

DeWeese-Boyd joined the Gordon College faculty in 1998, was promoted to Associate Professor in 2004, and was granted tenure in 2009.⁷⁹ In 2016, however, she was denied promotion to full Professor, even though the “Faculty Senate

70 *Id.*

71 *Id.* at *10–11.

72 *Id.* at *11 (“[The College’s] Statement of Faith, with which faculty members must agree, provides, inter alia, that: (1) ‘[t]he 66 canonical books of the Bible as originally written were inspired by God’; (2) ‘[t]here is one God, the Creator and Preserver of all things, infinite in being and perfection’; (3) ‘humankind can be saved only by the grace of God’; (4) ‘it is the responsibility of the believer to contribute by word and deed to the universal spread of the gospel’; and (5) ‘[a]t the end of the age the bodies of the dead shall be raised[,] ... [t]he righteous shall enter into full possession of eternal bliss[,] ... [and] the wicked shall be condemned to eternal death.’”).

73 *Id.* at *12.

74 *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1005 (Mass. 2021).

75 *Id.*

76 *Id.*

77 *Id.* at 1004.

78 *Id.* at 1005 (noting that “Gordon’s provost testified that faculty are not required to participate in leading prayers or to attend regular chapel services on campus, and that the handbook does not contain any specific reference to faculty responsibility for leading prayers”).

79 *Id.* at 1007.

unanimously recommended her for promotion.”⁸⁰ The President and Provost disagreed with the recommendation and declined to forward her promotion application to the Board of Trustees. In their nonconurrence decision, they cited “a lack of scholarly productivity, professionalism, responsiveness, and engagement.”⁸¹ They did not refer to any “religious or ministerial matters or theological disagreement.”⁸²

DeWeese-Boyd filed suit against the College. She alleged that she had been denied promotion because of her vocal opposition to the College’s policies on LGBTQ+ rights and because of her gender.⁸³ She sought relief under Massachusetts antidiscrimination laws and state common law contract and tort doctrines.⁸⁴

The College moved for summary judgment, asserting that the ministerial exception bars DeWeese-Boyd’s claims.⁸⁵ DeWeese-Boyd filed a cross-motion for summary judgment, asserting that, as a matter of law, she was not a minister within the meaning of the exception.⁸⁶ The trial court denied the College’s motion and granted DeWeese-Boyd’s cross-motion. The court concluded that, although the College is a religious institution,⁸⁷ DeWeese-Boyd was not a minister for purposes of the exception. In its decision, which the court issued before the Supreme Court’s decision in *Our Lady of Guadalupe*, the trial court applied a “functional approach.”⁸⁸

The trial court began by noting that, despite the many references to the College’s Christian mission and identity, and the responsibility of faculty to infuse faith into their teaching, “the simple promotion of a religious institution’s mission, alone, provides little insight into whether the duties or responsibilities undertaken by the employee carried substantial religious significance.”⁸⁹ The court also noted that DeWeese-Boyd was not expected to proselytize or to hold herself out as “an employee authorized to speak on Church doctrine.”⁹⁰ Finally, “DeWeese-Boyd did not perform any important religious functions for Gordon College.” The court explained that “DeWeese-Boyd performed almost no liturgical or ecclesiastical

80 *Id.*

81 *Id.*

82 *Id.* at 1008.

83 *DeWeese-Boyd v. Gordon College*, 2020 Mass. Super. LEXIS 73, at *21.

84 *Id.* at *2.

85 *Id.* at *4.

86 *Id.*

87 *Id.* at *40–43.

88 *Id.* at *47–48. In applying this functional approach, the court closely followed the Kentucky Supreme Court’s reasoning in *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 587 (Ky. 2014), which involved a suit by a tenured professor of Christian Social Ethics. The Kentucky Court focused primarily on the “important functions performed for the religious institution” and “whether those functions were essentially liturgical, closely related to the doctrine of the religious institution, resulted in a personification of the religious institution’s beliefs, or were performed in the presence of the faith community.” *Id.* at 613–14.

89 *Gordon College*, Mass. Super. LEXIS, at *68 (quoting *Kant v. Lexington Theological Seminary*, 426 S.W.3d 587, 594 (Ky. 2014)).

90 *Id.* at *70 (quoting *Kant*, 426 S.W.3d at 594–95).

functions for Gordon She was not responsible for leading students in prayer or devotional exercises; she did not lead chapel services or even select liturgy, hymns, or other content for chapel services; she did not teach religion or the Bible; [and] she did not play a particular role as a minister or spiritual leader.”⁹¹

The trial court granted the College’s motion to seek interlocutory appeal of the court’s determination that the ministerial exception did not apply, and the SJC granted the application for immediate review.⁹²

The SJC affirmed, “conclud[ing] that Gordon College is a religious institution, but that [DeWeese-Boyd] is not a ministerial employee.”⁹³ The Court largely echoed the reasoning of the trial court and focused on the functions that the plaintiff served. Specifically, “she did not teach religion or religious texts, lead her students in prayer, take students to chapel services or other religious services, deliver sermons at chapel services, or select liturgy”⁹⁴

As a consequence, the case turned on the significance of the plaintiff’s “responsibility to integrate her Christian faith into her teaching and scholarship as a professor of social work.”⁹⁵ The SJC concluded that, under current doctrine, the ministerial exception does not extend to faculty whose only religious responsibility is to integrate faith into their teaching and scholarship.⁹⁶

At first glance, the basis for the Court’s conclusion appears to be entirely pragmatic. The Court reasoned that, if the ministerial exception extended to all such faculty, the exception would threaten to swallow the rule. The SJC noted that, if DeWeese-Boyd were considered a minister, then “the number of employees playing key ministerial roles would be greatly increased,” thus removing significant legal protections for those employees.⁹⁷

91 *Id.* at *71.

92 *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1004 (Mass. 2021). *Cf. Tucker v. Faith Bible Chapel Int’l*, 36 F.4th 1021 (10th Cir. 2022) (holding that order denying summary judgment on a school’s ministerial exception defense is not immediately appealable).

93 *DeWeese-Boyd*, 163 N.E.3d at 1002.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* The SJC explained,

When the ministerial exception applies, the employee may not claim important protections of civil law prohibiting discrimination on the basis of any protected factor, such as race, religion, national origin, sex, or sexual orientation. Such exceptional treatment is deemed necessary to protect our religious institutions against interference by civil authorities in the selection of those who minister to their faithful. We are thus presented with a potential conflict between two fundamental American legal principles. The application of the ministerial exception could eclipse, and thereby eliminate, civil law protection against discrimination within a religious institution; in contrast, the decision not to apply the exception could allow civil authorities to interfere with who is chosen to propagate religious doctrine, a violation of our country’s historic understanding of the separation of church and State set out in the First Amendment to the United States Constitution.

Id. at 32; *see also id.* at 41–42 (noting that, if an employee is considered a minister, “the religious institution will be free to discriminate” on the basis of age, race, or national origin); Patrick Hornbeck, *A Nun*,

The Court's conclusion, however, also has a solid jurisprudential foundation. The SJC emphasized that the Court in *Hosanna-Tabor* and *Our Lady of Guadalupe* adopted a "functional analysis" for determining whether an employee is a minister within the meaning of the exception.⁹⁸ The SJC accordingly examined the plaintiff's actual responsibilities. The Court stressed that the plaintiff "was, first and foremost, a professor of social work. She taught classes on sustainability and general social work practice and oversaw practicums."⁹⁹ Unlike the plaintiffs in *Hosanna-Tabor* and *Our Lady of Guadalupe*, DeWeese-Boyd had no obligation to engage in specifically religious duties.

The SJC acknowledged that the plaintiff was required to "engage in teaching and scholarship from a Christian perspective and integrate her faith into her work."¹⁰⁰ The College argued that this obligation alone rendered all faculty—and, for that matter, all employees of the College, including the janitorial and kitchen staffs—ministers within the meaning of the exception.¹⁰¹ The SJC disagreed. The Court noted that the Supreme Court's two ministerial exception decisions did not address whether an obligation to integrate or model faith in one's work alone is sufficient to make the employee a minister.¹⁰² The SJC accordingly examined the plaintiff's duties, including her job description, even more closely.

The College relied on the faculty handbook and its description of the faculty's role. When DeWeese-Boyd began her employment at Gordon College, the handbook described faculty as "educators." In 2016, after the Supreme Court's decision in *Hosanna-Tabor* (and eighteen years after DeWeese-Boyd was hired), the College's legal counsel substantially revised the handbook. The revised provision stated, in relevant part:

One of the distinctives of Gordon College is that each member of faculty is expected to participate actively in the spiritual formation of our students into godly, biblically-faithful ambassadors for Christ. Faculty members should seek to engage our students in meaningful ways to strengthen them in their faith walks with Christ. In the Gordon College context, faculty members are both educators and ministers to our students.¹⁰³

The SJC concluded, however, that "the label is uninformative, not only because it was added so late in DeWeese-Boyd's tenure, but also because there is abundant evidence in the record of what was required and expected of Gordon faculty during her employment there and our focus, as the Supreme Court has directed, is on function."¹⁰⁴

a Synagogue Janitor, and a Social Work Professor Walk Up to the Bar: The Expanding Ministerial Exception, 70 BUFF. L. REV. 695 (2022).

98 *Id.* at 46–47.

99 *Id.* at 47.

100 *Id.*

101 *Id.* at 48.

102 *Id.* at 49.

103 *Id.* at 37–38 (quoting faculty handbook).

104 *Id.* at 50. In the SJC's view, to accept uncritically the College's post-hoc labeling of all faculty

Notwithstanding the College's contention that a core faculty responsibility is to serve as a spiritual mentor to students, the SJC found no "formal requirement[]"¹⁰⁵ of such an obligation. In the Court's view, "a general exhortation for faculty 'to be fully prepared in all facets of their tasks as Christian teachers and advisors, both inside and outside the classroom,'" did not alter the faculty's primarily secular function.¹⁰⁶ The Court reasoned that, if "all Christians teaching at all Christian schools and colleges are necessarily ministers," then the Supreme Court "could have simply said so and not developed the two-prong test and functional analysis laid out in *Our Lady of Guadalupe*."¹⁰⁷

Applying that test, the SJC concluded that "a faculty member with DeWeese-Boyd's responsibilities at Gordon is significantly different from the ordained ministers or teachers of religion at primary or secondary schools in the cases that have come before the Supreme Court."¹⁰⁸ The Court stressed that she "was not ordained or commissioned; she was not held out as a minister and did not view herself as a minister; and she was not required to undergo formal religious training, pray with her students, participate in or lead religious services, take her students to chapel services, or teach a religious curriculum."¹⁰⁹ Finally and crucially, the SJC concluded that DeWeese-Boyd's "responsibility to integrate the Christian faith into her teaching, scholarship, and advising was different in kind, and not degree, from the religious instruction and guidance at issue in *Our Lady of Guadalupe* and *Hosanna-Tabor*."¹¹⁰

The SJC acknowledged that "a case need not mirror *Hosanna-Tabor* and *Our Lady of Guadalupe* in order for the ministerial exception to apply."¹¹¹ The Court

as ministers would have the practical effect of adopting the approach of the two concurring Justices in *Our Lady of Guadalupe*, who argued for almost complete deference to the religious employer's defense. *Id.* at 49–50. Instead, the SJC concluded that it had an independent obligation to determine whether the plaintiff was in fact a minister.

105 *Id.* at 48.

106 *Id.*

107 *Id.*

108 *Id.* at 51–52.

109 *Id.* at 52–53.

110 *Id.* at 53. In this analysis, the SJC closely followed the reasoning in *Richardson v. Northwest Christian University*, 242 F. Supp. 3d 1132 (D. Or. 2017). *Richardson* involved Northwest Christian University's assertion that an employment discrimination claim brought by a professor of exercise science should be barred by the ministerial exception. Applying the "functional analysis" from *Hosanna-Tabor*, the federal district court held that a general duty to integrate faith into teaching is not, standing alone, sufficient to bring a professor within the scope of the ministerial exception. The district court reasoned,

[T]here is evidence plaintiff performed some important religious functions in her capacity as a professor. She was expected to integrate her Christianity into her teaching and demonstrate a maturing Christian faith. But any religious function was wholly secondary to her secular role: she was not tasked with performing any religious instruction and she was charged with no religious duties such as taking students to chapel or leading them in prayer.

Richardson, 242 F. Supp. 3d at 1145. The court reasoned that the College's position "would permit the ministerial exception to swallow the rule that religious employers must follow federal and state employment laws." *Id.* at 1146.

111 *De-Weese-Boyd*, 163 N.E.3d at 1017.

concluded, however, that “the facts [in DeWeese-Boyd’s suit] are materially different.”¹¹² As a consequence, “the significant expansion of the ministerial exception doctrine requested by Gordon is not dictated nor, do we believe, directed by existing Supreme Court precedent. It is our understanding that the ministerial exception has been carefully circumscribed to avoid any unnecessary conflict with civil law.”¹¹³

Gordon College filed a petition for a writ of certiorari in August 2021. The Court appears to have considered the petition carefully; the petition was distributed for conference seven times.¹¹⁴ Finally, on February 2, 2022, the Supreme Court denied certiorari. In a statement “respecting the denial of certiorari,” Justice Alito, joined by Justices Thomas, Kavanaugh, and Barrett, commented on the merits of the case. Justice Alito’s statement indicates marked concern with the SJC’s definition of “minister” and its attendant understanding of religious education, but he agreed with the “denial of the petition for a writ of certiorari because the preliminary posture of the litigation would complicate our review.”¹¹⁵ He stressed, however, that “in an appropriate future case, this Court may be required to resolve this important question of religious liberty.”¹¹⁶

Justice Alito’s statement reflects a shift from a focus on the specific functions of the employee to the “autonomy” of the religious institution in defining the content and method of its religious instruction.¹¹⁷ Most important, Justice Alito seemed to conclude that a teacher’s obligation to infuse faith into her teaching should be sufficient to bring the employee within the ministerial exception.¹¹⁸ In his view, the approach of the Massachusetts SJC—which relied on the fact that DeWeese-Boyd did not “teach religion, the Bible, or religious doctrine”¹¹⁹—reflects “a troubling and narrow view of religious education.”¹²⁰ Justice Alito asserted that an institution that offers a faith-infused education often treats “nominally secular” material in a different fashion than would secular institutions, which might take a wide range of philosophical or political perspectives on the same material.¹²¹ Justice Alito thus

112 *Id.*

113 *Id.* at 1017-18.

114 See <https://www.supremecourt.gov/docket/docketfiles/html/public/21-145.html> (case docket).

115 *Gordon College v. DeWeese-Boyd*, 142 S. Ct. 952 (2022) (Alito, J., statement respecting denial of certiorari in *Gordon College v. DeWeese-Boyd*, Docket No. 21-145, *cert. denied*, February 2, 2022). Justice Alito noted that the parties disputed whether the Massachusetts SJC’s decision was final or instead interlocutory, and he acknowledged that “this threshold jurisdictional issue would complicate our review.” *Id.* at 955. He concurred in the denial of certiorari on the understanding that the College could seek review after a final judgment if DeWeese-Boyd prevails on the merits. *Id.*

116 *Id.* at 952.

117 *Id.* at 954 (“In *Our Lady of Guadalupe School*, we explained that the ‘ministerial exception’ protects the ‘autonomy’ of ‘churches and other religious institutions’ in the selection of the employees who ‘play certain key roles.’”) (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020)).

118 *Id.* at 954–55.

119 *Id.* at 954 (quoting *DeWeese-Boyd*, 163 N.E.3d at 1014) (internal quotation marks omitted).

120 *Id.* at 954.

121 *Id.* at 954–55.

strongly suggested that a religious school's requirement that teachers integrate faith into their teaching, standing alone, might be sufficient to bring those teachers within the scope of the ministerial exception.

Justice Alito's statement makes clear that at least four Justices remain interested in reviewing the Massachusetts SJC's decision in the Gordon College case—and, more important, in expanding the reach of the ministerial exception in cases that involve not only religious K-12 education, but religious higher education as well.¹²²

Following the denial of certiorari, the litigation in the Gordon College case will continue in Massachusetts state court. Because the SJC affirmed the trial court's holding that the plaintiff is not a minister, proceedings on remand will focus on DeWeese-Boyd's substantive claims under Massachusetts law. The parties will litigate whether the College properly denied the plaintiff's application for promotion.

It is entirely possible that the case will settle. The plaintiff's damages will be limited by the fact that the College decided to eliminate the social work department two years after her claims arose.¹²³ But the prospect of a substantial attorneys' fee award to the plaintiff's lawyers, along with the encouragement Justice Alito's statement likely offered to the College, may mean that the case will be fully litigated on the merits.¹²⁴

122 Moreover, Chief Justice Roberts and Justices Gorsuch and Kagan might be amenable to such an expansion, given their approach in other ministerial exception cases. Chief Justice Roberts wrote the opinion in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission v. EEOC*, 565 U.S. 171, 176 (2012), and joined Justice Alito's opinion in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049. Justice Gorsuch joined Justice Alito's opinion in *Our Lady of Guadalupe*. See *id.* Justice Kagan joined Justice Alito's separate concurring opinion in *Hosanna-Tabor*, *supra* at 198 (Alito, J., concurring), which emphasized the autonomy of a religious institution "to determine for itself who is qualified to serve as a teacher or a messenger of its faith," *id.* at 202, and his opinion in *Our Lady of Guadalupe*, *supra* at 2054.

123 *De-Weese-Boyd*, 163 N.E.3d at 1004 n.7 (noting that the College eliminated the social work department in 2019).

124 If the College wins on the merits, then there would be no federal question for the Supreme Court to review. See 28 U.S.C. § 1257(a) (1988) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where ... any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.").

Even if DeWeese-Boyd is not a minister, litigation of her claims would not necessarily erase concerns about judicial intrusion into religious judgments by the College. Although the College explained its decision not to concur in the recommendation of DeWeese-Boyd's promotion by citing her "lack of scholarly productivity, professionalism, responsiveness, and engagement," *DeWeese-Boyd*, 163 N.E.3d at 1008, the trial court might still find that assessment of those standards is intertwined with religious judgments. (Although the question of scholarly productivity, which is largely a question of quantity, is unlikely to implicate religious judgments, the other characteristics might require assessment of her infusion of faith into the performance of her duties.) If so, the trial court cannot resolve those claims.

The trial court would not be permitted to resolve such claims for two reasons. First, the Massachusetts statutes that authorize DeWeese-Boyd's discrimination claims provides that "nothing herein shall be construed to bar" religious organizations "from giving preference in hiring or employment to members of the same religion or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are

In Massachusetts (and in any states that choose to follow the SJC's reasoning), the SJC's functional approach to the ministerial exception means that religious colleges will need to require more of teachers than integration of the school's doctrine into their instruction and scholarship to classify them as ministerial employees. Nor is it likely sufficient to revise a faculty handbook and simply declare that all faculty are "ministers."

It is only a matter of time, however, before the Supreme Court decides to review a case that involves facts similar to those in *Gordon College v. DeWeese-Boyd*. Justice Alito's statement will be a looming omnipresence¹²⁵ over the litigation of all claims by teachers at religious colleges. In some cases, lower courts will follow Justice Alito's signaling and more readily find that teachers at such colleges are ministers when they are required to infuse faith into their teaching and scholarship. In other cases, however, lower courts will follow the approach of the Massachusetts SJC, thereby providing the Supreme Court with a vehicle to address the scope of the ministerial exception at religious colleges.

III. The Future of the Ministerial Exception

Whether a second petition for certiorari follows further litigation in the Gordon College case or instead a similar challenge comes in a case that applies the SJC's approach, the U.S. Supreme Court will eventually decide whether a duty to infuse faith into teaching and scholarship alone brings teachers within the ministerial exception.

As a threshold matter, the Court will have to decide whether there is a meaningful distinction between K-12 schools, on the one hand, and colleges and universities, on the other. *Hosanna-Tabor* and *Our Lady of Guadalupe* addressed religious K-12 schools. As we explain below, we are skeptical that the mere duty to integrate the faith into all aspects of teaching should be sufficient to bring all teachers (even at K-12 schools) within the scope of the ministerial exception. But we recognize that K-12 teachers often are expected to serve as role models, and character education is an important function at such schools. Indeed, parents often choose to send their children to those schools precisely because of the moral and religious values that they expect will permeate their children's education.

Higher education is different for several reasons. First, as a matter of traditional Establishment Clause law, the Court has recognized that institutions of higher education, unlike K-12 schools, segregate religious activity from other educational

calculated by such organization to promote the religious principles for which it is established or maintained." MASS. GEN. LAWS ch. 151B, § 1, ¶ 5 (2018). Second, under the principles announced in *Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milivojevic*, 426 U.S. 696 (1976), and *Jones v. Wolf*, 443 U.S. 595, 604 (1979), civil courts are not competent to adjudicate religious questions. See *infra* notes 131–49 and accompanying text. If, however, the College's judgment about DeWeese-Boyd's performance rested on facts that the trial court can assess without making religious judgments, then the case can proceed.

125 Cf. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact.").

functions, and accordingly may receive direct federal funding.¹²⁶ The Court has assumed that the religious component of a college's mission does not permeate the instruction of every course or even most of them. Second, teachers of secular subjects at religious colleges are typically accorded the same degree of academic freedom to which those at nonreligious colleges are entitled.¹²⁷ Those faculty, moreover, usually have advanced degrees and other training in their disciplines that is disconnected from the college's faith tradition. (Consider, for example, a math professor with a Ph.D. in data science.) Even if faculty profess the same faith as the college, those teachers are more likely to instruct their students in accordance with the norms of their academic disciplines.

As a consequence, even if the mere obligation to infuse teaching with the faith is sufficient to render teachers at K-12 schools ministers, it is not obvious that the

126 See *Tilton v Richardson*, 403 U.S. 672, 680–82, 685–87 (1971). In *Tilton*, the Court upheld a program that provided federal funds to construct buildings on college campuses. The program did not exclude religious colleges. The Court noted:

There is no evidence that religion seeps into any of these [federally funded] facilities. Indeed, the parties stipulated in the District Court that courses in these institutions are taught according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards. Although appellants introduced several institutional documents that stated certain religious restrictions on what could be taught, other evidence showed that these restrictions were not in fact enforced and that the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination.

Id. at 681. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in contrast, the Court held that the religious and secular aspects of K-12 education could not be reliably separated; the Court thus held that direct funding was impermissible. *But see Mitchell v. Helms*, 530 U.S. 793 (1999) (plurality opinion); *see infra* note 253.

127 Although the American Association of University Professors 1940 Statement of Principles on Academic Freedom and Tenure stated that "limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment," the 1970 Interpretive Comments clarify that "[m]ost church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 *Statement*, and we do not now endorse such a departure." See American Association of University Professors, Statement of Principles on Academic Freedom and Tenure (1940),

<https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure#5> (last visited July 22, 2022). Since that 1970 comment, however, the resurgence of conservative Evangelical Protestantism (in particular) has reinvigorated or created religious colleges and universities, giving them a "covenantal" character. See Tanner Bean & Robin Fretwell Wilson, *When Academic Freedom Collides with Religious Liberty of Religious Universities*, 15 U. ST. THOMAS L.J. 442, 443 (2019) (borrowing the term from Stephen L. Carter, *The Constitutional and the Religious University*, 47 DEPAUL L. REV. 479, 483 (1998)). See also Gary K. House, *Evangelical Higher Education: History, Mission, Identity, and Future*, 6 J. CATH. EDUC. 480, 480–83 (2003) (citing W. C. RINGENBERG, *THE CHRISTIAN COLLEGE: A HISTORY OF PROTESTANT HIGHER EDUCATION IN AMERICA* (1984)) (noting growth in evangelical colleges and universities after strong trends toward secularization of religious higher education). See generally, *RELIGIOUS HIGHER EDUCATION IN THE UNITED STATES: A SOURCE BOOK* (Thomas C. Hunt & James C. Carper eds., 2018).

Bean and Wilson describe a wide variety of conflicts between "covenantal" colleges and regulatory institutions. These include attempts by the U.S. Department of Education and the EEOC to require such colleges to prohibit discrimination based on gender identity or sexual orientation. Bean & Wilson, *supra* at 462–63 (describing Obama Administration's requirement that schools apply to the Department for a waiver of Title IX; Title IX exempts religious institutions from its ban on sex discrimination if the entity has a sincerely held religious objection to compliance). The Council for Christian Colleges & Universities, founded in 1976, has been a significant voice for such institutions, and continues to advocate for the place of higher education that is completely integrated with personal faith and religious practice. See generally <https://www.cccu.org/> (last visited July 22, 2022).

same must be true for faculty at colleges and universities. The SJC, however, did not grapple in its opinion in *Gordon College* with this distinction. Nor did Justice Alito's statement acknowledge any difference between K-12 education and higher education.

Of course, the scope of the ministerial exception is important because it directly affects many religious colleges and their teachers (and perhaps other employees). The ultimate decision, though, will be even more significant because it has the potential to reshape the fundamental relationship between the Religion Clauses.

As we discussed above, the Supreme Court's decision in *Hosanna-Tabor* expressly grounded the ministerial exception in both of the First Amendment's Religion Clauses.¹²⁸ A close reading of the case reveals, however, that Establishment Clause concerns predominated.¹²⁹ The Court did not ignore Free Exercise concerns; it identified religious liberty as one reason for finding a ministerial exception.¹³⁰ But the Court rested its decision on a line of cases that addressed limits on governmental resolution of quintessentially religious questions.¹³¹ As we explain below, such limits derive their force principally from the Establishment Clause.

The Court in *Hosanna-Tabor* reached back to *Watson v. Jones*,¹³² a federal common law decision in which the Court required judicial deference to decisions about the ownership of congregational property made by the highest body within the Presbyterian Church.¹³³ The Court in *Watson*, invoking a "broad and sound view of the relations of church and state under our system of laws," deferred to the decision of the General Assembly of the Presbyterian Church that awarded ownership to one of the competing factions.¹³⁴

The Court in *Hosanna-Tabor* also relied on *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in North America*.¹³⁵ In *Kedroff*, the Court adopted *Watson's* reasoning as a matter of constitutional doctrine under the First Amendment's

128 See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n v. EEOC*, 565 U.S. 171, 188–90 (2012) (stating that the ministerial exception is "grounded in the Religion Clauses of the First Amendment"); see also *id.* at 181 ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."); *id.* at 189 ("We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers."); *id.* at 194 ("The EEOC and Perich originally sought an order reinstating Perich to her former position as a called teacher. By requiring the Church to accept a minister it did not want, such an order would have plainly violated the Church's freedom under the Religion Clauses to select its own ministers.").

129 This discussion is drawn from our treatment of the same question in *Smith & Tuttle*, *supra* note 2, at 1856–62.

130 *Hosanna-Tabor*, 565 U.S. at 188 ("By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments.").

131 See *id.* at 185–87.

132 80 U.S. 679 (1871).

133 *Id.* at 733; see *Hosanna-Tabor*, 565 U.S. at 185–87 (citing *Watson*, 80 U.S. 679).

134 80 U.S. at 733.

135 344 U.S. 94 (1952); see *Hosanna-Tabor*, 565 U.S. at 186–87 (citing *Kedroff*).

Religion Clauses.¹³⁶ *Kedroff* involved a dispute between a local Russian Orthodox congregation in New York and the church hierarchy in Moscow over control of the Russian Orthodox Cathedral in New York and the appointment of church leaders in the United States.¹³⁷ The state legislature had enacted a law that required every Russian Orthodox church in New York to recognize as authoritative determinations of the North American-based governing body.¹³⁸ The New York Court of Appeals relied on the law in ruling against the Russian Orthodox hierarchy in Moscow,¹³⁹ but the U.S. Supreme Court reversed.¹⁴⁰ The Court held that civil government must not usurp church authority to decide “strictly ecclesiastical” matters.¹⁴¹ Because of the structure of the Russian Orthodox Church, the Court ruled, such decisions belong to the Supreme Church Authority of the Russian Orthodox Church.¹⁴²

The Court in *Hosanna-Tabor* also relied on *Serbian Eastern Orthodox Diocese for the United States of America & Canada v. Milivojevich*,¹⁴³ which reaffirmed the

136 344 U.S. at 115–16 (noting that the Court decided *Watson* “before judicial recognition of the coercive power of the Fourteenth Amendment to protect the limitations of the First Amendment against state action,” but that “[f]reedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection”).

137 *Id.* at 95–97.

138 *Id.* at 97–99. The Court described the law at issue, Article 5-C of the Religious Corporations Law of New York, as follows:

The purpose of the article was to bring all the New York churches, formerly subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow or the Patriarch of Moscow, into an administratively autonomous metropolitan district. That district was North American in area, created pursuant to resolutions adopted at a sobor held at Detroit in 1924. This declared autonomy was made effective by a further legislative requirement that all the churches formerly administratively subject to the Moscow synod and patriarchate should for the future be governed by the ecclesiastical body and hierarchy of the American metropolitan district.

Id. at 98–99.

139 See *Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am. v. Kedroff*, 96 N.E.2d 56, 74 (N.Y. 1950).

140 *Kedroff*, 344 U.S. at 119.

141 *Id.*

142 *Id.* at 115. The Court reaffirmed this approach in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). *Blue Hull* involved the effort of a majority of a congregation to split from the denominational body because of the denominational body’s liberal stances on controversial political and social issues. *Id.* at 442 n.1. As in *Kedroff*, the conflict at issue was over ownership of church property. *Id.* at 441–43. The Georgia trial court held that the denomination had departed from traditional Presbyterian doctrine and, therefore, the congregation had the right to claim the property upon its departure from the denomination. *Id.* at 443–44. The Supreme Court of Georgia affirmed, *Presbyterian Church in the U.S. v. Eastern Heights Presbyterian Church*, 159 S.E.2d 690, 701 (Ga. 1968), but the U.S. Supreme Court reversed, reasoning that courts are not competent to decide what constitutes fidelity to the doctrines of a particular faith. *Blue Hull*, 393 U.S. at 445–46 (stating that it is “wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions”). The Court explained that “First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice.” *Id.* at 449. Accordingly, “the First Amendment enjoins the employment of organs of government for essentially religious purposes” and “commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.” *Id.*

143 426 U.S. 696 (1976); see *Hosanna-Tabor*, 565 U.S. at 187 (citing *Milivojevich*).

principle in *Kedroff*. *Milivojevich* involved the efforts of the U.S.-based Bishop Milivojevich to resist the authority of the Belgrade-based church hierarchy.¹⁴⁴ The hierarchy had restricted the size of Milivojevich's jurisdiction.¹⁴⁵ When he resisted, the hierarchy removed him from his position.¹⁴⁶ Milivojevich filed suit in Illinois state court, claiming that the church had failed to follow its internal procedures for removal of a bishop.¹⁴⁷ The Illinois Supreme Court agreed with Milivojevich and ordered him restored to his diocese and the diocese restored to its original size.¹⁴⁸ The U.S. Supreme Court reversed, holding that courts lack authority to resolve "quintessentially religious controversies."¹⁴⁹ The Court stated that when "hierarchical religious organizations" adjudicate disputes over internal discipline and church governance, "the Constitution requires that civil courts accept their decisions as binding upon them."¹⁵⁰

Although these cases cited the First Amendment in general rather than relying separately on the Establishment Clause or the Free Exercise Clause,¹⁵¹ the Court's core reasoning in each case must be based on the Establishment Clause. First, in none of these cases did the Court suggest that a balancing of interests would be appropriate in resolving the disputes.¹⁵² In the middle of the twentieth century, when the Court decided *Milivojevich*, such balancing was a hallmark of decision under the Free Exercise Clause.¹⁵³ In Free Exercise Clause cases in that era, the Court

144 426 U.S. at 704.

145 *Id.*

146 *Id.* at 705.

147 *Id.* at 706–07.

148 *Id.* at 708; *Serbian E. Orthodox Diocese for the U.S. of Am. & Can. v. Milivojevich*, 328 N.E.2d 268, 284 (Ill. 1975).

149 *Milivojevich*, 426 U.S. at 720.

150 *Id.* at 724–25. In *Jones v. Wolf*, 443 U.S. 595 (1979), which involved a dispute between competing factions over church property, the Court clarified that state and federal courts are not always bound to defer to the hierarchy of a particular denomination in resolving a dispute within a religious body. Instead, the Court held that "a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute," *id.* at 604, which the Court defined as "objective, well-established concepts of trust and property law familiar to lawyers and judges," *id.* at 603. But the Court also imposed an important limit on the use of "neutral principles" to resolve intrachurch disputes: "If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." *Id.* at 604; *see also id.* at 602 ("As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.").

151 *See, e.g., Milivojevich*, 426 U.S. at 698, 709–10; *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 100 n.5 (1952); *see also United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969).

152 *See Lupu & Tuttle, supra* note 2, at 1276–77.

153 *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (determining "whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right" under the Free Exercise Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) ("The freedom to act [under the Free Exercise Clause] must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the

measured interference with religious liberty against the state's interest in regulating the matter in question.¹⁵⁴ But the Court made clear in *Milivojevic* and other cases that the prohibition on adjudication of religious questions is categorical and not contingent on the relative strength of the government's reason for intervention.¹⁵⁵ In Establishment Clause cases, by contrast, the Court never considers whether an alleged violation of the Clause is outweighed by some governmental interest advanced by the challenged action. Instead, the Court simply asks whether the challenged action is one subject to categorical prohibition.

For example, the Court's cases addressing prayer or religious exercises in public schools do not consider the state's interest in fostering such piety.¹⁵⁶ The mere fact of state-sponsored religious indoctrination renders such conduct impermissible. Similarly, state funding of worship or religious indoctrination—such as the purchase of Bibles for distribution to Christian congregations—would violate the Establishment Clause regardless of the state's purported interest in promoting morality in the citizenry through Bible study.¹⁵⁷ The same is true when the government displays quintessentially religious symbols with the purpose of promoting religion.¹⁵⁸

Second, the cases cited in *Hosanna-Tabor* focused narrowly on the religious character of the questions presented to the lower courts. In those decisions, the Supreme Court held that governmental bodies, including courts, lack the competence to resolve strictly and purely ecclesiastical questions.¹⁵⁹ Although

protected freedom."); *id.* at 307 (noting that the "State of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders" and inquiring "whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact").

154 See *Sherbert*, 374 U.S. at 406.

155 See *Milivojevic*, 426 U.S. at 713 ("[T]his is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them."); see also *Blue Hull*, 393 U.S. at 449 ("[T]he First Amendment enjoins the employment of organs of government for essentially religious purposes ...").

156 See, e.g., *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (agreeing with the petitioners' argument that "the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State" because "the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government").

157 See *Mitchell v. Helms*, 530 U.S. 793, 822 (1999) (plurality opinion) (recognizing the Establishment Clause's "prohibition against the government providing impermissible content"); *Lemon v. Kurtzman*, 403 U.S. 602, 602–03 (1971) (holding that laws that provided direct public funds for religious education violated the Establishment Clause).

158 See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.").

159 See, e.g., *Milivojevic*, 426 U.S. 698; *Blue Hull*, 393 U.S. at 445–49; *Kedroff v. Saint Nicholas*

the indirect consequence of this approach is a zone of freedom for churches in their decision-making, the Court's primary focus was on the secular character of civil government and its lack of authority and capacity to resolve quintessentially religious disputes. The assertion of such jurisdiction had been a hallmark of many colonial courts in the pre-Revolutionary era and particularly in states with established churches.¹⁶⁰ But this relationship between religious organizations and the state has been soundly rejected by courts and other institutions of civil government since the founding era.

As noted above, the *Hosanna-Tabor* Court relied squarely on the line of cases starting with *Watson* in concluding that the ministerial exception exists.¹⁶¹ Those cases stand for the proposition that certain questions are simply beyond the authority of secular civil government to decide. The ministerial exception should be understood and applied in light of that proposition. In other words, the exception does not recognize a broad autonomy for religious institutions; instead, it reflects only a specific limitation on the power of government to resolve certain ecclesiastical matters. In this sense, the limitation is primarily imposed by the Establishment Clause, even if it also promotes interests within the scope of the Free Exercise Clause.¹⁶²

As we explained above, Justice Alito's opinion in *Our Lady of Guadalupe* hinted at an alternative source for the ministerial exception, and his statement regarding the denial of certiorari in *Gordon College* brings that source to the forefront.¹⁶³ The question of the proper source for the ministerial exception is not merely academic. The argument based on ecclesiastical deference, reflected in the case law from *Watson* to *Milivojevich*, focuses on the limited competence of civil courts to decide "quintessentially religious questions."¹⁶⁴ The argument based on church autonomy, in contrast, draws primarily from the Free Exercise Clause and focuses on the interest of religious organizations in controlling their own institutions and personnel, free from government regulation.

On the Establishment Clause view, the ministerial exception flows from the courts' lack of capacity to decide religious questions. The contours of the exception, then, should reflect this core justification for the doctrine. At a minimum, courts have the capacity to determine what constitutes "religion" for purposes of interpreting the Establishment Clause.¹⁶⁵

Cathedral of the Russian Orthodox Church in N. Am., 344 U.S. 94, 95 (1952); accord *Kreshik v. Saint Nicholas Cathedral of the Russian Orthodox Church of N. Am.*, 363 U.S. 190, 190–91 (1960) (per curiam); *Gonzalez v. Roman Cath. Archbishop of Manila*, 280 U.S. 1, 17–19 (1929).

160 See JAMES H. HUTSON, *CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES* 52 (2008).

161 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n v. EEOC*, 565 U.S. at 185–87 (citing and discussing *Watson*, *Kedroff*, and *Milivojevich*).

162 Some scholars have argued that the creation of a ministerial exception is misguided. See, e.g., Corbin, *supra* note 2.

163 See *supra* notes 114–20 and accompanying text.

164 *Milivojevich*, 426 U.S. at 720.

165 Civil courts retain the power and responsibility to decide the threshold question whether adjudication of a particular question falls outside their competence. For example, a civil court could

We believe that the Establishment Clause provides the proper grounding for the ministerial exception. We believe further that civil courts applying the exception should make the threshold determination of who is a minister for purposes of the exception. We reach this conclusion by starting from a basic premise: the First Amendment limits government authority to make laws “respecting an establishment of religion,”¹⁶⁶ and civil courts must have jurisdiction to determine what constitutes such an establishment. In other words, civil courts must determine the meaning of “religion” for Establishment Clause purposes. Courts exercise this responsibility in every Establishment Clause case. For example, to conclude that a speech at a high school graduation impermissibly promotes religion, the court must first decide that the speech was fundamentally religious in nature.¹⁶⁷

Similarly, in a case that involves a ministerial exception defense to claims by an employee of a religious organization, the court must decide whether the employee falls within the definition of minister. That definition, in turn, depends on the court’s determination that the employee’s role is one that has sufficient hallmarks of those things that are religious for Establishment Clause purposes. Just as school-sponsored prayer in a public school implicates the Clause because courts recognize that prayer is a quintessentially religious activity, an employee who leads others in prayer and indoctrinates others in the faith engages in religious activity and would properly fall within the ministerial exception. Crucially, however, the court, and not the religious employer, must determine that the employee’s role is sufficiently religious to bring her within the scope of the exception.¹⁶⁸

The centrality of the Establishment Clause in ministerial exception cases rests on an even more fundamental principle of jurisprudence: the right to equal treatment under the law. It is uncontroversial to assert that courts should treat similarly situated parties the same. In some cases, however, the Establishment Clause requires departure from this principle. Ordinarily, an employee who has experienced an adverse employment decision can seek redress under antidiscrimination law or other civil employment protections. When an employee of a religious organization makes such a claim, the default assumption is that the employee enjoys the same rights as any other employee.

not decide which of two factions of a divided church was more faithful to the historical confession of the church. See *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969); *Shannon v. Frost*, 42 Ky. 253 (Ct. of App. 1842). But the decision to abstain follows an initial determination that the matter in question is a quintessentially religious one. *Blue Hull*, *supra* at 445 (noting that case involved controversy “over religious doctrine and practice”). The Establishment Clause, like other provisions of the Constitution, operates against a background assumption that courts must adjudicate controversies properly brought before them.

166 U.S. CONST., amend. I (“Congress shall make no law respecting an establishment of religion ...”).

167 See, e.g., *Lee v. Weisman*, 505 U.S. 577, 586 (1992) (stating that the challenged practice of including benediction at graduation involved “the performance of a formal religious exercise”).

168 See *Lupu & Tuttle*, *supra* note 2, at 1278 (“This question of role is functional, not ecclesiastical. Were the question of ministerial status ecclesiastical, employers would be free to answer it unilaterally, in a wholly self-interested way.”); *id.* (defending the “[r]etention of judicial control over the factual predicates of the ministerial exception”).

Courts should depart from this norm only when the Establishment Clause¹⁶⁹ requires them to do so. As we explained above, the Establishment Clause prohibits courts from resolving strictly religious questions, including the fitness of a particular person to serve in a role that includes religious functions. Once again, the court must evaluate the role to determine whether it includes such religious functions. If a court instead permits the religious employer to determine who is a minister within the meaning of the exception, then the court will have allowed the employer to become the judge in its own case.¹⁷⁰ At a minimum, courts have a responsibility to determine when departure from the norm of equal treatment is warranted.

Grounding the ministerial exception in the Establishment Clause has three principal doctrinal implications. First, as we have noted, courts, and not religious employers, must determine which employees are ministers for purposes of the exception. Second, to determine whether an employee is a minister, courts must define those functions that constitute quintessentially religious activity—principally, leading worship and providing instruction in the tenets of the faith—within the meaning of the Establishment Clause. Third, because courts, and not religious employers, will make the threshold determination, the ministerial exception will less frequently conflict with the norm of equal treatment.

The view that Justice Alito advanced in his statement in the Gordon College case, in contrast, treats the ministerial exception primarily as a corollary of the Free Exercise Clause. The Free Exercise Clause protects the liberty of individuals and institutions to engage in religious activity.¹⁷¹ On Justice Alito’s view, those individuals and institutions effectively have the power to define what constitutes “religious activity” within their understanding of their faith.

Justice Alito’s view derives from the Court’s decision in *Thomas v. Review Board*.¹⁷² In *Thomas*, the plaintiff, a Jehovah’s Witness, sought unemployment benefits after leaving his job at a foundry that made parts for military equipment.¹⁷³ Relying on *Sherbert v. Verner*, he claimed an entitlement to benefits because he could not

169 Statutory provisions might also require departure from the norm of equal treatment. For example, Title VII permits religious entities to make employment decisions based on religion, notwithstanding the statute’s general prohibition on such discrimination. See 42 U.S.C. § 2000e-1 (2012) (“This subchapter [Title VII] shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”).

170 The Federalist Papers No. 10 (James Madison) (“No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”); see also *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 890 (1990) (rejecting a rule that permits exceptions from neutral and generally applicable laws due to sincere religious objections because under such an approach “each conscience is a law unto itself”).

171 *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (“[T]he right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions ...”).

172 450 U.S. 707 (1981).

173 *Id.* at 709–10. Thomas had previously worked in a different department, but when his employer closed the department, Thomas was transferred to a department that made armaments. *Id.*

continue, consistent with his religious conscience, to perform his job.¹⁷⁴ The benefits hearing officer allowed the introduction of evidence that another member of his faith community did not believe that the work was “unscriptural.”¹⁷⁵ The Indiana Supreme Court, relying on this evidence, concluded that Thomas lacked a religious basis for his claim, reasoning that he was motivated instead by a “personal philosophical choice.”¹⁷⁶ The U.S. Supreme Court reversed, holding that the government may not second-guess a person’s sincere assertion about a matter of religious conviction.¹⁷⁷ The Court explained,

[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.... [I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion.... [J]udicial review is confined to the facts as found and conclusions drawn.¹⁷⁸

After the Court’s decision in *Employment Division v. Smith*,¹⁷⁹ there were far fewer opportunities for religious claimants to seek exemptions from neutral and generally applicable laws.¹⁸⁰ Indeed, the Court did not again address the sincerity and substantiality of a religious claim until *Burwell v. Hobby Lobby Stores, Inc.*,¹⁸¹ which involved a commercial entity’s claim under the Religious Freedom Restoration Act (RFRA) that the Department of Health and Human Services had imposed a substantial burden on its religious exercise. The respondent asserted that the requirement that it provide insurance coverage for contraception to its employees conflicted with its faith.¹⁸² The Court, in an opinion by Justice Alito, held that the requirement imposed a substantial burden in violation of RFRA.¹⁸³ The Court relied on *Thomas*, reasoning that “it is not for us to say that [the respondent’s] religious

174 *Id.* at 710–11.

175 *Id.* at 711.

176 *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 391 N.E.2d 1127, 1130 (Ind. 1979); *see Thomas*, 450 U.S. at 713–15.

177 *Thomas*, 450 U.S. at 716.

178 *Id.* at 715–16; *cf. Wis. v. Yoder*, 406 U.S. 205 (1972) (concluding that “to have the protection of the Religion Clauses, the claims must be rooted in religious belief”).

179 494 U.S. 872 (1990).

180 In response to *Smith*, Congress enacted the Religious Freedom Restoration Act in 1993 to require strict scrutiny for government actions that impose a substantial burden on religious exercise. Pub. L. No. 103-141, codified at 42 U.S.C. § 2000bb *et seq.* (1993); *see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

181 573 U.S. 682 (2014).

182 *Id.* at 701–04.

183 *Id.* at 736.

beliefs are mistaken or insubstantial.”¹⁸⁴ Although *Hobby Lobby* involved a claim under RFRA, Justice Alito has made clear his view that the same standard should apply to claims for exemptions under the Free Exercise Clause.¹⁸⁵

This view of the Free Exercise Clause prioritizes the right of individuals and organizations to determine for themselves what counts as religious activity that deserves legal protection.¹⁸⁶ If the ministerial exception derives from this view of the Free Exercise Clause, then religious employers, and not courts, have authority to determine what counts as religious activity within their faith tradition. It follows that the religious employer also determines who functions as a ministerial employee responsible for providing or leading such religious activity.

In our view, Justice Alito overreads the Court’s decision in *Thomas*. The Court in *Thomas* focused on the competence of civil courts to adjudicate disputed tenets of the faith as between members of that faith tradition.¹⁸⁷ The Court’s decision, however, did not deprive courts of the power or obligation to determine whether the plaintiff is actually claiming that the duty or prohibition in question imposes a substantial burden on sincere religious exercise.¹⁸⁸ In order to resolve that question, courts must determine what constitutes religious exercise within the meaning of the First Amendment.

184 *Id.* at 707 (stating that “our ‘narrow function ... in this context is to determine’ whether the line drawn reflects ‘an honest conviction ...’ ” (quoting *Thomas*, 450 U.S. at 716)).

185 See *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1924 (2021) (Alito, J., concurring in the judgment). Justice Alito argued in *Fulton* that the Court should have overruled *Smith*, *id.* at 1894–1924, and adopted the model of Free Exercise analysis that he applied in *Hobby Lobby*, *id.* at 1924 (urging Court to adopt a rule under the Free Exercise that provides that a “law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest”).

186 See *id.* at 1884 (“The city of Philadelphia [has] issued an ultimatum to an arm of the Catholic Church: Either engage in conduct that the Church views as contrary to the traditional Christian understanding of marriage or abandon a mission that dates back to the earliest days of the Church—providing for the care of orphaned and abandoned children” (emphasis added)); see also Helen M. Alvare, *Church Autonomy After Our Lady of Guadalupe School: Too Broad? Or Broad as It Needs to Be?*, 25 TEX. REV. L. & POL’Y 319 (2021); Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U. L. REV. 1701 (2020); Richard W. Garnett, “The Freedom of the Church”: (Towards) an Exposition, Translation, and Defense, 21 J. CONTEMP. LEGAL ISSUES 33 (2013); Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009); Douglas Laycock, “The Things That Are Not Caesar’s: Religious Organizations as a Check on the Authoritarian Pretensions of the State”: Church Autonomy Revisited, 7 GEO. J.L. & PUB. POL’Y 253 (2009); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981). But see Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 B.Y.U. L. REV. 1099, 1112 (“Church autonomy is not and should not be a doctrine recognized in the United States.”).

187 To be sure, the Court’s decision in *Thomas* went beyond its prior (and subsequent) cases involving the denial of unemployment benefits. In the other cases, the claimants suffered adverse employment consequences because of their commitment to observe the Sabbath. Observance of the Sabbath fits squarely within any manageable definition of religious “exercise.” See, e.g., *Frazee v. Ill. Dep’t of Emp. Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136 (1987); *Sherbert v. Verner*, 374 U.S. 398 (1963); cf. *Emp. Div. v. Smith*, 494 U.S. 872 (1990) (sacramental use of peyote). In *Thomas*, however, the plaintiff asserted a religiously motivated justification for his refusal to work in an armaments factory. 450 U.S. at 709–10. There is a difference between worship, on the one hand, and a set of moral beliefs inspired by religious faith, on the other.

188 See, e.g., Frederick M. Gedicks, “Substantial” Burdens: How Courts May (and Why They Must) Judge Burdens on Religion under RFRA, 85 GEO. WASH. L. REV. 94 (2015).

For example, imagine that an employee at a large manufacturer refuses an assignment to the firearms division at the company. After he is terminated, he seeks unemployment benefits. He asserts that he is an atheist and that, as a matter of moral conviction, he cannot be complicit in the production of weapons. A court can properly determine that his claim does not fall within the Constitution's definition of religion.¹⁸⁹ In contrast, imagine that a different employee is fired after refusing to work on Sunday, which is her faith's day of rest. A court can properly determine that her claim involves religious exercise and that the denial of unemployment benefits substantially burdens that exercise.

In other words, there is a fundamental difference between a court's deciding disputed theological questions, on the one hand, and determining whether a case involves religious exercise, or a substantial burden on such exercise, on the other. Thomas prohibits courts from engaging in the former, but not the latter. In Justice Alito's view, however, Thomas effectively disables courts from questioning (1) whether a claim is religious, (2) whether the claim involves religious exercise, and (3) whether the claim imposes a substantial burden.

To be sure, Justice Alito's view does not appear to be the most employer-favoring view on the Court. Justice Thomas would require courts to "defer to a religious organization's good-faith understanding of who qualifies as its minister."¹⁹⁰ Justice Alito appears to contemplate some greater degree of judicial scrutiny of employer claims that a position is ministerial. Just how much, however, is unclear. In *Hosanna-Tabor*, Justice Alito's concurring opinion focused on the function performed by the employee but concluded by emphasizing that the religious function must be viewed from the employer's perspective.¹⁹¹ In his statement in the Gordon College case, he shifted his focus even more towards the employer's perspective. He summarized the basis of the ministerial exception by stressing the "the 'autonomy' of 'churches and other religious institutions' in the selection of the employees who 'play certain key roles.'"¹⁹²

The practical consequences of Justice Alito's approach to the ministerial exception are significant. First, following *Thomas v. Review Board*, Justice Alito's approach will accord substantial deference to religious employers' assertions of

189 See *Wis. v. Yoder*, 406 U.S. 205, 215–16 (1972) ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.").

190 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n v. EEOC*, 565 U.S. 171, 196 (2012)(Thomas, J., concurring).

191 *Hosanna-Tabor*, 565 U.S. at 205 (Alito, J., concurring) ("What matters in the present case is that Hosanna-Tabor believes that the religious function that respondent performed made it essential that she abide by the doctrine of internal dispute resolution; and the civil courts are in no position to second-guess that assessment.").

192 *Gordon College v. DeWeese-Boyd*, 142 S. Ct. 952, 954 (2022) (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020)).

what constitutes “religious activity” within their faith tradition.¹⁹³ This is at the heart of Justice Alito’s statement in the Gordon College case. He chided the Massachusetts SJC for advancing a “troubling and narrow view of religious education” that ignored the College’s own understanding of what religious education entails.¹⁹⁴ Justice Alito explained,

*What many faiths conceive of as ‘religious education’ includes much more than instruction in explicitly religious doctrine or theology.... [R]eligious education at Gordon College does not end as soon as a student passes [required courses in Bible, theology, and worship] and leaves the chapel. Instead, the college asks each member of the faculty to ‘integrate’ faith and learning, i.e., ‘to help students make connections between course content, Christian thought and principles, and personal faith and practice.’*¹⁹⁵

The first sentence of this assertion is telling. Justice Alito implied that the proper judicial inquiry should focus on the employer’s perception of what constitutes “religious activity,” not on some objective account of that category.

Second, by deferring to religious employers’ understanding of religious activity, Justice Alito’s approach necessarily leaves to religious employers the presumptive power to decide who counts as a minister. As Justice Alito stated in *Our Lady of Guadalupe*,

*In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution’s explanation of the role of such employees in the life of the religion in question is important.*¹⁹⁶

Religious organizations have considerable incentives to classify employees as ministers, because the ministerial exception functions to protect the organizations from liability for many workplace claims. It is therefore reasonable to expect employers to advance a capacious understanding of who functions as a minister.

For example, Gordon College argued not only that “the integrative function applies to all teachers at the college, whether they teach computer science, calculus, or comparative religion,” but also that it applies “to all its employees, as integrating the Christian faith into daily life and work is part of the college’s mission for everyone in the community, whether they be coaches, food service workers, or transportation providers.”¹⁹⁷ In other words, Gordon College effectively defined its entire workforce as ministers. Under Justice Alito’s approach, such understandings would be presumptively determinative.

193 See *supra* notes 169–84 and accompanying text.

194 *Gordon College*, 142 S. Ct. at 954.

195 *Id.* at 954–55 (emphasis added).

196 *Our Lady of Guadalupe*, 140 S. Ct. at 2066 (emphasis added).

197 *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1017 (Mass. 2021).

Indeed, a Free Exercise–based ministerial exception, in conjunction with a different strain of Establishment Clause doctrine, might make it impossible in practice not to defer to religious employers' definitions of religious activity and ministerial employees. Under Justice Alito's approach, a teacher at a religious school can be a minister solely because she is required to integrate the faith into her teaching. Courts that follow Justice Alito's approach and seek to determine whether teachers actually infuse the faith into their courses might face a different constitutional problem. Such scrutiny inevitably raises concerns about the state's impermissible entanglement with religion.

Entanglement concerns were the basis for the Court's decision in *Lemon v. Kurtzman*,¹⁹⁸ and more recently appeared in Judge McConnell's opinion for the Tenth Circuit in *Colorado Christian University v. Weaver*.¹⁹⁹ In *Colorado Christian University*, the court invalidated a state's exclusion of students attending "pervasively secular" colleges and universities from eligibility for certain state scholarship funds. The court found especially objectionable the prospect of state officials examining the syllabi of courses to determine the extent to which religion is infused into the instruction.²⁰⁰

At first blush, such limits on state and judicial scrutiny seem inconsistent with an approach to the ministerial exception, such as the SJC's in the Gordon College case, that requires courts to conduct a close inquiry of the religious nature of an employee's duties. We believe, however, that the entanglement concern does not undermine the SJC's approach, and in fact reinforces our understanding of the ministerial exception grounded firmly in the Establishment Clause. Under the SJC's approach, a teacher is a minister within the exception if she performs specifically religious activities such as instruction in religious doctrine or scripture. Determining whether a teacher performs such functions is not likely to require excessive entanglement for the same reason that determining that a public high school graduation speech, steeped in explicitly religious language and offered by a minister, does not lead to excessive entanglement.

Consider how a court would address the ministerial exception in practice. Courts generally resolve disputes over an employee's status under the ministerial exception at the summary judgment stage.²⁰¹ To support a motion for summary judgment, the school could seek to demonstrate that the teacher taught quintessentially religious content; in the SJC's view, there would be no need to demonstrate a link between a "religious worldview" and the otherwise secular subject matter of a course, because an obligation to integrate the faith into teaching is not sufficient to qualify the

198 403 U.S. 602, 613–14, 619 (1971) (invalidating state program that provided funding to religious schools because a "comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected," which "will involve excessive and enduring entanglement between state and church").

199 534 F.3d 1245, 1261–62 (10th Cir. 2008) (holding that denial of scholarship funds to students attending "pervasively religious" institutions violates the Religion Clauses).

200 *Id.* at 1261–63, 1266 (concluding that administrative scrutiny of course content involves "excessive entanglement and intrusion" into the religious beliefs and practices of the religious institutions).

201 See Smith & Tuttle, *supra* note 2, at 1874–76.

employee as a minister.²⁰² A judicial determination that a teacher’s responsibilities are quintessentially religious does not require the kind of intrusive inquiry at issue in *Lemon* or *Colorado Christian University*. The faculty member can testify about her duties and what expectations the school communicated to her about religious instruction. And the school can then show the specifically religious doctrines that it expects teachers to communicate. A court could then determine whether the teacher is actually expected to perform religious functions, such as worship or instruction in religious doctrine, without deciding whether religion “infuses” the curriculum.

Under Justice Alito’s approach, however, courts would have to determine whether religion or tenets of the faith are genuinely integrated into the curriculum. Because Justice Alito has a much more capacious understanding of “religion,” regulators’ inspection of course syllabi and materials would necessarily be more expansive and thus intrusive. To avoid the form of entanglement that courts have rightly eschewed, courts would have to give even more deference to the religious institution’s assertions about what constitutes religion and the employee’s status—to adopt, that is, Justice Thomas’s view, which would effectively leave religious organizations outside of the ordinary operation of employment law.

Third, because of this judicial deference both to what constitutes religious activity and to who counts as a minister, Justice Alito’s approach may have implications for a wide range of employers. *Hosanna-Tabor* and *Our Lady of Guadalupe* make clear that this deference applies to determinations by religious primary schools.²⁰³ This deference would extend to religious secondary schools.²⁰⁴ Justice Alito’s stern warning in his statement in the Gordon College case suggests that the same deference will apply in the context of religious higher education.

There is no reason in principle to believe, moreover, that this deference is limited to the context of religious schools. Religious social welfare organizations have many employees who work generally to advance their employers’ mission. For example, a nurse at a religiously affiliated hospital might be expected to integrate the teachings of the faith into the provision of care. A case worker for homeless families at a faith-based social services office might be instructed to infuse religious values into every aspect of the work with those families. A counselor at

202 See, e.g., *Palmer v. Liberty Univ.*, 2021 U.S. Dist. LEXIS 248963 (W.D. Va. 2021). In *Palmer*, a teacher at a religious college filed suit after she was terminated, alleging age discrimination. The university invoked the ministerial exception, but the judge denied the university’s motion for summary judgment on those grounds. The court granted the former teacher’s cross-motion for summary judgment, holding that she was not a minister for purposes of the exception. Although the university argued that all faculty had an obligation to “integrate a Christian worldview in their respective disciplines,” the court found that the professor had no duty to teach explicitly religious content and that she never included such content in her classes. *Id.* at *16–20.

203 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm’n v. EEOC*, 565 U.S. 171, 177–78 (2012) (applying ministerial exception to teacher at religious K-8 school); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055–59 (2020) (applying ministerial exception to claims by teachers at religious elementary schools).

204 See *Our Lady of Guadalupe*, 140 S. Ct. at 2064 (“Religious education is vital to many faiths practiced in the United States.”); *id.* at 2066 (noting that “[e]ducating and forming students in the Catholic faith lay at the core of the mission of the schools where [the plaintiffs] taught”).

a drug treatment program might be obligated to invoke a specific higher power in carrying out the client's treatment plan. In each of these examples, the employee has a general obligation to integrate faith into the day-to-day performance of the job. Given Justice Alito's focus on the religious employer's autonomy—and corresponding power to decide both what constitutes religious activity and who acts as a minister—we see no obvious principled basis to afford these employers less deference than the doctrine gives to religious schools.

If we are correct that Justice Alito's approach would apply equally in the context of religious social welfare organizations, then the ministerial exception to employer liability begins to swallow the rule. More than one million people work for religious or religiously affiliated social welfare organizations.²⁰⁵ This is a substantial number of potential "ministers" who would lose the protection of antidiscrimination and other basic employment laws.

In addition, Justice Alito's approach might extend to for-profit commercial entities that claim a religious identity. In *Hobby Lobby*, for example, a closely held corporation asserted rights to protection of its religious liberty under RFRA.²⁰⁶ Justice Alito's opinion for the Court concluded that this corporation enjoyed the same right to religious liberty as any individual, and he explicitly tied these rights to those arising under the Free Exercise Clause.²⁰⁷ If these entities count as religious employers, then they might have the power to designate at least some of their employees as ministers.²⁰⁸ To be sure, it is difficult to perceive what religious activity an employee at a hobby store performs.²⁰⁹ But under Justice Alito's approach, the employer has substantial room to define what counts as religious activity and who serves as a minister performing that activity.

In sharp contrast to Justice Alito's vision, courts originally created the ministerial exception as a prophylaxis, designed to ensure that courts did not decide fundamentally religious questions.²¹⁰ It is uncontroversial that a religious

205 Reliable estimates are scarce, but Catholic hospitals alone employ more than 700,000 workers. See Catholic Health Association of the United States, U.S. Catholic Health Care, <https://www.chausa.org/docs/default-source/default-document-library/the-strategic-profile.pdf> (last visited July 5, 2022).

206 573 U.S. 682, 702–03 (2014); see *id.* at 703 (noting that "Hobby Lobby's statement of purpose commits the [family that owns the company] to '[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles'").

207 *Id.* at 707 ("[P]rotecting the free-exercise rights of corporations protects the religious liberty of the humans who own and control those companies.").

208 See Ira C. Lupu & Robert W. Tuttle, *Religious Exemptions and the Limited Relevance of Corporate Identity*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 373 (Chad Flanders, Zoe Robinson, & Micah Schwartzman eds., 2016).

209 *Id.* at 375 (noting that the "distinctive religious character of these organizations is frequently quite thin").

210 In *McClure v. Salvation Army*, the first case to recognize a ministerial exception to claims under Title VII, the court explained,

Matters touching [the] relationship [between a religious organization and its ministers] must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions

organization may terminate a minister who deviates in her sermons from the doctrines of the faith; it is equally uncontroversial that a court cannot adjudicate such a dispute, because a civil court cannot decide what is orthodox within that (or any) faith tradition.²¹¹ But no judicially created exception would be necessary in such a case today, because the principal statutory protections for employees include an explicit exemption for religious organizations from the prohibitions on religion-based discrimination.²¹²

Courts devised the ministerial exception to address cases that involved claims other than facially apparent religion-based discrimination. Employment claims that assert other types of discrimination are outside of the reach of the religious exemption in antidiscrimination statutes. Imagine, for example, that a female minister is terminated from her position. The minister sues, asserting a claim of sex discrimination under Title VII or comparable state-law protections. The employer responds by asserting a nondiscriminatory justification for the adverse decision.²¹³ The plaintiff responds by asserting that the employer's justification is pretextual.

Adjudication of whether the defense is pretextual risks serious entanglement with religious decisions. This is obvious if the employer's justification is based on the minister's poor sermons or deficient pastoral care. But the ministerial exception is prophylactic in that it applies even if the employer's justification does not on its face question the employee's performance of a religious task. Even in such cases, there is a substantial risk that adjudication of whether the employer's defense is pretextual will require the court to decide whether religious tasks have been properly performed.²¹⁴

In other words, the courts that originally recognized the ministerial exception assumed that the performance of certain jobs is so essential to the faith that an ecclesiastical question would be highly likely to arise in litigation over the employee's performance. This is why those courts, including the U.S. Supreme Court in *Hosanna-Tabor*, anchored the ministerial exception in decisions that addressed judicial competence to resolve certain intrafaith disputes.²¹⁵ As we explained above,

which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.

460 F.2d 553, 559 (5th Cir. 1972).

211 See, e.g., *Leavy v. Congregation Beth Shalom*, 490 F. Supp. 2d 1011 (N.D. Iowa 2007); *McDonnell v. Episcopal Diocese of Ga.*, 381 S.E.2d 126 (Ga. 1989); *Marsh v. Johnson*, 82 S.W.2d 345 (Ky. 1935).

212 See, e.g., 42 U.S.C. § 2000e-1 (2012); D.C. CODE § 2-1402.11 (2017); MD CODE ANN., STATE GOV'T § 20-606 (West 2017).

213 This is what happened in the Gordon College case. See *DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1002–03, 1017–08 (Mass. 2021). (noting that the President and Provost asserted that the nonconcurrency decision was based on poor job performance rather than disagreement about theological matters).

214 *Butler v. St. Stanislaus Kostka Cath. Acad.*, 2022 U.S. Dist. Lexis 113040 (E.D.N.Y. 2022), at *35–41.

215 See *McClure*, 460 F.2d at 559–60 (citing *Watson*, *Gonzalez*, *Kedroff*, and *Blue Hull*); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n v. EEOC*, 565 U.S. 171, 185–97 (2012)(citing *Watson*, *Kedroff*, and *Milivojevich*).

the Court has long held that civil courts lack authority to adjudicate such disputes because civil authority does not reach into quintessentially religious matters.²¹⁶

These limits on judicial authority exist even when the parties willingly submit their dispute for resolution by a civil court. Although the ministerial exception is an affirmative defense,²¹⁷ the religious organization is not free to waive the limit on the court's competence.²¹⁸ For example, in *Equal Employment Opportunity Commission v. Catholic University of America*, the plaintiff claimed that she had been denied tenure because of her sex.²¹⁹ The university did not assert the ministerial exception in its defense; instead, it argued, among other things, that the plaintiff's scholarship lacked the quality required by the school's tenure standards.²²⁰ The court invoked the ministerial exception *sua sponte* to avoid judging the quality of the plaintiff's Roman Catholic canon law scholarship.²²¹

EEOC v. Catholic University underscores the root of the ministerial exception in the Establishment Clause. If the exception arose from the Free Exercise Clause and its protection for church autonomy, then the religious employer would be free to waive it.²²² Because the exception exists to limit the scope of judicial authority, the parties do not have ultimate control over its application.

Despite Justice Alito's strong signals to the contrary, we continue to believe that the ministerial exception is best understood as a prophylaxis that guards the limits on civil court competence. On our account, the scope of the exception should be carefully circumscribed to advance that prophylactic function. The ministerial exception is not a generative norm that creates new powers for religious institutions. It simply ensures that courts will abstain from decisions that are closely bound up with quintessentially religious questions. The definition and

216 See *supra* notes 130–60 and accompanying text.

217 See *Hosanna-Tabor*, 565 U.S. at 195 n.4 (“We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.”); see generally Smith & Tuttle, *supra* note 2, at 1864–72.

218 See *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015) (holding that ministerial exception is not waivable); cf. Michael J. West, *Note: Waiving the Ministerial Exception*, 103 VA. L. REV. 1861 (2017) (arguing that ministerial exception can be waived but that parties cannot confer on civil courts jurisdiction to decide religious questions); but see Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891, 1901, 1921–23 (2013) (arguing that a religious organization can waive a ministerial exception defense).

219 83 F.3d 455, 457 (D.C. Cir. 1996).

220 *Id.* at 459.

221 *Id.* at 460.

222 Similarly, religious organizations may invoke the ministerial exception even when their own explicit policies prohibit the type of discrimination claimed by the plaintiff. For example, imagine that a religious organization's rules prohibit sex-based discrimination in all employment decisions. The plaintiff, a female ministerial employee, sues, asserting that she was terminated because of her sex. Even if the church's own investigation determined that the plaintiff was terminated because of her sex, the ministerial exception would still bar her claim. If the ministerial exception derived from the Free Exercise Clause's protection for church autonomy, then the church arguably would be estopped from raising the exception in such a case. *But cf.* Corbin, *supra* note 2, at 960–64 (arguing that the court could have adjudicated Perich's retaliation and reinstatement claims without deciding ecclesiastical questions).

recognition of such questions belongs to civil courts in light of broader theories about the government's secular character. It cannot be left to the subjective beliefs of religious organizations.

IV. Further Implications of the Broad Ministerial Exception

The dispute in *Gordon College* involves only the relationship between the religious employer and its employees. A broad ministerial exception in the form contemplated by Justice Alito, however, is likely to have implications for the relationship between religious institutions and the government, as well. Specifically, it is plausible to argue that the theoretical underpinnings of a broad ministerial exception, grounded in church autonomy, require the government to exempt religious organizations from certain conditions on the receipt of public funds.

Imagine, for example, that some rural school districts in Oregon do not have a public secondary school. The state permits those school districts to contract with a nonpublic school to provide students with access to a high school education. Under state law, schools that enter contracts with a district to provide such opportunities must agree not to discriminate in hiring on the basis of race, sex, or sexual orientation.²²³ Imagine further that the state denies a religious school's contract bid because the school refused to sign a pledge to refrain from discrimination on the basis of sexual orientation. May the state exclude the school from participation in the program?²²⁴

The answer is surprisingly complicated. In *Carson as Next Friend of O.C. v. Makin*,²²⁵ the Supreme Court held that Maine could not exclude religious schools from a closely related program for rural school districts. In that program, the state gave parents in such districts a choice among public schools in adjacent districts and private schools.²²⁶ The statute, however, required eligible private schools to be "nonsectarian."²²⁷ The Supreme Court held that the exclusion of nonsectarian schools impermissibly denied parents and religious schools equal access to public funds, in violation of the Free Exercise Clause.²²⁸

There are two notable differences between our example and the program at issue in *Carson*. First, the program in *Carson* did not involve direct funding,²²⁹ whereas

223 We focus here on conditions that prohibit discrimination in the hiring of school employees, not on the admission of students. Because students obviously are not employees of the schools, the schools cannot rely on the protection of the ministerial exception to defend discriminatory admissions policies.

224 This example is based on Maine's statutory scheme for contracts for secondary education in rural districts. ME. REV. STAT. ANN. § 5204(3) (2022).

225 142 S. Ct. 1987 (2022).

226 ME. REV. STAT. ANN. § 5204(4) (2022) ("A school administrative unit that neither maintains a secondary school nor contracts for secondary school privileges ... shall pay the tuition ... at the public school or the approved private school of the parent's choice at which the student is accepted.").

227 *Id.* § 2951(2) (requiring that any school receiving tuition assistance payments must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution").

228 *Carson*, 142 S. Ct. at 2002.

229 In this context, "indirect" funding refers to public money that flows to an institution because

our example does. The Supreme Court's decision in *Carson*, however, appears to make the distinction between direct and indirect funding essentially irrelevant.²³⁰ Second, whereas the program in *Carson* expressly prohibited the use of state funds at sectarian schools, in our example the state's requirement does not explicitly exclude religious schools. The program accordingly does not "discriminate" on the basis of religious identity or character. Instead, some religious schools will claim that the nondiscrimination requirement will force them to choose between receiving government funds and adherence to their religious principles.²³¹

A core element of the decision in *Carson* and the line of decisions that it follows is that religious organizations should not be forced to make such a choice.²³² But the Court held in *Employment Division v. Smith*²³³ that the Free Exercise Clause does not require exemptions from neutral and generally applicable requirements for those with religious objections to compliance. In addition, the Court in *Fulton v. City of Philadelphia*²³⁴ specifically declined to overrule *Smith*,²³⁵ notwithstanding Justice Alito's extensive opinion concurring in the judgment, which urged the Court to

of the intervening choice of the program beneficiary, in this case the parents. "Direct" funding refers to the provision of government funds when the state selects the institution that will receive program funds. See Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 201, 221–27 (2005).

230 Although the Court noted that the public funds under the program flowed to religious schools because of the intervening choice of parents, *see* 142 S. Ct. at 1997–98 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002)), the Court also offered a more expansive reason why the program would not conflict with the Establishment Clause. The Court invoked a capacious understanding of "neutrality" as the determinative characteristic for both Establishment Clause and Free Exercise Clause analysis, reasoning that "there is nothing neutral about Maine's program. The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion." *Id.* at 1998. In addition, the Court suggested that there was no meaningful difference between the program at issue in *Carson*, which involved indirect funding, and the program at issue in *Trinity Lutheran*, which involved direct funding. *See id.* at 1996, 2000–02; *see also* Ira C. Lupu & Robert W. Tuttle, *Carson v. Makin and the Dwindling Twilight of the Establishment Clause*, AMERICAN CONSTITUTION SOCIETY EXPERT FORUM, <https://www.acslaw.org/expertforum/carson-v-makin-and-the-dwindling-twilight-of-the-establishment-clause/> (last visited July 5, 2022).

231 For discussions of religious objections to neutral conditions, see Douglas NeJaime & Reva Siegel, *Religious Accommodation, and Its Limits, in a Pluralist Society*, in RELIGIOUS FREEDOM AND LGBT RIGHTS: POSSIBILITIES AND CHALLENGES FOR FINDING COMMON GROUND (Robin Fretwell Wilson & William N. Eskridge, Jr. eds., 2018); *see generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

232 *See* *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (noting that although the church remained "free to continue operating as a church," it could enjoy that freedom only "at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center [was] otherwise fully qualified"); *Carson as Next Friend of O.C. v. Makin*, 142 S. Ct. 1987, 1997 (2022) ("By 'condition[ing] the availability of benefits' in that manner, Maine's tuition assistance program—like the program in *Trinity Lutheran*—'effectively penalizes the free exercise' of religion" (quoting *Trinity Lutheran*, 137 S. Ct. at 2021)).

233 494 U.S. 872 (1990).

234 141 S. Ct. 1868 (2021).

235 *Id.* at 1876–77 (stating that "we need not revisit [*Smith*] here" because "[t] his case falls outside *Smith*").

do so.²³⁶ The requirement in our example that participating schools refrain from discrimination based on sexual orientation is neutral and generally applicable.²³⁷

In other words, it is not clear under current Free Exercise doctrine whether the state would be compelled to fund a religious school that refuses to comply with the antidiscrimination requirement.²³⁸ For the purpose of this article, we will assume that the rule in *Smith* would apply. In practice, however, a broad ministerial exception might nonetheless require the state to include the religious school in its funding program.

Return to the example above. A religious school in Oregon requires teachers to integrate the faith into all aspects of its curriculum. The school applies to participate in the funding program for rural districts but asserts that its religious doctrine precludes it from employing gay and lesbian teachers. The school explains that, for the reasons suggested by Justice Alito in his Gordon College statement, its teachers are ministerial employees. Finally, the school argues that the state's eligibility requirement functions as a form of state control over its selection of ministers.

The school's basic contention is similar to a conventional Free Exercise claim: the state's condition impermissibly forces the school to choose between religious principle and access to public funds. But Justice Alito's version of the ministerial exception provides a different, and potentially stronger, basis for the school's objection.

Whereas the rule in *Smith* presents a significant obstacle to the school's Free Exercise claim for an exemption from the antidiscrimination requirement, the Court in *Hosanna-Tabor* expressly held that the ministerial exception applies notwithstanding the Court's decision in *Smith*.²³⁹ The Court reasoned that *Smith* "involved government regulation of only outward physical acts," whereas the teacher's claim in *Hosanna-Tabor* "concern[ed] government interference with an internal church decision that affects the faith and mission of the church itself."²⁴⁰ The Court therefore concluded that the "contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit."²⁴¹

236 *Id.* at 1883–1926 (Alito, J., concurring in the judgment) (urging the Court to overrule *Smith*).

237 "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877. "A law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions,' " *id.* (quoting *Smith*, 494 U.S. at 884), or if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," *Fulton*, 141 S. Ct. at 1877 (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542–46 (1993)).

238 *Cf. Fulton*, 141 S. Ct. at 1882 (holding that City violated religious organization's Free Exercise rights by excluding it from foster-care program because of the organization's refusal to comply with requirement that prohibited discrimination against families headed by same-sex couples).

239 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp. Opportunity Comm'n v. EEOC*, 565 U.S. 171, 190 (2012).

240 *Id.* Indeed, the Court in *Smith* specifically excluded from the reach of its decision cases involving government attempts to "lend its power to one or the other side in controversies over religious authority or dogma." *Smith*, 494 U.S. at 877.

241 *Id.*

Indeed, the school's claim to be exempt from the nondiscrimination condition in the contract proves more potent than even a pre-*Smith* assertion of a "substantial burden" on religious exercise. For the three decades before the Court's decision in *Smith*, courts purported to apply a test comparable to strict scrutiny to claims under the Free Exercise Clause for exemptions from neutral and generally applicable rules.²⁴² Under that approach (which the Court did not consistently follow), if the claimant could show a substantial burden on religious practice imposed by such a rule, then the state would be required to demonstrate that it had a compelling interest in denying the exemption.²⁴³

As noted above, the ministerial exception—because of its doctrinal roots in the Establishment Clause—does not permit courts to balance the state's interest in promoting equality norms in the workplace against the religious institution's interest in control over the selection of ministers.²⁴⁴ When a religious employer successfully demonstrates that an employee falls within the ministerial exception, the court can reject the employee's discrimination claim, no matter how strong on the merits—and no matter how important, as a matter of public policy, the antidiscrimination norm might be.²⁴⁵ Even though Justice Alito seeks to ground the ministerial exception in the Free Exercise Clause, there is no indication that he would abandon this Establishment-Clause-based aspect of the exception.²⁴⁶ Because all of the teachers at our hypothetical religious school fall within Justice Alito's understanding of the ministerial exception, the school would effectively be free of nondiscrimination obligations in its employment relations with them.

The question remains whether the state may exclude from participation in the program schools that refuse to comply with the antidiscrimination requirement. After all, if the state does not fund the school, the state will not interfere with the school's selection or retention of teachers.

242 See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963).

243 See *Sherbert*, 374 U.S. at 406–07 (inquiring whether "some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right" and concluding that desire to prevent the "filing of fraudulent claims by unscrupulous claimants feigning religious objections" was insufficient); *Wis. v. Yoder*, 406 U.S. 205 (1972) (concluding that state's interest in compulsory education did not justify refusal to exempt Amish families from requirement). In his separate opinion in *Fulton*, Justice Alito argued for a return to this approach under the Free Exercise Clause. See 141 S. Ct. at 1924 (Alito, J., concurring in the judgment) ("If *Smith* is overruled, what legal standard should be applied in this case? The answer that comes most readily to mind is the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest."). Notwithstanding this apparently rigorous standard, the Court almost always found in favor of the government in cases involving claims for religious exemptions from general laws. See, e.g., *United States v. Lee*, 455 U.S. 252 (1982); *Bowen v. Roy*, 476 U.S. 693 (1986); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *O'Lone v. Est. of Shabazz*, 482 U.S. 342 (1987).

244 See *supra* notes 151–57 and accompanying text.

245 See, e.g., *Hosanna-Tabor*, 565 U.S. at 196 (holding that the ministerial exception barred the plaintiff's suit for discrimination under the Americans with Disabilities Act).

246 See, e.g., *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020) ("When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.").

Prior to the Court's decision in *Carson*, the state could have contended that its program did not discriminate against religious schools based on their religious identity. In *Trinity Lutheran*, the Court expressly distinguished between state discrimination on the basis of religious status, on the one hand, and religious use of government funds, on the other. The case involved funding for playground resurfacing, and the state program categorically excluded churches from eligibility.²⁴⁷ The Court concluded that such discrimination on the basis of religious identity violated the Free Exercise Clause.²⁴⁸ In a footnote, however, the Court stated, "We do not address religious uses of funding or other forms of discrimination."²⁴⁹

In *Espinoza v. Montana Department of Revenue*,²⁵⁰ the Court continued to rely on this distinction between status and use. In that case, the state sought to include religious schools in a program that provided tax deductions for donations to create scholarships at primary and secondary schools. The state Supreme Court held that the state constitution barred the use of state funds for religious schools and, as a remedy, ordered the state to end the program—for scholarships at all schools, religious and secular. The U.S. Supreme Court concluded that the state court's interpretation of its constitution violated the Free Exercise Clause.²⁵¹ The Court reasoned that the interpretation reflected discrimination against religious schools because of their religious identity.²⁵²

Before the decision in *Carson*, therefore, the state could have defended the hypothetical condition of nondiscrimination in employment by arguing that the condition does not exclude religious schools because of their religious identity. If a religious school agrees not to discriminate in hiring on prohibited grounds, then the school will be fully eligible to participate in the program.

In *Carson*, however, the Court rejected the distinction between religious identity and religious use. The court of appeals had concluded that Maine's exclusion of religious schools from the program to provide rural students with access to a high school did not violate the Free Exercise Clause because the program "impose[d] a use-based restriction," rather than a status-based one. The Supreme Court rejected the distinction. The Court acknowledged that *Trinity Lutheran* and *Espinoza* "held that the Free Exercise Clause forbids discrimination on the basis of religious status," but it asserted that "those decisions never suggested that use-based discrimination

247 *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017) (noting that the Missouri Department of Natural Resources "had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity").

248 *Id.* at 2021–25 (concluding that the program "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character").

249 *Id.* at 2024 n.3.

250 140 S. Ct. 2246 (2020).

251 *Id.* at 2254–63.

252 *Id.* at 2261 ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.").

is any less offensive to the Free Exercise Clause.”²⁵³ After *Carson*, states may no longer deny funds to religious schools simply because religious schools might use the funds for religious purposes.²⁵⁴

In our example, the school could plausibly argue that the state’s nondiscrimination requirement operates in practice as discrimination based on religious use of the funds precisely because its teachers are ministers. The argument would proceed in five steps. First, the school will note that the state effectively funds the operation of schools that participate in the program. Second, those funds necessarily would be used to support the hiring of teachers. Third, the function of the teachers at our hypothetical religious school will be to deliver the school’s religious message and to mold students in the faith. Fourth, state requirements that limit the school’s power to select and exercise control over those teachers prevent the school from using the state’s funds for religious purposes. Fifth, the school would argue that, in practice, only schools that have religious beliefs that are compatible with the state’s antidiscrimination norms (or schools that do not consider their teachers to be ministers) would be eligible to participate in the program. In this sense, the antidiscrimination condition operates as a restriction on the religious use of funds.

To be sure, we do not find this argument persuasive, even accepting *Carson*’s rejection of the status-use distinction. The antidiscrimination condition does not inevitably control the religious content of classroom instruction. The school would still be free to require teachers to deliver that content in a manner consistent with the faith.

But Justice Alito’s expansive account of the ministerial exception, and more broadly of the Free Exercise Clause, opens the door to arguments like those of our hypothetical school. In a world in which a religious school can define all

253 *Carson as Next Friend of O.C. v. Makin*, 142 S. Ct. 1987, 2001 (2022).

254 Although the Court in *Locke v. Davey*, 540 U.S. 712 (2004), upheld a state scholarship program that excluded students pursuing degrees in devotional theology, we assume that *Locke* is effectively no longer good law after the Court’s decision in *Carson*. See *Carson*, 142 S. Ct. at 2002 (“*Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits.”). In addition, the Court’s reasoning in *Carson* strongly suggests that *Tilton v. Richardson*, 403 U.S. 672 (1971), which the Court decided on the same day as *Lemon v. Kurtzman*, 403 U.S. 602 (1972), is no longer good law. In *Tilton*, the Court held that the government can directly fund higher education facilities but that such funding programs must include a ban on the use of funds for religious purposes. This limit is now presumably ineffective.

We also assume that the Court has not rejected the fundamental requirement of neutrality in government funding as a requirement of the Establishment Clause. As the plurality in *Mitchell v. Helms*, 530 U.S. 793 (1999), explained, the main question in deciding if an aid program violates the Establishment Clause is whether any “religious indoctrination” supported by the aid can be attributed to the government:

In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and a religious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.

Id. at 809.

of its teachers as ministers, and in which “pervasively sectarian” schools are constitutionally entitled to government funds on an equal basis with other nonpublic schools, the state risks losing its power to advance nondiscrimination norms in hiring. In our example, it is at least plausible that the school would be entitled to insist on participation in the state program without compliance with the nondiscrimination requirement.

V. Conclusion

The Gordon College case returns to the state courts against the backdrop of an unsettled but diminishing account of the Establishment Clause. In *Hosanna-Tabor*, both Religion Clauses anchored the exception. After Justice Alito’s statement respecting the denial of certiorari in *Gordon College*, we suspect that it will become increasingly difficult to locate in the doctrine any remaining traces of the Establishment Clause. As we argued above, an exception derived entirely from Free Exercise principles, at least on Justice Alito’s account, deprives civil courts of nearly all capacity to control the scope of the exception. As with his general Free Exercise jurisprudence, based on his vast overreading of the Court’s decision in *Thomas v. Review Board*, religious claimants alone determine the religious significance of an asserted exception.

We think that this approach is wrong as an interpretation of both Religion Clauses. As one of us has argued elsewhere, Justice Alito misreads the relevant constitutional history in his argument that *Smith* should be overruled.²⁵⁵ At the time of the founding, state constitutions consistently described the protected scope of religious exercise as worship, religious instruction, and proselytizing—provided that those practices did not disturb the public welfare. No state constitution included any protection for religiously motivated objections to otherwise secular civil laws.²⁵⁶ We believe that the Court should focus on those same characteristics of religion in its interpretation of the Establishment Clause. The state impermissibly “establishes” religion when it engages in, sponsors, or attempts to control worship, religious education, or proselytizing.

We do not believe that this approach results in a secular “public square,” as many have argued.²⁵⁷ This understanding of religion for purposes of the Religion Clauses is a legal, rather than a theological, construct. It does not claim to define the subjective experience of believers or religious communities. As a legal matter, religion involves actions that do not have clear secular analogs, such as worship, prayer, ritual, or indoctrination in matters of the faith that do not substantially overlap with matters of the secular world. The nonreligious or secular is not

255 Ira C. Lupu & Robert W. Tuttle, “The Radical Uncertainty of Free Exercise Principles: Comment on *Fulton v. City of Philadelphia*,” AM. CONST. SOC’Y SUP. CT. REV. 2020–21, <https://www.acslaw.org/analysis/acs-journal/2020-2021-acs-supreme-court-review/the-radical-uncertainty-of-free-exercise-principles-a-comment-on-fulton-v-city-of-philadelphia/>.

256 For an overview of the historical background of the Free Exercise Clause, see JACK N. RAKOVE, BEYOND BELIEF, BEYOND CONSCIENCE: THE RADICAL SIGNIFICANCE OF THE FREE EXERCISE OF RELIGION (2020).

257 See RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984).

necessarily a space where God is absent.²⁵⁸ It is simply a domain where religious motivations and actions are outwardly indistinguishable from those motivated by secular concerns.

Our approach recognizes a fundamental symmetry between the Religion Clauses,²⁵⁹ whereas the current approach fully subordinates nonestablishment principles to free exercise interests. In the context of the ministerial exception, our approach would follow the functional analysis that the Court appeared to endorse in *Hosanna-Tabor* and *Our Lady of Guadalupe*. Civil courts are competent to decide when a position involves worship, religious instruction, or proselytizing—because those are the same features that courts must be competent to assess in order to interpret the Establishment Clause.

Does a religious college's requirement that teachers "infuse" the faith into their teaching and scholarship make them religious educators? It depends on the facts—on whether, for example, the teacher is evaluated on that basis, or whether the teacher engages in "specifically religious instruction" (i.e., invoking religious doctrine or interpreting religious texts), or whether the teacher leads students in prayer or worship. If the instructor who is simply a religious role model for students is deemed a minister, however, then all mooring in the Establishment Clause, as well as the original meaning of the Free Exercise Clause, is lost.

258 Indeed, the state has nothing to say about where God is or is not present.

259 See IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* (2014).

“SHOULD I STAY OR SHOULD I GO”: THE LEGAL RIGHTS OF STRANDED INTERNATIONAL STUDENTS

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Abstract

International students studying in the United States have specific legal rights under immigration laws when they are stranded because of worldwide health emergencies, like the COVID-19 pandemic, and armed conflict at home, like Russia’s invasion of Ukraine. These rights include the authorization to work off campus if the student experiences a severe economic hardship; and special student relief that can suspend the rules governing duration of status, full course of study, and employment eligibility. While in the United States on a nonimmigrant status, stranded students may also be simultaneously eligible for temporary protected status but not for humanitarian parole, provided by the Department of Homeland Security. The plight of international students in Ukraine is examined briefly, including possible violations of international law against evacuating African students. Improvements to the U.S. immigration system for international students are suggested, including private sponsorship of refugees, and “dual intent” in the visa process as a pathway to permanent residency. The pendulum swing of students’ rights during the pandemic illustrated the influence of presidential politics, the important role of legal advocacy, and the opportunity to craft comprehensive policy in the United States linking international higher education, workforce development, and pathways to citizenship.

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This indecision's buggin' me
If you don't want me, set me free.

—The Clash, *Should I Stay or Should I Go*¹

INTRODUCTION

In 2017, scholars of international students warned that “the international student community” was “living in a precarious world of insecurity” because international students were “increasingly ... the targets of violence and discrimination based on race, religion, ethnicity, and national origin.”² Five years later, the persistent COVID-19 pandemic and Russia’s invasion of Ukraine made the world of international students even more perilous and uncertain, often stranding them abroad.³ With concerns for their health and safety rising, international students needed to know the laws regarding their rights to stay abroad, their rights to return home, and their rights to continue their education.

The growing importance of understanding and strengthening the rights of stranded students parallels the increase in international student mobility. In 2019, “6.1 million tertiary students worldwide had crossed a border to study,” more than double the number in 2007.⁴ Between 1998 and 2019, the number of international and foreign tertiary students increased by an average of 5.5% annually.⁵ Among the countries composing the Organization for Economic Cooperation and Development (OECD),⁶ the United States is “the top OECD destination country for international tertiary students.”⁷ Following decades of consistent growth, international enrollment in U.S. institutions and the number of American students studying abroad reached their peaks in 2018–19: 1,095,299 international students attended U.S. institutions of higher education that year, while 347,099 U.S. students studied abroad for academic credit.⁸

1 THE CLASH, *Should I Stay or Should I Go*, on COMBAT ROCK (Epic Records/CBS, Inc. 1982).

2 CindyAnn Rose-Redwood & Reuben Rose-Redwood, *Rethinking the Politics of the International Student Experience in the Age of Trump*, 7 J. INT’L STUDENTS, I, II (2017).

3 Caitlin Dickerson, ‘I Kind of Stopped Existing’: Foreign Students Are Stuck, and Reeling, N.Y. TIMES, Apr. 26, 2020, at A11; Elizabeth Redden, *Stranded Abroad*, INSIDE HIGHER ED, Mar. 24, 2020, <https://www.insidehighered.com/news/2020/03/24/study-abroad-students-caught-international-border-closures>; Andrea Marks, *Thousands of International Students Are Stranded in Ukraine and Don’t Know What to Do Next*, ROLLING STONE, Feb. 25, 2022, <https://www.rollingstone.com/culture/culture-features/students-stranded-ukraine-nigeria-india-iran-1312509/>.

4 OECD, EDUCATION AT A GLANCE 2021: OECD INDICATORS 213 (2021). The OECD defines “tertiary education” to include “short cycle” programs (minimum duration of two years) that are typically “occupation-specific and prepare students to enter the labour market directly,” as well as bachelor’s, master’s, and doctoral programs. *Id.* at 21.

5 *Id.* at 213.

6 As of 2021, the OECD comprised thirty-eight countries spanning North, Central, and South America; Europe; and the Asia-Pacific region. OECD, OUR GLOBAL REACH, <https://www.oecd.org/about/members-and-partners/> (last visited June 5, 2022).

7 OECD, *supra* note 4, at 217.

8 INST. OF INT’L EDUC., OPEN DOORS: 2021 FAST FACTS (2021), <https://opendoorsdata.org/fast-facts/fast-facts-2021/>.

This growth was halted first by a virus about 0.1 micron in diameter,⁹ and then by a military with the fifth-largest budget in the world.¹⁰ After the initial cases of COVID-19 caused by the SARS-CoV-2 virus occurred in Wuhan, China in December 2019,¹¹ the highly contagious virus spread around the world, leading the World Health Organization on March 11, 2020, to declare the situation to be a pandemic.¹² By then, over one hundred colleges and universities in the United States had canceled in-person classes and transitioned courses online.¹³ By April 1, 2020, schools and institutions of higher education in 185 countries were shuttered, involving over 1.54 billion students, representing over 89% of total enrolled learners worldwide.¹⁴ A joint report from the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Children's Fund (UNICEF), and the World Bank bluntly stated, "The global disruption to education caused by the COVID19 pandemic constitutes the worst education crisis on record."¹⁵

This drastic upheaval caused total international enrollment in the United States and the number of U.S. students studying abroad to fall precipitously. Compared to the previous year, the number of international students at U.S. institutions fell 15%, to 914,095 students, in 2020–21; and in 2019–20, the number of U.S. students studying abroad for academic credit declined by 53%, to 162,633 students.¹⁶

After "the largest mobilization of forces" in Europe since 1945,¹⁷ the internationalization of higher education was again jeopardized. Russia, after amassing 190,000 soldiers along its border with Ukraine, invaded Ukraine on February 24, 2022,¹⁸ creating "Europe's largest and fastest-growing refugee crisis since World War II."¹⁹ By June 2022, almost seven million Ukrainians had crossed

9 Yinon M Bar-On et al., *SARS-CoV-2 (COVID-19) by the Numbers* 3, 9 eLIFE (2020), [HTTPS://ELIFESCENCES.ORG/ARTICLES/57309#DOWNLOADS](https://elifesciences.org/articles/57309#downloads).

10 INT'L INST. FOR STRATEGIC STUD., *MILITARY BALANCE 2022 FURTHER ASSESSMENTS* (2022), <https://www.iiss.org/blogs/analysis/2022/02/military-balance-2022-further-assessments>.

11 Wen-Hua Kong et al., *SARS-CoV-2 Detection in Patients with Influenza-like Illness*, 5 NATURE MICROBIOLOGY 675 (2020), <https://www.nature.com/articles/s41564-020-0713-1.pdf>.

12 WHO, WHO DIRECTOR-GENERAL'S OPENING REMARKS AT THE MEDIA BRIEFING ON COVID-19 - 11 MARCH 2020 (2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

13 Chronicle staff, *The Coronavirus Is Upending Higher Ed. Here Are the Latest Developments*, CHRON. HIGHER EDUC., Mar. 25, 2020, <https://www.chronicle.com/article/the-coronavirus-is-upending-higher-ed-here-are-the-latest-developments/>.

14 Giorgio Marinoni et al., *The Impact of COVID-19 on Higher Education Around the World*, IAU GLOBAL SURVEY REP. (2020), https://www.iau-aiu.net/IMG/pdf/iau_covid19_and_he_survey_report_final_may_2020.pdf.

15 WORLD BANK, UNESCO & UNICEF, *THE STATE OF THE GLOBAL EDUCATION CRISIS: A PATH TO RECOVERY* 4 (2021).

16 INST. OF INT'L EDUC., *supra* note 8.

17 Dan Bilefsky et al. *Can the West Stop an Invasion by Russia into Ukraine?* N.Y. TIMES, Jan. 10, 2022, at A8.

18 Anton Troianovski & Neil MacFarquhar, *Russia Attacks as Putin Warns World; Biden Vows to Hold Him Accountable*, N.Y. TIMES, Feb. 24, 2022, at A1.

19 Richard Pérez-Peña, *In Scathing Speech, Zelensky Chastises U.N. for Inaction*, N.Y. TIMES, Apr. 6, 2022, at A1.

the border out of the country,²⁰ and another seven million were displaced inside Ukraine. In late April 2022, the United Nations projected that the number of refugees could reach 8.3 million by the end of the year.²¹

While the COVID-19 pandemic and Russia's invasion of Ukraine caused disruption at colleges and universities worldwide, this article largely focuses on the rights of international students attending institutions in the United States on F-1 visas and the rights of U.S. students studying abroad, particularly when these students are unable to return home. It traces the history of "stranded students" in the United States and—highlighting the influence of politics on immigration laws—follows the restrictions on international students placed by the Trump Administration that were in turn largely removed and replaced by more lenient and supportive rules by the Biden Administration. The article concludes with suggested legal reforms that would clarify and strengthen the rights of stranded students in the United States.

I. "Stranded" Immigrants: History and Evolution of U.S. Immigration Law

A. Definition of "Stranded"

Under U.S. and international law, stranded students can be considered to be in a state of limbo. The U.S. Supreme Court described an immigrant who had lived in the United States for twenty-five years as "stranded in his temporary haven on Ellis Island" after he had traveled to Europe, was denied reentry into the United States for "security reasons," and was refused entry by France, Great Britain, Hungary, and "about a dozen Latin American countries."²² Unwilling to "exert... further efforts to depart... respondent sat on Ellis Island because this country shut him out and others were unwilling to take him in."²³

International law provides a precise definition of "stranded." The United Nations High Commissioner for Refugees (UNHCR) defines "stranded migrants" as persons "who are not in need of international protection and who cannot remain lawfully on the territory of a host State, move lawfully to another country,

20 UNITED NATIONS REFUGEE AGENCY, UKRAINE REFUGEE SITUATION (2022), <https://data2.unhcr.org/en/situations/ukraine>.

21 John Ismay et al., *U.S. Pushes Allies for Ukraine Arms as War Escalates*, N.Y. TIMES, Apr. 27, 2022, at A1.

22 *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 207, 208, 209 (1948).

23 *Id.* at 209. The Court held that "respondent's continued exclusion" without a hearing did not "deprive[] him of any statutory or constitutional right." *Id.* at 215. Congress subsequently passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which provides for the expedited removal of certain "applicants" seeking admission into the United States. 8 U.S.C. § 1225(a)(1) (2018). Applicants can prevent expedited removal by demonstrating to an asylum officer a "credible fear of persecution." *Id.* § 1225(b)(1)(B)(v). IIRIRA prohibits, however, judicial review of "the determination" that an applicant lacks a credible fear of persecution. *Id.* § 1252(a)(2)(A)(iii). See *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020).

or return to their country of origin.”²⁴ While this definition has been criticized as inadequate,²⁵ it is useful for the purposes of this article, particularly regarding international students. The scenarios generally explored below cover instances where international students cannot remain in the country in which they are studying, cannot travel, or cannot return home.

B. From Chinese Exclusion Acts to Immigration Reform for Stranded Students from China

Decades of racist and exclusionary immigration laws in the United States were established until World War II helped to chip away at them, in part because of the growing value of international students. In 1882, the first of the Chinese Exclusion Acts made it unlawful “for any Chinese laborer” to come to the United States and prohibited citizenship to Chinese nationals.²⁶ The Immigration Act of 1924 prohibited immigrants from “the Continent of Asia and the islands adjacent thereto,” while also establishing an “annual quota” of other nationalities to 2% “of the number of foreign-born individuals of such nationality resident in continental United States as determined by the United States census of 1890.”²⁷ The law defined a group of “non-quota immigrants,” which included an immigrant “who is a bona fide student at least 15 years of age and who seeks to enter the United States solely for the purpose of study at an accredited school, college, academy, seminary or university.”²⁸ Two years after China became an ally of the United States in World War II, Congress repealed the Chinese Exclusion Acts but established a quota for immigrants from China.²⁹

Under its new wartime alliance with the United States, the Chinese Nationalist government in 1942 began sending students, technical trainees, diplomats, and military members to the United States for additional education to prepare to help lead China’s modernization after the war.³⁰ Up to several thousand of these individuals came to the United States until early 1948, when the Chinese Communist Party made advances in the Chinese civil war. With the Nationalist government in retreat, about five thousand “highly skilled, well-connected Chinese” were left in the United States

24 UN HIGH COMM’R FOR REFUGEES (UNHCR), THE 10-POINT PLAN IN ACTION 284 (2016), <https://www.refworld.org/docid/59e99eb94.html>.

25 “The notion that stranded migrants are ‘persons who are not in need of international protection’ portrayed them as being not vulnerable and protected under some other framework. In effect the definition appears to ignore that being ‘stranded’ in a humanitarian crisis and left unprotected to human rights violations is a valid case for needing international protection. Further, a major shortcoming is the definition’s generality.... Also, the definition is not reflective of perspectives other than UNHCR’s mandate, and thus while the definition might serve UNHCR’s mandate, it is not contributing to the field on the whole.” Vincent Chetail & Matthias A. Braeunlich, *Stranded Migrants: Giving Structure to a Multifaceted Notion*, in 5 GLOBAL MIGRATION RESEARCH PAPER at 18 (2013).

26 Pub. L. No. 47-126, 22 Stat. 58 (1888).

27 Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924).

28 *Id.* at § 4.(e).

29 Pub. L. No. 78-199, 57 Stat. 600 (1943).

30 Madeline Y. Hsu, *The Disappearance of America’s Cold War Chinese Refugees, 1948-1966*, 31 J. AM. ETHNIC HIST. 12, 13 (2012).

"without funding or a home to which to return."³¹ To support these "stranded students,"³² Congress appropriated about \$10 million in scholarships and living stipends for an estimated 3500 individuals to complete their degrees and legally gain employment and permanent residency.³³

C. *The Emergence of Modern U.S. Immigration Law*

The Immigration and Nationality Act of 1952 ended the exclusion of Asians from the United States but maintained quotas based on national origin. It also introduced an immigration system prioritizing skilled laborers and family reunification.³⁴ The act amended the Immigration Act of 1924's definition of student under the classes of "nonimmigrant aliens" who were not considered immigrants, as follows:

an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn.³⁵

The Immigration and Nationality Act of 1965 finally abolished the quota system based on national origin and instead emphasized priorities for skilled laborers and immigrants with family already living in the United States.³⁶ The 1965 act maintained the classification and definition of students as nonimmigrant aliens, and it also added a provision authorizing a visa to be issued to an international student if the consular officer receives notice from the Attorney General of "a bond with sufficient surety" ensuring that at the expiration of the student's visa, the student "will depart from the United States."³⁷

D. *Visa Rules for International Students to Study in the United States*

Under U.S. immigration law, "any person not a citizen or national of the United States" is defined as an "alien,"³⁸ and for purposes of entry into the United States,

31 *Id.* at 13.

32 ROSE HUM LEE, *THE CHINESE IN THE UNITED STATES OF AMERICA* 103 (1960).

33 Hsu, *supra* note 30, at 13, 30 n.5.

34 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952).

35 *Id.* at § 101(a)(15)(F); 8 U.S.C. § 1101(a)(15)(F)(i) (2018).

36 Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

37 *Id.* at § 17.

38 8 U.S.C. § 1101(a)(3) (2018).

aliens are considered to be immigrants, unless they fall under one of twenty-two classes of “nonimmigrant aliens.”³⁹ Generally, international students can study in the United States if they qualify under one of three of these nonimmigrant classes,⁴⁰ which are named for the corresponding letter of its subsection in the Immigration and Nationality Act, as described below.⁴¹

1. F-1 Visas

The majority of international students enter the United States with an F-1 visa.⁴² To qualify, individuals must have a residence in a foreign country that they have “no intention of abandoning,” must be “a bona fide student qualified to pursue a full course of study,” and seek “to enter the United States temporarily and solely for the purpose of pursuing such a course of study” at “an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in an accredited language training program in the United States.”⁴³ The institution must be “particularly designated” by the student and “approved by the Attorney General after consultation with the Secretary of Education,” and the institution must “have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student.” If the institution “fails to make reports promptly the approval shall be withdrawn.”⁴⁴

A “full course of study” for undergraduates is largely based on traditional semesters and credit hours, with a limit on online courses. A full course of undergraduate study generally consists of at least twelve hours of instruction per academic term, “where twelve semester or quarter hours are charged full-time tuition or are considered full-time for other administrative purposes.”⁴⁵ F-1

39 8 U.S.C. § 1101(a)(15)(A)–(V) (2018).

40 The law allows an international student’s “alien spouse and minor children” to qualify for admission “if accompanying” the student or “following to join” them. 8 U.S.C. § 1101(a)(15)(F)(ii), (a)(15)(J), (a)(15)(M)(ii) (2018).

41 Beyond the three major classifications described here, nonimmigrants who hold visas under other categories may also be able to attend colleges and universities during their stay in the United States. As indicated by the U.S. Immigration and Customs Enforcement agency, unless otherwise noted, “Nonimmigrants who are attending school incidental to their primary purpose for being in the United States may attend the school of their choice either part-time or full-time.” U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, DEP’T OF HOMELAND SEC. [ICE], STUDENT AND EXCH. VISITOR PROGRAM, NONIMMIGRANTS: WHO CAN STUDY? (2018), <https://www.ice.gov/doclib/sevis/pdf/Nonimmigrant%20Class%20Who%20Can%20Study.pdf>. Additionally, holders of G-4 visas—resident representatives of foreign governments who are employees of international organizations, as well as members of their families and staff—are eligible to pay in-state tuition at public colleges and universities in the states in which they reside because they are not precluded “from establishing domicile in the United States,” unlike other nonimmigrants. *Toll v. Moreno*, 458 U.S. 1, 14 (1982).

42 ICE, SEVIS BY THE NUMBERS (2021), <https://www.ice.gov/doclib/sevis/pdf/sevisBTN2021.pdf>.

43 8 U.S.C. § 1101(a)(15)(F)(i) (2018).

44 *Id.* While the Immigration and Nationality Act delegates these responsibilities to the Attorney General, Congress transferred them to the Secretary of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

45 8 C.F.R. § 214.2(f)(6)(i)(B) (2022). For graduate students, school officials certify that their “[p]ostgraduate study is “a full course of study.” *Id.* § 214.2(f)(6)(i)(A).

students may count "no more than the equivalent of one class or three credits per session, term, semester, trimester, or quarter" toward their full course of study "if the class is taken on-line or through distance education and does not require the student's physical attendance for classes, examination or other purposes integral to completion of the class."⁴⁶

2. *M-1 Visas*

International students studying at a vocational or "nonacademic" institution in the United States gain access through an M-1 visa.⁴⁷ The statutory language defining their status is similar to that of F-1 students: they must have a residence in a foreign country that they have "no intention of abandoning," seek temporary entry "solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution (other than in a language training program) in the United States" that is "particularly designated by" the student and approved by the Department of Homeland Security, after consultation with the Secretary of Education, and the institution must have agreed to report to the Department of Homeland Security "the termination of attendance of each nonimmigrant nonacademic student."⁴⁸

Under the Department of Homeland Security's regulations for the Student and Exchange Visitors Program, several types of institutions qualify as vocational or nonacademic. They include community colleges and junior colleges that provide "vocational or technical training" and award associate degrees, vocational high schools, and schools that provide "vocational or nonacademic training other than language training."⁴⁹

3. *F-3 and M-3 Visas for Canadian and Mexican Part-Time Students*

Before the terrorist attacks on September 11, 2001, students from Canada and Mexico could attend colleges and universities in the United States part-time as visitors without a formal student visa,⁵⁰ which would otherwise, as per the requirements for F-1 and M-1 visas, require full-time attendance and proof of financial resources.⁵¹ After 9/11, the U.S. Immigration and Naturalization Service—which was reorganized under the Homeland Security Act of 2002 into three agencies, including the U.S. Citizenship and Immigration Services, in 2003—⁵² began enforcing the visa requirement, curtailing

46 *Id.* § 214.2(f)(6)(i)(G).

47 8 U.S.C. § 1101(a)(15)(M)(i) (2018).

48 *Id.*

49 8 C.F.R. § 214.3(a)(2)(ii) (2022).

50 Charles Dervarics, *Bill to Create New Visa Category Gets Endorsement*, DIVERSE ISSUES IN HIGHER EDUC., Nov. 6, 2002, <https://www.diverseeducation.com/home/article/15078826/bill-to-create-new-visa-category-gets-endorsement>.

51 8 U.S.C. § 1101(a)(15)(F)(i); (a)(15)(M)(i) (2018).

52 Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). *See also* Soo-Young Lee et al., *The Reorganization of the US Citizenship and Immigration Services (USCIS) and Its Effects*, 20 PUB. ORG. REV. 647 (2020).

enrollment at many two-year and four-year institutions in Texas, Arizona, New Mexico, and the Pacific Northwest that relied on enrollment from part-time students from across their respective international borders.

In response, the Border Commuter Student Act of 2002 established two new subcategories of visas for citizens of Canada and Mexico who live near the U.S. border and want to commute to a U.S. institution to study part time.⁵³ The legislation created F-3 visas “for an alien who is a national of Canada or Mexico, who maintains actual residence and place of abode in the country of nationality” and who meets the other criteria of a student obtaining an F-1 visa, except that their “qualifications for and actual course of study may be full or part-time,” and they commute “to the United States institution or place of study from Canada or Mexico.”⁵⁴ The statutory language for the M-3 visa for vocational education mirrors the F-3 language.⁵⁵

The flexibility afforded by the F-3 and M-3 visas also comes with some drawbacks. Students are not allowed to live in the United States anytime while on an F-3 or M-3 visa. Moreover, their family members cannot obtain derivative visas to join them. And as a practical matter, students face geographic realities to reach schools within commuting distance of the border, limiting their educational options.⁵⁶

4. J-1 Visas

The third major category of visas for international students in the United States is J-1 visas for exchange students or “exchange visitors,” as they are called more broadly under the regulations of U.S. Citizenship and Immigration Services.⁵⁷ The statute defines this category to include any alien “having a residence in a foreign country” that they have “no intention of abandoning” who is

a bona fide student, scholar, trainee, teacher, [or] professor. . . who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching . . . studying, . . . conducting research . . . or receiving training.⁵⁸

The U.S. Information Agency lists twelve categories of exchange visitor programs.⁵⁹ The regulations for programs for college students give broad authority to the Department of State. The department “may, in its sole discretion, designate bona fide programs which offer foreign students the opportunity to study in the

53 Border Commuter Student Act of 2002, Pub. L. No. 107-274, 116 Stat. 1923 (2002).

54 8 U.S.C. § 1101(a)(15)(F)(iii) (2018).

55 *Id.* § 1101(a)(15)(M)(iii).

56 D’ALESSIO LAW GROUP, F-3 CANADIAN OR MEXICAN NATIONAL ACADEMIC COMMUTER STUDENTS (2018), <https://dlgimmigration.com/f-3-canadian-or-mexican-national-academic-commuter-students>.

57 8 U.S.C. § 1101(a)(15)(J) (2018); 8 C.F.R. 214.2 (j)(1)(i) (2022).

58 8 U.S.C. § 1101(a)(15)(J) (2018).

59 U.S. DEP’T OF STATE, EXCH. VISITOR PROGRAM CATEGORY REQUIREMENTS (2016), <https://j1visa.state.gov/wp-content/uploads/2017/06/Exchange-Visitor-Program-Category-Requirements.pdf>.

United States at a post-secondary accredited academic institution or to participate in a student internship program."⁶⁰

Students coming to the United States for graduate medical education or training may also obtain J-1 visas.⁶¹ They must meet additional requirements, including making a commitment to return to their country of nationality or last residence upon completing their education in the United States, and providing written assurance from their home government that there is a need in that country for doctors with the skills they will learn.⁶²

E. Rules for International Students to Work in the United States

1. On-Campus Employment

International students on an F-1 visa may be employed by their institution. "On-campus employment" encompasses work on the school's premises—including "on-location commercial firms" serving students on campus, such as school bookstores and cafeterias—or at an off-campus location that is educationally affiliated with the school.⁶³ Students may work up to twenty hours per week while school is in session and work full-time when school is not in session or during vacation breaks.⁶⁴

2. Off-Campus Employment

After their first academic year, F-1 students may work off campus under one of three different programs.

a. Curricular Practical Training

An F-1 student may participate in "a curricular practical training program that is an integral part of an established curriculum."⁶⁵ Curricular practical training encompasses "alternative work/study, internship, cooperative education, or any other type of required internship or practicum that is offered by sponsoring employers through cooperative agreements with the school."⁶⁶ Most students who participate for one year or more in full-time curricular practical training become ineligible for "post-completion academic training," unless they are enrolled in "graduate studies that require immediate participation in curricular practical training."⁶⁷

60 22 C.F.R. § 62.23 (2022).

61 8 U.S.C. § 1101(a)(15)(J) (2018).

62 8 U.S.C. § 1182(j)(1)(C) (2018).

63 8 U.S.C. § 214.2(f)(9)(i) (2018).

64 *Id.*

65 8 C.F.R. § 214.2(f)(10)(i) (2022).

66 *Id.*

67 *Id.*

b. Twelve-Month Optional Practical Training.

Students on an F-1 visa can, after a full academic year of enrollment, work up to twelve months under the Optional Practical Training (OPT) program, if the employment is directly related to their major area of study.⁶⁸ Students can complete their OPT employment before they complete their academic studies (“precompletion”) by working part-time or full-time.⁶⁹ Students can also complete their OPT employment after they complete their degree (“postcompletion”) by working part time or full time.⁷⁰

c. Twenty-Four-Month Science, Technology, Engineering, or Mathematics Optional Practical Training.

Holders of an F-1 visa can apply for an extra twenty-four months of postcompletion OPT if they earn a bachelor’s, master’s, or doctoral degree in certain listed science, technology, engineering, or mathematics (STEM) fields, and if their employer meets certain requirements as well.⁷¹ The OPT extension for STEM students began in 2008 and has vastly increased participation in the OPT program. The original STEM extension was seventeen months,⁷² and it was expanded to twenty-four months in 2016.⁷³ The total number of students participating in OPT grew from 24,838 in 2007 to 200,162 in 2018, an increase of over 700%.⁷⁴ During the same period, the cohort of students pursuing extended STEM OPT rose from two students, when the category was established, to 69,650 students.⁷⁵

68 *Id.* § 214.2(f)(10)(ii).

69 U.S. DEP’T OF HOMELAND SEC., F-1 OPTIONAL PRACTICAL TRAINING (OPT) (2022), <https://studyinthestates.dhs.gov/sevis-help-hub/student-records/fm-student-employment/f-1-optional-practical-training-opt>.

70 8 C.F.R. § 214.2(f)(11)(i)(B)(1), (f)(10)(ii)(A)(3) (2022).

71 *Id.* § 214.2(f)(10)(ii)(C)(2). Employers must be enrolled in E-Verify, a web-based system through which employers can confirm the eligibility of their employees to work in the United States by matching information on employees’ Form I-9 (Employment Eligibility Verification) against the records of the Social Security Administration and the Department of Homeland Security. U.S. DEP’T OF HOMELAND SEC., ABOUT E-VERIFY, <https://www.e-verify.gov/> (last visited July 15, 2022). Among other requirements, employers must implement a formal training program customized for the student that enhances their academic learning through practical experience; ensure that the student will not replace a full- or part-time, temporary, or permanent U.S. worker; and attest that they have sufficient resources and trained personnel to train the student appropriately. *See* 8 C.F.R. § 214.2 (f)(10)(ii)(C) (5)–(11) (2022).

72 Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students with STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students with Pending H-1B Petitions, 73 Fed. Reg. 18944 (Apr. 8, 2008).

73 Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students, 81 Fed Reg. 13040 (Mar. 11, 2016).

74 U.S. CITIZENSHIP AND IMMIGRATION SERVS. OMBUDSMAN, DEP’T OF HOMELAND SEC., ANNUAL REPORT TO CONGRESS 65 (2020).

75 *Id.*

d. Off-Campus Employment Based on Severe Economic Hardship.

Regulations for F-1 visas allow international students to work off campus if they experience a "severe economic hardship caused by unforeseen circumstances beyond the student's control."⁷⁶ The regulations list several such circumstances, including "loss of financial aid or on-campus employment without fault on the part of the student, substantial fluctuations in the value of currency or exchange rate, inordinate increases in tuition and/or living costs, unexpected changes in the financial condition of the student's source of support," plus medical bills and "other substantial and unexpected expenses."⁷⁷

Severe economic hardship is determined on a case-by-case basis by an institution's designated school official (DSO).⁷⁸ The DSO is a regularly employed member of an institution's administration "whose office is located at the school and whose compensation does not come from commissions for recruitment of foreign students."⁷⁹ Individuals who principally "recruit foreign students for compensation" do not qualify as a DSO. The president or head of a school must appoint DSOs.⁸⁰

A DSO at a student's institution may recommend the student for work off campus for intervals of one year if the DSO certifies to four criteria:

- (1) The student has been in F-1 status for one full academic year;
- (2) The student is in good standing as a student and is carrying a full course of study;
- (3) The student has demonstrated that acceptance of employment will not interfere with the student's carrying a full course of study; and
- (4) The student has demonstrated that the employment is necessary to avoid severe economic hardship due to unforeseen circumstances beyond the student's control ... and has demonstrated that [on-campus] employment ... is unavailable or otherwise insufficient to meet the needs that have arisen as a result of the unforeseen circumstances.⁸¹

The U.S. Citizenship and Immigration Services (USCIS) adjudicates applications for severe economic hardship.⁸² Applicants submit specific forms along with their

76 8 C.F.R. § 214.2(f)(9)(ii)(C) (2022).

77 *Id.*

78 8 C.F.R. § 214.3(l)(1) (2022).

79 *Id.*

80 *Id.*

81 8 C.F.R. § 214.2(f)(9)(ii)(D) (2022).

82 The regulation ambiguously states, "The Service shall adjudicate the application for work authorization based upon severe economic hardship." *Id.* § 214.2(f)(9)(ii)(F)(2). "The Services" is in turn defined as "U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and/or U.S. Immigration and Customs Enforcement, as appropriate in the context in which the term appears." *Id.* § 1.2 (2022). USCIS operates the Student and Exchange Visitors Program. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP'T OF HOMELAND SEC. [USCIS], STUDENTS AND EXCH. VISITORS, <https://www.uscis.gov/working-in-the-united->

DSO's certification to the USCIS service center that has jurisdiction over their place of residence. The adjudicating officer issues an Employment Authorization Document if employment is authorized.⁸³ The director of USCIS notifies the student of the decision, and, if the application is denied, the student is also informed of the reason for the denial.⁸⁴ Students cannot appeal a denied request.⁸⁵

Students may continue to receive employment authorization one year at a time "up to the expected date of completion of the student's current course of study."⁸⁶ USCIS may renew authorization for off-campus employment only if the student maintains their nonimmigrant status and good academic standing, which is determined by the DSO.⁸⁷ The employment authorization is automatically terminated whenever the student fails to maintain their nonimmigrant status.⁸⁸

3. *Special Student Relief*

Beyond "severe economic hardship" for individual students, the regulations for F-1 visas give the Department of Homeland Security itself significant discretion to suspend regulations for F-1 students "from parts of the world that are experiencing emergent circumstances."⁸⁹ Emergent circumstances include natural disasters, wars or military conflicts, and national or international financial crises.⁹⁰ Collectively, the discretionary benefits—encompassing duration of status, full course of study, and employment eligibility—are called "special student relief."⁹¹

Special student relief can be provided for on-campus and off-campus employment. On-campus employment usually cannot exceed twenty hours a week while school is in session,

[states/students-and-exchange-visitors](#) (last visited Aug. 1, 2022).

83 8 C.F.R. § 214.2(f)(9)(ii)(F)(2) (2022).

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.* § 214.2(f)(9)(ii)(A).

88 *Id.* § 214.2(f)(9)(ii)(F)(2).

89 U.S. DEP'T OF HOMELAND SEC., SPECIAL STUDENT RELIEF, <https://studyinthestates.dhs.gov/students/special-student-relief> (last visited Aug. 1, 2022); 8 C.F.R. § 214.2(f)(5)(v) (2022). The regulations refer to "the Commissioner," which is defined to mean, after March 1, 2003, "the Director of U.S. Citizenship and Immigration Services, the Commissioner of U.S. Customs and Border Protection, and the Director of U.S. Immigration and Customs Enforcement, as appropriate in the context in which the term appears." 8 C.F.R. § 1.2 (2022). As a practical matter, when special student relief is invoked, it is promulgated by the Department of Homeland Security through the *Federal Register*. See, e.g., Employment Authorization for Sudanese F-1 Nonimmigrant Students Experiencing Severe Economic Hardship as a Direct Result of the Current Crisis in Sudan, 87 Fed. Reg. 23195 (Apr. 19, 2022).

90 U.S. Dep't of Homeland Sec., Emergent Circumstance Versus Temporary Protected Status: What Is the Difference? (2017), <https://studyinthestates.dhs.gov/2017/11/emergent-circumstances-versus-temporary-protected-status-what-difference>.

91 U.S. Dep't of Homeland Sec., *supra* note 89; NAFSA, SPECIAL STUDENT RELIEF FOR F-1 STUDENTS: ESSENTIAL CONCEPTS, <https://www.nafsa.org/professional-resources/browse-by-interest/special-student-relief-f-1-students-essential-concepts>.

unless the Commissioner suspends the applicability of this limitation due to emergent circumstances, as determined by the Commissioner, by means of notice in the Federal Register, the student demonstrates to the DSO that the employment is necessary to avoid severe economic hardship resulting from the emergent circumstances, and the DSO notates the Form I-20 [Certificate of Eligibility for Nonimmigrant Student Status]⁹² in accordance with the Federal Register document.⁹³

As noted in Part I.E.2, off-campus employment for F-1 students has specific time limits and required connections to academic studies. "In emergent circumstances," however, "as determined by the Commissioner, the Commissioner may suspend the applicability of any or all of the requirements of [off-campus work authorization] by notice in the Federal Register."⁹⁴

The intricacies of the regulations governing international students studying in the United States belie their practical effects when those students' lives are upended by worldwide medical emergencies and hostilities in their home countries. The coronavirus pandemic and the 2022 war in Ukraine provide meaningful lessons on how best to support these stranded students and how politics can change the rules.

II. The Coronavirus Pandemic and Stranded Students

In response to the spread of COVID-19 at the beginning of 2020, the Centers for Disease Control and Prevention (CDC) first advised colleges and universities to scale back student-exchange programs, and then advised campuses to close after some institutions had already done so and switched to online learning. On March 1, 2020, the CDC issued guidance that institutions of higher education "should consider postponing or canceling upcoming student foreign exchange programs" and "consider asking current program participants to return to their home country."⁹⁵ It also suggested that institutions "should consider asking students participating in study abroad programs to return to the United States."⁹⁶ By March 9, the CDC released interim guidance for colleges and universities to plan and prepare for COVID-19,⁹⁷ and many institutions required students to leave campus and announced they would offer all instruction online after spring break.⁹⁸

92 U.S. DEP'T OF HOMELAND SEC., STUDENTS AND THE FORM I-20, <https://studyinthestates.dhs.gov/students/prepare/students-and-the-form-i-20> (last visited Aug. 1, 2022).

93 8 C.F.R. § 214.2(f)(9)(i) (2022).

94 *Id.* § 214.2(f)(9)(ii)(A). See *supra* note 89 for definition of "Commissioner."

95 Elizabeth Redden, *DC to Colleges: 'Consider' Canceling Exchange Programs*, INSIDE HIGHER ED, Mar. 2, 2020, <https://www.insidehighered.com/news/2020/03/03/cdc-tells-colleges-consider-canceling-foreign-exchange-programs-because-coronavirus>.

96 *Id.*

97 STATE HIGHER EDUC. EXEC. OFFICERS, UPDATE ON COVID-19 (2020), <https://sheeo.org/update-on-covid-19/>.

98 Elizabeth Redden, *Spring Break Conundrum: Stay Home or Travel?* INSIDE HIGHER ED, Mar. 11, 2020, <https://www.insidehighered.com/news/2020/03/11/students-faculty-dispersing-personal-spring-break-travel-create-new-challenges>; Elizabeth Redden, *Colleges Ask Students to Leave Campuses*,

A. *Stranded by Restrictions over Modes of Instruction*

As mentioned in Part I.D.1, students on an F-1 visa must enroll in a “full course of study,” which for undergraduates is generally twelve credit hours per semester,⁹⁹ with a limit of one course or three credits per semester taken online.¹⁰⁰ In the spring semester of 2020, when over 1300 institutions of higher education in all fifty states canceled in-person classes or shifted to online instruction only,¹⁰¹ students on F-1 visas faced a dilemma that U.S. Immigration and Customs Enforcement (ICE) initially addressed favorably. The agency issued guidance on March 9, 2020, expressing that it was focused on “ensuring that nonimmigrant students are able to continue to make normal progress in a full course of study as required by federal regulations” and intended “to be flexible with temporary adaptations.”¹⁰² More detailed guidance on March 13, 2020, advised that F-1 and M-1 students could “temporarily count online classes towards a full course of study in excess of the limits” under the regulations.¹⁰³ This flexibility applied to F-1 and M-1 students “even if they have left the United States and are taking the online classes from elsewhere.”¹⁰⁴

Four months later, the Department of Homeland Security reversed its policy and threatened F-1 students enrolled entirely in online courses with deportation. On July 6, 2020, ICE announced that for the fall of 2020 semester

Nonimmigrant F-1 and M-1 students attending schools operating entirely online may not take a full online course load and remain in the United States. The U.S. Department of State will not issue visas to students enrolled in schools and/or programs that are fully online for the fall semester nor will U.S. Customs and Border Protection permit these students to enter the United States. Active students currently in the United States enrolled in such programs must depart the country or take other measures, such as transferring to a school with in-person instruction to remain in lawful status. If not, they may face immigration consequences including, but not limited to, the initiation of removal proceedings.¹⁰⁵

INSIDE HIGHER ED, Mar. 11, 2020, <https://www.insidehighered.com/news/2020/03/11/harvard-cornell-mit-and-others-ask-students-leave-campus-due-coronavirus>.

99 8 U.S.C. § 1101(a)(15)(F)(i) (2018).

100 8 C.F.R. § 214.2(f)(6)(i)(G) (2022).

101 ANDREW SMALLEY, NATIONAL CONFERENCE OF STATE LEGISLATURES HIGHER EDUCATION RESPONSES TO CORONAVIRUS (COVID-19) (2021), <https://www.ncsl.org/research/education/higher-education-responses-to-coronavirus-covid-19.aspx>.

102 ICE, BROADCAST MESSAGE: CORONAVIRUS DISEASE 2019 (COVID-19) AND POTENTIAL PROCEDURAL ADAPTATIONS FOR F AND M NONIMMIGRANT STUDENTS (Mar. 9, 2020), <https://www.ice.gov/doclib/sevis/pdf/bcm2003-01.pdf>.

103 ICE, COVID-19: GUIDANCE FOR SEVP STAKEHOLDERS (Mar. 13, 2020), https://www.ice.gov/sites/default/files/documents/Document/2020/Coronavirus%20Guidance_3.13.20.pdf; See 8 C.F.R. § 214.2(f)(6)(i)(G), (m)(9)(v) (2022).

104 ICE, *supra* note 103.

105 ICE, SEVP MODIFIES TEMPORARY EXEMPTIONS FOR NONIMMIGRANT STUDENTS TAKING ONLINE COURSES DURING FALL 2020 SEMESTER (July 6, 2020), <https://www.ice.gov/news/releases/sevp-modifies-temporary-exemptions-nonimmigrant-students-taking-online-courses-during>.

Advocates for international students pushed back against the directive,¹⁰⁶ and Harvard University and the Massachusetts Institute of Technology filed suit against the Department of Homeland Security on July 8, 2020 in the U.S. District Court in Massachusetts, seeking injunctive relief preventing the department from enforcing the new policy.¹⁰⁷ Harvard and MIT’s complaint charged that the policy was “arbitrary and capricious” under the Administrative Procedures Act,¹⁰⁸ among other reasons because it

entirely fails to consider the significant effects that it will have on universities that have invested considerable time and effort in developing plans for the 2020-2021 academic year—plans that carefully balance the health and safety of faculty, students, and staff, with their core mission of educating students. The July 6 Directive likewise fails to consider the devastating effects that it will have on international students who will be forced to leave the United States or will be unable to enter to take classes, or those who will not be able to return to their home—or any—country.¹⁰⁹

The Department of Homeland Security quickly rescinded the policy. “[L]ess than five minutes” into a hearing on the case on July 14, 2020,¹¹⁰ the parties reached a resolution: the policy was withdrawn and ICE agreed to “return to the status quo,” meaning the guidance it had issued in March 2020.¹¹¹ ICE memorialized this agreement through a broadcast message to all users of the Student and Exchange Visitor Information System (SEVIS) on July 24, 2020.¹¹² ICE continued the March 2020 guidance for the 2021–22 and 2022–23 academic years,¹¹³ with clarification

106 See, e.g., AM. COUNCIL ON EDUC., DHS-ICE JULY 6, 2020 DIRECTIVE ON INTERNATIONAL STUDENTS FOR FALL 2020 TALKING POINTS, <https://www.acenet.edu/Documents/Talking-Points-ICE-International-Students-Directive.pdf> (last visited Aug. 1, 2022); NAFSA, ICE’S GUIDANCE LIMITS DECISION-MAKING AUTHORITY OF HIGHER EDUCATION LEADERS (2020), <https://www.nafsa.org/about/about-nafsa/ices-guidance-limits-decision-making-authority-higher-education-leaders>.

107 President and Fellows of Harvard Coll. v. U.S. Dep’t of Homeland Sec., No. 1:20-cv-11283 (D. Mass. July 8, 2020).

108 5 U.S.C. § 706(2)(A) (2018).

109 Complaint for Declaratory and Injunctive Relief at 20–21, President and Fellows of Harvard Coll. v. U.S. Dep’t of Homeland Sec., No. 1:20-cv-11283 (D. Mass. July 8, 2020), <https://s3.documentcloud.org/documents/6982801/1-Main.pdf>.

110 Camille G. Caldera & Michelle G. Kurilla, *DHS and ICE Rescind Policy Barring International Students Taking Online Courses*, HARVARD CRIMSON, July 15, 2020, <https://www.thecrimson.com/article/2020/7/15/ice-lawsuit-policy-rescinded/>.

111 Collin Binkley, *Trump Administration Rescinds Rule on International Students*, PBS NEWS HOUR, July 14, 2020, <https://www.pbs.org/newshour/nation/judge-to-hear-arguments-in-challenge-to-foreign-student-rule>.

112 ICE, BROADCAST MESSAGE: FOLLOW-UP: ICE CONTINUES MARCH GUIDANCE FOR FALL SCHOOL TERM (July 24, 2020), <https://www.ice.gov/doclib/sevis/pdf/bcmFall2020guidance.pdf>. SEVIS is the Department of Homeland Security’s web-based system to maintain information on schools certified for the Student and Exchange Visitor Program, F-1 and M-1 students coming to the United States to attend those schools, U.S. Department of State-designated Exchange Visitor Program sponsors, and J-1 visa Exchange Visitor Program participants. ICE, STUDENT AND EXCH. VISITOR INFO. SYS. (2021), <https://www.ice.gov/sevis/overview>.

113 ICE, BROADCAST MESSAGE: ICE CONTINUES MARCH 2020 GUIDANCE FOR THE 2021–22 ACADEMIC YEAR (Apr. 26, 2021), <https://www.ice.gov/doclib/sevis/pdf/bcm2104-05.pdf> [hereinafter ICE, 2021–22

that the flexibility regarding online classes extended to continuing students, while “new or Initial F and M students who were not previously enrolled in a program of study on March 9, 2020, will not be able to enter the United States as a nonimmigrant student ... if their course of study is 100 percent online.”¹¹⁴

B. Stranded by Work Restrictions

By the end of April 2020, many international students were “watching their financial lives fall apart.”¹¹⁵ With on-campus jobs closed along with the campuses themselves and without authority to work off-campus,¹¹⁶ many international students saw their “bank accounts dwindle” while they sought housing to replace their shuttered residence halls and, in some cases, while they still owed a portion of their semester’s tuition.¹¹⁷

Recognizing these difficult situations for international students in the United States, USCIS issued a news alert on April 13, 2020, acknowledging “that there are immigration-related challenges as a direct result of the coronavirus (COVID-19) pandemic” and “that nonimmigrants may unexpectedly remain in the United States beyond their authorized period of stay due to COVID-19.”¹¹⁸ The news alert referenced USCIS’s “Special Situations” page, which included information on how F-1 students could request employment authorization to work off-campus if they “experience severe economic hardship because of unforeseen circumstances beyond [their] control.”¹¹⁹

With the pandemic persisting into 2022,¹²⁰ ICE published more explicit guidance on a range of issues for international students on April 18, 2022.¹²¹ With regard to employment, the guidance clarified, among other issues, that

- students on F visas can engage in remote work for on-campus employment if the on-campus job “has transitioned to remote work or the employment can be done through remote means”;

GUIDANCE]; ICE, BROADCAST MESSAGE: ICE CONTINUES MARCH 2020 GUIDANCE FOR THE 2022–23 ACADEMIC YEAR (Apr. 18, 2022), <https://www.ice.gov/doclib/sevis/pdf/bcm2204-04a.pdf> [hereinafter ICE, 2022–23 GUIDANCE].

114 ICE, 2021–22 GUIDANCE, *supra* note 113; ICE, 2022–23 GUIDANCE, *supra* note 113.

115 Dickerson, *supra* note 3.

116 See *supra* text accompanying notes 65–88.

117 Dickerson, *supra* note 3.

118 USCIS, COVID-19 DELAYS IN EXTENSION/CHANGE OF STATUS FILINGS (Apr. 13, 2020), <https://www.uscis.gov/news/alerts/covid-19-delays-in-extensionchange-of-status-filings>.

119 USCIS, SPECIAL SITUATIONS (Oct. 25, 2019), <https://www.uscis.gov/humanitarian/special-situations>.

120 WHO, WHO CORONAVIRUS (COVID-19) DASHBOARD (May 27, 2022), <https://covid19.who.int/>. Beyond this worldwide health emergency, domestic politics within the United States played a role in the more expansive approach to the needs of international students between 2020 and 2022. See *infra* text accompanying notes 163–83.

121 ICE, FREQUENTLY ASKED QUESTIONS FOR SEVP STAKEHOLDERS ABOUT COVID-19 (Apr. 18, 2022), <https://www.ice.gov/doclib/coronavirus/covid19faq.pdf>.

- students participating in OPT, including STEM OPT, "may work remotely if their employer has an office outside of the United States or the employer can assess student engagement using electronic means"; and
- "[f]or the duration of the COVID-19 emergency," students "who are working in their OPT opportunities fewer than 20 hours a week" will be considered "as engaged in OPT."¹²²

C. Stranded by Initial Legal Restrictions on Federal Emergency Relief Funds to International Students

In response to the health and economic challenges posed by the coronavirus pandemic, Congress passed several funding packages totaling \$5.1 trillion between 2020 and 2021.¹²³ Three of the initiatives—the Coronavirus Aid, Relief, and Economic Security (CARES) Act,¹²⁴ the Coronavirus Response and Relief Supplement Appropriations (CRRSA) Act,¹²⁵ and the American Rescue Plan (ARP)¹²⁶—included major provisions to support colleges and universities and their students, with the majority of funding flowing from the U.S. Department of Education to institutions of higher education "through multiple iterations" of the Higher Education Emergency Relief Fund (HEERF).¹²⁷ HEERF provided about \$75 billion in funding to institutions of higher education and their students.¹²⁸

Each iteration of HEERF required institutions to use at least half of their funding for financial aid grants to students.¹²⁹ The parameters for the uses and recipients of financial aid grants broadened between the CARES Act and the CRRSA Act. Under the CARES Act, institutions were required to "provide emergency financial aid grants to students for expenses related to the disruption of campus operations due to coronavirus (including eligible expenses under a student's cost

122 *Id.*

123 CTR. ON BUDGET & POL'Y PRIORITIES, ROBUST COVID RELIEF ACHIEVED HISTORIC GAINS AGAINST POVERTY AND HARDSHIP, BOLSTERED ECONOMY (Feb. 24, 2022), https://www.cbpp.org/sites/default/files/2-24-2022pov_1.pdf.

124 Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

125 Coronavirus Response and Relief Supplement Appropriations (CRRSA) Act, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

126 American Rescue Plan, Pub. L. No. 117-2, 135 Stat. 4 (2021).

127 SOPHIA LADERMAN & TOM HARNISCH, STATE HIGHER EDUC. EXEC. OFFICERS ASS'N, ANALYSIS OF FEDERAL STIMULUS FUNDING TO STATES AND PUBLIC INSTITUTIONS OF HIGHER EDUCATION 5 (2021), https://shef.sheeo.org/wp-content/uploads/2021/05/SHEEO_SHEF_FY20_IB_Federal_Stimulus.pdf. See CARES Act, *supra* note 124, at § 18004; CRRSA Act, *supra* note 125, at § 314; American Rescue Plan, *supra* note 126, at § 2003.

128 NAT'L ASS'N OF COLL. AND UNIV. BUDGET OFFICERS, HEERF RESOURCE CENTER: HIGHER EDUCATION EMERGENCY RELIEF FUND (HEERF) GRANT PROGRAM (2022), <https://www.nacubo.org/HEERF>.

129 CARES, *supra* note 124, at § 18004(c); CRRSA Act, *supra* note 125, at § 314(d)(5); American Rescue Plan, *supra* note 126, at § 2003(7).

of attendance, such as food, housing, course materials, technology, health care, and child care).¹³⁰ Under the CRRSA Act, an institution's "financial aid grants to students" could be used for "any component of the student's cost of attendance or for emergency costs that arise due to coronavirus, such as tuition, food, housing, health care (including mental health care), or child care."¹³¹ Moreover, the CRRSA Act required institutions to prioritize grants "to students with exceptional need, such as students who receive Pell Grants."¹³² The American Rescue Plan maintained the same definition of "financial aid grant" as in the CRRSA Act.¹³³

Initially, international students were ineligible for emergency financial aid grants. In an interim final rule, the Department of Education—citing, in part, several direct and indirect references to Title IV in the statutory language of the CARES Act¹³⁴—reasoned that "Congress intended the category of those eligible for 'emergency financial aid grants to students' in section 18004 of the CARES Act to be limited to those individuals eligible for title [sic] IV assistance."¹³⁵ Under Title IV, students are eligible for a grant, loan, or work assistance if, among other qualifications, they are "a citizen or national of the United States, a permanent resident of the United States, or able to provide evidence from the Immigration and Naturalization Service that [they are] in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident."¹³⁶

Following a series of lawsuits against the interim final rule,¹³⁷ as well as thousands of public comments against it,¹³⁸ the Department of Education—after the transition from President Trump to President Biden—enabled nonimmigrant students in the United States to be eligible for the pandemic-relief financial aid appropriated by Congress. In May 2021, the department's final regulations revised "the definition of 'student' to make clear that any individual who is or was enrolled at an eligible institution on or after the date the national emergency was declared for COVID-19 may qualify for assistance under HEERF program requirements" and emphasized that individuals were "no longer required to be title [sic] IV eligible in order to

130 CARES Act, *supra* note 124, at § 18004(c).

131 CRRSA Act, *supra* note 125, at § 314(c)(3).

132 *Id.*

133 American Rescue Plan, *supra* note 126, at § 2003.

134 Eligibility of Students at Institutions of Higher Education for Funds Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 85 Fed. Reg. 36494, 36496–97 (June 17, 2020).

135 *Id.* at 36496.

136 20 U.S.C. § 1091(a)(5) (2018); 34 C.F.R. § 668.33 (2022).

137 *Oakley v. DeVos*, No. 4:20-cv-03215-YGR, 2020 WL 3268661 (N.D. Cal. June 17, 2020) (enjoined Department of Education from enforcing eligibility requirement for students to receive HEERF emergency financial aid grant with regard to community colleges in California); *Washington v. DeVos*, 466 F. Supp. 3d 1151 (E.D. Wash. 2020) (similar preliminary injunction against enforcement of the rule with regard to institutions in the State of Washington); *Noerand v. DeVos*, 474 F. Supp. 3d 394, 399 (D. Mass. 2020) ("to read these provisions as limited to students eligible under Title IV would lead to absurd results").

138 Eligibility to Receive Emergency Financial Aid Grants to Students Under the Higher Education Emergency Relief Programs, 86 Fed. Reg. 26608, 26609 (May 14, 2021) (to be codified at 34 C.F.R. pt. 677).

receive a HEERF student grant.”¹³⁹ The Department of Education indicated that the revised definition better met the intent of Congress. In the notice of its final rule, the department wrote, “Congress created a program that was designed to award emergency financial aid grants in the most expedient way possible without the establishment of unnecessary roadblocks that would slow down the ability of institutions to help students address added expenses stemming from the COVID-19 national emergency.”¹⁴⁰

D. Stranded by Travel Restrictions

Prominently campaigning on an anti-immigration agenda before he was elected president in 2016,¹⁴¹ Donald Trump signed a series of executive orders and proclamations aimed at restricting migrants from selected countries—often Muslim majority—and limiting refugees.¹⁴² The chaotic disruption for international students, especially after the implementation of the first executive order during President Trump’s second week in office,¹⁴³ has been well chronicled.¹⁴⁴ The constitutionality of many of these executive actions has also been well examined.¹⁴⁵

The U.S. Supreme Court ultimately upheld the president’s authority to impose such travel constraints,¹⁴⁶ specifically those promulgated under a presidential proclamation issued in September 2017 that restricted entry for the nationals of eight foreign states that had systems for “identity-management and information-sharing protocols and practices” deemed “inadequate” by the Trump Administration.¹⁴⁷ The proclamation implemented a range of restrictions on entry

139 *Id.* at 26609.

140 *Id.*

141 Nick Corasaniti, *A Look at Trump’s Immigration Plan, Then and Now*, N.Y. TIMES, Aug. 31, 2016, <https://www.nytimes.com/interactive/2016/08/31/us/politics/donald-trump-immigration-changes.html>.

142 See Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017), *revoked by* Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 9, 2017); Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 27, 2017); Proclamation No. 9983, 85 Fed. Reg. 6699 (Feb. 5, 2020).

143 Exec. Order No. 13769, *supra* note 142.

144 See, e.g., Anya Kamenetz, *Students Stranded Worldwide by Trump Order*, NPRED, Jan. 30, 2017, <https://www.npr.org/sections/ed/2017/01/30/512431112/students-stranded-worldwide-by-trump-order>; Karin Fischer, *Trump’s Travel Ban Leaves Students Stranded—And Colleges Scrambling to Help*, CHRON. HIGHER EDUC., Jan. 29, 2017, <https://www.chronicle.com/article/trumps-travel-ban-leaves-students-stranded-and-colleges-scrambling-to-help>; Elizabeth Redden, *Stranded and Stuck*, INSIDE HIGHER ED, Jan. 30, 2017, <https://www.insidehighered.com/news/2017/01/30/students-and-scholars-are-stranded-after-trump-bars-travel-nationals-7-countries>.

145 See, e.g., Earl M. Maltz, *The Constitution and the Trump Travel Ban*, 22 LEWIS & CLARK L. REV. 391 (2018); Michele Waslin, *The Use of Executive Orders and Proclamations to Create Immigration Policy: Trump in Historical Perspective*, 8 J. MIGRATION & HUM. SOC’Y 54 (2020); Peter Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 MICH. ST. L. REV. 1 (2018); Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475 (2018).

146 *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

147 Proclamation No. 9645, 82 Fed. Reg. 45161, 45164 (Sept. 27, 2017). The eight countries were Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen.

based on the “distinct circumstances” in each of the eight countries, exempted lawful permanent residents, and provided case-by-case waivers under certain circumstances.¹⁴⁸

The U.S. Supreme Court upheld the terms of the presidential proclamation, rejecting the arguments brought by the state of Hawaii that the proclamation violated the Immigration and Nationality Act and the Establishment Clause of the Constitution. With regard to immigration law, the Court stated,

By its plain language, § 1182(f) [of the Immigration and Nationality Act] grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest.¹⁴⁹

With regard to the Establishment Clause, Hawaii claimed that proclamation violated that clause of the First Amendment “because it was motivated not by concerns pertaining to national security but by animus toward Islam.”¹⁵⁰ The plaintiffs cited several statements made by Donald Trump during the campaign and after taking office. For example, during the campaign, Trump published a “Statement on Preventing Muslim Immigration” calling for a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.”¹⁵¹ The Court rejected this argument. It wrote, “The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion.”¹⁵²

Presidential legal authority to limit travel based on national security was thus already well established when the coronavirus pandemic struck in January 2020, leaving international students little recourse against a series of presidential proclamations that were sometimes terminated only to be reestablished and terminated again. Between March 2020 and May 2020, President Trump suspended entry of immigrants and nonimmigrants who posed a risk of transmitting the novel coronavirus from China,¹⁵³ Iran,¹⁵⁴ the European Schengen Area,¹⁵⁵ the United

148 *Id.* at 45164, 45165–69.

149 *Hawaii*, 138 S. Ct. at 2400, 2423.

150 *Id.* at 2406.

151 *Id.* at 2417.

152 *Id.* at 2421.

153 Proclamation No. 9984, 85 Fed. Reg. 6709 (Feb. 5, 2020); *continued in effect by* Proclamation No. 10143, 86 Fed. Reg. 7467 (Jan. 28, 2021); *revoked*, Proclamation No. 10294, 86 Fed. Reg. 59603 (Oct. 28, 2021).

154 Proclamation No. 9992, 85 Fed. Reg. 12855 (Mar. 4, 2020); *continued in effect by* Proclamation No. 10143, *supra* note 153; *revoked*, Proclamation No. 10294, *supra* note 153.

155 Proclamation No. 9993, 85 Fed. Reg. 15045 (Mar. 16, 2020); *revoked*, Proclamation No. 10138, 86 Fed. Reg. 6799 (Jan. 22, 2021); *reestablished without interruption*, Proclamation 10143, *supra* note 153. The countries in this area are Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

Kingdom and the Republic of Ireland,¹⁵⁶ and Brazil.¹⁵⁷ Soon after assuming office, President Biden enacted a proclamation suspending entry of nationals from South Africa as immigrants and nonimmigrants as a means to mitigate transmission of the coronavirus.¹⁵⁸ President Biden later suspended but then quickly restored entry from Botswana, Eswatini, Lesotho, Malawi, Mozambique, Namibia, South Africa (the subject of earlier proclamations), and Zimbabwe.¹⁵⁹

The constantly changing travel restrictions, which caused confusion for international students over whether to leave the United States,¹⁶⁰ compounded the unintended incentive under U.S. immigration law for international students and others with nonimmigrant status to overstay their visas or otherwise remain in the United States without authorization. Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, individuals who remain in the United States unlawfully for at least 180 days but less than one year are barred from reentry for three years, and those who remain unlawfully for one year or longer are barred from reentry for ten years.¹⁶¹ The bars are "automatically imposed when the individual leaves the physical territory of the United States," creating a dilemma for them: either "maintain their precarious position as undocumented [immigrants] within the United States or leave the country and likely face a three- or 10-year ... bar to legal re-entry to the United States."¹⁶²

III. The 2021 Presidential Transition and Its Effect on International Students During the Pandemic

Soon into its term of office, the Biden Administration adopted policies and made statements to undo the so-called "Trump effect" on international education, described as the "combination of policies and rhetoric from the 45th president ... making international students reconsider coming to the United States amid a political climate hostile to globalism."¹⁶³ For example, on February 2, 2021, President Biden issued an executive order titled, "Restoring Faith in Our Legal

156 Proclamation No. 9984, *supra* note 153; *revoked*, Proclamation No. 10138, *supra* note 155; *reestablished without interruption*, Proclamation No. 10143, *supra* note 153.

157 Proclamation No. 10041, 85 Fed. Reg. 31933 (May 28, 2020); *revoked*, Proclamation No. 10138, *supra* note 155; *reestablished without interruption*, Proclamation No. 10143, *supra* note 153.

158 Proclamation No. 10143, *supra* note 153; *revoked*, Proclamation No. 10294, *supra* note 153.

159 Proclamation No. 10315, 86 Fed. Reg. 68385 (Dec. 1, 2021); *revoked*, Proclamation No. 10329, 87 Fed. Reg. 149 (Jan. 3, 2022).

160 Olivia Tucker & Tigerlily Hopson, 'I Just Want to Go Home': Omicron Variant Casts Doubt on International Students' Travel Plans, YALE DAILY NEWS, Dec. 7, 2021, <https://yaledailynews.com/blog/2021/12/07/i-just-want-to-go-home-omicron-variant-casts-doubt-on-international-students-travel-plans/>.

161 8 U.S.C. § 1182 (a)(9)(B)(i)I, II (2018).

162 Jane Lilly López, *Redefining American Families: The Disparate Effects of IIRIRA's Automatic Bars to Reentry and Sponsorship Requirements on Mixed-Citizenship Couples*. 5 J. MIGRATION & HUM. SEC. 236, 238, 239 (2017).

163 Vimal Patel, *Is the 'Trump Effect' Scaring Away Prospective International Students?* CHRON. HIGHER EDUC., Nov. 13, 2018, <https://www.chronicle.com/article/is-the-trump-effect-scaring-away-prospective-international-students/>.

Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans.”¹⁶⁴ Among several other provisions, the executive order directed the Secretary of State, the Attorney General, and the Secretary of Homeland Security to “identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits and make recommendations on how to remove these barriers, as appropriate and consistent with applicable law.”¹⁶⁵

Five months later, the Department of State and the Department of Education released a joint statement of principles entitled, “A Renewed U.S. Commitment to International Education.”¹⁶⁶ The document stated, “The robust exchange of students, researchers, scholars, and educators, along with broader international education efforts between the United States and other countries, strengthens relationships between current and future leaders. These relationships are necessary to address shared challenges, enhance American prosperity, and contribute to global peace and security.”¹⁶⁷ Pledging to “commit to undertaking actions to support a renewed focus on international education,” the departments listed as one of their principles, “Welcome international students, researchers, scholars, and educators to the United States in a safe and secure manner and encourage a diversity of participants, disciplines, and types of authorized schools and higher education institutions where they can choose to study, teach, or contribute to research.”¹⁶⁸

Following up on this rhetoric, the Biden Administration took several steps that eased the process for international students to study and remain in the United States. Part II.C describes the Department of Education’s final rules that enabled nonimmigrant students in the United States to be eligible for pandemic-relief-funding financial aid.¹⁶⁹ Two other policy changes are detailed below.

A. Evaluation of F-1 Visa Applicants’ Intent

Under the Immigration and Nationality Act, an alien “shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status.”¹⁷⁰ If students appear to want to stay in the United States long term, the consular officer could deny their nonimmigrant visas.

In a 2005 cable to all diplomatic and consular posts, Secretary of State Condoleezza Rice called for consular officers to be reasonable when evaluating the ability of an F-1 visa applicant

164 Exec. Order No. 14012, 86 Fed. Reg. 8277 (Feb. 5, 2021).

165 *Id.*

166 U.S. DEP’T OF STATE AND U.S. DEP’T OF EDUC., A RENEWED U.S. COMMITMENT TO INTERNATIONAL EDUCATION, (July 2021), https://educationusa.state.gov/sites/default/files/intl_ed_joint_statement.pdf.

167 *Id.*

168 *Id.*

169 86 Fed. Reg. 26608, *supra* note 138. See also *supra* text accompanying notes 137–40.

170 8 U.S.C. § 1184(b) (2018).

to satisfactorily demonstrate that s/he possesses a residence abroad that s/he has no intention of abandoning Consular officers adjudicating student visa applications should evaluate the applicant's requirement to maintain a residence abroad in the context of the student's present circumstances; they should focus on the student applicant's immediate and near-term intent.¹⁷¹

The Trump Administration in effect rescinded the Rice cable in 2017 by amending the section in the State Department's *Foreign Affairs Manual* pertaining to students and exchange visitors. The language stated, If you are not satisfied that the applicant's present intent is to depart the United States at the conclusion of his or her study or OPT, you must refuse the visa under INA 214(b). To evaluate this, you should assess the applicant's current plans following completion of his or her study or OPT. The hypothetical possibility that the applicant may apply to change or adjust status in the United States in the future is not a basis to refuse a visa application if you are satisfied that the applicant's present intent is to depart at the conclusion of his or her study or OPT.¹⁷²

The Biden Administration, on December 29, 2021, restored the approach of the Rice cable in evaluating the intent of international students to leave the United States after completing their academic program, and it extended this approach to M-1 visa applicants as well as F-1 applicants.¹⁷³ The new language stated that it "is natural that the student does not possess ties of property, employment, and continuity of life" because the student "is often single, unemployed, without property, and is at the stage in life of deciding and developing their plans for the future."¹⁷⁴ The language goes on to say,

Student visa adjudication is made more complex by the fact that students typically are expected to stay in the United States longer than do many other nonimmigrant visitors, to complete their program of studies. In these circumstances, it is important to keep in mind that the applicant's intent is to be adjudicated based on present intent - not on contingencies of what might happen in the future, after a lengthy period of study in the United States. Therefore, the residence abroad requirement for student applicants should be considered in the context of the usual limited ties that a student would have, and their immediate intent.¹⁷⁵

171 U.S. DEP'T OF STATE, CABLE ON EVALUATING RESIDENCE ABROAD FOR F-1 STUDENTS (Sept. 28, 2005), https://www.nafsa.org/_/file/_/amresource/DOScable_20050928.htm.

172 9 FOREIGN AFF. MANUAL § 402.5-5(E)(1)(b), *retracted* (cited in Dan Berger et al., *A Proposal to Bring Back Reasonableness: Resurrect the Rice Cable on Students and Temporary Intent, and Expand It to J-1 Exchange Visitors*, IMMIGRATION DAILY, Dec. 28, 2020, <https://discuss.ilw.com/articles/articles/396934-article-a-proposal-to-bring-back-reasonableness-resurrect-the-rice-cable-on-students-and-temporary-intent-and-expand-it-to-j-1-exchange-visitors-by-dan-berger-stephen-yale-loehr-emily-hindle-and-hun-lee>).

173 Lizbeth M. Chow, *State Department Updates Guidance on F-1/M-1 Student Intent to Depart and Residence Abroad Requirements*, NAT'L L. REV., Dec. 29, 2021, <https://www.natlawreview.com/article/state-department-updates-guidance-f-1m-1-student-intent-to-depart-and-residence>.

174 9 FOREIGN AFF. MAN. § 402.5-5(E)(1)b (Feb. 28, 2022), <https://fam.state.gov/fam/09FAM/09FAM040205.html>.

175 *Id.*

B. “Duration of Status” Rules

Rather than being admitted into the United States for a fixed time period, international students are admitted for the period of time during which they comply with the terms and conditions of their nonimmigrant status, called “duration of status.” For example, the duration of status for students on F-1 visas is “the time during which an F-1 student is pursuing a full course of study at an educational institution . . . , or engaging in authorized practical training following completion of studies”¹⁷⁶

In September of the Trump Administration’s fourth year in office, the Department of Homeland Security proposed to change the admission period from duration of status to a fixed time period for students under F and J visas, and international journalists under I visas.¹⁷⁷ Citing the growth in the number of recipients of F, J, and I visas, the department indicated a need to improve its monitoring of these visa holders. A duration-of-status admission period “does not afford immigration officers enough predetermined opportunities to directly verify that aliens granted such nonimmigrant statuses are engaging only in those activities their respective classifications authorize while they are in the United States,” which in turn “has undermined DHS’s ability to effectively enforce compliance with the statutory inadmissibility grounds related to unlawful presence and has created incentives for fraud and abuse.”¹⁷⁸

As a result of its concerns, the Department of Homeland Security proposed, among many other amendments, to set “the authorized admission and extension periods for F and J nonimmigrants (with limited exceptions) up to the program length, not to exceed a 2- or 4-year period.”¹⁷⁹ International students wishing to remain in the United States beyond their specifically authorized admission period would need to apply for an extension of stay directly with USCIS or depart the country and apply for admission with U.S. Customs and Border Protection at a port of entry.¹⁸⁰

The Biden Administration withdrew this proposed rulemaking in July 2021. In its notice to withdraw the proposal, the Department of Homeland Security noted during the thirty-day public comment period for the proposed rule, it had received more than 32,000 public comments, and “[m]ore than 99 percent of commenters opposed the proposed rule,” arguing that it was discriminatory, “would significantly burden the foreign students [and], exchange scholars . . . by requiring extension of stays in order to continue with their programs of study or work”,

176 8 C.F.R. § 214.2(f)(5)(i) (2022). For a discussion of “full course of study,” see *supra* text accompanying note 46.

177 Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media, 85 Fed. Reg. 60526 (Sept. 25, 2020). For duration of status for I visa holders, see 8 C.F.R. § 214.2(i) (2022).

178 85 Fed. Reg. *supra* note 177 at 60528.

179 *Id.* at 60529.

180 *Id.* at 60526.

and "would impose exorbitant costs and burdens on foreign students ... due to the direct cost of the extension of stay application fee."¹⁸¹ The department "believes some of the comments may be justified and is concerned that the changes proposed unnecessarily impede access to immigration benefits."¹⁸² The department withdrew the proposed rule with a caveat that it "may engage in a future rulemaking to protect the integrity of programs that admit nonimmigrants in the F, J, and I classifications."¹⁸³

IV. Russia's Invasion of Ukraine and the Rights of U.S., Ukrainian, and Other Students

After amassing 190,000 soldiers along its border with Ukraine, Russia invaded Ukraine on February 24, 2022,¹⁸⁴ igniting "one of the biggest exoduses in European history."¹⁸⁵ Between the start of the war and June 2022, more than fourteen million Ukrainians had evacuated their homes: nearly seven million leaving the country, and the remaining seven million displaced within Ukraine.¹⁸⁶ While American students studying in Ukraine and Russia were evacuated,¹⁸⁷ many Ukrainian citizens studying in the United States were stranded as their families fled their homes,¹⁸⁸ and thousands of the refugees themselves were students from around the world studying in Ukraine who needed to get home or relocate.¹⁸⁹

A. U.S. Students Studying Abroad

Courts have ruled that colleges and universities have a duty of reasonable care to protect students from reasonably foreseeable harm while participating in study abroad programs.¹⁹⁰ Institutions in the United States followed this standard of

181 Establishing a Fixed Time Period of Admission and an Extension of Stay Procedure for Nonimmigrant Academic Students, Exchange Visitors, and Representatives of Foreign Information Media, 86 Fed. Reg. 35410 (July 6, 2021).

182 *Id.*

183 *Id.*

184 Troianovski & MacFarquhar, *supra* note 18.

185 Josh Zumbrun, *Ukraine Faces a Staggering Population Loss*, WALL ST. J., June 4–5, 2022, A2.

186 Ann M. Simmons & Courtney McBride, *100 Days of Death and Devastation in Ukraine*, WALL ST. J., June 3, 2022, <https://www.wsj.com/articles/100-days-of-death-and-devastation-in-ukraine-11654259204>.

187 Josh Moody, *Russia-Ukraine War Disrupts Study Abroad*, INSIDE HIGHER ED, Mar. 3, 2022, <https://www.insidehighered.com/news/2022/03/03/russia-ukraine-war-disrupts-study-abroad-programs>.

188 Josh Moody, *Ukrainian, Russian Students Face Financial Woes in U.S.*, INSIDE HIGHER ED, Mar. 30, 2022, <https://www.insidehighered.com/news/2022/03/30/war-creates-financial-woes-russian-ukrainian-students>.

189 Alexis Okeowo, *The Foreign Students Who Saw Ukraine as a Gateway to a Better Life*, NEW YORKER, Apr. 1, 2022, <https://www.newyorker.com/news/dispatch/the-foreign-students-displaced-by-war>.

190 See *Bloss v. Univ. of Minn.*, 590 N.W.2d 661, 665 (Minn. Ct. App. 1999) (in case brought by student sexually assaulted by a taxi driver while participating in a university-sponsored study-abroad program, university's decision to use host families to provide housing was discretionary policy-making conduct protected by statutory immunity, but court could "envision circumstances involving safety of students, particularly school children on school premises, that might not allow an

care after Russia ignited the conflict in Ukraine to protect their students attending classes in the region.

It was unclear how many U.S. students were studying in Ukraine when the war began. The most recent statistics, from 2019–20, indicated that only fifty-five U.S. students “studied abroad to Ukraine” in 2019–20.¹⁹¹

For students studying in Russia, U.S. colleges and universities quickly recalled their students who were enrolled at their Russian-based facilities. For example, Middlebury College helped to arrange the return of twelve students from the Middlebury School in Russia,¹⁹² which offers programs in Yaroslavl, Irkutsk, and Moscow.¹⁹³ In making this decision, Middlebury officials took into consideration “the limited number of international flights out of Russia, and the U.S. Department of State’s authorization for family members and nonessential embassy staff to return to the U.S.”¹⁹⁴

Other universities canceled study-abroad programs scheduled for the region later in 2022. For example, Harvard University had planned a study-abroad program in June 2022 in Tbilisi, Georgia.¹⁹⁵ An update on the program’s website advised, “The Tbilisi program is postponed to Summer 2023. Check back in Fall 2022 for more information.”¹⁹⁶

B. Ukrainian Students in the United States

The war had serious legal and financial consequences for Ukrainian students studying in the United States. According to 2020–21 statistics, 1739 students from Ukraine were studying at U.S. colleges and universities, including 877 undergraduates, 529 graduate students, 48 nondegree students, and 285 students participating in OPT.¹⁹⁷ Through March and April 2022, the U.S. government extended several forms of relief and protection to Ukrainians living in the United

exercise of ‘discretionary duty’”). *See also* *Mattingly v. Univ. of Louisville*, 2006 U.S. Dist. LEXIS 53259 (W.D. Ky. July 28, 2006) (in case brought by student raped during study abroad program, public university and its officer sued in his official capacity were immune from liability for the negligent performance of a public function).

191 INST. OF INT’L EDUC., OPENDOORS, U.S. STUDY ABOARD: ALL DESTINATIONS (2021), <https://opendoorsdata.org/data/us-study-abroad/all-destinations/>.

192 Moody, *supra* note 187.

193 MIDDLEBURY C.V. STARR SCHOOLS ABROAD, STUDY ABROAD IN RUSSIA, <https://www.middlebury.edu/schools-abroad/schools/russia> (last visited Aug. 1, 2022)

194 Moody, *supra* note 187. *See* U.S. EMBASSY AND CONSULATES IN RUSSIA, DEP’T OF STATE, TRAVEL ADVISORY: DEPARTURE OF NON-EMERGENCY U.S. GOVERNMENT EMPLOYEES AND FAMILY MEMBERS (Feb. 28, 2022), <https://ru.usembassy.gov/travel-advisory-departure-of-non-emergency-u-s-government-employees-and-family-members-february-28-2022/>.

195 Moody, *supra* note 187.

196 HARVARD SUMMER SCHOOL, HARVARD SUMMER PROGRAM IN TBILISI, GEORGIA (2022), <https://summer.harvard.edu/study-abroad/tbilisi-georgia/>.

197 INST. OF INT’L EDUC., OPENDOORS, ACADEMIC LEVEL AND PLACES OF ORIGIN (2021), <https://opendoorsdata.org/data/international-students/academic-level-and-places-of-origin/>.

States. Some of the programs directly benefitted students, while other programs specifically excluded them, and some initiatives overlapped.

1. *Special Student Relief*

As the war in Ukraine extended week by week after Russia's expected dominant forces met fierce Ukrainian resistance and stalled,¹⁹⁸ financial hardships mounted for Ukrainian students in the United States. As their families back home fled and lost their homes and businesses, students ran out of money for tuition, food, and rent.¹⁹⁹ To assist these students, the Department of Homeland Security offered special student relief for eighteen months beginning April 19, 2022.²⁰⁰ Among other eligibility requirements, students had to be citizens of Ukraine, present in the United States in F-1 nonimmigrant status on the date of the notice (April 19, 2022), and "experiencing severe economic hardship as a direct result of the ongoing armed conflict in Ukraine."²⁰¹

Under this special relief, Ukrainian students could reduce their course load while maintaining their F-1 nonimmigrant student status. Course-load requirements were cut in half, from the usual twelve hours per semester to "a minimum of six semester or quarter hours of instruction per academic term" for undergraduates, and "a minimum of three semester or quarter hours of instruction per academic term" for graduate students.²⁰² For students granted employment authorization, a single class or three credits per semester "of online or distance education" would satisfy the minimum course requirement.²⁰³

Ukrainian students could also request authorization for employment and to work for an increased number of hours while their institution was in session if they were experiencing severe economic hardship. For on-campus work, students could work longer than twenty hours per week while school is in session.²⁰⁴ For off-campus work, students no longer needed one full academic year of F-1 status nor the need to demonstrate working off campus would interfere with their studies, and they could work more than twenty hours per week while school was in session.²⁰⁵

In the same volume of the *Federal Register* with this notice providing special student relief, the Department of Homeland Security also published a notice designating

198 Joseph M. Donato, *Bad Math: The Root of Russian Miscalculation in Ukraine*, MOD. WAR INST. AT WEST POINT, May 10, 2022, <https://mwi.usma.edu/putins-bad-math-the-root-of-russian-miscalculation-in-ukraine/>.

199 Moody, *supra* note 188.

200 Employment Authorization for Ukrainian F-1 Nonimmigrant Students Experiencing Severe Economic Hardship as a Direct Result of the Ongoing Armed Conflict in Ukraine, 87 Fed. Reg. 23189 (Apr. 19, 2022).

201 *Id.*

202 *Id.* See 8 C.F.R. § 214.2(f)(6)(i) (2022).

203 87 Fed. Reg. 23189, *supra* note 200, at 23189.

204 *Id.* at 23192. See 8 C.F.R. § 214.2(f)(9)(i) (2022).

205 87 Fed. Reg. 23189, *supra* note 200, at 23193. See 8 C.F.R. § 214.2(f)(9)(ii)(A) (2022).

Ukraine for temporary protected status (TPS),²⁰⁶ which provided an additional layer of security for Ukrainian students.

2. *Temporary Protected Status*

Under the Immigration Act of 1990,²⁰⁷ the Secretary of Homeland Security can designate a foreign country experiencing a crisis for TPS and provide nationals from those countries who are in the United States with the legal authority to live and work here for a limited time. The secretary can designate a foreign state for TPS if the secretary makes one of three findings: there is “an ongoing armed conflict within the state and, due to such conflict, requiring the return of aliens who are nationals of that state to that state ... would pose a serious threat to their personal safety”; there has been an environmental disaster like an earthquake, flood, drought, or epidemic “resulting in a substantial, but temporary, disruption of living conditions in the area affected”; or “there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety.”²⁰⁸ After making this designation, the secretary may then grant TPS to eligible nationals of that foreign state.²⁰⁹

While TPS does not lead to lawful permanent resident status or provide any immigration status, individuals granted TPS enjoy several benefits. They are not removable from the United States, can obtain an employment authorization document, and may be granted travel authorization.²¹⁰ The Department of Homeland Security cannot detain individuals with TPS on the basis of their immigration status in the United States.²¹¹

Under a notice filed April 19, 2022, the Secretary of Homeland Security declared that “ongoing armed conflict and extraordinary and temporary conditions” met the statutory conditions to support designating Ukraine for TPS.²¹² The designation was for a time period of eighteen months, from April 19, 2022 to October 19, 2023.²¹³ Ukrainian nationals must have continuously resided in the United States since April 11, 2022 and have been continuously physically present in the United States since April 19, 2022, to apply for TPS.²¹⁴

206 Designation of Ukraine for Temporary Protected Status, 87 Fed. Reg. 23211 (Apr. 19, 2022).

207 Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

208 8 U.S.C. § 1254a(b) (2018). The Immigration and Nationality Act technically ascribes this authority to the Attorney General, but Congress transferred it to the Secretary of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

209 8 U.S.C. § 1254a(a)(1)(A) (2018).

210 *Id.* § 1254a. See also USCIS, TEMPORARY PROTECTED STATUS, May 20, 2022, <https://www.uscis.gov/humanitarian/temporary-protected-status>.

211 8 U.S.C. § 1254a (2018). See also USCIS, *supra* note 210.

212 87 Fed. Reg. 23211, *supra* note 206.

213 *Id.* at 23215.

214 *Id.* at 23211.

Generally, it appears that students on F-1 visas may simultaneously hold TPS. According to a set of Frequently Asked Questions provided by USCIS on August 12, 2015, to NAFSA: Association of International Educators but never posted on USCIS's website, "a person with F-1 ... or any other nonimmigrant status may apply for and receive TPS."²¹⁵ Furthermore, "The individual can continue to hold both statuses, as long as he or she remains eligible for both."²¹⁶ As an example,

if an F-1 (student) applies for and obtains TPS, but he or she continues to abide by all of the F-1 eligibility requirements, he/she can continue to maintain F-1 status and simultaneously hold TPS. Any individual who applies for and is granted TPS must continue to comply with the separate eligibility requirements of all other statuses (e.g., F-1, H-1B) that he or she seeks to maintain.²¹⁷

Specifically regarding Ukrainian students on F-1 visas, the Department of Homeland Security—in the notice providing special student relief—indicated that F-1 nonimmigrant students from Ukraine "may file the TPS application according to the instructions in the USCIS notice announcing the designation of Ukraine for TPS."²¹⁸ Ukrainian students could maintain F-1 nonimmigrant status and TPS concurrently if they maintained a minimum course load as provided under the Special Student Relief, did not violate their nonimmigrant status, and maintained their TPS.²¹⁹

3. *Humanitarian Parole*

Under the Immigration and Nationality Act, the Secretary of Homeland Security has the discretion to "parole into the United States temporarily under such

215 NAFSA, BASICS OF TEMPORARY PROTECTED STATUS (TPS), <https://www.nafsa.org/regulatory-information/basics-temporary-protected-status-tps>. See USCIS FAQ: STATELESSNESS AND THE ABILITY TO WORK FOR JOINT F-1/TPS [hereinafter USCIS FAQ], https://www.nafsa.org/_/File/_/amresource/WorkForJointF1TPS.pdf.

216 See USCIS FAQ, *supra* note 215.

217 *Id.*

218 87 Fed. Reg. *supra* note 200, at 23194. The notices for Special Student Relief and Temporary Protected Status were published in the same volume of the *Federal Register*.

219 *Id.* Similar accommodations have not been made for the more than 4800 Russian students studying in the United States. See INST. OF INT'L EDUC., *supra* note 197. In fact, early political sentiment ran against students from Russia, with some members of Congress suggesting removing them from the United States. Fiona Harrigan, *Don't Kick Russian Students Out of the U.S.*, REASON, Mar. 1, 2022, <https://reason.com/2022/03/01/dont-kick-russian-students-out-of-the-u-s/>. A White House proposal included within an emergency supplemental appropriation for Ukraine in April 2022 would have authorized an unlimited number of green cards—which allow for legal permanent residence and work authorization—to Russians with an advanced STEM degree for four years. H.R. Doc. No. 117-115, 117th Cong., 2d Sess. (2022). See also WHITE HOUSE, Apr. 28, 2022, https://www.whitehouse.gov/wp-content/uploads/2022/04/FY_2022_emergency_supplemental_assistance-to-ukraine_4.28.2022.pdf. The proposal would have eliminated the requirement under section 203(b)(2) of the Immigration and Nationality Act (8 U.S.C. § 1153(b)(2) (2018)) that the services of an immigrant must be "sought by an employer." Instead, Russians with advanced STEM degrees needed only to be "seeking admission to engage in work in the United States in an endeavor related to science, technology, engineering, or mathematics." WHITE HOUSE, *supra*, at 33. The proposal aimed to "help the United States attract and retain Russian STEM talent and undercut Russia's innovative potential, benefitting U.S. national security." *Id.* at 33–34. This language was not included in the final version of the bill. Pub. Law No. 117-128, 136 Stat. 1212 (2022).

conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States.”²²⁰ The phrase “urgent humanitarian reasons” is not defined in statute or regulation, leading USCIS officers to “look at all of the circumstances, taking into account factors such as (but not limited to)

- “Whether or not the circumstances are pressing;
- The effect of the circumstances on the individual’s welfare and wellbeing; and
- The degree of suffering that may result if parole is not authorized.”²²¹

Similarly, neither statutes nor regulations define “significant public benefit.” As a result, “Parole based on significant public benefit includes, but is not limited to, law enforcement and national security reasons or foreign or domestic policy considerations. USCIS officers look at all of the circumstances presented in the case.”²²²

a. Uniting for Ukraine Program

The Biden Administration pledged to accept up to 100,000 Ukrainian refugees fleeing from the war with Russia.²²³ Toward that end, the Department of Homeland Security established the Uniting for Ukraine program on April 21, 2022, to provide “a pathway for Ukrainian citizens and their immediate family members who are outside the United States to come to the United States and stay temporarily in a two-year period of parole.”²²⁴ To be considered for parole under Uniting for Ukraine, an individual generally must be a Ukrainian citizen with a Ukrainian passport; must have resided in Ukraine immediately before the Russian invasion through February 11, 2022, and were displaced as a result of the invasion; and must have a supporter “in the United States who agrees to provide them with financial support for the duration of their stay in the United States.”²²⁵ After applicants are paroled into the United States, they are “eligible to apply for discretionary employment authorization from USCIS.”²²⁶

Seeking asylum would preclude entry through the Uniting for Ukraine program. The Department of Homeland Security, in its press release announcing the program, warned,

Ukrainians should not travel to Mexico to pursue entry into the United States. Following the launch of Uniting for Ukraine, Ukrainians who present at land U.S. ports of entry without a valid visa or without pre-

220 8 U.S.C. §1182(d)(5)(A) (2018).

221 USCIS, HUMANITARIAN OR SIGNIFICANT PUBLIC BENEFIT PAROLE FOR INDIVIDUALS OUTSIDE THE UNITED STATES, <https://www.uscis.gov/humanitarian/humanitarianpublicbenefitparoleindividualsoutsideUS>.

222 *Id.*

223 Miriam Jordan et al., *U.S. to Admit Up to 100,000 Refugees as Ukraine Exodus Floods Europe*, N.Y. TIMES, Mar. 25, 2022, A12.

224 USCIS, UNITING FOR UKRAINE, <https://www.uscis.gov/ukraine> (last visited Aug. 1, 2022).

225 *Id.*

226 *Id.*

authorization to travel to the United States through Uniting for Ukraine will be denied entry and referred to apply through this program.²²⁷

b. Ukrainian Students in the United States Exempt from Uniting for Ukraine

Ukrainian students in the United States were exempt from the Uniting for Ukraine parole program. The program guidelines states, "Ukrainian citizens who are present in the United States will not be considered for parole under Uniting for Ukraine. However, Ukrainian citizens present in the United States may be eligible for Temporary Protected Status (TPS)."²²⁸ Therefore, Ukrainian students holding F-1 visas could, in fact, apply for TPS.²²⁹

4. Lautenberg Amendment for Religious Minorities from the Former Soviet Union

For a subset of Ukrainian students who are specific religious minorities, the reauthorization of the Lautenberg Amendment in March 2022 could help them qualify as refugees, but they would need to apply outside the United States. Named after former U.S. Senator Frank Lautenberg from New Jersey and originally enacted as part of the Fiscal Year 1990 Foreign Operations Appropriations Act,²³⁰ the Lautenberg Amendment requires the U.S. Attorney General to establish "one or more categories of aliens who are or were nationals and residents of the Soviet Union and who share common characteristics that identify them as targets of persecution in the Soviet Union on account of race, religion, nationality, membership in a particular social group, or political opinion."²³¹ The act required the new categories to include nationals and residents of the former Soviet Union—including Ukraine—who were Jews and Evangelical Christians, and members of the Ukrainian Catholic Church or the Ukrainian Orthodox Church.²³²

Nationals of the former Soviet Union who fall under these categories "may establish, for purposes of admission as a refugee" that they have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion by asserting such a fear and asserting a credible basis for concern about the possibility of such persecution."²³³ By contrast, the Immigration and Nationality Act requires prospective refugees to establish

227 U.S. DEP'T OF HOMELAND SEC., PRESIDENT BIDEN TO ANNOUNCE UNITING FOR UKRAINE, A NEW STREAMLINED PROCESS TO WELCOME UKRAINIANS FLEEING RUSSIA'S INVASION OF UKRAINE (Apr. 21, 2022), <https://www.dhs.gov/news/2022/04/21/president-biden-announce-uniting-ukraine-new-streamlined-process-welcome-ukrainians>.

228 *Id.*

229 87 Fed. Reg. *supra* note 200 at 23194.

230 Foreign Operations, Export Financing, and Related Program Appropriations Act of 1990, Pub. L. No. 101-167, § 599D(a), 103 Stat. 1195, 1261-62 (1989).

231 *Id.* at § 599D(b)(1)(A), 103 Stat. 1262.

232 *Id.* at § 599D(b)(2)(A)(B), 103 Stat. 1262. The former members of the Soviet Union include Russia, Ukraine, Belarus, Moldova, Kazakhstan, Estonia, Latvia, Lithuania, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan, Armenia, Azerbaijan, and Georgia.

233 *Id.* at § 599D(a), 103 Stat. 1261-62.

a “well-founded fear of future persecution” on an individual basis.²³⁴ Finally, to be eligible to apply for refugee status under the Lautenberg Amendment, an individual must have close family in the United States.²³⁵

The Lautenberg Amendment was most recently extended through the Consolidated Appropriations Act of 2022.²³⁶ The application period started March 15, 2022, and it was set to end on September 23, 2022. Applications could only be submitted by resettlement agencies such as the International Rescue Committee.²³⁷ A U.S. relative must start the application process by applying through a resettlement agency near where they live.²³⁸

The requirement for applications to be submitted by resettlement agencies prevents Ukrainian students already in the United States, including those with F-1 visas, from securing refugee status under the Lautenberg Amendment. The U.S. Department of State specifically advised that “Ukrainians should not attempt to apply for visas in order to travel to the United States as refugees.”²³⁹ Seeking asylum would also likely prevent a Ukrainian student’s access to the Lautenberg process, based on the Department of Homeland Security’s caution to Ukrainians from entering the United States through Mexico regarding the Uniting for Ukraine program.²⁴⁰

As of July 2022, the status of applications through the Lautenberg Amendment process remained uncertain. There were “at least several thousand Ukrainians in the Lautenberg pipeline” who had submitted applications or were at some stage of processing.²⁴¹ If Lautenberg Amendment applicants “decide to come through the [Uniting for Ukraine] parole program rather than waiting for Lautenberg processing,” the consequences were unknown.²⁴²

C. *International Students Stranded in Ukraine*

While this article focuses on U.S. students studying abroad and international students studying in the United States, the significant number of international students in Ukraine compels a brief examination of the effect that Russia’s invasion

234 8 C.F.R. § 1208.13(b) (2022).

235 Pub. L. No. 101-167, *supra* note 230, § 599E(c), 103 Stat. 126. The Attorney General may waive certain grounds for inadmissibility “to assure family unity.”

236 Consolidated Appropriations Act, 2022, H.R. 2471, 117th Cong. § 7034 (1)(5) (2022).

237 INTERNATIONAL RESCUE COMMITTEE, LAUTENBERG PROGRAM FOR FORMER SOVIET UNION (Mar. 30, 2022), <https://www.rescue.org/announcement/lautenberg-program-former-soviet-union>.

238 HEBREW IMMIGRATION AID SOCIETY [HIAS], HIAS UKRAINE CRISIS FREQUENTLY ASKED QUESTIONS 4 (2022), https://www.hias.org/sites/default/files/hias_ukraine_faq_-_april_25_.pdf.

239 U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, INFORMATION FOR NATIONALS OF UKRAINE (May 27, 2022), <https://travel.state.gov/content/travel/en/News/visas-news/information-for-nationals-of-Ukraine.html>.

240 *See supra* text accompanying note 227.

241 Reuven Blau, *Ukrainian Refugee Groups Decry Trickle of U.S. Help*, BROOKLYN EAGLE, July 8, 2022, <https://brooklyneagle.com/articles/2022/07/08/ukrainian-refugee-groups-decry-trickle-of-u-s-help/>.

242 HIAS, *supra* note 238, at 4.

of Ukraine had on the foreign students studying there, and lessons that can be learned, particularly regarding students of color. According to the Ukrainian State Center for International Education, there were 76,548 international students in Ukraine from 155 countries in 2020, the most current data available.²⁴³ Within ten days of the Russian invasion of Ukraine, more than eight hundred medical students studying at Sumy State University were stranded in the city of Sumy in northeastern Ukraine, about forty miles from the Russian border, as Russia's military blocked access to roads and trains. Most of the students were from India and Africa.²⁴⁴ During Russian shelling of the city of Kharkiv, at least one student from India was killed on March 1, 2022.²⁴⁵

1. *Indian Students*

In 2020, India—with 18,095 students—represented the top country of origin of international students in Ukraine.²⁴⁶ The majority of these students studied medicine.²⁴⁷ Ukrainian universities have been actively recruiting Indian students since 2014.²⁴⁸ Agencies paid to recruit students to institutions in countries like Ukraine have taken advantage of the stiff competition for enrollment at public medical universities in India and the relatively lower entrance requirements and tuition costs in Eastern Europe.²⁴⁹ Poland, Armenia, and Hungary offered seats in their universities to Indian medical students rescued from Ukraine.²⁵⁰

2. *African Students*

Three African countries ranked among the top ten countries of origin of international students in Ukraine in 2020: Morocco (8832 students), Nigeria (4227), and Egypt (3048).²⁵¹ These students decided to attend college in Ukraine for several reasons. University fees were lower than in destinations like the United Kingdom and France, "but the quality of instruction in fields, including medicine, computer science, and international law, was high. They could take classes in English, and

243 UKRAINIAN STATE CENTER FOR INT'L EDUC., INTERNATIONAL STUDENTS IN UKRAINE, <https://studyinukraine.gov.ua/en/life-in-ukraine/international-students-in-ukraine/> (last visited Aug. 1, 2022).

244 Alexandra Eaton et al., *More Than 800 Medical Students, Most African or Indian, Are Stranded in Northeastern Ukraine*, N.Y. TIMES, Mar. 3, 2022, <https://www.nytimes.com/live/2022/03/03/world/russia-ukraine/medical-students-stranded-ukraine>.

245 Shuriah Niazi, *Indian Student Dies as Russia Shells University City*, UNIV. WORLD NEWS, Mar. 1, 2022, <https://www.universityworldnews.com/post.php?story=20220301150937921>.

246 UKRAINIAN STATE CENTER FOR INT'L EDUC., *supra* note 243.

247 Shuriah Niazi, *Indian Medical Students Fleeing Ukraine Demand Study Places*, UNIV. WORLD NEWS, Mar. 11, 2022, <https://www.universityworldnews.com/post.php?story=20220311110031864>.

248 *Id.*

249 Pola Lem, *War in Ukraine Disrupts Medical Education in India*, INSIDE HIGHER ED, Mar. 24, 2022, <https://www.insidehighered.com/news/2022/03/24/war-ukraine-creates-crisis-medical-education-india>.

250 Niazi, *supra* note 245.

251 UKRAINIAN STATE CENTER FOR INT'L EDUC., *supra* note 243.

they were still attending college in Europe.”²⁵² Ultimately, these students hope for a better life than they anticipate at home. For example, “Nigeria, like many former colonies of the richest nations in Europe, is a country full of young, ambitious people looking to get out, for a better education, better jobs, a better start.”²⁵³

Some home governments of African students who escaped Ukraine sought placements for them elsewhere. For example, the Nigerian government held discussions with the governments of Greece, Hungary, Poland, and Romania “to enable Nigerian students in their fifth and sixth years of medical studies to complete their studies at universities in these countries.”²⁵⁴ Several other Eastern European countries, including Bulgaria and Serbia, indicated they would allow students previously studying in Ukraine, including African students, to complete their education at their institutions of higher education.²⁵⁵

3. *Discrimination Against Students of Color*

In the chaos of the mass evacuation of refugees from Ukraine early in the war, many international students of color experienced discrimination while trying to cross the Ukrainian border. In the first week of Russia’s invasion, hundreds of thousands of people evacuated Ukraine for the European Union through Ukraine’s border with the city of Medyka, Poland.²⁵⁶ Ukrainian border guards prioritized processing their fellow Ukrainian citizens over refugees from Africa, South Asia, and the Middle East—mostly students attending Ukraine’s medical and business schools—who were held aside and forced to wait in wintry weather for over forty-eight hours.²⁵⁷ Even worse, some students were reportedly beaten by Ukrainian, Polish, and Belarussian border guards.²⁵⁸

The situation repeated itself at other border crossings. At the crossing between Ukraine and the Romanian town of Siret, there appeared to be “one rule for Ukrainians and another for everyone else.”²⁵⁹ Border guards reserved one gate for Ukrainians “and people flowed through,” while thousands of international refugees from countries like India, Morocco, Namibia, Pakistan, and Zambia “were directed to one gate that was mostly closed.”²⁶⁰

252 Okeowo, *supra* note 189.

253 *Id.*

254 Wagdy Sawahel, *Universities Reach Out to African Students Who Escaped Ukraine*, UNIV. WORLD NEWS, Mar. 15, 2022, <https://www.universityworldnews.com/post.php?story=20220315065736746>.

255 *Id.*

256 Drew Hinshaw, *Foreign Refugees Fleeing Ukraine Say They Were Held for Days at Border*, WALL ST. J., Mar. 2, 2022, <https://www.wsj.com/articles/foreign-refugees-fleeing-ukraine-say-they-were-held-for-days-at-border-11646218800>.

257 *Id.*

258 *Id.*; Jeffrey Gettleman & Monika Pronczuk, *Two Refugees Cross Poland’s Border, and Enter Different Worlds*, N.Y. TIMES, Mar. 14, 2022, A1.

259 Monika Pronczuk & Ruth Maclean, *Africans Fleeing Ukraine Say Racist Authorities Hindered Their Escape*, N.Y. TIMES, Mar. 2, 2022, A10.

260 *Id.*

African governments responded, and there were hints of an investigation. The governments of Gabon, Ghana, Kenya, Nigeria, and South Africa condemned how their citizens were treated at the Ukrainian border.²⁶¹ The African Union said, "Reports that Africans are singled out for unacceptable dissimilar treatment would be shockingly racist" and violate international law.²⁶² The European Commission Against Racism and Intolerance said in a statement condemning Russia's invasion that it "trusts that reports about unjustified differential treatment of Roma and people of African or Asian descent coming from Ukraine will be effectively investigated and that the authorities will ensure that there is no discrimination against any of the people who should be offered protection and assistance."²⁶³

It has been suggested that African governments apply to intervene in the case brought by Ukraine against Russia before the International Court of Justice²⁶⁴ to help highlight how the war has affected African nationals.²⁶⁵ By intervening, "African governments would be doing the world a favour if they chose to apply to the ICJ to claim diplomatic protection on behalf of their nationals suffering racist discrimination in the midst of this war."²⁶⁶

V. How to Broaden Assistance for Stranded Students in the United States

A. Distinguishing "Refugee" from "Asylum Seeker"

When considering which policy levers to pull to improve protections for stranded international students, it is important to consider the legal distinctions between refugees and individuals seeking asylum. Refugees and asylum seekers are each defined as "any person who is outside any country of such person's nationality ... who is unable or unwilling to return to ... that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."²⁶⁷ While refugees

261 Hinshaw, *supra* note 256.

262 Pronczuk & Maclean, *supra* note 259.

263 EUROPEAN COMM'N AGAINST RACISM AND INTOLERANCE, STATEMENT OF THE EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE (ECRI) ON THE CONSEQUENCES OF THE AGGRESSION OF THE RUSSIAN FEDERATION AGAINST UKRAINE (Apr. 5, 2022), <https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/-/statement-of-the-european-commission-against-racism-and-intolerance-ecri-on-the-consequences-of-the-aggression-of-the-russian-federation-against-ukrai>.

264 Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), 2022 I.C.J. 182 (Mar. 16).

265 Chepkorir Sambu, *African Governments Must Do More to Protect Citizens Caught Up in Ukraine's War*, NEW HUMANITARIAN, May 18, 2022, <https://www.thenewhumanitarian.org/opinion/2022/05/18/African-governments-citizens-Ukraine-war>.

266 *Id.*

267 8 U.S.C. §§ 1101(a)(42)(A), 1158 (b)(1)(A)–(B) (2018). A "refugee" may also be a person "in such special circumstances as the President . . . may specify" who is within their country of nationality" who is "persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(B) (2018).

and asylum seekers fit the same definition, the distinction is whether they are in the United States: individuals who are outside the United States are considered for refugee status,²⁶⁸ while those who are physically present in the United States or who are seeking admission at a port of entry are considered for asylum status.²⁶⁹

Gaining asylum is notoriously difficult.²⁷⁰ Almost all noncitizens seeking to enter the United States at a port of entry or near the border have faced “expedited removal,” unless they indicate either an intent to apply for asylum or a fear of persecution.²⁷¹ Asylum seekers are interviewed by an asylum officer to determine if they have a “credible fear” of persecution.²⁷² If the asylum officer determines that the asylum seeker has a credible fear of persecution, there is a “significant possibility” of establishing eligibility for asylum, and the individual is referred to immigration court to proceed with the asylum application process.²⁷³ If the asylum officer determines the person does not have a credible fear, the individual is ordered removed.²⁷⁴ Before removal, the individual may appeal for a review of the negative finding of credible fear of persecution by an immigration judge.²⁷⁵ If the immigration judge overturns the negative finding, the individual is placed in removal proceedings through which they can seek protection from removal, including asylum.²⁷⁶ If the immigration judge upholds the asylum officer’s negative finding, the individual is removed from the United States.²⁷⁷

The asylum process is as time consuming as it is complex. As of December 31, 2021, USCIS had 438,500 pending asylum cases,²⁷⁸ and it could take up to two

268 8 U.S.C. § 1157 (2018).

269 8 U.S.C. § 1158 (2018).

270 In general, asylum seekers “must navigate a difficult and complex process that can involve multiple government agencies.” AM. IMMIGRATION COUNCIL, *ASYLUM IN THE UNITED STATES 1* (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_in_the_united_states.pdf. In the wake of the Trump Administration, “It has never been a more difficult time to gain entry into the United States to pursue an asylum claim. Likewise, it has never been more challenging to actually access that system by filing an application once here, to survive while that application is pending adjudication, and ultimately to be granted asylum.” Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 *LOY. L. REV.* 121, 127 (2021).

271 8 U.S.C. § 1225 (2018). *See also* AM. IMMIGRATION COUNCIL, *A PRIMER ON EXPEDITED REMOVAL* (2019), https://www.americanimmigrationcouncil.org/sites/default/files/research/primer_on_expedited_removal.pdf.

272 8 U.S.C. § 1225 (b)(1)(B)(ii) (2018).

273 *Id.* § 1225 (b)(1)(B)(v).

274 *Id.* § 1225 (b)(1)(B)(iii)(I).

275 *Id.* § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 208.30(g) (2022).

276 8 C.F.R. § 1208.30(g)(2)(iv)(B)–(C) (2022).

277 *Id.* at §§ 1003.42(f), 1208.30(g)(2)(iv)(A). Under a rule adopted in May 2022 that was designed to expedite the processing of asylum claims, asylum officers were authorized to consider the asylum applications of individuals subject to expedited removal who assert a fear of persecution or torture and pass the required credible fear screening. Previously, only immigration judges could decide such cases. *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 *Fed. Reg.* 18078 (2022).

278 USCIS, *I-589 AFFIRMATIVE ASYLUM SUMMARY OVERVIEW FY2022 Q1 (OCT 1, 2021–DEC 31, 2021)* 12

to four years to schedule an initial interview with applicants.²⁷⁹ As of May 2022, there was a backlog of over 1.8 million cases before immigration courts.²⁸⁰ These daunting statistics have real-world implications for asylum seekers. They are separated from their families, which may face dangerous situations abroad, and they may be unable to retain counsel who can maintain representation for the duration of the asylum seeker's extended case.

Given the procedural and substantive difficulties inherent in the asylum process, some experts suggest that reform would be a Sisyphean task. "[T]he forces that generate inconsistent adjudicative outcomes are not easy to constrain, at least not without costly trade-offs," one expert wrote:

Among the determinants the number of decisional units; the size of the decisional units; the caseload; the criteria and procedures for appointing adjudicators; the and policy guidance they receive; their degree of decisional independence; amount of deference and the scope of review on appeal; the prevalence written reasoned opinions and the accompanying use of stare decisis; the resources devoted to the process; the procedural resources; the degree specialization; and such subject-matter attributes as the degrees of complexity, dynamism, emotional or ideological content, and determinacy.²⁸¹

With these complexities regarding asylum in mind, the suggested reforms below focus on refugees.

B. Private Sponsorship of Refugees

For international students who find themselves stranded in the United States, the F-1 visa process that gained them entry into the country does not provide a "a durable solution," that is, a permanent resolution that would "enable them to live normal lives with full access to rights and freedoms."²⁸² Student visas are temporary: "the student must prove that they are entering the U.S. in non-immigrant status and do not have an intent to immigrate."²⁸³ Moreover, students on an F-1 visa must demonstrate that they can pay for their educational and living expenses for the length of their stay; if circumstances change back home and they want to remain

(2022), https://www.uscis.gov/sites/default/files/document/data/Asylum_Division_Quarterly_Statistics_Report_FY22_Q1_V4.pdf.

279 AM. IMMIGRATION LAWS. ASS'N ASYLUM AND REFUGEE COMM., PRACTICE POINTER: AILA FREQUENTLY ASKED QUESTIONS (FAQS) ON CHANGES TO THE ASYLUM OFFICE AFFIRMATIVE SCHEDULING SYSTEM 1 (2018), <https://www.aila.org/File/DownloadEmbeddedFile/74796>.

280 TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE [TRAC], BACKLOG OF PENDING CASES IN IMMIGRATION COURTS AS OF MAY 2022, https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php.

281 Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 473 (2007).

282 COORDINATING TEAM FOR THE INITIATIVE ON U.S. EDUC. PATHWAYS FOR REFUGEE STUDENTS, UNIVERSITY SPONSORSHIP OF REFUGEE STUDENTS: INITIATIVE ON INCREASING U.S. EDUCATION PATHWAYS FOR REFUGEE STUDENTS 7, 9 (2021), https://www.higheredimmigrationportal.org/wp-content/uploads/2021/11/UniversitySponsorshipofRefugeeStudents_v1a.pdf.

283 *Id.* at 9.

in the United States, “the F-1 visa does not, as currently designed, provide durable protection.”²⁸⁴ One possible solution to address the limitations of F-1 visas for stranded students is the creation of a private sponsorship program for refugees as an additional category of priority admission under U.S. refugee admissions and resettlement policy.

1. *Three Current Priorities for Admission of Refugees*

Under the Immigration and Nationality Act as amended by the Refugee Act of 1980, the president, after consultation with Congress, sets the annual number of refugee admissions and the allocation of those numbers by global region.²⁸⁵ The Bureau of Population, Refugees, and Migration within the Department of State administers the processing of refugee cases through the U.S. Refugee Admissions Program (USRAP).²⁸⁶ The USCIS adjudicates refugee processing according to a system of three priorities for admission:

- Priority 1 (P-1): cases identified by the UNHCR, a U.S. embassy, or a specially trained nongovernmental organization, “including persons facing compelling security concerns, women-at-risk, victims of torture or violence, and others in need of resettlement”;
- Priority 2 (P-2): groups of special humanitarian concern identified by USRAP “such as certain Congolese in Rwanda”; and
- Priority 3 (P-3): Family reunification cases, including spouses, unmarried children under twenty-one, and parents of “persons lawfully admitted to the U.S. as refugees or asylees or persons who are lawful permanent residents or U.S. citizens who previously had refugee or asylum status.”²⁸⁷

2. *Biden Initiative to Create Fourth Priority for Refugee Admission*

Under an executive order signed February 4, 2021, President Biden ordered that “USRAP should be rebuilt and expanded, commensurate with global need.”²⁸⁸ The executive order more specifically stated, “To meet the challenges of restoring and expanding USRAP, the United States must innovate, including by effectively employing technology and capitalizing on community and private sponsorship of refugees, while continuing to partner with resettlement agencies for reception and placement.”²⁸⁹

284 *Id.*

285 8 U.S.C. § 1157 (2018); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980). *See, e.g.*, Presidential Determination No. 2022-02, 86 Fed. Reg. 57525 (Oct. 18, 2021), under which 125,000 refugees would be admitted.

286 U.S. BUREAU OF POPULATION, REFUGEES, AND MIGRATION, ABOUT REFUGEE ADMISSIONS, <https://www.state.gov/refugee-admissions/about/>.

287 USCIS, REFUGEE SECURITY SCREENING FACT SHEET 3 (June 3, 2020), https://www.uscis.gov/sites/default/files/document/fact-sheets/Refugee_Screening_and_Vetting_Fact_Sheet.pdf.

288 Exec. Order No. 14013, 86 Fed. Reg. 8839 (Feb. 9, 2021).

289 *Id.*

In a report to Congress in September 2021,²⁹⁰ the Biden Administration outlined a new private-sponsorship pilot program described as "a major initiative in FY 2022" under which community members would assume "the primary responsibility of welcoming and providing initial support to newly arrived refugees, helping facilitate their successful integration."²⁹¹ Private sponsorship has been described as teaming up refugees "with groups of individuals, such as local clubs, businesses, university communities, or faith groups, who commit to providing financial, logistical, and integration support for refugees accepted through resettlement programs."²⁹² Private groups could also "nominate, or name, the individual refugees they wish to sponsor."²⁹³

The Department of State, in coordination with the Department of Health and Human Services, was developing the private sponsorship program and linking it to a new "Priority 4 (P-4) category."²⁹⁴ The proposed P-4 priority category would "cover refugees supported by private sponsors who accept primary responsibility for funding and providing core resettlement services."²⁹⁵ The private sponsorship pilot program would include a matching component under which "private sponsors will be matched with refugees who already have access to USRAP through another priority category," and upon approval for resettlement, "these refugees would be re-assigned to the P-4 category to distinguish them from the typical P-1, P-2, and P-3 categories."²⁹⁶ The pilot program would also include an identification component, under which "private sponsors who meet certain criteria will be permitted to identify and refer refugees to the P-4 category and apply to sponsor their resettlement."²⁹⁷

3. Role for Colleges and Universities in Proposed P-4 Priority

An alliance of college and university presidents has suggested that institutions of higher education "have the potential to play a leadership role in the development of private sponsorship in the United States," given "the significant interest and

290 U.S. DEP'TS OF STATE, HOMELAND SEC., & HEALTH AND HUM. SERVS., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2022: REPORT TO CONGRESS (Sept. 20, 2021), <https://www.state.gov/wp-content/uploads/2021/09/Proposed-Refugee-Admissions-for-FY22-Report-to-Congress.pdf/>.

291 *Id.* at 7. The United States has a history of private-sector sponsorship of refugees, most recently the Private Sector Initiative established by the Reagan Administration in 1987 (Presidential Determination No. 87-1, 51 Fed. Reg. 39637 (Oct. 30, 1986)), which lapsed under the Clinton Administration in 1995. See generally DAVID BIER & MATTHEW LA CORTE, NISKANEN CENTER, PRIVATE REFUGEE RESETTLEMENT IN U.S. HISTORY (2016), https://www.niskanencenter.org/wp-content/uploads/old_uploads/2016/04/PrivateRefugeeHistory.pdf.

292 COORDINATING TEAM FOR THE INITIATIVE ON U.S. EDUC. PATHWAYS FOR REFUGEE STUDENTS, *supra* note 282, at 13.

293 *Id.*

294 U.S. DEP'TS OF STATE, HOMELAND SEC., & HEALTH AND HUM. SERVS., *supra* note 290, at 18.

295 *Id.*

296 *Id.*

297 *Id.*

capacity of U.S. campuses to support refugee students.”²⁹⁸ College and university sponsorship for refugees “would remove the legal barriers currently preventing talented refugees residing in a first country of asylum from attending U.S. colleges and universities and provide them with a path to permanent residency and citizenship.”²⁹⁹

To achieve this goal, the federal government could enable institutions of higher education “or an implementing organization representing them” to nominate directly, or at least identify, students who would be sponsored privately and resettled to the United States.³⁰⁰ This role would fill “the identification mechanism” outlined in the Biden Administration’s proposal.³⁰¹ To enable the proposed private sponsorship program to increase the number of refugee students, the U.S. government could “formally and explicitly create additional places for sponsored refugees each year, distinct from its annual government-assisted resettlement target.”³⁰²

This policy proposal aligns with a policy recommendation in a 2022 report published by the UNHCR and UNESCO detailing how host countries can support refugees’ access to their national systems of higher education.³⁰³ Among over a dozen recommendations, the report suggested the creation of university networks “that engage collectively to support refugee students.” Creating such networks would facilitate the ability of “officers in charge of university refugee admission and integration [to] meet and exchange on issues and approaches.”³⁰⁴

C. “Dual Intent” and a Pathway to Residency

The United States has been criticized for lacking a comprehensive “international education policy” like those in countries like Australia, Canada, and the United Kingdom that “offer clearer pathways to work opportunities and a professional future.”³⁰⁵ Canada, for example, has a “national strategy to attract international students [that] is underpinned with pathways, not only to jobs, but to citizenship” that helped increase the number of international students studying in Canada by 119% between 2010 and 2017.³⁰⁶

298 COORDINATING TEAM FOR THE INITIATIVE ON U.S. EDUC. PATHWAYS FOR REFUGEE STUDENTS, *supra* note 282, at 13.

299 *Id.* at 11.

300 *Id.* at 4.

301 *Id.* at 14. See U.S. DEP’TS OF STATE, HOMELAND SEC., & HEALTH AND HUM. SERVS., *supra* note 290, at 18.

302 *Id.*

303 REFUGEES’ ACCESS TO HIGHER EDUCATION IN THEIR HOST COUNTRIES: OVERCOMING THE ‘SUPER-DISADVANTAGE’ (Michaela Martin & Manal Stulgaitis eds., 2022).

304 *Id.* at 61.

305 Anna Esaki-Smith, *Do International Students Benefit from Their US Study-Abroad Experience?* 110 INT’L HIGHER EDUC. 31, 32 (2022), <https://www.internationalhighereducation.net/api-v1/article/!/action/getPdfOfArticle/articleID/3426/productID/29/fileName/article-id-3426.pdf>.

306 *Id.* at 32.

The requirement that students applying for an F-1 visa must prove that "they are entering the United States in non-immigrant status and do not have an intent to immigrate" to the United States has been called an "outdated immigration law."³⁰⁷ It has been suggested that international students applying for F-1 visas be allowed to express a "dual intent" to complete their degree and then transfer to another legal status, such as "lawful permanent resident" with the authorization to live and work in the United States on a permanent basis ("green card" holder).³⁰⁸

The U.S. Citizenship Act, introduced in the U.S. House of Representatives in February 2021, would allow applicants for F-1 visas to have a dual intent.³⁰⁹ Under the proposed amendments in the legislation,³¹⁰ the definition of a nonimmigrant alien seeking an F-1 visa would carve out an exception for "a student qualified to pursue a full course of study at an institution of higher education" from the intent not to abandon their "residence in a foreign country."³¹¹ The Presidents' Alliance on Higher Education and Immigration has endorsed this legislation.³¹²

VI. Conclusion

Stranded international students live in a state of limbo: during worldwide health emergencies like the COVID-19 pandemic and armed conflict like the war in Ukraine, stranded students are not sure if they can stay in their host country or if they will be able to return home. In the meantime, financial pressures mount, and they look to the host government for support. The immigration laws in the United States provide such assistance in certain circumstances, including authorization to work if the student can demonstrate "severe economic hardship,"³¹³ and—if the Department of Homeland Security finds they are from parts of the world experiencing "emergent circumstances"—a relaxation of the rules regarding duration of status, full course of study, and employment eligibility.³¹⁴ Further action by the Department of Homeland Security could enable international students on F-1 visas to simultaneously obtain TPS.³¹⁵

Unfortunately, and perhaps even cruelly, international students can see their rights and protections swing like a pendulum along the arc of presidential politics,

307 COORDINATING TEAM FOR THE INITIATIVE ON U.S. EDUC. PATHWAYS FOR REFUGEE STUDENTS, *supra* note 282, at 51. See 8 U.S.C. § 1101(a)(15)(F)(i) (2018).

308 Esaki-Smith, *supra* note 305, at 33; COORDINATING TEAM FOR THE INITIATIVE ON U.S. EDUC. PATHWAYS FOR REFUGEE STUDENTS, *supra* note 282, at 51. See 8 U.S.C. § 1101(a)(20) (2018) for the definition of "lawfully admitted for permanent residence."

309 U.S. Citizenship Act, H.R. 1177, 117th Cong. (1st Sess. 2021).

310 *Id.* at § 3408.

311 *Id.*

312 COORDINATING TEAM FOR THE INITIATIVE ON U.S. EDUC. PATHWAYS FOR REFUGEE STUDENTS, *supra* note 282, at 51.

313 8 C.F.R. § 214.2(f)(9)(ii)(C) (2022).

314 *Id.* § 214.2(f)(5)(v).

315 8 U.S.C. § 1254a(b) (2018).

placing them in an almost purgatorial state. In the roughly two years between the onset of the COVID-19 pandemic during the Trump Administration in January 2020 and the start of the Biden Administration in 2021:

- international students on F-1 visas were assured that taking an all-online course load would count as a full course of study after their institutions closed their campuses at the start of the pandemic, only to be threatened with deportation but soon protected again;³¹⁶
- international students were initially ineligible for emergency financial aid grants funded through the HEERF established and continued under several pandemic relief bills but then gained access to these funds;³¹⁷
- the level of scrutiny of the intent of F-1 visa applicants not to abandon their home residence and to depart the United States after finishing their studies was tightened and then restored to its long-standing, more lenient level;³¹⁸
- the admission period for students on F-1 visas was proposed to change from “duration of status”—meaning until they completed their studies—to a fixed time period no longer than four years, but the proposal was withdrawn;³¹⁹ and
- travel was suspended, and then restored, and sometimes suspended and restored again, between the United States and China, the European Schengen Area, the United Kingdom, Ireland, Brazil, and South Africa.³²⁰

Political shifts alone do not guarantee better treatment for international students: advocacy and litigation on behalf of students from abroad contributed significantly to the opposition against, and often the defeat of, unconstitutional and arbitrary rules. For example, the rule threatening students with deportation if they did not take a fully on-campus course load met resistance from organizations like the American Council on Education and a lawsuit brought jointly by Harvard and MIT.³²¹ States’ attorneys general often took the lead against restrictions affecting international students, including Hawaii’s attempt to enjoin the enforcement of the Trump Administration’s travel restrictions,³²² and the states of California and Washington filing law suits against the interim final rule that denied international students access to emergency financial aid under HEERF.³²³

The revolving-door rights of international students in the United States during the COVID-19 pandemic and the war in Ukraine demonstrate “the lack of

316 See *supra* text accompanying notes 99–114.

317 See *supra* text accompanying notes 123–40.

318 See *supra* text accompanying notes 170–75.

319 See *supra* text accompanying notes 176–83.

320 See *supra* text accompanying notes 153–59.

321 See *supra* text accompanying notes 106–14.

322 *Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018) (“The State [of Hawaii] operates the University of Hawaii system, which recruits students and faculty from the designated countries”).

323 *Oakley v. DeVos*, No. 4:20-cv-03215-YGR, 2020 WL 3268661 (N.D. Cal. June 17, 2020); *Washington v. DeVos*, 466 F. Supp. 3d 1151 (E.D. Wash. 2020).

a national policy for higher education internationalization in the United States," which "leaves international education subject to dramatic changes from one administration to another, potentially putting the system in a precarious position to respond to crises."³²⁴ A policy opportunity has presented itself, and "[t]his is the moment for the U.S. to embark on the essential next step in expanding refugee access to higher education"³²⁵ and access for nonimmigrant students as well. "The need for additional legal pathways ... is vast, and the disparity in access to higher education, immense."³²⁶ Ukrainian President Volodymyr Zelensky, in his livestreamed address to the Association of American Universities on May 16, 2022, alluded to the importance of protecting the rights of international students: "We can't lose the power of youth, the power and energy of young people without which we can have no future and we cannot create anything."³²⁷

324 Esaki-Smith, *supra* note 305, at 32.

325 COORDINATING TEAM FOR THE INITIATIVE ON U.S. EDUC. PATHWAYS FOR REFUGEE STUDENTS, *supra* note 282, at 6.

326 *Id.*

327 Darryl Coote & Clyde Hughes, *Zelensky Addresses U.S. Universities on Rebuilding Higher Ed, Bringing Back Students*, UPI WORLD NEWS, May 16, 2022, https://www.upi.com/Top_News/World-News/2022/05/16/ukraine-President-Volodymyr-Zelensky-universities-speech/6191652688281/.

JUDICIAL DEFERENCE TO ACADEMIC DECISIONS: EVOLUTION OF A CONTROVERSIAL DOCTRINE

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Abstract

Over four decades ago, the U.S. Supreme Court ruled that students were not entitled to robust due process protections when public institutions dismissed them on academic grounds. A subsequent Supreme Court decision reinforced the notion that courts should defer to academic decisions that were based on "genuine professional judgment." In the years since these decisions were announced, federal (and some state) courts have shown considerable deference to academic judgments in cases brought by faculty challenging denials of promotion or tenure, and by students challenging academic dismissal decisions, often dismissing the lawsuit or awarding summary judgment to the institution, seemingly without a thorough review of the institution's supporting evidence for its exercise of "genuine professional judgment." Although scholars have roundly criticized judicial deference, especially when discrimination claims are before the court, deference persists to this day in most, but not all such litigation. This article traces the development of judicial deference in decisions involving faculty and student plaintiffs, discusses why courts refuse to defer in a few cases, and suggests implications for college and university defendants facing litigation involving academic judgments.

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INTRODUCTION

Litigation against colleges and universities, once infrequent,¹ has become ubiquitous, as increasing state and federal regulation and broadened protections for the rights of employees and students have virtually erased any notion that, in the eyes of the law, academic organizations differ substantially from business organizations in most respects. In fact, higher education, as a sector, is more heavily regulated than most, if not all, businesses.²

Prior to the 1970s, most courts deferred to the decisions of colleges and universities, using a form of the business judgment rule³ that encouraged a judicial “hands off” approach to the decisions of those with superior knowledge and expertise in the ways of academe.⁴ The civil rights movement⁵ and the demise of the *in loco parentis* doctrine⁶ encouraged students to challenge colleges’ decisions made about their behavior, both academic and nonacademic, with, as will be seen, more success in their challenges to discipline on the basis of nonacademic behavior.⁷ However, courts were more likely to defer to the judgment of academics for decisions involving hiring,⁸ promotion and tenure of faculty⁹, or curriculum,¹⁰ believing that judicial competence to review these issues was inferior to that of the academic decision-makers. This belief was, in part, encouraged by two decisions by the U.S. Supreme Court¹¹ that ordered deference to a university’s academic

1 GOVERNMENT REGULATION OF HIGHER EDUCATION 1 (Walter C. Hobbs ed., 1978); HARRY EDWARDS & VIRGINIA DAVIS NORDIN, HIGHER EDUCATION AND THE LAW 5 (1979); Robert O’Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept?*, 36 J.C. & U.L. 729, 741 (2010).

2 See generally Stephen S. Dunham, *Government Regulation of Higher Education: The Elephant in the Room*, 36 J.C. & U.L. 749 (2010).

3 The U.S. Supreme Court has noted that judicial review of a business decision is typically deferential under the business judgment rule. See, e.g., *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90 (1991).

4 Ernest Gellhorn & Barry B. Boyer, *The Academy as a Regulated Industry*, GOVERNMENT REGULATION OF HIGHER EDUCATION, *supra* note 1, at 34. (The courts’ “active judicial role in the discipline arena has not been transferred to the review either of academic judgments or of administrative decisions ... Individual academic judgments have long been considered part of the faculty’s academic freedom.”)

5 See generally THOMAS C. HOLT, THE MOVEMENT: THE AFRICAN AMERICAN STRUGGLE FOR CIVIL RIGHTS (2021).

6 Philip Lee, *The Curious Life of In Loco Parentis at American Universities*, 8 HIGHER EDUC. REV. 65 (2011).

7 See *Goss v. Lopez*, 419 U.S. 565 (1975). Student challenges to discipline resting on academic grounds are discussed *infra* Part II. See also *Healy v. James*, 408 U.S. 169 (1972) (public college could not deny student organization recognition unless organization refused to comply with reasonable rules).

8 See, e.g., *Faro v. New York Univ.*, 502 F.2d 1229 (2d Cir. 1974), *infra* text accompanying notes 47–50.

9 See, e.g., *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980).

10 See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (ruling that a Louisiana statute mandating the teaching of “creation science” violated the Constitution’s Establishment Clause). See also *Yacovelli v. Moeser*, 324 F. Supp. 2d 760 (M.D.N.C. 2004) (rejecting legal challenge to university’s requirement that students read a book about Islam) and *Subhail v. Univ. of the Cumberland*, 107 F. Supp. 3d 748, 757 (E.D. Ky. 2015) (rejecting student’s breach of contract claim for adding required courses to the curriculum. “Universities are afforded great deference in developing their academic curriculum.”).

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

judgment about the evaluation of students; but it was even more prevalent when a court was asked to review, and the plaintiff hoped, to reverse, a negative promotion, tenure, or dismissal decision.¹²

Most judicial rulings in the early post-1970 period involved challenges by students using constitutional due process or first amendment theories to challenge discipline.¹³ In the area of student discipline, as opposed to the evaluation of student academic performance, courts were less likely to defer to the institution.¹⁴ And later, when students began challenging institutional decisions related to requests for disability accommodations,¹⁵ courts subjected the basis for these academic decisions to somewhat more scrutiny than those grounded in contract or constitutional claims.¹⁶

There were relatively few challenges by faculty to employment decisions until, in 1972, Congress amended Title VII of the Civil Rights Act of 1964 to include colleges and universities within the definition of employers subject to the Act.¹⁷ Beginning

12 See *Faro* and its progeny, *infra* text accompanying notes 47–50.

13 O’Neil, *supra* note 1, at 732, noting “the dramatic rise in student activism starting in the late 1960s, which brought to the courts a host of novel free speech and due process issues seldom seen on college and university campuses in earlier times. If only because the claims of student plaintiffs in such cases were familiarly constitutional, based on readily available First and Fifth Amendment precepts, judges were less inclined to defer to academic judgments. As early as the Supreme Court’s 1972 ruling in favor of a student political group’s claim not to be barred from a public campus because of the controversiality of its views, it was clear that deference would not foreclose review of such clearly constitutional interests—that would have been the Court’s view even if the institution claimed an ‘academic’ rationale for excluding the student group. And where the challenged sanction involved disciplining a student (or occasionally an outspoken professor) for campus protest or disruption, the historical basis for judicial deference was far less apparent. Thus, intervention became far more difficult for colleges and universities to resist in cases of this type.” (footnotes omitted).

14 See *Goss v. Lopez*, 419 U.S. 565 (1975) and its progeny. “[I]f the judgment to be reviewed by the court is not a ‘genuinely academic decision,’ courts are less likely to defer . . . if the judgment being reviewed is a disciplinary rather than an academic judgment, the court’s competence is relatively greater and the university’s is relatively less; the factor of relative institutional competence may therefore become a wash or weigh more heavily in the court’s (and thus the challenger’s) favor. Similarly, when the challenge to the institution’s decision concerns the procedures it used rather than the substance or merits of the decision itself, the court’s competence is greater than the institution’s, and there is usually little or no room for deference.” WILLIAM A. KAPLIN ET AL., *THE LAW OF HIGHER EDUCATION* 161 (6th ed. 2019). In cases involving student academic performance, the courts have been overwhelmingly deferential to academic judgments. See *infra* Part II.

15 See, e.g., *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791 (1st Cir. 1992) (appellate court reversed summary judgment for the University, ruling that the University must demonstrate that it had attempted to accommodate the student and had evaluated the impact of the requested accommodation on the medical school’s academic program).

16 *Id.* See also *Guckenberger v. Bos. Univ.*, 957 F. Supp. 306 (D. Mass. 1997). Of course, in many cases courts agreed that the defendant college or university had not violated the laws against disability discrimination but not because the court had simply deferred to the institution’s academic judgment. *But see* *Class v. Towson Univ.*, 806 F.3d 236, 246 (4th Cir. 2015) (court rejected football player’s failure to accommodate claim, saying “deference is due to a university’s professional judgment in the context of student qualifications”). See cases discussed *infra* Part II.C.3.

17 42 U.S.C. § 2000e-1 (1970), as amended. The Equal Employment Opportunity Act of 1972, 86 Stat. 103, § 3 (1972), amended Title VII to extend the Act’s coverage to colleges and universities.

in 1974 with the *Faro* case,¹⁸ federal courts fashioned a deferential approach to evaluating faculty plaintiffs' claims of discrimination when their quest for hiring, promotion and/or tenure was rejected by the institution.¹⁹ Courts were somewhat less willing to defer when faculty filed breach of contract or constitutional claims after a negative employment decision,²⁰ but many still bowed to the academic judgment of the faculty and administrators who evaluated the plaintiffs.²¹ The rationale of these federal courts was that judges lacked the disciplinary expertise to understand whether, in fact, a faculty member's scholarship or teaching was worthy of promotion and/or tenure, and juries had even less ability to make these judgments.²² Noting that these decisions are subjective and complicated,²³ the

18 *Faro v. N.Y. Univ.*, 502 F.2d 1229 (2d Cir. 1974), *infra* text accompanying notes 47–50.

19 Most of these cases involve women faculty; a few male faculty also sued alleging sex, race, or national origin discrimination. *See, e.g.*, GEORGE R. L'ANOUÉ & BARBARA A. LEE, *ACADEMICS IN COURT: THE CONSEQUENCES OF FACULTY DISCRIMINATION LITIGATION* (1987).

20 *See, e.g.*, *McAdams v. Marquette Univ.*, 974 N.W.2d 708 (Wisc. 2018) (court rejected university's claim that institutional academic freedom required the court to defer to its judgment). *See also* *McConnell v. Howard Univ.*, 818 F.2d 58 (D.C. Cir. 1993) (professor brought action claiming breach of contract and defamation. McConnell was a tenured professor dismissed by Howard University for refusing to teach one of his assigned courses because a student had called him a "condescending, patronizing racist" during a previous course meeting. McConnell demanded that the student either apologize or be removed from the class. A disciplinary review process was initiated against McConnell, and the board of trustees voted to terminate him. The trial court granted summary judgment to Howard University, saying, in part, that the board of trustees should be granted special deference to making personnel decisions about tenured faculty. The appellate court disagreed and remanded the case, explaining that allowing the board of trustees to determine whether the contract between Dr. McConnell and Howard University had been violated would effectively be allowing one of the contracting parties to make a decision about a contract to which they are bound.).

21 *See, e.g.*, *Allworth v. Howard Univ.*, 890 A.2d 194 (D.C. Ct. App. 2006); *Fredieu v. Case W. Rsrv. Univ.*, 2021 Ohio 1953 (Ohio App. June 10, 2021).

22 "Indeed, it is the rare case in which a court could fairly claim comparable competence or familiarity with the ways in which academic decisions develop. For the very reasons that many observers of the academy express frustration, even outrage, at the slow pace of hiring or other key intra-college and university decisions, an outsider who happens to be a judge is seldom better equipped to understand or adjudicate arcane academic disputes or conflicts." O'Neil, *supra* note 1, at 736. *See also* David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 *LAW & CONTEMP. PROBS* 227, 227–47 (1990) (arguing that judicial review should be deferential on academic freedom grounds). *See also* Judith C. Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 *GEO. L.J.* 945, 994 (2009) (arguing that academic speech should have First Amendment protection and thus judicial deference).

23 *Mayberry v. Dees*, 663 F.2d 502, 519 (4th Cir. 1981). *See also* Stephen J. Leacock, *Tenure Matters: The Anatomy of Tenure and Academic Survival in American Legal Education*, 45 *OHIO N.U. L. REV.* 115, 120 (2019). ("In adjudicating such challenges, the judiciary acknowledges that the burden of proof rests upon '[a] disappointed candidate' who is denied tenure. The judiciary also acknowledges that subjective factors *may* be present in tenure decisions. This does *not* support any conclusions that arbitrariness or capriciousness play a role in educational institutions' decision-making deliberations. In the final analysis, since the burden of proof to invalidate a tenure-denial decision falls upon the denied faculty member, the weight of the burden of proof matters. Additionally, certain 'practical considerations make a challenge to the denial of tenure at the college or university level an uphill fight—notably [because of] the absence of fixed, objective criteria for tenure at that level'" (citing *Blasdel v. Nw. Univ.*, 687 F.3d 813, 815, 816 (7th Cir. 2012)). And for an analysis of how courts might review employment decisions for professional employees and recognize that subjectivity is not necessarily a signal of a Title VII violation, see Andrea R. Waitroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 *WM. & MARY L. REV.* 45 (1979).

courts typically ruled for the institution.²⁴ University defendants in some of these cases also argued that their decisions were protected by academic freedom and that judicial “intervention” into these decisions was an inappropriate violation of an institution’s autonomy with respect to academic judgments.²⁵

Beginning in the late 1970s, scholars began reviewing cases involving faculty challenges to negative employment decisions and commenting on the degree to which courts deferred to the defendants’ academic judgment. Although some scholars applauded the judicial restraint in these decisions and reviewed them relatively uncritically,²⁶ a 1980 article by Professor Richard Yurko argued that judicial deference to academic judgments, particularly in claims of employment discrimination, was inappropriate, noting that

such a response [from the reviewing courts] not only misstates the issue—absent discrimination, the title VII plaintiff has no legal basis for expecting judicial intervention—but also produces a classic problem of circularity. Academic institutions are accorded judicial deference unless a plaintiff can prove discrimination, but few plaintiffs can prove discrimination because academic institutions are accorded judicial deference.²⁷

Yurko noted that judges have not applied deference in their review of other complicated issues, saying

much modern litigation—whether it involves determining the cause of complex industrial accidents, or sifting through the sophisticated economic analyses of a major antitrust case, or deciding whether tonal similarities in

24 LANOUE & LEE, *supra* note 19.

25 “[J]udicial deference based upon regard for academic freedom may incline courts to avoid adjudicating personnel claims of a type that would almost certainly not be spurned in less sensitive contexts.” O’Neil, *supra* note 1, at 734–35. See also J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 254 (1989) and Rabban, *supra* note 22, at 291 (concluding that that he “favor[s] judicial deference to departmental decisions as long as stated disciplinary judgments are plausible and are not pretexts”).

26 See, e.g., Robert M. O’Neil, *Academic Freedom and the Constitution*, 11 J.C. & U.L. 275 (1984); Edward Stoner & J. Michael Showalter, *Judicial Deference to Educational Judgment: Justice O’Connor’s Opinion in Grutter Reapplies Longstanding Principles, as Shown by Rulings Involving College Students in the Eighteen Months Before Grutter*, 30 J.C. & U.L. 583 (2003–04).

27 Richard Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation*, 60 B.U. L. REV. 473, 496 (1976). Yurko also listed three rationales used by reviewing courts to defer to the defendant institution’s academic judgment: “Three major justifications have been offered for this markedly diffident treatment of the personnel decisions of educational institutions. First, some courts have professed an incompetence to evaluate academic qualifications. They view judgments about such matters as requiring expertise in particular academic areas that the judiciary simply does not possess. Related to this concern is a second suggestion that deference is warranted because the employment decisions of academia are unavoidably subjective. One district judge described the problem: ‘A professor’s value depends upon his creativity, his rapport with students and colleagues, his teaching ability, and numerous other intangible qualities which cannot be measured by objective standards’ (citing *Lewis v. Chicago State College*, 299 F. Supp. 1357, 1359 (N.D. Ill. 1969)). In contrast to these primarily substantive concerns, institutional considerations are at the heart of the third rationale—the ‘floodgates of litigation’ argument. In part, this proffered justification for deference merely echoes the usual dire predictions about the ‘devastating effects’ on the federal court docket of an influx of new litigation.” *Id.* at 496–97 (footnotes omitted).

musical scores are close enough to imply copyright infringement—requires courts to resolve difficult factual issues by exercising judgment in fields where they possess no particular expertise.²⁸

The Yurko article and others published in the late 1970s and early 1980s signaled a sea change in scholarly attitudes toward judicial deference to academic judgments in employment decisions. Most subsequent articles criticized the federal courts, particularly in Title VII sex discrimination cases, for their light touch that usually resulted in a ruling for the college.²⁹ Later still, more recent articles have asserted that deference has no place in judicial review of academic employment decisions, including hiring as well as promotion and tenure.³⁰

Most scholars addressing judicial deference to decisions based on student academic performance were less critical, however. For example, one concludes that, after *Horowitz* and *Ewing*,³¹ federal courts embraced judicial deference in student challenges (as they had in faculty challenges as well), and predicted that the trend would continue and was generally appropriate.³² Another scholar, reviewing challenges to academic judgments brought by students under the disability discrimination laws concluded that judges should defer to such academic judgments because “the incompetence of the courts to review academic standards” meant that judges needed to rely on “academic expertise.”³³

28 *Id.* at 497–98. In a later article, another scholar commented on the purported lack of judicial expertise issue: “On the surface, this appears to be a legitimate rationale, except for the fact that other employment fields, where the evaluation of performance entails highly specialized knowledge and is discretionary, have not intimidated federal courts. The courts have ruled on discrimination claims in fields such as accounting partnerships; administrative law judgeships; law enforcement; engineering; computer programming; and hard sciences such as chemistry. If the courts are willing to venture into these highly specialized areas in order to determine if discrimination has occurred, then the deference given to universities where many of these fields are taught and professors tenured should cease as the court has established the precedent of adequate knowledge and expertise.” Guillermo S. Dekat, Comment: *John Jay, Discrimination, and Tenure*, 11 THE SCHOLAR: ST. MARY’S L. REV. ON MINORITY ISSUES 237, 263–66 (2009).

29 See, e.g., Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 961 (1982); Harry Tepker, *Title VII, Equal Employment Opportunity and Academic Autonomy: Toward a Principled Deference*, 16 U. CAL. DAVIS L. REV. 1047 (1983); Mark Bartholomew, *Judicial Deference and Sexual Discrimination in the University*, 8 BUFF. WOMEN’S L.J. 55 (1999–2000); Susan L. Pacholski, Comment: *Title VII in the University: The Difference Academic Freedom Makes*, 59 U. CHI. L. REV. 1317 (1992); Scott A. Moss, *Against “Academic Deference”: Keeping Title VII Alive to Redress Academic Discrimination*, 27 BERKELEY. J. EMPL. & LAB. L. 1 (2006); Leacock, *supra* note 23.

30 Dekat, *supra* note 28, at 241.

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

32 Thomas A. Schweitzer, *Academic Challenge Cases: Should Judicial Review Extend to Academic Evaluation of Students?* 41 AM. U. L. REV. 267 (1992).

33 James Leonard, *Judicial Deference to Academic Standards under Section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act*, 75 NEB. L. REV. 27, 30, 90 (1996). But see Sam McHale, Comment: *The Amorphous Student-University Contract: Origins, Development, and the Need for State Oversight*, 168 U. PA. L. REV. 223 (2019) (arguing that judicial review of student contract claims is too deferential, and state oversight agencies should develop performance-based metrics and outcome metrics to analyze, and hold institutions accountable for, how students fare in the job market after graduation).

Despite the criticism of scholars concerning deference to academic judgments concerning faculty employment issues, whether the plaintiffs in these lawsuits were faculty or students, the courts, for the most part, have continued to rely on the “academic expertise” of faculty and administrative decision-makers. Although in a few recent cases courts have rejected deference, particularly when faculty claim that negative decisions were infected with discrimination, the courts have continued to reject the invitation to substitute their judgment (or that of a jury) to the evaluations of both faculty and student performance by the academic experts.

This article reviews the history of academic deference by the federal (and some state) courts in reviewing claims regarding evaluation of faculty performance and student academic achievement, often dismissing the lawsuit or awarding summary judgment to the institution, seemingly without a thorough review of the institution’s supporting evidence for its exercise of “genuine professional judgment.” Beginning with early cases involving faculty challenges to negative employment decisions and, later, to academic evaluations of students, it moves through the decades of the late twentieth century and the early twenty-first. It reviews both court cases and the legal literature with respect to the challenges to “external” review of academic judgments, and what may appear to be the slow evolution of judicial skepticism of academic deference, at least for decisions involving faculty claims of employment discrimination. It notes some inclination over the years for courts to review the institution’s defense of academic judgment more closely, even while continuing to award summary judgment in most cases.³⁴ Even more recent cases have begun to show a pattern of ordering a jury trial when the court concludes that material facts call into question whether the decision was based on “genuine academic judgment” rather than on impermissible factors such as discrimination.³⁵ It concludes with a series of observations regarding the intensity of judicial scrutiny of the parties’ factual allegations that respects the greater competence of the academic evaluators while at the same time retaining the court’s role as ensuring the fairness, if not the accuracy, of these academic judgments.

I. Judicial Deference to Faculty Personnel Decisions

Prior to the 1960s, when the Higher Education Act³⁶ was passed and the movement to desegregate public higher education³⁷ was active, litigation against a college or

34 See, e.g., AMY GAJDA, *THE TRIALS OF ACADEME* 5–6 (2009). As will be seen in Part I, jury trials are unusual in faculty employment discrimination cases, even if the court opinion demonstrates that it has closely reviewed the college’s evidence of a nondiscriminatory motive.

35 See, e.g., *Tudor v. Se. Okla. State Univ.*, 2017 U.S. Dist. LEXIS 177654 (W.D. Okla. Oct. 26, 2017) (denying summary judgment because of the existence of disputes regarding material facts), Professor Tudor was eventually reinstated with tenure after an appellate court upheld a jury verdict in her favor. 13 F.4th 1019 (10th Cir. 2021). See *Tudor infra* text accompanying notes 99–104.

36 Higher Education Act of 1965, 20 U.S.C. §§ 1001 et seq.

37 Litigation concerning the desegregation of formerly *de jure* segregated systems of public higher education began in the 1960s and continued throughout the rest of the twentieth century in some states. For a history of desegregation litigation in public higher education, see generally JEAN PREER, *LAWYERS V. EDUCATORS: BLACK COLLEGES AND DESEGREGATION IN PUBLIC HIGHER EDUCATION* (1982). See also JOHN B. WILLIAMS, *RACE DISCRIMINATION IN PUBLIC HIGHER EDUCATION: INTERPRETING FEDERAL CIVIL RIGHTS ENFORCEMENT, 1964–1996* (1997). For a thorough review of the cases involving the desegregation of public higher education, see

university was unusual and typically resulted in victory for the institution. Hobbs reminds us that courts sharply rejected the few student challenges to institutional discipline between the mid-nineteenth and mid-twentieth centuries, when courts developed the concept of *in loco parentis* to justify the “parental” role of the college.³⁸ The courts began to apply constitutional due process protections to students at public colleges and universities in 1961 with the *Dixon* case.³⁹ Eight years later, the U.S. Supreme Court ruled in favor of high school students who had peacefully protested, saying that they had First Amendment rights to do so,⁴⁰ and in 1972, the Court applied the same reasoning to college students.⁴¹

Students challenging academic evaluations, however, have not encountered the same response from the courts. In 1978, the U.S. Supreme Court rejected a medical student’s request to overturn her dismissal, saying that “[c]ourts are particularly ill equipped to evaluate academic performance . . . [and the Court] warned against any such judicial intrusion into academic decision making.”⁴² Seven years later, the Court rejected a medical student’s challenge to his dismissal, stating

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.⁴³

The *Horowitz* and *Ewing* decisions have become a powerful justification for courts to defer to the academic judgments of institutional defendants, not only in situations involving student academic performance, but also, in many instances, to those involving judgments about hiring, promotion or tenure, or in some cases dismissal, of college faculty.

A. The Evolution of Judicial Deference to Faculty Personnel Decisions

Prior to the extension of Title VII of the Civil Rights Act of 1964 to colleges and universities in 1972,⁴⁴ litigation by faculty against their potential or actual college

Mary Ann Connell, *Race and Higher Education: The Tortuous Journey Towards Desegregation*, 36 J.C. & U.L. 945 (2010).

38 GOVERNMENT REGULATION OF HIGHER EDUCATION, *supra* note 1. Hobbs cites cases decided by Illinois, Kentucky, and Minnesota courts that determined that colleges had “inherent power” to discipline students without the procedures that contemporary students expect and are entitled to. *Id.* at 2–3. See also Anthony v. Syracuse Univ., 224 A.D. 487 (N.Y. App. Div. 1928) (university need not provide reasons for dismissal of student).

39 *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) (students expelled for engaging in civil rights protest were entitled to due process prior to implementation of discipline).

40 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (students disciplined for wearing black armbands to school to protest the war in Vietnam).

41 *Healy v. James*, 408 U.S. 169 (1972) (Court ruled in favor of student group’s claim that denial of recognition by the college violated their constitutional right of free association).

42 *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91–92 (1978).

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

44 42 U.S.C. § 2000e-1 (1970), as amended. The Equal Employment Opportunity Act of 1972, 86

employers primarily involved contract or constitutional law, and courts did not hesitate to interpret those contracts and scrutinize the parties' allegations as they would contracts or constitutional claims in a nonacademic setting.⁴⁵ But with the advent of the federal nondiscrimination laws, faculty had new avenues to challenge denials of promotion, tenure, hiring, or dismissal.

1. Early Promotion and Tenure Denial Cases

Lawsuits brought in the 1970s and 1980s claiming discrimination under Title VII of the Civil Rights Act of 1964⁴⁶ found federal judges, at both the trial and appellate levels, wary of wading into close reviews of the credentials of those who had been granted promotion and/or tenure and those who had not. Despite this discomfort, plaintiffs were able to obtain bench trials in several important early cases.

One of the earliest such Title VII cases involving a university is *Faro v. New York University*,⁴⁷ decided in 1974. Dr. Maria Faro had been employed as a nontenured research scientist funded by a research grant at the New York University Medical Center. When the grant ended, she was offered a non-tenure-track position, which she declined, asserting that the University should have offered her a tenure-track position. When the University did not do so, she filed a sex discrimination claim under Title VII and sought a preliminary injunction to force the University to give her a tenure-track position.⁴⁸ The court rejected her claim, with these words, which have been repeated by courts in numerous subsequent Title VII claims brought, primarily, by women faculty since *Faro*:

Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision. Dr. Faro would remove any subjective judgments by her faculty colleagues in the decision-making process by having the courts examine "the university's recruitment, compensation, promotion and termination and by analyzing the way these procedures are applied to the claimant personally" ...⁴⁹

Stat. 103, § 3 (1972), amended Title VII to extend the Act's coverage to colleges and universities.

45 See, e.g., *Greene v. Howard Univ.*, 412 F.2d 1128 (D.C. Cir. 1969) (breach of contract claim in nonreappointment) and *Keddie v. Pa. State Univ.*, 412 F. Supp. 1264 (M.D. Pa. 1976) (constitutional challenges to denial of tenure).

46 42 U.S.C. § 2000e-1 (1970), as amended.

47 502 F.2d 1229 (2d Cir. 1974).

48 According to the court, Dr. Faro asserted that male faculty had been given tenure-track positions, but she had not. The trial judge commented, "Dr. Faro, in effect, envisions herself as a modern Jeanne d'Arc fighting for the rights of embattled womanhood on an academic battlefield, facing a solid phalanx of men and male faculty prejudice. She would compare herself and her qualifications with all recent appointees to the NYU medical faculty and asserts that she is just as competent as they are. In particular, she selects three doctors for comparison. She states that she was offered \$4,000 for the same job for which a Dr. Alves was paid \$23,000. Of course, as the district court found and the record substantiates, it was not the same job. Analysis of the proof clearly shows that the experience possessed by such male professors as have been hired is not comparable to the limited teaching and research background of Dr. Faro." *Id.* at 1231-32.

49 *Id.* See also *Feldman v. Ho*, 171 F.2d 494, 497 (7th Cir. 1999) "[F]or a university to function well, it must be able to decide which members of its faculty are productive scholars and which are not..."

The court denied the preliminary injunction, and the appellate court affirmed.

Despite this seemingly deferential language, *Faro* is interesting for several reasons. First, there was a bench trial. Second, the trial court did not simply defer to the University's judgment. It held a three-day hearing on the plaintiff's allegations, and numerous witnesses testified about the reasons she was not offered a tenure-track position.⁵⁰ But the language of the Second Circuit's *Faro* opinion has invited federal courts to defer to defendants' academic judgment, and, for the most part, the courts have accepted this invitation, usually without conducting a trial.

Four years after the *Faro* decision was published, the same federal circuit addressed a second case involving a female professor. Again, the case went to trial. In *Powell v. Syracuse University*,⁵¹ a visiting assistant professor's contract was not renewed, and she sued, claiming race and sex discrimination. In addition to demonstrating some procedural irregularities in the process the department used to determine that she would not be rehired, she alleged that three White faculty had been hired to teach the courses that she had taught for Syracuse. After the trial concluded,⁵² the court dismissed the lawsuit, and the appellate court affirmed.

The appellate court noted that both the University and the trial court had quoted its deferential language in *Faro* reproduced above, and said "In recent years, many courts have cited the *Faro* opinion for the broad proposition that courts should exercise minimal scrutiny of college and university employment practices. Other courts, while not citing *Faro*, have concurred in its sentiments."⁵³ The court then appeared to retreat from what had been interpreted by subsequent federal courts as wholesale deference to academic judgments in discrimination cases:

This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear, however, that the common-sense position we took in *Faro*, namely that courts must be ever-mindful of relative institutional competences, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act

[T]he only way to preserve academic freedom is to keep claims of academic error out of the legal maw."

50 According to the appellate court, "The district court did not dispose of the motion on the affidavits alone but granted a protracted hearing (three days) in which Dr. Faro and Drs. Sabatini (Chairman of the Cell Biology Department), Dr. Rusk (Director of the Institute of Rehabilitation Medicine and Chairman of the Department of Rehabilitation Medicine), [Dr.] Potter (Associate Dean of the Medical Schools) and [Dr.] Goodgold (Professor of Rehabilitation Medicine and Director of Research and Training in the Institute of Rehabilitation Medicine); all testified. The court's conclusion that there was no discrimination against Dr. Faro is amply supported by the proof—in fact, it is the only conclusion which could be properly adduced therefrom." *Faro*, 502 F.2d at 1231.

51 580 F.2d 1150 (2d Cir. 1978). Professor Powell was represented by the National Association for the Advancement of Colored People in this case.

52 Although the appellate opinion in *Powell* does not explicitly address the issue of whether a trial was held, it appears that it was because the opinion refers to the "testimony" of all of the members of the tenure committee that had made the negative decision, and found their testimony credible.

53 *Id.* at 1153. But, as quoted *supra* note 50, the trial court in *Faro* had conducted three days of hearings at which Professor Faro was given an opportunity to listen to medical school administrators' reasons for denying her a tenure-track position and to provide evidence on her own behalf.

of 1964. In affirming here, we do not rely on any such policy of self-abnegation where colleges are concerned.⁵⁴

The court continued,

Accordingly, while we remain mindful of the undesirability of judicial attempts to second-guess the professional judgments of faculty peers, we agree with the First Circuit when it “caution[ed] against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of...discrimination in institutions of higher learning as readily as for other Title VII suits.” *Sweeney v. Board of Trustees of Keene State College*...

It is our task, then, to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior. *Faro* does not, and was never intended to, indicate that academic freedom embraces the freedom to discriminate.⁵⁵

And yet, the trial and appellate courts rejected the plaintiff’s discrimination claim, finding that concerns about her performance and the quality of her students’ work provided a legitimate nondiscriminatory reason for her nonreappointment.

Two years after *Powell*, the same U.S. court of appeals issued another opinion involving alleged sex discrimination in denial of tenure. In *Lieberman v. Gant*,⁵⁶ a female professor of English sued the University of Connecticut, alleging that her tenure denial was a result of sex discrimination. The *Lieberman* court held a fifty-two day bench trial over a period of two years, but the trial court had refused to review the personnel files of allegedly comparable male faculty, a decision that,

54 *Id.*

55 *Id.* at 1154. In *Sweeney v. Keene State College*, 569 F.2d 169, 176 (1st Cir. 1978), the trial and appellate courts had ruled for the plaintiff, finding that the college’s failure to promote her was infected with sex discrimination. The college appealed to the U.S. Supreme Court, arguing that the trial and appellate courts had applied an incorrect burden of proof to the college—that it must prove that it had not discriminated against the plaintiff, rather than the McDonnell Douglas burden of merely articulating a legitimate nondiscriminatory reason for denying promotion. The Supreme Court agreed, and vacated and reversed the lower court opinions, remanding the case. *Bd. of Trs. v. Sweeney*, 439 U.S. 24 (1978). On remand, the trial court again ruled for Sweeney, and the college appealed again. The appellate court affirmed, stating

One familiar aspect of sex discrimination is the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than are applied to their male counterparts. The district court could have concluded consistently that [another plaintiff] merited promotion by any standard, that Sweeney was better qualified than the two men who were denied promotion, and that Sweeney would have been promoted had she been evaluated against the standard that was applied generally to men.

Defendants have persuaded us that this was a close case, but not that the district court committed clear error in concluding that Sweeney was denied a promotion because of her sex. 604 F.2d 106,113 (1st Cir. 1979).

56 630 F.2d 60 (2d Cir. 1980).

according to Professor Lieberman, was a significant omission.⁵⁷

The trial court ruled in favor of the University, and the appellate court affirmed. Although the appellate panel's deference language in *Lieberman* was more restrained than that of the *Faro* panel, the appellate court signaled a clear reluctance to perform an in-depth analysis of the plaintiff's evidence, saying

Although academic freedom does not include "the freedom to discriminate", *Powell*...this important freedom cannot be disregarded in determining the proper role of courts called upon to try allegations of discrimination by universities in teaching appointments. The Congress that brought educational institutions within the purview of Title VII could not have contemplated that the courts would sit as "Super-Tenure Review Committee(s)", *Keddie v. Pennsylvania* [citation omitted]; their role was simply to root out discrimination. Chief Judge Clarie thus did not err in declining plaintiff's invitation to engage in a tired-eye scrutiny of the files of successful male candidates for tenure in an effort to second-guess the numerous scholars at the University of Connecticut who had scrutinized Dr. Lieberman's qualifications and found them wanting, in the absence of independent evidence of discriminatory intent or a claim that plaintiff's qualifications were clearly and demonstrably superior to those of the successful males, a claim which was not made by Dr. Lieberman because it could not have been substantiated.⁵⁸

Even in cases in which plaintiffs raised constitutional challenges to denials of tenure, courts continued to cite the *Faro* deference language to justify their refusal to review the comparative qualifications of faculty for tenure. In *Clark v. Whiting*,⁵⁹ for example, a professor challenged a tenure denial by North Carolina Central University under the Constitution's equal protection and due process clauses. The professor had submitted information on the qualifications of allegedly comparable faculty who had been granted tenure. The trial court rejected his constitutional claims without a trial and dismissed the lawsuit, and the appellate court affirmed. The appellate court's language made an important distinction between the judicial duty to examine the defendant's motive for the negative decision in constitutional claims, compared with those claims brought under the nondiscrimination laws. Said the court,

If perchance courts were, on equal protection grounds, to undertake to review faculty promotions by engaging in a comparison of competency and qualifications of those granted and those denied promotion in any academic field, they would, by parity of reasoning, be obligated to review the equality of treatment in connection with the grant or denial of faculty tenure. Nor is it a far step from such a review of faculty promotions and tenure to faculty salaries or assignments. In essence, what plaintiff thus argues for, if carried to its logical conclusion, is the judicial supervision of the most delicate part

57 LANOUE & LEE, *supra* note 19, at 51-88.

58 *Id.* at 67-68.

59 607 F.2d 634 (4th Cir. 1979).

of every state educational institution's academic operations, a role federal courts have neither the competency nor the resources to undertake. The burden, which such an exercise of judicial process would involve, was vividly described by the Court in *Faro v. New York University*... We, therefore, refuse to embark upon a comparative inquiry under an equal protection claim into either the quantity or the quality of the published scholarly contributions of the University's faculty members who have been granted or denied promotion, holding that the determination of such matters by the appropriate University authorities is not reviewable in federal court on any ground other than racial or sex discrimination or a First Amendment violation.⁶⁰

Subsequent cases demonstrate that courts continued to defer to academic judgments, even if asked to review claims of discrimination in denial of tenure.⁶¹ In yet another Second Circuit opinion, *Zahorik v. Cornell University*,⁶² the appellate court affirmed a summary judgment ruling for the University and said

Courts, moreover, are understandably reluctant to review the merits of a tenure decision [citing *Lieberman v. Gant*, which had cited *Faro*]. Where the tenure file contains the conflicting views of specialized scholars, triers of fact cannot hope to master the academic field sufficiently to review the merits of such views and resolve the differences of scholarly opinion. Moreover, the level of achievement required for tenure will vary between universities and between departments within universities. Determination of the required level in a particular case is not a task for which judicial tribunals seem aptly suited. Finally, statements of peer judgments as to departmental needs, collegial relationships and individual merit may not be disregarded absent evidence that they are a facade for discrimination.⁶³

One year later, another federal circuit court struggled with balancing the scrutiny of an allegedly discriminatory tenure denial with deference to the academic judgment of faculty and academic administrators. In *Namenwirth v. Board of Regents of the University of Wisconsin System*,⁶⁴ a magistrate judge, acting on behalf of the trial court, compared Marion Namenwirth's academic performance with that of several male comparators and concluded that the University's decision to deny her tenure was not based on sex discrimination.

Professor Namenwirth was hired by the Department of Zoology—the only woman in the department, and the first faculty member of either sex to be denied tenure in that department as well. According to the appellate court opinion, the University of Wisconsin had been cited by the U.S. Department of Health, Education

60 *Id.* at 640–41. The judge dismissed the case on jurisdictional grounds; it does not appear that a trial was held.

61 As noted, the early cases (*Faro*, *Powell*, *Lieberman*, and *Kunda*) involved bench trials (jury trials were not available until the Civil Rights Act of 1991 provided for a jury trial for Title VII lawsuits. 42 U.S.C. § 1981a(c) (1991)).

62 729 F.2d 85 (2d Cir. 1984).

63 *Id.* at 93.

64 769 F.2d 1235 (7th Cir. 1985).

and Welfare, finding that it had discriminated against women in hiring and salary decisions.⁶⁵ When it was time for Namenwirth to be evaluated for tenure, she was unsuccessful at every level of the decision-making process.⁶⁶ She was able to show that a male comparator from the same department was granted tenure after a request from her department that a preliminary negative recommendation regarding him be reconsidered. The department had made no such request for reconsideration of her negative evaluation. The court found that the University's decision was "reasonable" and not the product of sex discrimination, and dismissed her claim with prejudice.

The appellate court showed some discomfort with the nature of academic decision-making and its potential to allow discrimination to affect the outcome but concluded that it could not justify attempting to second-guess the academics. Said the court,

To allow the decision-maker also to act as the source of judgments of qualification would ordinarily defeat the purpose of the discrimination laws. But in the case of tenure decisions we see no alternative. Tenure decisions have always relied primarily on judgments about academic potential, and there is no algorithm for producing those judgments. Given the similar research output of two candidates, an experienced faculty committee might—quite rightly—come to different conclusions about the potential of the candidates. It is not our place to question the significance or validity of such conclusions.

But to say all that is only to face up to the problem. The problem remains: faculty votes should not be permitted to camouflage discrimination, even the unconscious discrimination of well-meaning and established scholars. The courts have struggled with the problem since Title VII was extended to the university, and have found no solution. Because of the way we have described the problem—the decision-maker is also the source of the qualifications—there may be no solution; winning the esteem of one's colleagues is just an essential part of securing tenure. And that seems to mean that in a case of this sort, where it is a matter of comparing qualification against qualification, the plaintiff is bound to lose.⁶⁷

Throughout the 1990s and early 2000s, opinions using language deferential to academic judgments were far more frequent than those scrutinizing defendants' justification for tenure denials either on the basis of alleged discrimination or breach of contract.⁶⁸

65 *Id.* at 1237.

66 Namenwirth was granted reconsideration after the tenure denial in a subsequent year. Again, the decision was negative.

67 *Id.* at 1243.

68 *See, e.g.,* Tanik v. S. Methodist Univ., 116 F.3d 775, 776 (5th Cir. 1997) (summary judgment for the university, no trial); Villanueva v. Wellesley Coll., 930 F.2d 124, 129 (1st Cir. 1991) (summary judgment for the college, no trial); Broussard-Norcross v. Augustana Coll. Ass'n, 935 F.2d 974, 975–76 (8th Cir. 1991) (summary judgment for the college, no trial); Brown v. Geo. Wash. Univ., 802 A.2d 382, 385 (D.C. 2002) (summary judgment for the university on plaintiff's breach of contract claim, no trial); Okruhlik v. Univ. of Ark., 395 F.3d 872, 879 (8th Cir. 2005) (judgment notwithstanding the verdict for

The Civil Rights Act of 1991 permitted Title VII plaintiffs to request a jury trial,⁶⁹ where none had been available before. And although the number of plaintiffs who avoided a ruling of summary judgment for the employer and thus potentially could have a jury hear their case increased slightly after that amendment to Title VII,⁷⁰ many courts continued to accept the defendant college's request to award summary judgment, thus avoiding a jury trial.⁷¹ And the deferential approach of the federal (and some state) courts continued.

For example, in *Bina v. Providence College*,⁷² the appellate court, citing its earlier decision in *Brown v. Trustees of Boston University*,⁷³ said

A court may not simply substitute its own views concerning the plaintiff's qualifications for those of the properly instituted authorities; the evidence must be of such strength and quality as to permit a reasonable finding that the denial of tenure was "obviously" or "manifestly" unsupported.⁷⁴

In *Figal v. Vanderbilt University*,⁷⁵ a state appellate court affirmed the trial court's award of summary judgment to the University. The appellate court agreed with the trial court's deference to the academic judgment of the University that the plaintiff's scholarly performance did not meet the standard of excellence required for a positive tenure decision, as defined in the Faculty Manual.⁷⁶ The appellate court quoted the trial court's rationale with approval: "The law provides that courts are to defer to the academic decisions of colleges and universities and not intrude on faculty employment determinations or substitute their judgment with respect to qualifications of faculty members for promotions or tenure. Only a substantial departure from accepted academic norms or from procedural regularity, to demonstrate that the university did not actually exercise professional judgment, warrants court intervention."⁷⁷ The appellate court noted that the trial

university after jury verdict for plaintiff); *Qamhiyah v. Iowa State Univ. of Sci. & Tech.*, 2008 U.S. Dist. LEXIS 138071 (S.D. Iowa June 27, 2008) (summary judgment for the university, no trial); *Figal v. Vanderbilt Univ.*, 2013 Tenn. App. LEXIS 656 (Tenn. Ct. App. Sept. 27, 2013) (summary judgment for the university, no trial); and *Kouassi v. W. Ill. Univ.*, 2015 U.S. Dist. LEXIS 64926 (Ill. Cent. Dist. Ct. May 18, 2015) (summary judgment for the university, no trial).

69 42 U.S.C. § 1981a(c) (1991). Prior to this Act, plaintiffs were limited to a bench trial.

70 See, e.g., *Kahn v. Fairfield Univ.*, 357 F. Supp. 2d 496, 505 (D. Conn. 2005); *Hinton v. City Coll. of New York*, 2008 U.S. Dist. LEXIS 16058 (S.D.N.Y. Feb. 29, 2008); *Moore v. Univ. of Memphis*, 2013 U.S. Dist. LEXIS 174525 (W.D. Tenn. Dec. 13, 2013). But in other cases, the trial judge overturned the jury verdict through a judgment notwithstanding the verdict: See, e.g., *Fisher v. Vassar Coll.*, 114 F.3d 1332 (2d Cir. 1997) (en banc).

71 See, e.g., cases cited *supra* note 68.

72 39 F.3d 21 (1st Cir. 1994).

73 891 F.2d 337, 346 (1st Cir. 1989).

74 *Bina*, *supra* note 72, at 26. The court found that the college had carried its burden of supplying a legitimate nondiscriminatory reason for its failure to hire the plaintiff—his teaching evaluations had been problematic.

75 2013 Tenn. App. LEXIS 656 (Tenn. Ct. App. Sept. 27, 2013).

76 *Id.* at *21–22.

77 *Id.* at *21. This recitation of Tennessee law is similar to the provisions of New York's Civil

court had not deferred to the University's interpretation of its Faculty Manual, but only to the university's "assessment of the strength or weakness of Dr. Figal's scholarly work."⁷⁸

And in *Davis v. Western Carolina University*,⁷⁹ a faculty member denied tenure lost discrimination claims under the Rehabilitation Act⁸⁰ and the Americans with Disabilities Act (ADA).⁸¹ The trial court, in awarding summary judgment to the University, noted that the Fourth Circuit has stated

[W]e review professorial employment decisions with great trepidation. We must be ever vigilant in observing that we do not sit as a 'super personnel council' to review tenure decisions, always cognizant of the fact that professorial appointments necessarily involve 'subjective and scholarly judgments,' with which we have been reluctant to interfere.⁸²

The appellate court affirmed, noting that it was "hesitant to second guess the 'subjective and scholarly judgments' involved in professorial employment matters."⁸³

2. The Outliers Rejecting Deference

Since *Faro*, a handful of cases has rejected deference and examined each party's facts without reference to the matter of academic judgment. For example, in an early federal court opinion, *Sweeney v. Board of Trustees of Keene State College*, after a four-day bench trial, the trial court found for the plaintiff, who had alleged that denial of promotion to full professor was a result of sex discrimination.⁸⁴ The federal appellate court affirmed the trial court's finding for the plaintiff, noting the same concern as the *Powell* opinion, stating

[W]e voice misgivings over one theme recurrent in those opinions: the notion that courts should keep "hands off" the salary, promotion, and hiring decisions of colleges and universities. This reluctance no doubt arises from the courts'

Practice Law & Rules § 7801–7806, which provides that judicial review by state courts of the decisions of a "corporation," (including a private college or university) be limited to whether the decision was "arbitrary, capricious, or an abuse of discretion." N.Y.C.P.L.R. § 7803 (2014).

78 *Figal*, 2013 Tenn. App. LEXIS 656, at *21.

79 2016 U.S. Dist. LEXIS 20354 (W.D.N.C. Feb. 19, 2016), *aff'd*, 695 Fed. App'x 686 (4th Cir. 2017). The trial court noted that the record contained "thousands of pages" of evidence, and very few, minor disputes about the facts of the case—just its outcome. *Id.* at *3.

80 29 U.S.C. § 794 (1973).

81 42 U.S.C. §§ 12101 et seq. (1990).

82 *Davis*, 2016 U.S. Dist. LEXIS 20354, at *50–51.

83 *Davis*, 695 Fed. App'x at 689.

84 569 F.2d 169 (1st Cir. 1978), *vacated and remanded*, Bd. of Trs. v. Sweeney, 439 U.S. 24 (1978), *on remand*, 1979 U.S. Dist. LEXIS 14798 (D.N.H. Jan. 29, 1979), *cert. denied*, 444 U.S. 1045 (1980), *appeal after remand* 604 F.2d 106 (1st Cir. 1979). The U.S. Supreme Court ruled that the trial and appellate courts had applied the wrong burden of proof to the defendant, requiring the college to prove that it did not discriminate, rather than simply articulating a nondiscriminatory reason for the tenure denial. The outcome on remand was the same using the correct burden of proof.

recognition that hiring, promotion, and tenure decisions require subjective evaluation most appropriately made by persons thoroughly familiar with the academic setting. Nevertheless, we caution against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of sex discrimination in institutions of higher learning as readily as for other Title VII suits.⁸⁵

A case from the U.S. Court of Appeals for the Third Circuit artfully combined a form of deference with an insistence that college faculty plaintiffs were no different from blue-collar workers with respect to Title VII protections. In *Kunda v. Muhlenberg College*,⁸⁶ Connie Kunda, an assistant professor of physical education, was denied tenure because she had not earned a master's degree, which she was told, after the tenure denial, was required for promotion. At trial, she was able to show that male faculty had been advised to earn a master's degree, and they had been awarded tenure. After a four-day trial, the court ruled in Kunda's favor and the appellate court affirmed, finding that the lack of advising was motivated by sex discrimination. The appellate decision, written by Judge Dolores Sloviter, a former law school professor, appeared to disagree with the prevailing deference arguments, saying "Congress did not intend that those institutions which employ persons who work primarily with their mental faculties should enjoy a different status under Title VII than those which employ persons who work primarily with their hands."⁸⁷ On the other hand, Judge Sloviter wrote,

[I]t is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.⁸⁸

In another case where a federal court refused to defer to the university's academic judgment, the U.S. Court of Appeals for the Third Circuit, citing *Kunda*,⁸⁹ affirmed the finding of a trial court that Rutgers University had discriminated against a

85 *Sweeney*, 569 F.2d at 176.

86 463 F. Supp. 294 (E.D. Pa. 1978), *aff'd*, 621 F.2d 532 (3d Cir. 1980).

87 *Kunda*, 621 F.2d at 550.

88 *Id.* at 548. The *Kunda* case is interesting because Professor Kunda had been judged worthy of tenure by her peers, but the provost and president rejected that recommendation because she lacked the master's degree. Thus, the ultimate tenure denial was based upon an objective criterion—the lack of a master's degree—and not upon the academic judgment of the provost and president. The trial court fashioned a remedy that, in the appellate court's view, respected academic judgment while acknowledging the right of the college to require educational credentials. It ruled that, if Professor Kunda obtained a master's degree within two years, she would be given tenure. She did earn the degree and was awarded tenure. LANOUE & LEE, *supra* note 19, at 89–113.

89 *Kunda*, 621 F.2d 532.

professor on the basis of his national origin by denying him promotion to full professor.⁹⁰ Rejecting the university's argument that faculty committees had determined that Professor Bennun's research did not meet the required standard of excellence, the trial court performed an extensive comparison between the plaintiff and his comparators, concluding that the university's claim that Professor Bennun's research was of lesser quality than that of his comparators was a pretext for discrimination. The appellate court concurred, rejecting the notion that federal courts should defer to academic judgments.⁹¹

And in *Jew v. University of Iowa*,⁹² the trial court, reviewing the plaintiff's evidence of hostile treatment by the male faculty in her department, including the circulation of false rumors of a sexual affair with the department chair, concluded that the promotion denial was tainted by sex discrimination and not an appropriate exercise of professional judgment. Furthermore, the court, in its findings of fact, determined that

in November of 1983 Dr. Jew was qualified for promotion to full professor. I further find and conclude that defendants have failed to prove by a preponderance of the evidence that a majority of the senior faculty would have voted against recommending Dr. Jew for promotion if the discriminatory factor had been absent. Defendants have also failed to prove by a preponderance of the evidence that if the discriminatory factor had been absent the proposed promotion of Dr. Jew to full professor would have been rejected at any subsequent stage of the promotion process.⁹³

The trial court did not mention the term "academic deference," nor did it indicate that the defendant university had claimed that deference should be given to its academic judgments.

The 1990 decision of the U.S. Supreme Court in *University of Pennsylvania v. EEOC*⁹⁴ squelched the use of the "academic freedom privilege" to withhold otherwise confidential evaluative material from the plaintiff in a sex discrimination challenge to the denial of tenure. This decision could have been seen as an invitation to courts to engage in a more thorough review of the "academic judgment" of the plaintiffs' faculty peers and higher levels of decision-making. For at least two decades after that decision was announced, however, there was seemingly little impact on most courts to sharpen the focus of their analyses of the evidence, and the use of summary judgments for defendants in these cases persisted.⁹⁵

90 *Bennun v. Rutgers State Univ.*, 737 F. Supp. 1393 (D.N.J. 1990), *aff'd*, 941 F.2d 154 (3d Cir. 1991).

91 *Bennun*, 941 F.2d at 174.

92 749 F. Supp. 946 (S.D. Iowa 1990).

93 *Id.* at 961. The facts, as recited by the court, indicate that the harassment and discrimination against the plaintiff engaged in by several of the male faculty was so severe that the court believed the recommendation against tenure was not the type of "genuine academic judgment" required by the *Ewing* court to justify deference.

94 493 U.S. 182, 198–99 (1990).

95 Federal courts continued to award summary judgment to college and university defendants

B. A Movement Away from Deference?

More recently, a few federal appellate courts have spoken strongly against deferring to the judgments of college and university defendants. Perhaps the strongest language appears in *Mawakana v. Board of Trustees of University of the District of Columbia*.⁹⁶ In *Mawakana*, a Black law professor sued the University of the District of Columbia Board of Trustees claiming racial discrimination in his tenure denial. The trial court awarded summary judgment to the university, citing academic deference in tenure review cases, but the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the case. The appellate panel noted that the plaintiff had alleged several facts that, if established at trial, would indicate that the decision to deny tenure was irregular and may have been motivated by discrimination. The court explained:

[W]e believe that *Ewing* and the concept of academic freedom do not entitle a university to special deference in Title VII tenure cases. Indeed, the first premise of the deference afforded the university in *Ewing* was that the university had “acted in good faith.” That premise cannot be assumed in a Title VII case, where the question is *whether* the employer acted in good faith. The second premise of the Court’s deference in *Ewing* was that the Court was being asked to review the substance of a genuinely academic decision. *Id.* That premise also cannot be assumed in a Title VII case, where a court is asked to evaluate the reason for—as opposed to the substance of—the University’s decision and thus *whether* the employer’s decision was genuinely academic. In sum, *Ewing* dictates that a court cannot second-guess a university’s decision to deny tenure *if* that decision was made in good faith (i.e., for genuinely academic reasons, rather than for an impermissible reason such as the candidate’s race). But a Title VII claim requires a court to evaluate *whether* a university’s decision to deny tenure was made in good faith (i.e., for academic reasons rather than for an impermissible reason such as the applicant’s race).⁹⁷

This language suggests that the court believed that the burden was on the defendant university to demonstrate that the decision was a “genuinely academic decision” but did not explain how courts should determine whether or not the decision was made in good faith. The allegations in the *Mawakana* case suggest that factors other than “genuine academic judgment” may have been at play.⁹⁸

throughout the decade ending in the year 2020. *See, e.g.,* Theidon v. Harvard Univ., 948 F.3d 477 (1st Cir. 2020); Nguyen v. Regents of Univ. of Cal., 823 Fed. App’x 497 (9th Cir. 2020); Seye v. Bd. of Trs. of Ind. Univ., 2020 U.S. Dist. LEXIS 81111 (S.D. Ind. May 8, 2020), *aff’d*, 830 Fed. App’x 778 (7th Cir. 2020); Maras v. Curators of Univ. of Mo., 983 F.3d 1023 (8th Cir. 2020); and Zeng v. Marshall Univ., 2020 U.S. Dist. LEXIS 53131 (S.D. Va. Mar. 26, 2020), *aff’d*, 2022 U.S. App. LEXIS 855 (4th Cir. Jan. 11, 2022).

⁹⁶ 926 F.3d 859 (D.C. Cir. 2019), *reh’g en banc denied*, 2019 U.S. App. LEXIS 224253 (D.C. Cir. Aug. 14, 2019).

⁹⁷ *Id.* at 864–65 (emphasis in original).

⁹⁸ The plaintiff alleged that the dean, who made the effective decision, had treated White tenure candidates more favorably than Black candidates, citing specific examples of such treatment. Of course, if the negative decision was not based on academic judgment, but rather on other factors, such as budget difficulties or an employee’s misconduct, then academic deference might not be appropriate. *See,*

Another appellate court rejected a defendant university's argument that the court should defer to the academic judgment of the decision-makers. In *Tudor v. Southeastern Oklahoma State University*,⁹⁹ a transgender woman professor of English was denied tenure twice on the grounds that her scholarship and service were insufficient. There was credible evidence that the tenure denial had been based on administrators' and some colleagues' discomfort with her transgender status. In responding to the university's argument that deference supported its motion for summary judgment, the court disagreed. The trial judge noted that "Defendants argue that their decision to deny the plaintiff tenure was a subjective matter based upon decisions made at the administrative level and that the Court should grant deference to the administration's decisions on this issue."¹⁰⁰ But the court noted numerous differences in material facts and ruled that the case must be tried. A jury found for the plaintiff on both her sex discrimination claim and her retaliation claim, but rejected her hostile environment claim. The trial judge refused to reinstate her and ordered back and front pay.

Both parties appealed. The appellate court found that sufficient evidence existed to support the jury verdict, and ordered the plaintiff reinstated. To the defendant's argument that reinstatement was inappropriate because of hostility between the parties, the appellate court replied

There are plenty of work-arounds and solutions making reinstatement possible in cases where some animosity exists, such as a remote office, a new supervisor, or a clear set of workplace guidelines. And, as discussed further below, some positions such as higher education teaching and scholarship are inherently fairly insulated from the adverse sentiments of colleagues. Courts must look beyond ill feeling and instead address simply whether a productive working relationship would still be possible, and they must do so through the lens of a strong preference for reinstatement [citing *Bingman v. Natkin & Co.*, 937 F.2d 553, 558 (10th Cir. 1991) (reinstatement should be granted in "all but special instances of unusual work place hostility").]¹⁰¹

The court noted that all of the administrators who had rejected the plaintiff's tenure application had left the university, and that the department chair, who had initially opposed her tenure quest, now believed that she deserved tenure.

The court then addressed the plaintiff's request that she be reinstated with tenure. The court agreed, saying

Given the jury verdict in favor of Dr. Tudor, it is established—and we cannot now question—that Dr. Tudor would have been granted tenure in 2009–10

e.g., *Steele v. Mattis*, 899 F.3d 943 (D.C. Cir. 2018) (professor dismissed while under contract claimed age discrimination. Because the university had argued that the reason for the dismissal was budget cuts and his failure to follow the prescribed syllabus, the appellate court ruled that the university's defense did not implicate academic judgment and that the case must be tried to a jury.) At the time this article was published, there had been no further proceedings in the case.

99 2017 U.S. Dist. LEXIS 177654 (W.D. Okla. Oct. 26, 2017), *rev'd in part, aff'd in part*, 13 F.4th 1019 (10th Cir. 2021).

100 *Id.* at *7.

101 *Tudor*, 13 F.4th 1019 at 1034.

absent the discrimination. Thus, in granting Dr. Tudor reinstatement with tenure, we do not serve as a super-tenure committee making academic decisions for Southeastern. We are instead restoring Dr. Tudor to the position she would have been in had Southeastern not engaged in prohibited discrimination against her.¹⁰²

The court added “Southeastern appears to be arguing for a special rule of deference to educators, but illegal decisions by educational institutions do not enjoy special sanctity. In fact, Congress specifically removed the previous Title VII exemption for educational institutions in 1972, making them unquestionably subject to Title VII’s general prohibitions.”¹⁰³ Citing *Kunda*,¹⁰⁴ the court ordered Professor Tudor reinstated as an associate professor with tenure—an unusual ruling but not unprecedented.¹⁰⁵

C. Is Deference Still the Norm?

Despite what may appear to be a movement toward less judicial reliance on academic judgment, some recent court decisions reviewing claims of discrimination or breach of contract in tenure denials have continued to announce their deference to the defendant institution’s academic judgment, although these courts have discussed both parties’ evidence prior to making these judgments.¹⁰⁶ In other recent cases, the language of deference may not be as obvious, but courts continue to dismiss lawsuits or award summary judgment to defendant colleges and universities in promotion or tenure denial cases, although after what appears to be a careful review of the plaintiff’s and the defendant’s evidence.¹⁰⁷ In recent cases where the court has rejected the defendant’s invitation to defer, the plaintiff has

102 *Id.* at 1039.

103 *Id.*

104 *Kunda v. Muhlenberg Coll.*, 621 F.2d 532 (3d Cir. 1980).

105 For other cases in which a court ordered a plaintiff reinstated with tenure or promoted, see *Brown v. Trs. of Bos. Univ.*, 891 F.2d 337 (1st Cir. 1989). See also *Gladney v. Thomas*, 573 F. Supp. 1232 (D. Ala. 1983) and *Younus v. Shabat*, 336 F. Supp. 1137 (N.D. Ill. 1971), *aff’d mem.* 6 Fair Empl. Prac. Cas. (BL) 314 (7th Cir. 1973).

106 See, e.g., *Wei-Ping Zeng v. Marshall Univ.*, 2020 U.S. Dist. LEXIS 53131, *32 (S.D. W. Va. Mar. 26, 2020) (tenure denial) (“the issue of deference to a university’s tenure decision is far from “irrelevant”—indeed, it is precisely this principle that frames a court’s approach to Title VII claims raised in relation to tenure denials.”) See also, e.g., *Graham v. Columbia Coll.*, 2012 U.S. Dist. LEXIS 44776 (D.S.C. Jan. 11, 2012) (layoff for budget reasons). The court quoted *Smith v. University of North Carolina*, 632 F.2d 316, 345 n.26 (4th Cir. 1980) (“Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.”) (quoting *Faro v. New York Univ.*, 502 F.2d 1229, 1231–32 (2d Cir. 1974)).

107 *Maras v. Curators of the Univ. of Mo.*, 983 F.3d 1023 (8th Cir. 2020) (tenure denial); *Seye v. Bd. of Trs. of Ind. Univ.*, 2020 U.S. Dist. LEXIS 81111 (S.D. Ind. May 8, 2020), *aff’d*, 830 Fed. App’x 778 (7th Cir. 2020) (tenure denial); *Nguyen v. Regents of the Univ. of Cal.*, 823 Fed. App’x 497 (9th Cir. 2020) (tenure denial); *Theidon v. Harvard Univ.*, 948 F.3d 477 (1st Cir. 2020) (tenure denial); *Davis v. W. Carolina Univ.*, 2016 U.S. Dist. LEXIS 20354 (W.D.N.C. Feb. 19, 2016), *aff’d*, 695 Fed. App’x 696 (4th Cir. 2017) (tenure denial); *Kouassi v. W. Ill. Univ.* 2015 U.S. Dist. LEXIS 64926 (C.D. Ill. May 18, 2015) (tenure denial).

alleged procedural violations serious enough to convince the court that dismissal or summary judgment are inappropriate.¹⁰⁸

This review of challenges to academic personnel decisions suggests that a simple defense of “academic deference” will not be sufficient to result in dismissal or summary judgment for the institution. Litigation involving denial of tenure or promotion is lengthy, complicated, and expensive, and the number of published opinions suggests that the pace of litigation has not abated. Academic administrators (chairs, deans, provosts) will need to ensure that individuals participating in these decisions, including faculty, justify their recommendations with solid evidence and careful adherence to policies and procedures.

II. Judicial Deference to Student Academic Challenges

Although early judicial decisions tended to reject institutions’ arguments that they were entitled to deference in cases of student misconduct,¹⁰⁹ courts have tended to defer to the decision of a faculty member or academic administrator if the dispute involves academic judgments such as grades;¹¹⁰ whether a student met

108 See, e.g., *Pagano v. Case W. Rsvr. Univ.*, 166 N.E. 3d 654, 665 (Ct. App. Ohio 2021) (tenure denial). (“Dr. Pagano has identified specific contract provisions that may have been breached and provided evidence that reasonably supports that procedural irregularities prejudiced her during the tenure review process. The procedural irregularities alleged in Dr. Pagano’s breach of contract claim and the allegations of resulting prejudice are sufficient to overcome summary judgment.” See also *Moini v. LeBlanc*, 456 F. Supp. 3d 34, 51 (D.D.C. 2020) (Professor denied tenure claimed national origin discrimination and breach of contract. The trial court rejected the university’s motion to dismiss, stating “The President stresses that courts ‘generally give deference to the decisions that universities make, including tenure decisions.’ [citation omitted] Even so, Moini has made a plausible allegation of an ‘arbitrary and capricious’ decision. For example, recall that the Appeals Panel and the dissenting member of the Hearing Panel found it troubling that others had relied heavily on the student evaluations.” However, in a later ruling, the same court awarded summary judgment on all claims to the university. *Moini v. Wrighton*, 2022 U.S. Dist. LEXIS 86537 (D.D.C. May 13, 2022)). And see *Miller v. Sam Houston State University*, 986 F.3d 880 (5th Cir. 2021) (tenure denial), reversing the grant of summary judgment to the university and remanding to a different trial judge. The plaintiff was not awarded tenure on the basis of poor collegiality; the appellate court ruled that the trial judge had impermissibly denied her certain discovery requests, and that a different trial judge should be assigned to the case.

109 *Goss v. Lopez*, 419 U.S. 565, 581 (1975), holding that a student in a public school had a property right in continued attendance and that before being disciplined for social misconduct (as compared with academic misconduct), the student had a right to “be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.” In *Horowitz v. Board of Curators of the University of Missouri*, 435 U.S. 78 (1978), however, the Court distinguished between the appropriate type of review of behavioral misconduct and academic performance. With respect to academic evaluation, the Court said, “The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal.” *Id.* at 86.

110 See, e.g., *In re Susan M. v. New York L. Sch.*, 556 N.E. 2d 1104 (N.Y. 1990) (“Because [the plaintiff’s] allegations are directed at the pedagogical evaluation of her test grades, a determination best left to educators rather than the courts, we conclude that her petition does not state a judicially cognizable claim.” *Id.* at 1105).

academic requirements;¹¹¹ student academic performance in class¹¹² or in clinical settings;¹¹³ or, in some cases, to academic misconduct.¹¹⁴ The courts have been most deferential when a student challenges a grade, unless the student can make an argument that there has been overt bias or procedural violations.¹¹⁵ In most cases, courts have refused to substitute their judgment for that of a faculty member who has assigned a grade to student academic work.¹¹⁶ In some cases, however, courts have struggled with the dichotomy established in *Horowitz*¹¹⁷ because some cases involve an assessment of both the student's academic performance and possible misconduct, either behavioral or academic.¹¹⁸

111 See, e.g., *Rhode v. State of Okla. ex rel. Bd. of Regents of the Univ. of Cent. Okla.*, 2021 U.S. Dist. LEXIS 188179 (W.D. Okla. Sept. 30, 2021).

112 The Court in *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78 (1978), justified its distinction between the nature of judicial review of academic judgments compared to review of discipline thusly: "Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full-hearing requirement. In *Goss*, the school's decision to suspend the students rested on factual conclusions that the individual students had participated in demonstrations that had disrupted classes, attacked a police officer, or caused physical damage to school property. The requirement of a hearing, where the student could present his side of the factual issue, could under such circumstances 'provide a meaningful hedge against erroneous action.' *Ibid.* The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Id.* at 89–90.

113 See the discussion of judicial review of academic dismissals for inadequate clinical performance in Part II.C.

114 For a discussion of lawsuits related to student academic misconduct, see Barbara A. Lee, *Judicial Review of Student Challenges to Academic Misconduct*, 39 J.C. & U.L. 511, 513 (2013). The author defines academic misconduct as "plagiarism, cheating, collaborative work on an assignment that is intended to be done by the student individually, or other violations of the academic expectations of a course or assignment. The use of fabricated data or unauthorized materials, or the destruction of materials in order to prevent other students from using them (such as library resources), is also a form of academic misconduct." See also Thomas Schweitzer, "Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students? 41 AM. U. L. REV. 267 (1992); Fernand N. Dutille, *Disciplinary Versus Academic Sanctions: A Doomed Dichotomy?* 29 J.C. & U.L. 619 (2003); Perry A. Zirkel, *Procedural and Substantive Student Challenges to Disciplinary Sanctions at Private—As Compared with Public Institutions of Higher Education: A Glaring Gap?* 83 MISS. L.J. 863 (2014); and Jessica Barlow, Comment: *Student Challenges to Academic Decisions: The Need for the Judiciary to Look Beyond Deference*, 117 PENN ST. L. REV. 873 (2013).

115 See, e.g., *Sylvester v. Tex. S. Univ.*, 957 F. Supp. 944 (S.D. Tex. 1997) (court ordered law student's grade changed to a "pass" from a D because the law school had not followed its procedures for adjudicating a grade dispute).

116 See, e.g., *In re Susan M. v. New York L. Sch.*, 556 N.E. 2d 1104, 1105 (N.Y. 1990) ("Because [the plaintiff's] allegations are directed at the pedagogical evaluation of her test grades, a determination best left to educators rather than the courts, we conclude that her petition does not state a judicially cognizable claim."). See also *Babinski v. Queen*, 2021 U.S. Dist. LEXIS 187150, at *25 (M.D. La. Sept. 29, 2021) ("The educator's authority to create, assign, and grade assignments is unquestioned, and courts do not engage in *post hoc* assessments of educator's grading decisions.»).

117 *Horowitz*, 435 U.S. 78.

118 For a discussion of whether all forms of academic evaluation and academic misconduct

Courts typically defer to institutional decisions with respect to academic dismissals¹¹⁹ and failures of clinical performance,¹²⁰ although there are exceptions.¹²¹ Courts have shown somewhat more skepticism when reviewing cases involving academic or professional requirements when they conflict with student speech rights, although in most cases the defendants have prevailed.¹²² Review of a student's academic performance in clinical settings is especially deferential, particularly in health care settings.¹²³ Student claims that they have been discriminated against on the basis of a disability tend to attract somewhat more judicial scrutiny, although, again, the courts have appeared more comfortable analyzing the procedures used than the propriety of the accommodations given or withheld.¹²⁴

A. Failure to Comply with Academic Requirements

Heeding *Ewing's* admonishment that courts should defer to a college's "genuinely academic decision,"¹²⁵ courts have been generally unsympathetic to student claims

should enjoy the same procedural protections, see Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289 (1999).

119 *Horowitz*, 435 U.S. 78. See also *Al-Dabagh v. Case Wes. Rsrv. Univ.*, 777 F.3d 355 (6th Cir. 2015) (upholding dismissal and denying breach of contract claim, stating that academic judgments are to receive judicial deference unless arbitrary or capricious); *Chenari v. Geo. Wash. Univ.*, 847 F.3d 740 (D.C. Cir. 2017) and *Hajjar-Nejad v. Geo. Wash. Univ.*, 37 F. Supp. 3d 90 (D.D.C. 2014). *But see Sharik v. Se. Univ. of the Health Sci., Inc.*, 780 So. 2d 136 (Fla. Dist. Ct. App. 2000) (affirming jury verdict for plaintiff, finding that medical school's decision to dismiss student for failing his last course was arbitrary and capricious).

120 *Nigro v. Va. Commonwealth Univ./Med. Coll. of Va.*, 492 Fed. App'x 347, 360 (4th Cir. 2012). See also *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 437 (6th Cir. 1998).

121 See, e.g., *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2021), *infra* text accompanying notes 148–49. The court rejected the university's claim that its dismissal of the student from a master's degree program was academic in nature, reversing summary judgment awarded to the university.

122 See the discussion of *Brown v. Li*, 308 F.2d 939 (9th Cir. 2002); *Pompeo v. University of New Mexico*, 852 F.3d 973 (10th Cir. 2017); *Tatro v. University of Minnesota*, 816 N.W.2d 509 (Minn. 2012); *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011); *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012); *Oyama v. University of Hawaii*, 813 F.3d 850 (9th Cir. 2015); and *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) *infra* in Section II.A of this article.

123 For a discussion of challenges to academic dismissals in clinical settings, see Ellen Babbitt & Barbara A. Lee, *Accommodating Students with Disabilities in Clinical and Professional Programs: New Challenges, New Strategies*, 42 J.C. & U.L. 119 (2016). See also Laura Rothstein, *Medical Education and Individuals with Disabilities: Revisiting Policies, Practices, and Procedures in Light of Lessons Learned from Litigation*, 46 J.C. & U.L. 258 (2021). The Rothstein article has an extended discussion of the facts of many of the cases mentioned in this article as well as additional cases involving medical students not cited herein.

124 See, e.g., *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807, 823 (9th Cir. 1999) (Although the trial court deferred to the University, determining that the accommodations given a student with a disability were reasonable, the appellate court disagreed with the trial court's deferential standard of review, saying that the University "did not demonstrate that it conscientiously exercised professional judgment in considering the feasibility" of the requested accommodations, stating that "the school's system for evaluating a learning disabled student's abilities and its own duty to make its program accessible to such individuals fell short of the standards we require to grant deference."). On remand, the trial court determined that the student was not disabled because he had achieved earlier academic success without accommodations; the appellate court affirmed that ruling (*Wong v. v. Regents of the Univ. of Cal.*, 379 F.3d 1097 (9th Cir. 2004)).

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

that academic rules or requirements violate free speech rights. A 1988 U.S. Supreme Court case, *Hazelwood School District v. Kuhlmeier*,¹²⁶ afforded substantial deference to K–12 schools in regulating student speech if the school could demonstrate that the action was taken because of “legitimate pedagogical concerns”¹²⁷ about its content or effect. And although *Hazelwood* focused on public K–12 schools, it has been applied in some federal circuits to higher education cases as well,¹²⁸ while other federal circuits have limited its application in higher education cases.¹²⁹ But not all federal courts have been as deferential to institutional requirements, as will be seen later in this section.

For example, in *Brown v. Li*,¹³⁰ a student sued his master’s thesis committee, the dean of the graduate school, and the chancellor of the University of California at Santa Barbara when his thesis committee did not approve his master’s thesis because he had included a “Disacknowledgements” section in which he harshly criticized those individuals and others. Although the student eventually received his degree, the school decided not to include the thesis in the University’s library. The student claimed that the defendants had violated his First Amendment free speech rights. The court, citing *Hazelwood*,¹³¹ concluded that “an educator can, consistent with the First Amendment, require that a student comply with the terms of an academic assignment. [That case] also make[s] clear that the First Amendment does not require an educator to change the assignment to suit the student’s opinion or to approve the work of a student that, in his or her judgment, fails to meet a legitimate academic standard.”¹³² In ruling for the defendants, the court said

In view of a university’s strong interest in setting the content of its curriculum and teaching that content, *Hazelwood* provides a workable standard for evaluating a university student’s First Amendment claim stemming from curricular speech. That standard balances a university’s interest in academic freedom and a student’s First Amendment rights. It does not immunize the university altogether from First Amendment challenges but, at the same time, appropriately defers to the university’s expertise in defining academic standards and teaching students to meet them.¹³³

More recently, in *Pompeo v. Board of Regents of the University of New Mexico*,¹³⁴ the Tenth Circuit also followed *Hazelwood*. In *Pompeo*, a graduate student claimed that her professor, in criticizing a paper that she wrote for class, had violated her

126 484 U.S. 260 (1988).

127 *Id.* at 273.

128 *See, e.g.*, *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002), *infra* text accompanying notes 130-133.

129 *See* discussion in *Babinski v. Queen*, 2021 U.S. Dist. LEXIS 187150 (M.D. La. Sept. 29, 2021), in which the court said that Fifth Circuit jurisprudence narrows the application of *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), to only those cases involving school-sponsored speech, citing *Morgan v. Swanson*, 659 F.3d 359, 376 (5th Cir. 2011) (en banc), and noted that other circuits apply *Hazelwood* more broadly.

130 308 F.2d 939 (9th Cir. 2002).

131 *Hazelwood*, 484 U.S. 260.

132 *Brown*, 308 F.3d at 949.

133 *Id.* at 951–52.

134 852 F.3d 973 (10th Cir. 2017).

First Amendment free speech rights. The professor had told the student that she had to rewrite a paper because she had focused on her personal opinions about lesbianism rather than providing support for the statements she had made. The student refused to rewrite the paper and stopped attending class. Although the university refunded her tuition for that class, she sued both the professor and the professor's supervisor.

The University conceded that the student had free speech rights, but, citing *Hazelwood*,¹³⁵ argued that the professors were protected by qualified immunity because there was no clearly established law that restrictions on student speech that were related to legitimate pedagogical concerns violated the First Amendment. The trial court agreed, awarding summary judgment to the defendants, and the appellate court affirmed. The appellate court noted

Our case law does not suggest that federal courts are in the business of determining whether a term is actually inappropriate for an academic audience, to the extent appropriateness can be objectively defined. Short of turning every classroom into a courtroom, we must "entrust[] to educators these decisions that require judgments based on viewpoint."¹³⁶

A case from the Supreme Court of Minnesota provides a useful analysis of the legal conflict between academic program rules and student free speech, particularly when made off campus. In *Tatro v. University of Minnesota*,¹³⁷ the student plaintiff was enrolled in a mortuary science program. She had posted several comments on her Facebook page about the cadaver with which she was working. The program faculty found her comments not only disrespectful but potentially threatening, concluding that they were a violation of the program's rules requiring confidentiality and respectful behavior regarding the donated cadavers used by the students. She was charged with a code of conduct violation, was placed on academic probation, and was given a failing grade in the course. Tatro sued, claiming that because the social media postings were done off campus, the University did not have the authority to punish her.

Although an appellate court had ruled for the University, citing *Tinker*¹³⁸ and noting that Tatro's posting had created a substantial disruption for the mortuary science program, the state's supreme court, in affirming the ruling for the University, rested its analysis on more narrow reasoning. The high court recognized that off-campus student speech would ordinarily be protected by the First Amendment. However, said the court, the plaintiff had agreed that

a university may regulate student speech on Facebook that violates established professional conduct standards. This is the legal standard we adopt here, with the qualification that any restrictions on a student's Facebook posts

135 *Hazelwood*, 484 U.S. 260. The Tenth Circuit had ruled in 2004 that a student enjoyed First Amendment free classroom speech rights, *See Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), *infra* text accompanying notes 151-154.

136 *Pompeo v. Bd. of Regents of the Univ. of N.M.*, 852 F.3d 973, 989-90 (10th Cir. 2017), quoting *Fleming v. Jefferson Cnty. Sch. Dist.*, 298 F.3d 918, 928 (10th Cir. 2002).

137 816 N.W.2d 509 (Minn. 2012).

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

must be narrowly tailored and directly related to established professional conduct standards. Tying the legal rule to established professional conduct standards limits a university's restrictions on Facebook use to students in professional programs and other disciplines where student conduct is governed by established professional conduct standards. And by requiring that the restrictions be narrowly tailored and directly related to established professional conduct standards, we limit the potential for a university to create overbroad restrictions that would impermissibly reach into a university student's personal life outside of and unrelated to the program. Accordingly, we hold that a university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards.¹³⁹

Another case in which professional standards outweighed free speech claims is *Oyama v. University of Hawaii*.¹⁴⁰ The plaintiff was a student enrolled in a post-baccalaureate program in secondary education and seeking teacher certification. He was asked to write a paper for a course in educational psychology, and the opinions he expressed in that paper were of concern to the professors in the teacher preparation program. Oyama wrote that he felt that child predation and consensual sex with a minor should be legal, although he would report such activities as required by state law. He also opined that severely disabled students should not be mainstreamed into regular classes—a perspective that was counter to state education policy. The program staff refused to recommend Oyama for teacher certification and barred him from student teaching; he sued, alleging free speech violations.

The trial and appellate courts deferred to the academic judgment of the program faculty that Oyama's rejection did not violate the First Amendment. The court explained its reasoning for deference:

We emphasize that the University did not “establish” or “define” these professional standards by fiat. Its decision was not, in other words, based on school policies untethered to any external standards, regulations, or statutes governing the profession. Instead, the University relied upon standards established by state and federal law, the Hawaii Department of Education, the HTSB [Hawaii Teacher Standards Board], and the University's national accreditation agency, the NCATE [National Council for Accreditation of Teacher Education]...the University framed its concerns about Oyama's statements by reference to professional standards set beyond the walls of

139 *Tatro*, 816 N.W.2d at 521. In June of 2021, the U.S. Supreme Court ruled that a public school could not discipline a student for making comments critical of the school and its staff when done outside of school hours and while under her parents' supervision. *Mahanoy Area Sch. Dist. v. B.L.*, 121 S. Ct. 2038 (2021). The school had argued that the *Tinker* analysis should be used and that the “substantial disruption” caused by the student's social media posts justified the discipline. The trial and appellate courts rejected the *Tinker* defense; the U.S. Court of Appeals for the Third Circuit held that *Tinker* does not apply to out-of-school conduct. *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170 (3d Cir. 2020). The Supreme Court did not address whether *Tinker* applied because it found that the student's comments had not disrupted the school's functioning and thus were fully protected by the First Amendment. *Mahanoy Area Sch. Dist.*, 121 S. Ct. at 2048.

140 813 F.3d 850 (9th Cir. 2015).

its own institution. The University thus compared Oyama's speech not to its own idiosyncratic view of what makes a good teacher, but rather to external guideposts that establish the skills and disposition a secondary school teacher must possess.¹⁴¹

Suggesting that deference to academic judgments was not automatic, the court continued:

[W]e may defer to the University's decision because of its prerogative to evaluate professional competencies and dispositions, not because of a blind faith in the University's sense of what views are right or wrong. Consistent with this rationale for deference, we may uphold the University's decision only if it reflects reasonable professional judgment about Oyama's suitability for teaching. The University's decision to deny Oyama's application satisfies this requirement.¹⁴²

If, however, a court is not convinced that the proffered reasons for the student's failure to meet academic requirements were squarely based on professional judgment, the student may be able to get a free speech claim to a jury. For example, in *Felkner v. Rhode Island College*,¹⁴³ a student enrolled in a master's degree program in social work, grounded in social justice values, frequently expressed politically conservative views with which his professors and fellow students disagreed. The student and the professors sparred frequently over assignments that the student had submitted, and when the student refused to comply with the requirements of assignments, he was given failing grades. He filed suit against several professors and the college, asserting violations of free speech and due process, retaliation, conspiracy to violate his constitutional rights, and violation of the establishment clause.

Although the trial court had awarded summary judgment to the college on all claims, the Rhode Island Supreme Court ruled that Felkner's free speech and retaliation claims must be tried to a jury, given that court's opinion that there were genuine issues of material fact as to whether the faculty's actions were reasonably related to legitimate pedagogical concerns or a pretext for punishing him for his conservative views and his persistence in publicizing them. Said the court,

The fact that a student may be required to debate a topic from a perspective that is contrary to his or her own views may well be reasonably related to legitimate pedagogical concerns. That relationship is far more tenuous, however, when the student is told that he or she must then lobby for that

141 *Id.* at 870.

142 *Id.* at 873. For additional cases involving the application of professional standards to a student teacher's claim of free speech violations, see *Snyder v. Millersville Univ.*, 2008 U.S. Dist. LEXIS 97943 (E.D. Pa. Dec. 3, 2008) (student teacher who posted controversial photo on social media site available to her young students was not protected by the First Amendment) and *Winkle v. Ruggieri*, 2013 U.S. Dist. LEXIS 59655 (S.D. Ohio Jan. 22, 2013) (teacher training program's requirement of student compliance with "core values" was a legitimate pedagogical method of assessing potential teachers' suitability for the role of a teacher). See also *Scaccia v. Stamp*, 700 F. Supp. 2d 219 (N.D.N.Y. 2010) (faculty had legitimate concerns about student's academic performance; no violation of due process or free speech in his dismissal from graduate program).

143 203 A.3d 433 (R.I. 2019).

position in a public forum or that his or her viewpoint is not welcome in the classroom because it is contrary to the majority viewpoint of the students and faculty.¹⁴⁴

On remand,¹⁴⁵ the defendants repeated their motion for summary judgment. The trial court addressed the defendants' earlier claim of sovereign immunity, which the higher court had not addressed because the trial court had ruled in the defendants' favor and thus had not ruled on the sovereign immunity issue. The trial court ruled that at the time of the activities of which the plaintiff had complained, the professors' actions were not clearly established as violations of a student's constitutional rights because they concerned "intangible academic matters, such as grades and internship and project approvals"—matters that were clearly academic in nature.¹⁴⁶ The court awarded summary judgment to the defendants on all claims before it, obviating the need for a jury trial.

If a plaintiff can muster facts that suggest that faculty academic decisions were based, at least in part, on bias against a student's religious views, the court may reject defendants' claims that their judgments were based on legitimate pedagogical concerns and thus should be respected. Two cases decided within a year of each other posed similar issues regarding compliance with academic program rules, but this time they involved student claims of both free speech and religious exercise violations.

In the first, the court deferred to the academic judgment of the faculty; in the second, it did not. In *Keeton v. Anderson-Wiley*,¹⁴⁷ a student enrolled in a school counseling graduate program at Augusta State University resisted the program's requirement that, in her counseling preparation, she recognize and respect the rights of all potential clients, including gay patients. The student objected, stating that homosexuality was against her religious beliefs and thus the program's requirements that she express beliefs with which she disagreed violated her First Amendment free speech and free exercise rights. She also announced that if she encountered a gay client, she would attempt to use "conversion therapy" to change their sexual orientation. The program required her to follow a "remediation plan" so that she would learn to counsel all clients in accordance with the American Counseling Association's Code of Ethics. She refused, and sought a preliminary injunction to halt the imposition of the remediation plan. The court ruled that requiring the student to comply with the Code of Ethics was a valid program requirement and explained

Just as a medical school would be permitted to bar a student who refused to administer blood transfusions for religious reasons from participating

144 *Id.* at 450.

145 2021 R.I. Super. LEXIS 69 (R.I. Super. Aug. 21, 2021).

146 *Id.* at *36. The court cited *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78 (1978), *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), and *Bethel School District v. Fraser*, 478 U.S. 675 (1986) in support of its ruling. For a case, still in progress, involving claims similar to those of Felkner, see *Babinski v. Queen*, 2021 U.S. Dist. LEXIS 187150 (M.D. La. Sept. 29, 2021).

147 664 F.3d 865 (11th Cir. 2011).

in clinical rotations, so ASU may prohibit Keeton from participating in its clinical practicum if she refuses to administer the treatment it has deemed appropriate. Every profession has its own ethical codes and dictates. When someone voluntarily chooses to enter a profession, he or she must comply with its rules and ethical requirements.¹⁴⁸

In the second case, *Ward v. Polite*,¹⁴⁹ a student in a graduate program in counseling at Eastern Michigan University objected, on religious grounds, to being required to counsel gay clients and affirm their values. The plaintiff had performed well in classwork, but, as part of a required practicum, had to counsel clients. She asked her faculty supervisor for permission to refer a gay client to another counselor, which was done, but the faculty member initiated a disciplinary process against the student and a faculty hearing committee expelled her from the program. The student sued the University and several individual defendants, alleging First Amendment and Free Exercise violations. The trial court awarded summary judgment to the University, but the appellate court reversed and ruled that the case had to be tried to a jury.

The University argued that the program had a policy of not allowing referrals resulting from the values or beliefs of a counselor, and that its no-referral policy was based upon the American Counseling Association's Code of Ethics. When the court reviewed the Code of Ethics and the questions that the faculty disciplinary panel had asked the student, the appellate court concluded that there was no formal no-referral policy, and that the Code of Ethics permitted values-based referrals. The court characterized the questions and comments of the faculty on the disciplinary hearing panel as hostile to the plaintiff's religious beliefs, and said that the factual disputes indicated that neither party deserved to win at that stage of the litigation.¹⁵⁰

148 *Id.* at 879.

149 667 F.3d 727 (6th Cir. 2012).

150 The court took notice of the outcome in *Keeton*, *supra* text accompanying notes 147–48. But the court was careful to distinguish the two cases, even though both plaintiffs objected to counseling gay clients on religious grounds, because the students' different solutions to their religious objections were the basis for the court's differentiation between them. The court explained:

At one level, the two decisions look like polar opposites, as a student loses one case and wins the other. But there is less tension, or for that matter even disagreement, between the two cases than initially meets the eye. The procedural settings of the two cases differ. In *Keeton*, the district court made preliminary fact findings after holding a hearing in which both sides introduced evidence in support of their claims. Not only are there no trial-level fact findings here, but *Ward* also gets the benefit of all reasonable factual inferences in challenging the summary-judgment decision entered against her.

The two claimants' theories of constitutional protection also are miles apart. *Keeton* insisted on a constitutional right to engage in conversion therapy—that is, if a “client discloses that he is gay, it was her intention to tell the client that his behavior is morally wrong and then try to change the client's behavior.” That approach, all agree, violates the ACA code of ethics by imposing a counselor's values on a client, a form of conduct the university is free to prohibit as part of its curriculum. Instead of insisting on changing her clients, *Ward* asked only that the university not change her—that it permit her to refer some clients in some settings, an approach the code of ethics appears to permit and that no written school policy prohibits. Nothing in *Keeton* indicates that Augusta State applied the prohibition on imposing a counselor's values on the client in anything but an even-handed manner. Not so here, as the code of ethics, counseling norms, even the university's own practices, seem to permit the one thing *Ward* sought: a referral.

Clearly, the appellate court did not believe that the faculty in the *Ward* case had exercised “genuine professional judgment.”

A significant case decided by the U.S. Court of Appeals for the Tenth Circuit weakened the deference to academic judgments previously shown by the courts, although some subsequent opinions have distinguished its ruling. In *Axson-Flynn v. Johnson*,¹⁵¹ a student at the University of Utah had enrolled in its Actor Training Program. She told the faculty that she would not say certain words in whatever plays were being read or performed because her religious beliefs prohibited saying such words. She was admitted to the program, but refused to say certain words. A faculty member told her that she should speak to other “good Mormon girls” who were willing to say those words, and that she would either have to “modify your values” or leave the program.¹⁵² The student sued, claiming violations of her free speech and free exercise rights.

Although the appellate court, citing *Hazelwood*,¹⁵³ agreed with the University that courts should give “substantial deference to [the defendant’s] stated pedagogical concern,¹⁵⁴ it speculated that the program faculty’s motivation for its ultimatum was hostility to the student’s Mormon faith rather than a “legitimate pedagogical concern.” And with respect to the student’s free exercise claim, the court suggested that refusing to grant the student’s requested religious exception could also be pretextual because the program faculty had made a prior exception for a Jewish student to be absent on a religious holiday. Both claims were remanded to the trial court for further action.

As was evident in *Axson-Flynn* and *Ward v. Polite*, reviewing federal appellate courts recognize the tradition of judicial deference to academic judgments, but allegations that the judgments were not “truly academic” are taken seriously by these courts and may persuade them to reject summary judgments for the defendant university. However, when asked to opine on differences of opinion between students and faculty about the evaluation of class assignments (*Pompeo, Felkner*)¹⁵⁵ or the propriety of academic and professional standards (*Tatro, Oyama*),¹⁵⁶ reviewing courts are still more comfortable deferring to these “genuine” academic judgments.

B. Academic Dismissals

1. Deference to Academic Judgments

In the majority of cases involving dismissals of students on the basis of academic failure, the courts have characterized these decisions as academic judgments and have

Id. at 741 (internal citations omitted).

151 356 F.3d 1277 (10th Cir. 2004).

152 *Id.* at 1282.

153 *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260 (1988).

154 *Axson-Flynn*, 356 F.3d at 1290.

155 *Pompeo*, *supra* text accompanying notes 134–36. *Felkner*, *supra* text accompanying notes 143–45.

156 *Tatro*, *supra* text accompanying notes 137–39; *Oyama*, *supra* text accompanying notes 140–42.

deferred to the institution. Although students claiming that a failure to accommodate a disability have had some limited success in prevailing, or at least avoiding a grant of summary judgment to the institution, even those claims are usually unavailing. This section will review representative cases involving academic dismissals, noting where courts have questioned the institution's rationale for the dismissal.

In *Madej v. Yale University*,¹⁵⁷ an international undergraduate student was academically dismissed from Yale. Because he had started a consulting business to which he devoted sixty hours per week, he had accumulated an insufficient number of course credits to avoid being placed on academic warning. He then failed a course because he submitted his final exam after the deadline and was academically withdrawn from Yale. Although Madej appealed the withdrawal, the reviewing committee rejected his appeal. Madej sued for breach of contract and negligence, seeking a preliminary injunction to reverse his withdrawal.¹⁵⁸ Citing *Horowitz*¹⁵⁹ and several state court opinions,¹⁶⁰ the court noted that judicial deference to academic judgments was appropriate, saying "to the extent that the action challenges Madej's withdrawal, it challenges an academic judgment."¹⁶¹ The court concluded that Yale had followed its policies with respect to academic withdrawal appropriately, and rejected the plaintiff's breach of contract claim as well as his claims that Yale's actions were arbitrary and capricious and a breach of the duty of good faith and fair dealing. Finding that Madej's contract and negligence claims were insufficiently supported, the court denied his request for a preliminary injunction.

In *Chan v. Board of Regents of Texas Southern University*,¹⁶² two law students were academically dismissed when they failed a final exam in their first-year contracts course. They appealed their grades, but were unsuccessful. The students argued that the process of "curving" class grades was a violation of their substantive due process rights. Citing *Ewing* and *Horowitz*,¹⁶³ the court noted, "The Supreme Court has held that federal courts should not override grading and similar decisions about academic merit unless they so substantially depart from accepted academic norms as to demonstrate a failure to exercise professional judgment."¹⁶⁴ And since the exams were graded anonymously, the students' claims of arbitrary action by the professor were similarly rejected by the court.

In *Texas Southern University v. Villarreal*,¹⁶⁵ a first-year law student was dismissed for failing to maintain the required grade point average of 2.0. The student's

157 2020 U.S. Dist. LEXIS 58651 (D. Conn. Mar. 31, 2020).

158 According to the court, Yale would have permitted Madej to be readmitted after two semesters. *Id.* at *16.

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

160 *Ruggiero v. Yale Univ.*, 2007 U.S. Dist. LEXIS 66290, (D. Conn. Sept. 10, 2007); *Gupta v. New Britain Hosp.*, 687 A.2d 111 (Conn. 1996); *Craine v. Trinity Coll.*, 791 A.2d 518 (Conn. 2002).

161 *Madej*, 2020 U.S. Dist. LEXIS 58651, at *20.

162 2012 U.S. Dist. LEXIS 164429 (S.D. Tex. Nov. 16, 2012).

163 *Horowitz*, 435 U.S. 78; *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985).

164 *Chan*, 2012 U.S. Dist. LEXIS 164429, at *10–11.

165 620 S.W. 3d 899 (Tex. 2021).

grade point average was 1.976. The student claimed that the administration of the final examination in one course was flawed and that he was disadvantaged as a result, alleging a violation of his right to due process under the Texas Constitution. Although the appellate court had allowed his liberty interest claim to go forward, the state supreme court reversed, calling his dismissal a “purely academic” decision, and saying

[C]ourts are ill equipped to evaluate the academic judgment of professors and universities...We hold that an academic dismissal from higher education carries insufficient stigma to implicate a protected liberty interest. And assuming without deciding that Villarreal had a protected property right in his continuing education, the procedures followed by the School in connection with his dismissal were constitutionally adequate.¹⁶⁶

The court also denied that the Texas Constitution provided property right protections for graduate study, saying that higher education is not a fundamental right under the state Constitution.¹⁶⁷

In a complex case involving both the state and federal courts of Utah, a doctoral student challenged her dismissal from a neuroscience program on both state (contract) and federal (constitutional) law bases. She sued the university and the members of her dissertation committee in both their official and individual capacities. In *Rossi v. University of Utah*,¹⁶⁸ the state supreme court rejected the student’s breach of contract claim, finding that none of the documents she relied on were contractual in nature. In a companion case in federal court, *Rossi v. University of Utah*,¹⁶⁹ the plaintiff claimed violations of both procedural and substantive due process regarding the manner in which her dismissal was handled as well as defamation by the chair of her dissertation committee who had alleged that she had fabricated some of her data and accused her of other unprofessional conduct. The defendants sought summary judgment on all counts and asserted qualified immunity defenses. The federal trial judge denied the defendants’ motions for summary judgment on the defamation and substantive due process claims regarding the plaintiff’s property right to remain enrolled at the public university, stating that Tenth Circuit precedent held that students at a public institution of higher education have a property interest that requires due process before enrollment can be terminated.¹⁷⁰

The reasons for the student’s dismissal from the doctoral program were a mixture of alleged academic and disciplinary failures. Although the plaintiff attempted to characterize the reasons for her dismissal from the program as disciplinary, the trial court had concluded that the primary reason was academic,

166 *Id.* at 907–08.

167 *Id.* at 909.

168 496 P.3d 105 (Utah 2021).

169 2020 U.S. Dist. LEXIS 79782 (D. Utah May 5, 2020), *rev’d sub nom* Rossi v. Dudek, 2022 U.S. App. LEXIS 12142 (10th Cir. May 5, 2022).

170 *Rossi*, 2020 U.S. Dist. LEXIS 79782, at *90, citing Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975).

and thus the defendants needed to meet only a lower standard under *Horowitz* and *Ewing*. Said the court,

For purposes of determining adequate process in the context of procedural due process, an academic dismissal is more subjective and evaluative. It requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking. For academic dismissals, the court has declined to enlarge the judicial presence in the academic community.¹⁷¹

Deferring to the faculty's academic judgment about the quality of the student's work, the trial court granted the defendants' summary judgment motions on the plaintiff's claims of substantive due process violations with respect to her liberty interest claim but denied their summary judgment motions on the plaintiff's substantive due process claims with respect to her property interests on the basis of their alleged mistreatment of the student. The court also denied the dissertation committee chair's summary judgment motion on the defamation claim. Finally, the court dismissed the claims against the four committee members (including the chair) in their official capacities but allowed the claims to proceed against them in their individual capacities.

The appellate court rejected the trial court's rulings for the student,¹⁷² finding that she had received sufficient due process protections—both substantive and procedural—on her property right claim. Said the court,

[t]he parties suggest that the procedural and substantive due process standards are effectively the same in a case like this, as Rossi alleges she was dismissed for impermissible reasons. . . . We agree, so we analyze Rossi's due process challenges together, focusing on whether it was clearly established that the decision to dismiss her was anything other than careful and deliberate. We conclude that, because the University provided an extensive administrative appeals process which Rossi does not directly charge with bias, Rossi cannot show that her clearly established rights were violated.¹⁷³

The appellate court also reversed the trial court's denial of sovereign immunity to the faculty members who served on her dissertation committee. Although the appellate court stated that the appeals committee had given some deference to the dissertation committee's evaluation of Rossi's work, rather than making its own determination as to its quality, the court explained that "It was not clearly established that an administrative appeals process fails to produce a careful and deliberate decision just because it may not have involved de novo review of all aspects of an academic determination that is alleged to have been based on nonacademic factors."¹⁷⁴

171 *Rossi*, 2020 U.S. Dist. LEXIS 79782, at *92.

172 *Rossi*, 2022 U.S. App. LEXIS 12142.

173 *Id.* at *23–24.

174 *Id.* at *29.

2. *Rejection of Academic Deference*

Courts have occasionally refused to defer to the academic judgment of faculty or administrators in academic dismissals, however, particularly if the facts are in dispute and allegations of ill-will and retaliation are made.

In a case in which the court was skeptical of the college's grounds for moving for summary judgment, *Sandie v. George Fox University*,¹⁷⁵ a graduate student enrolled in a master's of arts in teaching (MAT) program was dropped from the student teaching portion of the program because faculty members believed her performance as a student teacher was inadequate. Although the program gave her an opportunity to repeat the student teaching portion the following semester, Sandie sued for breach of contract, negligence, violation of the duty of good faith and fair dealing, and disability discrimination. The court rejected her disability discrimination claim, finding no evidence of a relationship between her asthma and the university's decision to dismiss her from the MAT program. The court also awarded summary judgment to the university on Sandie's negligence claim, which, according to the court, made it unnecessary for the court to rule on the defendant's request for judicial deference to its academic judgment. Sandie's breach of contract claim, however, survived the defendant's summary judgment motion because the court found substantial differences in material facts as to whether various documents were contractual in nature and whether a contract between the parties existed.

Despite courts' discomfort with reviewing academic judgments, they are more willing to scrutinize defendants' "academic" defenses when students dismissed on academic grounds claim unlawful discrimination. As in those employment discrimination cases discussed in Part I,¹⁷⁶ trial courts have analyzed defendants' defenses of deference to academic judgment when plaintiffs have alleged a failure to accommodate or ill-will on the part of some faculty or staff, stating that the decision-makers' motive must be evaluated rather than merely accepting the stated academic rationale for the negative decision.

For example, the U.S. Court of Appeals for the Seventh Circuit has stated definitively that *Ewing's* language regarding deference to academic judgment does not apply to cases where a plaintiff claims that discrimination infected the decision made by the institution. In *Novak v. Board of Trustees of Southern Illinois University*¹⁷⁷ involving a claim of disability discrimination, the court rejected reliance on *Ewing*, saying

Courts of appeals have been careful not to import this formulation of the deference owed to academic decisions when analyzing allegations under the discrimination statutes. Although such a formulation rests comfortably in the context of substantive due process analysis, the Supreme Court has noted specifically that such a formulation applies only to "*legitimate academic decision[s]*"

175 2021 U.S. Dist. LEXIS 63386 (D. Or. Mar. 11, 2021).

176 See, e.g., *Mawakana*, *supra* text accompanying notes 96–98.

177 777 F.3d 966 (7th Cir. 2015).

and that academic decisions that are discriminatory are not legitimate.¹⁷⁸

In *Novak*, the plaintiff challenged his dismissal from a doctoral program in curriculum and instruction. The student, who had received accommodations for his posttraumatic stress disorder, had failed an examination required for doctoral candidacy several times. He had received the accommodations he had requested, but each time the professors evaluating his examinations found that he had not met the standard for a passing grade. The trial court had awarded summary judgment to the university, finding that the examination failure was a legitimate nondiscriminatory reason for the student's dismissal and unrelated to his disability. Despite its language rejecting *Ewing* deference, the appellate court concurred, reviewing the testimony of the faculty who had given Novak the failing grades. The appellate court found that the professors' exam grades were made honestly and fairly, and that the plaintiff had produced no evidence that discrimination had infected the decision to dismiss him from the program.¹⁷⁹

In another case involving dismissal from a graduate program, *Grubach v. University of Akron*,¹⁸⁰ the plaintiff alleged breach of contract and age discrimination in his dismissal from a PhD program for failing the required examination. Although the trial court had awarded summary judgment to the university on all claims, the appellate court reversed on the breach of contract claim. The plaintiff had alleged several irregularities in the way that two of the professors had graded his examination, and the court ruled that the case needed to be tried to a jury. The court said

A trial court's standard for reviewing the academic decisions of a college or university is not merely whether the court would have decided the matter differently but, rather, whether the faculty action was arbitrary and capricious. Accordingly, a trial court is required to defer to academic decisions of the college unless it perceived such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.¹⁸¹

The appellate court determined that the plaintiff had alleged sufficient evidence to suggest that the grading of his examination was not fully an exercise of professional judgment and that a jury would need to resolve the issue.

178 *Id.* at 975–76 (emphasis in original).

179 *Id.* at 976–77. The appellate court explained: “Mr. Novak points to several perceived faults in the faculty’s methodology. None of those alleged faults suggest anything other than an error in the course of a faculty member’s evaluation of the student’s work. Any lapse hardly supports the inference that the faculty members were involved in something other than a bona fide professional enterprise throughout the course of their assessment. There is no evidence that the faculty members’ grading of Mr. Novak’s Preliminary Examination was anything other than an honest, professional evaluation of his potential for the particular program in which he was enrolled. In other words, the evidence of record is insufficient to support a finding that the professors’ stated reasons for failing Mr. Novak’s various Day 3 submissions were deliberately false—a mask for a decision based on discriminatory grounds.” *Id.* at 977.

180 2020 Ohio App. LEXIS 2411 (Ohio Ct. App. Sept. 25, 2020).

181 *Id.* at *16–17.

C. *Clinical Failure*

Perhaps because of the long and expensive training required for medical professionals, former medical or other health care students bring the majority of cases involving academic dismissals related to clinical failure. They involve breach of contract, constitutional, and disability discrimination claims. In dismissal cases where students allege that their dismissal violated their free speech rights, some have been somewhat more successful,¹⁸² but absent such allegations, most cases result in a summary judgment award for the university.¹⁸³

Some cases involving dismissals from medical school or a medical residency discuss a “heightened deference” standard for GME (graduate medical education). For example, in *Kling v. University of Pittsburgh Medical Center*,¹⁸⁴ a federal trial court, citing Third Circuit precedent,¹⁸⁵ rejected the plaintiff’s claim that the court should not use a heightened deference standard in reviewing the defendant’s justifications for dismissing him from a residency program. While most reviewing courts did not necessarily use this term in their written opinions, it is clear that they were following this presumption in their reasoning.

1. *Breach of Contract Claims*

In *Hajar-Nejad v. George Washington University*,¹⁸⁶ a medical student lost a breach of contract claim after he was dismissed for lack of professionalism and poor academic performance in his clinical rotations. The court did an extensive review of the criticisms of the plaintiff’s performance in the clinical setting, noting that “decisions involving academic dismissal merit summary judgment... ‘unless the plaintiff can provide some evidence from which a fact finder could conclude that there was no rational basis for the decision or that it was motivated by bad faith or ill will unrelated to academic performance.’”¹⁸⁷

The court concluded that based on the evidence before the [committee responsible for recommending academic dismissals] and in light of the

182 See, e.g., cases discussed *supra* Part II.B.

183 In some cases, courts have commented that deference should be provided because of concerns about patient safety. See, e.g., *Alden v. Geo. Univ.*, 734 F.2d 1103, 1108 (D.C. Cir. 1999) (“This rule of judicial nonintervention is ‘particularly appropriate in the health care field’ where the students who receive degrees will provide care to the public,” citing *Burke v. Emory Univ.*, 338 S.E. 2d 500 (Ga. Ct. App. 1985).) See also *Kraft v. William Alanson White Psychiatric Found.*, 498 A.2d 1145, 1149 (D.C. App. 1985.) (“An academic judgment of school officials that a student does not have the necessary clinical ability to perform adequately and was making insufficient progress toward that goal is a determination calling for judicial deference,” citing *Bd. of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89–90 (1978) and *Hankins v. Temple Univ. Health Scis. Ctr.*, 829 F.2d 437, 443 (3d Cir. 1987) (“University faculties... must have the widest discretion in making judgments as to the academic performance of their students.”).

184 2021 U.S. Dist. LEXIS 127999 (W.D. Pa. July 9, 2021).

185 *Hankins*, 829 F.2d at 443.

186 37 F. Supp. 3d 90 (D.D.C. 2014).

187 *Id.* at 116, quoting *Paulin v. Geo. Wash. Univ. Sch. of Med. & Health Scis.*, 878 F. Supp. 2d 241, 247 (D.D.C. 2012).

deference appropriate in reviewing dismissal decisions by medical schools, the Court cannot conclude that either the Committee's recommendation that Plaintiff be dismissed, or the Dean's ultimate decision to dismiss Plaintiff based on this recommendation were arbitrary and capricious.¹⁸⁸

The court noted that judicial deference to such academic judgments was "particularly appropriate in the health care field."¹⁸⁹

In *In re Zanelli v. Rich*,¹⁹⁰ the student claimed that her academic dismissal from a nursing program at Nassau Community College breached her contract with the college and violated her due process rights. The student had failed a course, and when she was offered the opportunity to retake the course or be dismissed, she refused to retake the course. The court affirmed the lower court's dismissal of both of her claims. The court noted that "determinations made by educational institutions as to the academic performance of their students are not completely beyond the scope of judicial review" but said that "review is limited to the question of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith, or contrary to Constitution or statute."¹⁹¹ Finding no evidence of arbitrariness, the court rejected the breach of contract claim. With respect to the due process claim, citing *Horowitz*,¹⁹² the court noted that due process requirements are "less stringent" when a student is dismissed for academic reasons than when she is dismissed for disciplinary reasons.¹⁹³

But sometimes students prevail in breach of contract claims. In an unusual case that resulted in a jury verdict for the student,¹⁹⁴ a private medical school dismissed the student for failing his last class before graduation. The student filed numerous tort and contract claims; the court allowed only his allegation of a breach of an implied-in-fact contract to go to the jury. The jury found that the dismissal was arbitrary and capricious, and awarded him a partial tuition refund; the trial court had rejected the student's claim for lost future earnings. The appellate court upheld the jury verdict, but reversed the trial court's limitations on damages and remanded for a new trial on the damages issue.

188 *Hajar-Nejad*, 37 F. Supp. 3d at 118.

189 *Id.* at 117. *See also* *Morris v. Yale Univ. Sch. of Med.*, 2012 Conn. Super. LEXIS 1216 (Conn. Super. Ct. May 7, 2012), *aff'd*, 63 A.3d 991 (Conn. App. Ct. 2013).

190 8 N.Y.S.3d 217 (N.Y. App. Div. Apr. 1, 2015).

191 *Id.* at 218–19.

192 *Bd. of Curators of the Univ. of Mio. v. Horowitz*, 435 U.S. 78 (1978).

193 *Zanelli*, 8 N.Y.S.3d at 219. *But see* *Paulin v. Geo. Wash. Univ. Sch. of Med. & Health Scis.*, 878 F. Supp. 2d 241, 247 (D.D.C. 2012) (Student dismissed from physician assistant program filed breach of contract claim, asserting that the clinical rotation to which she was assigned—her last after an academically strong performance in her previous clinical rotations—was disorganized and evaluated her performance based upon "ill will, personal spite and retaliation" instead of appropriate clinical criteria. The court rejected the medical school's motion to dismiss the lawsuit.).

194 *Sharick v. Se. Univ. of the Health Scis.*, 780 So.2d 136 (Fla. Dist. Ct. App. 2000).

2. Constitutional Claims

Students dismissed from health care clinical programs have attempted to convince the court that the dismissal was for disciplinary rather than academic reasons, thus claiming a violation of their procedural due process protections when they are not given a hearing, as required by *Goss v. Lopez*.¹⁹⁵ Given the courts' reliance on *Horowitz*,¹⁹⁶ this strategy typically fails. For example, in *Shah v. University of Texas Southwestern Medical School*,¹⁹⁷ the plaintiff lost on his due process claims. The student had been dismissed for receiving two negative write-ups for what the medical school characterized as failures of professionalism. The student challenged his dismissal on the grounds of both procedural and substantive due process, demanding that the school delete all references to his dismissal from his academic record so that he could seek admission to other medical schools. The court noted that he had been given reasons for his dismissal, had been allowed to appeal that decision, and had been given a further opportunity to appeal the decision to the provost and dean. That process was sufficient, said the court, for an academic decision.

The court then turned to the student's substantive due process claim. Citing the *Ewing* language that a court should defer to the academic judgment of the institution, unless its actions were "such a substantial departure from accepted academic norms as to demonstrate that [the decision-maker] did not actually exercise professional judgment,"¹⁹⁸ the court ruled that the student had been counseled on numerous occasions about his failures to meet the expectations of his clinical instructors, and that the issuance of the two negative reports on the student's academic performance was a legitimate exercise of professional judgment and thus not a substantive due process violation.

Similarly, in *Al-Asbahi v. West Virginia Board of Governors*,¹⁹⁹ a pharmacy student also failed to persuade the court that his due process claim had merit. He sued the West Virginia School of Pharmacy when he was dismissed from its Doctor of Pharmacy program. The student had earned poor grades in his first year and was dismissed, but the dean agreed to readmit him on the condition that he earn no grades below a C in required courses and follow a specific remediation plan. After he was readmitted, the student's academic performance did not comply with the terms of his readmission, and he was dismissed a second time.

The student asserted claims of both substantive and procedural due process violations. His substantive due process claim was based upon his belief that he had been graded unfairly and deserved higher grades than those given to him. The court rejected that claim, saying

195 419 U.S. 565 (1975). *See, e.g.,* *Perez v. Tex. A&M Univ. at Corpus Christi*, 589 F. App'x 244, 248 (5th Cir. 2014) (dismissal was academic, not disciplinary).

196 *Horowitz*, 435 U.S. 78.

197 129 F. Supp. 3d 480 (N.D. Tex. 2015), *aff'd*, 668 F. App'x 88 (5th Cir. 2016).

198 *Bd. of Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1978).

199 2017 U.S. Dist. LEXIS 12400 (D. W. Va. Jan. 30, 2017), *aff'd*, 724 F. App'x 266 (4th Cir. 2018).

the decisions made by Dean Chase and other administrators, or even the grading decisions by Martello or any other professor, are not unjustified by any circumstance or governmental interest. Not only do these defendants have an interest, they owe a duty to the public to ensure that pharmacists and other medical professionals are qualified, properly trained, and of the highest caliber.²⁰⁰

Citing both *Ewing* and *Horowitz*, the court concluded that the dean had made the dismissal decision “conscientiously and with careful deliberation.”²⁰¹

Turning to the plaintiff’s procedural due process claim, the court reviewed in detail the facts and ruling of *Horowitz*,²⁰² and concluded that the plaintiff had received sufficient due process. The court noted that the student was well aware of the faculty’s dissatisfaction with his academic performance, the dean’s dismissal decision was based upon her knowledge of his performance limitations, and he was given an opportunity to attempt to persuade her not to dismiss him from the program.

In this case, the federal district court stated that the plaintiff had a property right in “continuation and completion of his education” in the Doctor of Pharmacy program.²⁰³ The U.S. Supreme Court has not ruled on whether or not students at public colleges and universities enjoy a property right in continued enrollment. The lower federal courts have used a variety of approaches to this question.²⁰⁴

3. Disability Discrimination Claims

By far the most frequent lawsuits brought by medical/health care students challenging dismissals for clinical failures are based on disability discrimination.²⁰⁵

200 *Al-Asbahi*, 2017 U.S. Dist. LEXIS 12400, at *35.

201 *Id.* at *38.

202 *Horowitz*, 435 U.S. 78.

203 *Al-Asbahi* 2017 U.S. Dist. LEXIS 12400, at *39.

204 For a discussion of the differences among the federal circuits in whether or not they recognize a student’s property right in higher education, see Dalton Mott, *The Due Process Clause and Students*, 65 U. KAN. L. REV. 651, 653–64 (2017). According to Mott, courts in the Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits analyze the law of the state in which the institution is located to determine whether or not a property right exists. In the First, Sixth, and Tenth Circuits, Mott states, federal courts rule, citing *Goss v. Lopez*, that postsecondary students have the same property right as students in K–12 public schools. And Mott describes a third group—the Fifth and Eighth Circuits, which assume a property right without deciding the issue.

205 Students bringing claims of disability discrimination under the ADA or the Rehabilitation Act must demonstrate that they are “otherwise qualified” to meet the academic and technical standards of the academic program. Students who cannot meet these standards, with or without reasonable accommodation, are not protected by these laws. See, e.g., *Chapman v. Meharry Med. Coll.*, 2021 U.S. Dist. LEXIS 15186 (M.D. Tenn., Aug. 12, 2021) (student who could not pass required examinations, even with accommodations, was not qualified; “Deference is particularly important with regard to degree requirements in the health care field. ‘The decision of a college not to waive [a] requirement and lower the standards for continued training in [] medicine is entitled to deference. We should only reluctantly intervene in academic decisions ‘especially regarding degree requirements in the health care field when the conferral of a degree places the school’s imprimatur upon the student as qualified to pursue [the] chosen profession,’” citing *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432,

Plaintiffs are usually unsuccessful. One of the earliest such cases is *Doherty v. Southern College of Optometry*.²⁰⁶ In *Doherty*, a student with neurological disorders was admitted to a program in optometry. The program required students to be able to demonstrate proficiency in using four instruments; proficiency was required for successful completion of the degree. The student asked the college to waive the proficiency requirement, but it refused, stating that his inability to use the instruments meant that he was not a qualified individual with a disability (a necessary showing in order for a plaintiff to prevail in a disability discrimination lawsuit). The appellate court concurred, saying that waiving the requirement was not a reasonable accommodation.

Similarly, in *Ohio Civil Rights Commission v. Case Western Reserve University*,²⁰⁷ a visually impaired student's claim was unsuccessful. She was denied admission to medical school and filed a Rehabilitation Act²⁰⁸ claim with the state Civil Rights Commission, which ruled in her favor. The University appealed, and the Supreme Court of Ohio reversed. The Commission had ruled that the medical school must provide accommodations to the student such as assisting her in reading X-rays and excusing her from certain requirements, and such as starting an intravenous line and observing surgeries. The medical school followed technical standards for admission created by the Association of American Medical Colleges.

The Commission and lower court had relied on testimony by a blind medical school graduate that Temple University had provided him with substantial accommodations, including extra tutoring and modifications of academic requirements in order to allow him to graduate. The Ohio Supreme Court, citing *Horowitz* and *Ewing*, characterized the medical school's decision not to admit the applicant as an academic one that is subject to judicial deference²⁰⁹ and ruled that the accommodations requested by the applicant, and ordered by the Commission, were not reasonable. Citing *Doherty*,²¹⁰ the court noted that the law does not require an institution "to accommodate a handicapped person by eliminating a course requirement which is reasonably necessary to the proper use of the degree."²¹¹ The court also ruled that the accommodations would impose an undue burden on the faculty.

Similarly, in *McCully v. University of Kansas School of Medicine*,²¹² a federal appellate court affirmed a summary judgment ruling for the medical school. The student had been admitted, and disclosed that she had spinal muscular atrophy, which meant

437 (6th Cir. 1998).

206 862 F.2d 570 (6th Cir. 1988).

207 666 N.E.2d 1376 (Ohio 1996).

208 29 U.S.C. § 794 (1973).

209 *Ohio C.R. Comm'n*, 666 N.E.2d at 1386.

210 *Doherty*, 862 F.2d at 575.

211 *Ohio C.R. Comm'n*, 666 N.E.2d at 1386. *But see* *Palmer Coll. of Chiropractic v. Davenport C.R. Comm'n*, 850 N.W.2d 326 (Iowa 2014) (Court ruled that college must accommodate visually impaired applicant by allowing another individual to interpret X-rays for him because state licensing board did not require the skills that the college required of its graduates, and two blind students had previously graduated from the college and were licensed and practicing.)

212 591 F. App'x 648 (10th Cir. 2014).

that she was physically limited in standing and lifting. Her disability required an assistant to perform some of the functions required of a medical student, such as lifting and positioning patients and performing certain emergency and life support functions. The court agreed that the requested accommodations would impermissibly alter the medical school's curriculum, and approved the school's rescinding her admission.

In *Falcone v. University of Minnesota*,²¹³ a medical student with learning disabilities failed multiple courses and clinical rotations, despite receiving several accommodations. The trial court rejected his Rehabilitation Act²¹⁴ claim, and the appellate court affirmed. The appellate court noted that the plaintiff was arguing that the medical school should modify its training program to respond to his disabilities; the court disagreed, saying "the statute does not require an educational institution to lower its standards for a professional degree, for example, by eliminating or substantially modifying its clinical training requirements."²¹⁵

In *Shin v. University of Maryland Medical System Corp.*,²¹⁶ an intern whose clinical performance was determined to be unsatisfactory lost a challenge to his dismissal. Although the intern claimed that the decision violated the ADA²¹⁷ because the medical school did not provide the accommodations he requested, the defendants provided extensive documentation of performance problems, including misdiagnosing patients and giving inappropriate medications as well as evidence that the requested accommodations were unreasonable because they interfered with patient safety. The court agreed with the defendants, saying "[We] defer to the views of Appellees on the standards for professional and academic achievement"²¹⁸ in the medical education program, and awarded summary judgment to the defendants.

Similarly, in *Al-Dabagh v. Case Western Reserve University*,²¹⁹ a student who had performed well academically in classroom-based courses lost a challenge to his dismissal. The student was dismissed after he was convicted of driving while intoxicated. Although a trial judge required the University to reinstate him on the grounds that he had completed all requirements for graduation, the appellate court reversed, noting that the student handbook provided that meeting professionalism standards was part of the academic requirements for graduation. The court interpreted the language of the handbook as contractual in nature and stated "Al-Dabagh's dismissal on professionalism grounds amounts to a deference-receiving academic judgment for several reasons. The student handbook—the governing contract—says professionalism is part of Case Western's academic curriculum at least four times. Judges are 'ill equipped' to second-guess the University's curricular choices."²²⁰

213 388 F.3d 656 (8th Cir. 2004).

214 29 U.S.C. § 794 (1973).

215 *Falcone*, 388 F.3d at 659.

216 369 F. App'x 472 (4th Cir. 2010).

217 42 U.S.C. §§ 12101 et seq. (1990).

218 *Shin*, 369 F. App'x at 482.

219 777 F.3d 355 (6th Cir. 2015).

220 *Id.* at 359, internal citations omitted.

Although colleges and universities have an obligation to accommodate qualified students with disabilities, there is no such requirement if the student does not disclose a disability and does not ask for accommodations. In *Doe v. Board of Regents of the University of Nebraska*,²²¹ a medical student with depressive disorder did not disclose that disorder to the faculty or his clinical rotation supervisors. Doe had numerous academic problems but did not seek accommodations. After allowing Doe to postpone several examinations and granting him a leave of absence, his supervisors noticed several lapses in professionalism such as tardiness, being abrupt with patients, and a general lack of medical knowledge. He was dismissed from the program, and an appeal was unsuccessful.

The Supreme Court of Nebraska came down firmly on the side of deference to the medical professionals' academic judgment. This court said

In actions under the ADA and the Rehabilitation Act, substantial deference is generally given to academic judgments. Courts are generally ill equipped, as compared with experienced educators, to determine whether a student meets a university's reasonable standards for academic and professional achievement. Evaluating performance in clinical courses is no less an academic judgment than that of any other course, and is entitled to the same deference.²²²

Finding that the plaintiff had not provided evidence that his dismissal for poor professionalism and inadequate clinical performance was a pretext for discrimination, the court affirmed the lower courts' summary judgment award for the defendants.

In a case with similar facts, *Halpern v. Wake Forest University Health Sciences*, a federal appellate court rejected a medical student's ADA²²³ and Rehabilitation Act²²⁴ claims that his dismissal from medical training was discriminatory.²²⁵ The student had been diagnosed with attention deficit hyperactivity disorder and an anxiety disorder but had not requested accommodations. When he was confronted with concerns about unprofessional behavior during his clinical rotations, he claimed that his disabilities were responsible for his allegedly rude, unprofessional treatment of staff and his inability to deal with constructive criticism. He later requested accommodations that the faculty found to be unreasonable, and the problematic behavior continued.

The trial court awarded summary judgment to the medical school, and the appellate court affirmed. The appellate court concluded that meeting standards of professionalism is an essential function of a medical doctor, and that Halpern had requested an accommodation—an unlimited amount of time to modify his behavior—that was unreasonable and of an uncertain outcome, given his previous behavior.

221 846 N.W.2d 126 (Neb. 2014).

222 *Id.* at 151.

223 42 U.S.C. §§ 12101 et seq. (1990).

224 29 U.S.C. § 794 (1973).

225 2012 U.S. App. LEXIS 5287 (4th Cir. Feb. 28, 2012).

Thus, said the court, Halpern was not qualified, as required by the both the ADA²²⁶ and the Rehabilitation Act,²²⁷ and thus was not protected by either.

Despite the courts' deference to academic judgments when a medical student claims that discrimination on the basis of disability motivated the dismissal from a clinical program, there are occasions when the factual allegations persuade a court to reject deference. For example, in *Pushkin v. Regents of University of Colorado*,²²⁸ a doctor who managed multiple sclerosis and used a wheelchair won his Rehabilitation Act case. He had been rejected from a residency program in psychiatry primarily because the decision-makers were concerned about how psychiatric patients would respond to a doctor in a wheelchair. He filed a lawsuit under the Rehabilitation Act.²²⁹ The court found that the reasons for rejecting the plaintiff were related to his disability and that his qualifications had not been addressed with seriousness by the committee that recommended his rejection.

In a more recent case, *Weiss v. Rutgers University*,²³⁰ a graduate student with learning disabilities survived the university's motion to dismiss her discrimination claim. The student had been dismissed from a program in counseling because of alleged deficiencies in her performance in a required internship. She filed claims of disability discrimination under state and federal law. Reviewing the university's motion to dismiss, the trial court concluded that the student had stated a claim that she was otherwise qualified because she had performed well in classroom courses, despite the fact that the requirements of the internship were quite different from those courses she had previously taken. Many of the faculty members' concerns were about her behavior with clients and issues of professionalism. The court said

The Court is mindful of the deference given to academic decision making in the ADA context [citation omitted]...However, this deference does not override this Court's duty to draw all reasonable inferences in favor of the non-moving party at the motion to dismiss stage. The Court is unpersuaded that the Complaint's factual allegations support academic deference, and will not defer to the Rutgers Defendants absent a fuller record.²³¹

The fact that the defendants had sought a dismissal rather than summary judgment, which would have required a fuller evidentiary record, appears to have influenced the court's rejection of deference in this case.

III. Conclusion

This review of court decisions involving academic judgments concerning faculty and students suggests that, despite some relatively recent judicial rejections

226 42 U.S.C. §§ 12101 et seq. (1990).

227 29 U.S.C. § 794 (1973).

228 658 F.2d 1372 (10th Cir. 1981).

229 29 U.S.C. § 794 (1973).

230 2014 U.S. Dist. LEXIS 80397 (D.N.J. June 10, 2014).

231 *Id.* at *14–15.

of deference to academic judgment in cases involving denials of promotion or tenure, deference is usually the norm for both faculty and student claims. And while an award of summary judgment for the defendant institution and its officials is more likely than not in these cases, the courts seem to be scrutinizing the factual allegations of the parties more closely in recent cases, rather than deferring to the academic authorities' characterization of the qualifications (or lack thereof) of the students and the faculty.

This research was stimulated by the results of two recent employment discrimination cases²³² in which the courts not only refused to defer to the university's academic judgments, but in one case rejected it completely and awarded the plaintiff tenure.²³³ The courts in these two cases, and in a very few others, rejected deference in situations where the alleged mistreatment by the institution seemed particularly egregious to the judges (for example, *Mawakana*,²³⁴ *Tudor*,²³⁵ and *Pagano*²³⁶). However, other recent litigation involving faculty promotion and tenure has resulted in summary judgment awards for the institution (*Maras*,²³⁷ *Seye*,²³⁸ *Nguyen*,²³⁹ *Theidon*,²⁴⁰ and *Zeng*²⁴¹).

With respect to student challenges to academic judgments, a trend away from deference has not occurred. Unless a plaintiff was able to articulate what appeared to the court to be clearly arbitrary actions by faculty members or academic administrators (*Ward v. Polite*,²⁴² *Pushkin*²⁴³), courts accepted the defendants' often substantial evidence that the plaintiff's performance problems, even if related to a disability, required a ruling for the defendants.

This review of academic deference litigation suggests that, unless plaintiffs, whether they be faculty or students, can provide substantial evidence of bad faith, serious procedural irregularities, or personal bias by decision-makers involved in making academic judgments, courts will very likely continue to defer. Given the fact that judges and juries have relatively little acquaintance with the inner

232 *Mawakana v. Bd. of Trs. of the Univ. of the Dist. of Columbia*, 926 F.3d 859 (D.C. Cir. 2019) and *Tudor v. Se Okla. State Univ.*, 2017 U.S. Dist. LEXIS 177654 (W.D. Okla. Oct. 26, 2017), *rev'd in part, aff'd in part*, 13 F.4th 1019 (10th Cir. 2021).

233 *Tudor*, 13 F.4th at 1049.

234 *Mawakana*, 926 F.3d 859.

235 *Tudor*, 2017 U.S. Dist. LEXIS 177654.

236 *Pagano v. Case W. Rsr. Univ.*, 166 N.E.3d 654, 665 (Ct. App. Ohio 2021).

237 *Maras v. Curators of Univ. of Mo.*, 983 F.3d 1023 (8th Cir. 2020).

238 *Seye v. Bd. of Trs. of Ind. Univ.*, 2020 U.S. Dist. LEXIS 81111 (S.D. Ind. May 8, 2020), *aff'd*, 830 Fed. App'x 778 (7th Cir. 2020).

239 *Nguyen v. Regents of Univ. of Cal.*, 823 Fed. App'x 497 (9th Cir. 2020).

240 *Theidon v. Harvard Univ.*, 948 F.3d 477 (1st Cir. 2020).

241 *Zeng v. Marshall Univ.*, 2020 U.S. Dist. LEXIS 53131 (S.D. Va. Mar. 26, 2020), *aff'd*, 2022 U.S. App. LEXIS 855 (4th Cir. Jan. 11, 2022).

242 667 F.3d 727 (6th Cir. 2012).

243 *Pushkin v. Regents, Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981).

workings of colleges and universities and the way that academic judgments are made, this trend will very likely continue. Most of the cases reviewed for this article were disposed of on summary judgment; few were dismissed prior to the summary judgment stage because courts preferred to have a more complete evidentiary record to review. Given the complexity of many of these judgments, particularly those involving promotion and tenure, it seems that colleges and universities facing this type of litigation will need to prepare thorough defenses that not only show compliance with their own policies and procedures but that demonstrate the fairness of these decisions and the thoughtfulness with which they were made. Inadequacies in faculty or student performance that may seem obvious to faculty in the plaintiff's department or discipline, particularly in cases involving promotion or tenure, may not be obvious to judges, and certainly not to members of the jury.

As is the case with litigation of any kind, college and university defendants would prefer to resolve the litigation before trial, and the analysis in this article shows that, in the majority of the cases reviewed, the lawsuit did not get to a jury. And while some judges in recent cases still refer to *Horowitz*, and occasionally to *Ewing*, as justification for deferring to the institution's academic judgment, as did courts in earlier cases, judges in recent cases appear to have closely scrutinized the institution's reasons for the negative decision that is being challenged to ascertain whether or not it is truly an exercise of professional judgment.

A HIGHER EDUCATION DUE PROCESS PRIMER: RESOLVING PROCEDURAL DUE PROCESS INCONSISTENCIES IN FAVOR OF GREATER PROCEDURAL PROTECTIONS

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Abstract

This article expands on the current landscape of understanding surrounding due process protections for students enrolled at public colleges and universities. The analysis engages with existing due process scholarship and expands on the due process implications of landmark federal appellate court and Supreme Court holdings. The article concludes by offering a model student conduct procedure that attempts to resolve procedural due process inconsistencies across circuits and conduct case types. It elaborates on the positives and negatives associated with such a model procedure as well as highlights how the model procedure exceeds the minimum required constitutional protections with little or no expansion on current university resources.

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INTRODUCTION

Over the last two decades, student enrollment at public colleges and universities across the United States increased more than twenty-six percent from 13.2 million to 16.6 million enrolled students.¹ This increase in student enrollment, coupled with the necessary pervasiveness of remote learning caused by the COVID-19 pandemic, this leads to an increase in academic and behavioral student conduct violations on college campuses around the country.²

How should colleges and universities meet this demand of addressing student conduct code violations? Does federal or state law provide any guidance on what process should be afforded to students who do violate the conduct code? If there is a minimally required procedural process, should public colleges and universities exceed those requirements?

Under the current state of the law, the procedural due process requirements afforded to public college and university students vary from state to state. This indicates that where a student attends a higher education institution ultimately determines their constitutionally protected due process rights in a student conduct proceeding. With the continued increase in the cost of higher education year after year, continued enrollment is more important to students than ever.³ Students are often conscious of their impending time and financial investments when they choose between higher education institutions, but they likely never consider choosing a university based on the constitutional protections afforded in a student conduct proceeding. It should not be the responsibility of a student to choose a college or university based on student conduct codes and procedures; the higher education institutions that opine about student-centered philosophies and student retention should give their students all the procedural protections required by law, and then some.

This article explores the history of procedural due process requirements and the current state of the law regarding a student's right to continued enrollment at a public college or university. After examining the procedural protections currently afforded to students, this article recommends a student conduct procedural process that exceeds minimum constitutional protections and provides a model for how

1 UNDERGRADUATE ENROLLMENT, NATIONAL CENTER FOR EDUCATION STATISTICS, ANNUAL REPORT (2020), https://nces.ed.gov/programs/coe/indicator_cha.asp.

2 Doug Lederman et al., *Transcription for The Key with Inside Higher Ed EP. 38: Combating Cheating in the COVID Era*, Inside Higher Ed. (Feb. 2021), https://www.insidehighered.com/sites/default/server_files/media/The%20Key%20-%20Ep%2038.pdf. (“With academic misconduct, to be frank, we simply saw a significant increase in the number of reports we were seeing. And when we compared our numbers from the past few academic years, those numbers were staggering. So, for example, the academic year of 2018 to 2019 we saw a little less than 300 academic integrity cases. In the academic year of 2019 to 2020, which incorporates some of this pandemic time, we saw about less than 700. And then when we look at, thinking about academic year 2020 to 2021, and we just look at that time from March 2020 to the end of 2020, the majority of cases that we’ve seen over the past four years in where in that concentrated period of time, roughly around 900 cases.”).

3 Briana Boyington et al., *20 Years of Tuition Growth at National Universities*, U.S. NEWS AND WORLD REP. (Sept. 17, 2021), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-09-20/see-20-years-of-tuition-growth-at-national-universities>.

to implement such a procedure. Providing procedural protections that surpass the minimum constitutional standard is beneficial for colleges and universities, and the students they serve.⁴

I. The Due Process Clause

Section 1 of the Fourteenth Amendment of the U.S. Constitution defines citizenship in the United States and outlines three important legal provisions: privileges and immunities, due process, and equal protection under the law.⁵ The full text of Section 1 of the Fourteenth Amendment is as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁶

The Due Process Clause of the Fourteenth Amendment prevents states from depriving any person of life, liberty, or property without the due process of law.⁷ There are two different categories of due process: procedural and substantive. Procedural due process “ensures that a state will not deprive a person of life, liberty, or property unless fair procedures are used in making that decision.”⁸ Substantive due process “forbids the government from depriving a person of life, liberty, or property in such a way that shocks the conscience or interferes with the rights implicit in the concept of ordered liberty.”⁹

Many challenges to university conduct code procedures stem from a deprivation of procedural due process—alleging that the institution did not provide adequate procedural steps to satisfy procedural due process before removing a student from a college or university. Courts apply a two-step analysis in determining a procedural due process violation: (1) did the individual have a life, liberty, or property interest where due process applies, and (2) was the process afforded constitutionally adequate?¹⁰

4 This article addresses procedural due process protections in its recommended procedural model. This article does not address the contested case requirements of the Administrative Procedures Act (APA). For colleges and universities that must follow state APA contested case requirements, refer to the discussion in Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 334 (1999).

5 U.S. CONST. amend. XIV.

6 *Id.*

7 *Id.*

8 *Captain Andy's Sailing, Inc. v. Johns*, 195 F. Supp. 2d 1157, 1176 (D. Haw. 2001).

9 *Donahoe v. Arpaio*, 869 F. Supp. 2d 1020, 1072 (D. Ariz. 2012), *aff'd sub nom. Stapley v. Pestalozzi*, 733 F.3d 804 (9th Cir. 2013).

10 *Captain Andy's Sailing*, 195 F. Supp. 2d at 1176.

A. *The Property Interest*

In cases involving due process violation claims against public colleges and universities, most allege a deprivation of a property interest, with a few cases claiming a liberty deprivation. Property interests emerge in two ways: (1) through the identification of a source of a property interest and (2) what actually qualifies as a property interest.¹¹ Property interests are commonly called “positive law,” meaning they derive from some other source of law.¹² The U.S. Supreme Court acknowledges that although the federal Constitution does not create property interests, those interests are derived from “independent sources such as state law.”¹³ Independent sources not only include state and local government statutes and regulations but can also be extended to express and implied contracts.¹⁴

Once an independent source of law is identified, courts must then determine if the source of law qualifies as a property interest. Property interests require more than an “adverse effect” when removed; a plaintiff must also have “a legitimate claim of entitlement” to the property interest.¹⁵ Property interests cannot be removed by the state at its discretion; states must adhere to certain standards before removing the benefit.¹⁶ For example, the Supreme Court recognizes property interests in social security benefits, welfare benefits, licenses, and government employment.¹⁷ In sum, a plaintiff must identify an independent source of law that creates a property interest, and this interest must grant a valid entitlement to the plaintiff.

B. *The Liberty Interest*

The Supreme Court does not provide specific parameters for identifying a liberty interest but often finds deprivation of a liberty interest when “the government puts the person’s reputation at risk.”¹⁸ One Supreme Court case found a liberty interest in K-12 education because misconduct resulting in suspension “could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.”¹⁹ Whether a student chooses to raise a due process violation under the property or liberty interest against a public college or university, courts must then examine whether the conduct process afforded the student comports with procedural due process protections.

11 Dalton Mott, *The Due Process Clause and Students: The Road to a Single Approach of Determining Property Interests in Education*, 65 U. KAN. L. REV. 651, 653 (2017).

12 *Id.* at 653.

13 *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

14 Mott, *supra* note 12, at 654–55.

15 *Id.* at 655.

16 *Id.*

17 *Id.*

18 *Id.* at 660.

19 *Id.* (citing *Goss v. Lopez*, 419 U.S. 562, 575 (1975)).

II. Early Circuit Jurisprudence

Before the Supreme Court examined the question of procedural due process protections for K-12 and higher education students, the Fifth Circuit heard a landmark higher education procedural due process case in *Dixon v. Alabama State Board of Education*.²⁰ The plaintiffs never received notice of their alleged conduct violation, “Conduct Prejudicial to the School ...and Unbecoming a Student,” and also did not receive any type of hearing prior to their expulsion.²¹ The plaintiffs, nine Black college students, brought a procedural due process challenge against the Alabama State Board of Education after they were expelled from Alabama State College for their participation in civil rights movement demonstrations.²²

In its analysis, the Fifth Circuit examined a 1958 annotation of cases, titled “Right of student to hearing on charges before suspension or expulsion from educational institution.”²³ The Fifth Circuit agreed with the annotator’s statement that “[t]he cases involving suspension or expulsion of a student from a public college or university all involve the question whether the hearing given to the student was adequate. In every instance the sufficiency of the hearing was upheld.”²⁴ The court further noted that all of the cases in the annotation required some type of a hearing.²⁵ The Fifth Circuit then quotes the following passage from Harvard Law Professor Warren A. Seavey:

...when many of our courts are so careful in the protection of those charged with crimes that they will not permit the use of evidence illegally obtained, our sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.²⁶

The Fifth Circuit uses this quote in its holding “that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct.”²⁷

20 294 F.2d 150 (5th Cir. 1961); see also Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289 (1999).

21 *Dixon*, 294 F.2d at 150–51.

22 *Id.* at 150–52.

23 *Id.* at 158.

24 *Id.* (citing Annot. 58 A.L.R.2d 903 (1958)).

25 *Id.* at 158.

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

27 *Id.* at 158.

The *Dixon* court expanded on its holding by stating specific procedural standards intended for higher education students.²⁸ This process includes

1. notice to the student of the alleged violation that, if proven, would warrant expulsion;
2. an oral or written report given to the student of the facts proposed by witnesses, as well as the names of the witnesses;
3. the opportunity for the student to defend themselves, either through oral or written testimony; and
4. to provide the findings of the hearing to the student.²⁹

The Fifth Circuit further expanded on the hearing requirement, noting that “the nature of the hearing should vary depending upon the circumstances of the particular case.”³⁰ This gives colleges and universities the flexibility to impose varying degrees of hearings, while requiring “something more than an informal interview with an administrative authority” for cases involving expulsion.³¹ The Fifth Circuit concluded its opinion by stating “[i]f these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.”³²

III. Supreme Court Jurisprudence

After the Fifth Circuit examined the procedural due process protections afforded to public college and university students, the Supreme Court heard three seminal cases that shaped the legal landscape for student conduct. Ultimately, the Court has not issued a definitive holding on whether a property or liberty interest exists in higher education. However, the Court indicated its preference toward a basic level of protection for public college and university students through these three cases.

A. *Goss v. Lopez*

The Court’s first case in which it examined any property interest in education was the K-12 case, *Goss v. Lopez*.³³ Here, a group of high school students brought a procedural due process claim against their school after receiving a ten-day suspension for alleged behavioral misconduct, without receiving a hearing prior to the suspension.³⁴ The Court began by directly addressing the issue of whether the students had a valid property interest in continued enrollment in K-12

28 *Id.*

29 *Id.*; see also Berger & Berger, *supra* note 21, at 306.

30 *Id.* at 158.

31 *Id.* at 158–59.

32 *Id.* at 159.

33 419 U.S. 565 (1975).

34 *Id.* at 568.

education.³⁵ The Supreme Court examined two Ohio state laws that provided free K-12 education to residents ages five to twenty-one and required compulsory K-12 school attendance.³⁶ The Court noted that, although not required, Ohio provided for the establishment and maintenance of a public school system to which “young people do not shed their constitutional rights at the schoolhouse door.”³⁷ The Court held these two Ohio state laws created a property right in K-12 education, which cannot “be taken away for misconduct without adherence to the minimum protections required” by the Due Process Clause.³⁸

Next, the Court examined whether the suspension without a hearing implicated the liberty interest. The Court stated that “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,” requires adherence to minimum due process protections.³⁹ The Court noted that, in this case, a ten-day suspension for behavioral misconduct “could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.”⁴⁰ In holding that the liberty interest applies to continued K-12 enrollment, the Court found it apparent that “the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.”⁴¹ The Court concluded its analysis of the property and liberty interest by refusing the state’s argument that a ten-day suspension didn’t constitute a “severe nor grievous” loss, adding that “a 10-day suspension from school is not de minimis in our view and may not be imposed in complete disregard of the Due Process Clause.”⁴²

Once the Supreme Court determined that continued enrollment in K-12 education qualified as a property and liberty interest, the Court then determined what the Due Process Clause required and when those processes are required. After examining other noneducational case law, the Court stated the following:

At the very minimum ...students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afford some kind of hearing. Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be first notified.⁴³

35 *Id.* at 572–74.

36 *Id.* at 573.

37 *Id.* at 574 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)) (internal quotation marks omitted).

38 *Id.* at 574.

39 *Id.* (citing *Wis. v. Constantineau*, 400 U.S. 433, 437 (1971); *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972)).

40 *Id.* at 575.

41 *Id.*

42 *Id.* at 576.

43 *Id.* at 579 (quoting *Baldwin v. Hale*, 17 L. Ed. 531 (1864)) (internal quotation marks omitted).

The Court continued by stating that, even though disciplinary suspension is an educational tool frequently used in K-12 schools, that does not negate the school's requirements to communicate with the student respondent and to let that student tell their version of events.⁴⁴ "We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency."⁴⁵

The Court concluded its decision in *Goss* by articulating the procedural due process rule for K-12 behavioral misconduct allegations:

Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a *suspension of 10 days or less*, that the student be given oral or written notice of the charges against him, and if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.⁴⁶

In further elaborating on these requirements, the Court added that a delay between the notice and hearing isn't required and that the hearing will most often occur immediately after informing the student of the alleged misconduct.⁴⁷ The Court specified that "the student first be told what he is accused of doing and what the basis of the accusation is" before that student is given an opportunity to explain.⁴⁸ Because the notice and hearing often occur almost simultaneously, the Court required that, generally, the notice and hearing must occur before the imposed suspension.⁴⁹ The Court did grant an exception to this requirement if the student "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process."⁵⁰

While acknowledging this process as the "constitutional minimum," the Court also clarified what it was not requiring:

We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.⁵¹

44 *Id.* at 580.

45 *Id.* at 581.

46 *Id.* at 581 (emphasis added).

47 *Id.* at 582.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.* at 583.

The Court concluded by expanding on the constitutional minimum and adds, in dicta, what would be required for cases exceeding a ten-day suspension:

Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedure. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.⁵²

In summary, the Supreme Court in *Goss* found a property and liberty interest in continued K-12 enrollment. This triggers a procedural due process requirement of at least a notice and informal hearing prior to a suspension of ten days or greater due to behavioral misconduct.

B. Board of Curators of University of Missouri v. Horowitz

Three years later, the Supreme Court heard its first of two cases involving the question of due process in higher education student conduct processes. The Court first heard *Board of Curators of University of Missouri v. Horowitz*⁵³ in 1978. The Court intended to determine “what procedures must be afforded to a student at a state educational institution whose dismissal may constitute a deprivation of ‘liberty’ or ‘property’ ...of the Fourteenth Amendment.”⁵⁴

In *Horowitz*, the University of Missouri-Kansas City dismissed the student respondent from medical school for academic deficiencies.⁵⁵ The Court noted that the student respondent did not raise a deprivation of a property interest.⁵⁶ If the student had raised a property deprivation claim, she “would have been required to show at trial that her seat at the Medical School was a ‘property’ interest recognized by Missouri state law.”⁵⁷ Instead of raising a property deprivation claim, the student respondent raised a liberty deprivation claim by “substantially impairing her opportunities to continue her medical education or to return to employment in a medically related field.”⁵⁸

The Court began its analysis by invoking a common constitutional law doctrine: constitutional avoidance. The Court stated that it did not need to decide if the student had a liberty or property interest in continued higher education enrollment.⁵⁹ Instead, the Court “assumed” the student had a liberty or property

52 *Id.* at 584.

53 435 U.S. 78 (1978).

54 *Id.* at 79.

55 *Id.* at 81 (“The faculty members noted that the respondent’s ‘performance was below that of her peers in all clinical patient-oriented settings,’ that she was erratic in her attendance at clinical sessions, and that she lacked a critical concern for personal hygiene.”).

56 *Id.* at 82.

57 *Id.*

58 *Id.*

59 *Id.* at 84.

interest and concluded the student received minimal due process procedural protections before her removal.⁶⁰ The Court elaborated that the student received sufficient notice of the “faculty’s dissatisfaction with her clinical progress” and that this potentially affected her ability to graduate on time.⁶¹ The Supreme Court quoted the District Court for the Western District of Missouri in agreeing that the procedural process afforded comported with due process:

In fact, the Court is of the opinion, and so finds, that the school went beyond constitutionally required procedural due process by affording respondent the opportunity to be examined by seven independent physicians in order to be absolutely certain that their grading of the respondent in her medical skills were correct.⁶²

The Court proceeded to refute the assertion by the Eighth Circuit Court of Appeals that the *Goss* decision required a formal hearing prior to dismissal.⁶³ The Court noted that *Goss* does not require some type of formal hearing prior to dismissal for academic ability and performance.⁶⁴ It elaborated by stating the following:

All that *Goss* required was an informal give-and-take between the student and the administrative body dismissing him that would, at least, give the student the opportunity to characterize his conduct and put it in what he deems the proper context.⁶⁵

The Court continued by giving deference to the flexibility of due process protections, especially between cases of academic misconduct and behavioral misconduct.⁶⁶ The Court provided that the flexibility between these two types of cases “calls for far less stringent procedural requirements” for academic misconduct dismissals.⁶⁷ Effectively, due process allows for less procedural process requirements for students facing academic dismissals than those facing behavioral dismissals.

The Court further differentiated between behavioral and academic misconduct procedural requirements by holding that academic misconduct cases do not require hearings at all.⁶⁸ The Court reaches this holding because dismissal for academic

60 *Id.*

61 *Id.* at 85.

62 *Id.* (quoting *Horowitz v. Curators of U. of Mo.*, 447 F. Supp. 1102, 1113 (W.D. Mo. 1975)).

63 *Id.*

64 *Id.*

65 *Id.* at 86 (citing *Goss v. Lopez*, 419 U.S. 565, 584 (1975)) (internal quotation marks omitted).

66 *Id.* at 86. This author uses the phrase “academic misconduct” to encompass commonly understood code violations such as cheating, fabrication, multiple submissions of work, plagiarism, unauthorized recording and/or use, and assisting in the commission of academic misconduct. Additionally, this author uses this to encompass the academic failings described in *Horowitz* and *Ewing*, “which shares characteristics of both academic and disciplinary proceedings.” (See *Ashokkumar v. Elbaum*, 932 F. Supp. 2d 1002, 1008 (D. Neb. 2013).

67 *Id.*

68 *Id.* at 90 (“[w]e decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing.”).

deficiencies is “more subjective and evaluative than typical factual questions presented in the average disciplinary decision.”⁶⁹ The Court then added the following:

Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making.⁷⁰

The Supreme Court does not explicitly state the exact procedural process to afford to students accused of academic misconduct and facing dismissal, but it does summarize its overall position in the following footnote:

We conclude that considering all relevant factors, including the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations, a hearing is not required by the Due Process Clause of the Fourteenth Amendment.⁷¹

C. *Regents of the University of Michigan v. Ewing*

In 1985, eight years after the *Horowitz* decision, the Supreme Court examined its only other case regarding due process protections in higher education student conduct processes. In *Regents of the University of Michigan v. Ewing*, the student respondent was dismissed after failing an examination required for continued progress in the academic program.⁷² The respondent alleged he had a property interest in continued enrollment, and the university’s decision to dismiss him violated his substantive due process rights.⁷³

To begin its analysis, the Court stated that in *Horowitz*, “we assumed, without deciding, that federal courts can review an academic decision of a public educational institution under a substantive due process standard.”⁷⁴ Just as in *Horowitz*, the *Ewing* Court assumed, without deciding, that the student had a property interest in continued enrollment at the university.⁷⁵ The Court also determined that “even if *Ewing*’s assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action.”⁷⁶

69 *Id.*

70 *Id.*

71 *Id.* at 86–87, n. 3.

72 474 U.S. 214, 215 (1985).

73 *Id.* at 217.

74 *Id.* at 222 (citing *Horowitz*, 435 U.S. at 91–2).

75 *Id.* at 223.

76 *Id.*

In addition to its holding that the student received sufficient due process prior to his removal for academic misconduct, the Court elaborated, in dicta, about the role of judicial interference in these types of cases:

When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.⁷⁷

The Court concluded its opinion by refusing to intervene in the academic decision and did not elaborate any further on the procedural protections required for academic dismissal.⁷⁸

IV. Subsequent Lower Court Approaches

As a result of the Supreme Court decisions in *Goss*, *Horowitz*, and *Ewing*, lower federal courts are split on how to approach the issue of property interest in due process cases. Circuits apply one of the follow three approaches in deciding the property interest issue: (1) the state-specific approach, (2) the generalized approach, and (3) the assumption approach.⁷⁹

A. *The State-Specific Approach*

The state-specific approach is by far the most popular approach, followed by the Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits.⁸⁰ This approach derives from Supreme Court precedent not specifically related to a student's property interest in continued enrollment at a public college or university; it relies on the more broadly applicable standard of deriving a property interest from an independent source of state law, thus creating a valid entitlement.⁸¹ To state a deprivation of procedural due process claim, student plaintiffs must direct these circuits to examine state or municipal law to find an explicit grant of a property interest. This includes an express or implied contractual relationship between the institution and the student, or a statute that provides for continued enrollment at colleges or universities.⁸²

In the case *Leone v. Whitford*, the District Court for the District of Connecticut utilized the state-specific approach in determining whether a property interest existed for a student who was denied her teacher certification and dismissed from

77 *Id.* (citing *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)).

78 *Id.* at 227–28.

79 *See Mott*, *supra* note 12, at 658, 660, 664.

80 *Id.* at 658.

81 *Id.*

82 *Id.*

her academic program.⁸³ The district court examined the student's procedural due process claims by examining whether she had an implied contractual agreement in continued enrollment in her program.⁸⁴ In beginning its analysis, the district court stated that both the Supreme Court and Second Circuit identify a property or liberty interest through a source "independent of the Constitution," including state law.⁸⁵ After noting that a contract could constitute the establishment of an independent source, the district court added the following:

Although not every contractual benefit rises to the level of a constitutionally protected property interest, the Supreme Court has recognized that every term of a contract need not be reduced in writing in order to form a constitutionally protected property interest. Rather, an implied contract may result from a course of dealings between the parties that creates a protected interest.⁸⁶

Though the district court stated that an implied contract could create a property interest, it did not find such a contract between the student and Central Connecticut State University.⁸⁷ Even though the student may have relied on assurances made to her by a staff member at her school, the dean, and the university itself "retained the authority to override whatever agreement the School's subordinate officers were making with Leone."⁸⁸ The district court stated that the dean informed the student that she was at risk for removal from her program prior to her removal and that this promise, "was fully realized when Whitford expelled Leone from the Program."⁸⁹ The district court concluded that the student unreasonably relied on promises from a staff member at her school, and that this situation did not create a contractual right "that rose to the level of a significant property interest."⁹⁰ The court subsequently held that the university did not violate the student's procedural due process rights.⁹¹

Because the Second Circuit utilized the state-specific approach, the district court in *Leone* was not required to examine the procedural protections afforded to the student prior to her removal from her academic program. Once the court reached the determination that there was no implied contractual relationship that created a property interest under state law, the court ended the inquiry. The district court did not determine if Central Connecticut State University was required to give the student the minimal constitutional protections for academic

83 *Leone v. Whitford*, 2007 WL 1191347, at *4 (D. Conn. Apr. 19, 2007), *aff'd*, 300 Fed. App' 99 (2d Cir. 2008) (unpublished).

84 *Id.* at 8.

85 *Id.*

86 *Id.* (citing *Costello v. Town of Fairfield*, 811 F.2d 782, 784 (2d Cir. 1987) (a simple contract dispute does not give rise to a cause of action under section 1983); and *Perry v. Sindermann*, 408 U.S. 593, 602 (1972)).

87 *Id.* at 8–9.

88 *Id.* at 8.

89 *Id.* at 8–9.

90 *Id.* at 9.

91 *Id.*

misconduct before removing her from her program. In fact, this determination by the district court that the student did not have a property interest in continued enrollment effectively communicated that procedural due process protections are not required for students prior to their removal. Under the state-specific approach, the distinction in process requirements for academic and behavioral removals is irrelevant; if no property interest is identified by courts using the state-specific approach, procedural due process requirements do not apply.⁹²

The Ninth Circuit Court of Appeals followed a similar judicial framework in its decision of *Austin v. University of Oregon*. In *Austin*, the District Court of the District of Oregon examined whether an independent source of state law granted a property interest in continued enrollment at the University of Oregon.⁹³ The district court stated that “there must be a legitimate claim of entitlement” to the asserted property interest and that this requires “an existing law, rule, or understanding” that makes this entitlement mandatory.⁹⁴ The district court then stated the following regarding the precedent of procedural due process protections:

...the answer is clear: there is no Supreme Court, Ninth Circuit, or Oregon District Court case that, at the time of the events giving rise to this case, clearly establishes the property rights Plaintiffs assert, nor is there any apposite statute establishing the same.⁹⁵

The plaintiffs in this case asserted that *Goss v. Lopez* provided for a property interest in continued enrollment in higher education.⁹⁶ The district court did not find that *Goss* established this right “given that it involved middle school public education under a relatively broad Ohio state statute.”⁹⁷ The court continued by confirming that “[t]here is no analogous Oregon law applicable to college education that would create a corollary to *Goss* in this case.”⁹⁸ Thus, the district court distinguished between K-12 and higher education when determining that a property right to continued enrollment in higher education did not exist in Oregon.

In a footnote, the district court elaborated that *Goss* mentions *Dixon v. Alabama* and numerous lower federal court cases that provide for procedural due process protections prior to student removal.⁹⁹ None of these cited cases in *Goss* implicated the District of Oregon nor the Ninth Circuit, prompting the district court to state “[t]his does not create a right, beyond debate, in this district or circuit, in the higher education and student athlete property rights that plaintiffs now assert here.”¹⁰⁰

92 For more conversation regarding express or implied contract analysis for procedural due process protections, see *Doe v. Brown Univ.*, 166 F. Supp. 3d 177 (D.R.I. 2016).

93 *Austin v. Univ. of Or.*, 205 F. Supp. 3d 1214, 1221 (D. Or. 2016), *aff'd*, 925 F.3d 1133 (9th Cir. 2019).

94 *Id.* at 1221.

95 *Id.* at 1221–22.

96 *Id.* at 1222.

97 *Id.*

98 *Id.*

99 *Id.* at n. 3.

100 *Id.*

In a departure from the typical jurisprudence of state-specific circuits, the district court analyzed the process afforded to the student respondents after finding that no property interest existed. In another footnote, the court stated the following:

While I need not reach the merits of the due process claims, I note that significant information offered at this state undercuts allegations that Plaintiffs were summarily deprived of process, including timely notice of the Student Conduct Code violations against them, the choice of resolution format provided to them, the fact that Plaintiffs were allowed to consult counsel in choosing their preferred format, and the number of rights conferred by each of those choices. Plaintiffs' conclusory allegations that the process to which they were entitled were flawed need not be taken as true.¹⁰¹

Essentially, the district court was not required to evaluate the process provided by the University of Oregon because the student respondents were not entitled to procedural due process protections as a matter of state law. The district court's elaboration that, even though not required, the university provided sufficient procedural protections prior to their removal, is somewhat immaterial. If the student conduct process offered by the University of Oregon did not meet procedural due process protections, it is unlikely the court would have found a property deprivation because the property interest does not exist. In conclusion, *Leone* and *Austin* both illustrate the application of the state-specific's approach to determining the issue of a property interest in continued higher education enrollment.

B. The Generalized Approach

The next popular approach to determining a property interest in continued enrollment at a public college or university is the generalized approach. This approach is followed in the First, Sixth, and Tenth Circuits and simply expands the Supreme Court's holding in *Goss* to higher education institutions.¹⁰² Unlike the state-specific approach, these circuits bypass an independent source of law granting a property interest.¹⁰³ Instead, these circuits generally expand *Goss* and rely on circuit precedent to find a property interest in continued higher education enrollment.¹⁰⁴ Once courts apply the generalized approach that a property interest exists in continued higher education enrollment, they then look to the sufficiency of the process afforded by the college or university.

The Sixth Circuit took the generalized approach when deciding the case of *Flaim v. Medical College of Ohio*. In this case, a third-year medical student was arrested and convicted of an off-campus felony drug offense and was later expelled from the

101 *Id.* at 1223, n. 4.

102 *Mott, supra* note 12, at 659.

103 *Id.*

104 *Id.*

college as a result.¹⁰⁵ The student raised the following deprivations of procedural due process on appeal with the Sixth Circuit:

- a. inadequacy of notice;
- b. denial of a right to counsel;
- c. denial of a right to cross-examine adverse witnesses;
- d. denial of a right to receive written findings of facts and recommendations;
- and
- e. denial of a right to appeal the school's decision to expel him.¹⁰⁶

The Sixth Circuit began by confirming its application of the generalized approach in noting that circuit precedent implicates the Due Process Clause in higher education conduct decisions and cites *Goss* as support for this extension.¹⁰⁷ The Sixth Circuit referred to *Goss* in stating that "the Supreme Court has made clear that there are two basic due process requirements: (1) notice, and (2) an opportunity to be heard."¹⁰⁸

In addition to its procedural due process analysis, the Sixth Circuit also examines the student's claims under the three-prong test of *Mathews v. Eldridge*.¹⁰⁹ This test helps courts determine that when due process applies, the amount of process required is largely a fact-based analysis.¹¹⁰ Because the Sixth Circuit's decision on the alleged procedural deprivations did not change as a result of either analysis, the following illustration of the Court's decision only includes details on the procedural due process analysis.

After confirming that procedural due process is applicable to disciplinary decisions in higher education, the Sixth Circuit began examining each of the student's alleged deprivations.¹¹¹ Regarding the sufficiency of notice, the Sixth Circuit cited its own precedent in stating "[a]ll that is required by the Due Process Clause ...is sufficient notice of the charges...and a meaningful opportunity to prepare for the hearing."¹¹² The court also acknowledged that *Goss* provides for a more formal notice in more serious cases, while the Fifth Circuit in *Dixon* requires a written explanation of the charges that, if proven, justify expulsion.¹¹³ Because the student received a written notice identifying the alleged policy violations, a right to an internal investigation, and notice of an interim suspension until the completion

105 *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 632 (6th Cir. 2005).

106 *Id.* at 634.

107 *Id.* at 633 (citing *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245 (E.D. Mich. 1984) (internal quotation marks omitted), *aff'd*, 787 F.2d 590 (6th Cir. 1986)); *see also Goss v. Lopez*, 419 U.S. 562, 575 (1975).

108 *Id.* at 634 (citing *Goss*, 419 U.S. at 579).

109 *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

110 *Id.*

111 *Id.* at 637.

112 *Id.* at 639.

113 *Id.* at 637 (citing *Goss*, 419 U.S. at 584; and *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961)).

of the investigation, the Sixth Circuit found this notice more than adequate.¹¹⁴

Regarding the student's right to legal counsel, the Sixth Circuit "assumed without deciding that there is a right to counsel in some academic disciplinary proceedings" and found sufficiency in the process used in *Flaim*.¹¹⁵ The court elaborated in a footnote that "[w]e need not consider here all the circumstances under which an accused may have a right to counsel."¹¹⁶ Sixth Circuit precedent further allows for the right to counsel if "an attorney presented the University's case or the hearing was subject to complex rules of evidence or procedure."¹¹⁷ Because the college's policy allowed respondent attorney involvement if the student faced off-campus criminal charges, and the college's case was not presented by an attorney, the Sixth Circuit again ruled against the student on this claim.¹¹⁸

The Sixth Circuit also held that the student was not denied due process for his inability to cross-examine the arresting officer who testified against him in his on-campus proceeding.¹¹⁹ After acknowledging that circuit precedent and the Constitution do not afford the right to cross-examine in campus conduct cases, the Sixth Circuit cited a Second Circuit case that stated "if the case had resolved itself into a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing."¹²⁰ Because the student admitted to his felony drug conviction, there was no critical fact issue that required cross-examination, and therefore, no due process deprivation occurred.¹²¹

The Sixth Circuit continued to affirm the District Court of the Northern District of Ohio's analysis as it found no due process violation for the written findings claim.¹²² In stating that the Due Process Clause's flexibility may require written findings of fact in some proceedings, circuit precedent identifies no constitutional right to written findings of fact.¹²³

The Court ends its analysis in *Flaim* by holding that the right to appeal is not a constitutional due process protection. "Courts have consistently held that there is no right to an appeal from an academic disciplinary hearing that satisfies due process."¹²⁴ Even though the student claimed that the college's policy, past practices, and policy requirements from the accrediting body for medical schools

114 *Id.* at 638–39.

115 *Id.* at 640.

116 *Id.* at 644, n. 4.

117 *Id.* at 640 (citing *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984).

118 *Id.* at 640–41.

119 *Id.* at 641.

120 *Id.* (citing *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972); and *Jaksa*, 579 F. Supp. at 1252)).

121 *Id.*

122 *Id.* at 642.

123 *Id.*

124 *Id.* (citing *Smith on Behalf of Smith v. Severn*, 129 F.3d 419, 428–29 (7th Cir. 1996); *Winnick*, 460 F.2d at 549; and *Foo v. Tr., Ind. Univ.*, 88 F. Supp. 2d 937, 952 (S.D. Ind. 1999)).

provided a right to appeal, the Sixth Circuit found “[Flaim] fails to tie any of these points to a constitutional right to appeal the decision of an academic institution.”¹²⁵ The Sixth Circuit then concluded its opinion by upholding the district court’s decision to deny the student’s procedural due process claims.¹²⁶

C. *The Assumption Approach*

The least common approach, used in only the Fifth and Eighth Circuits, is the assumption approach. As its name implies, courts that follow the assumption approach simply assume that a property interest exists for students enrolled at public colleges and universities.¹²⁷ Unlike the state-specific or generalized approach, the Fifth and Eighth Circuits do not decide the issue of the property interest; “[i]nstead, the assumption approach serves as a gap-filler for courts to avoid the property interest question, unless the particular facts of a case require that it does so.”¹²⁸ The Fifth and Eighth Circuits look at the sufficiency of the process provided to students and skip the issue of whether or not a property interest exists.¹²⁹

In a case upheld by the Fifth Circuit, the District Court for the Eastern District of Louisiana implemented the assumption approach in a case involving a student dismissed from Louisiana State University’s medical school.¹³⁰ In *Mathai*, the district court examined the dismissal of a student for “polysubstance dependence and narcissistic traits,” both of which violated the school’s continued enrollment contract and fitness for duty policy.¹³¹ The student claimed her dismissal violated her due process rights because she was dismissed without notice and an opportunity to be heard.¹³²

The district court began its analysis by directly implicating the assumption approach. The court described this approach in the following manner:

The Court assumes without deciding that plaintiff has a property or liberty interest in her continued education at LSU. Defendant does not argue against the existence of such an interest, and both the United States Supreme Court and the Fifth Circuit have addressed due process claims by postsecondary students without expressly stating that students have a property interest in their studies.¹³³

125 *Id.* at 642.

126 *Id.* at 644.

127 Mott, *supra* note 12, at 663.

128 *Id.* at 664.

129 *Id.*

130 *Mathai v. Bd. of Supervisors of La. State Univ. and Agricultural and Mech. Coll.*, 959 F. Supp. 2d 951 (E.D. La. 2013), *aff’d*, 551 Fed. App’x 101 (5th Cir. 2013) (unpublished).

131 *Id.* at 955.

132 *Id.* at 958.

133 *Id.* (citing *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 84–85 (1978); *Ekmark v. Matthews*, 2013 WL 1363545, at *1 (5th Cir. Apr. 5, 2013)).

The district court then stated, “even assuming that plaintiff has an interest protected by the Due Process Clause, her claim cannot succeed because she was not denied due process.”¹³⁴

After assuming that the property interest existed and that the student was not denied due process protections, the district court highlighted the difference between the procedural requirements afforded to academic misconduct and behavioral misconduct violations.¹³⁵ The court identified *Horowitz* and *Goss* to support the conclusion that academic dismissals do not require a hearing as required in behavioral dismissals.¹³⁶

In determining whether the student’s dismissal for “polysubstance dependence and narcissistic traits” qualified as an academic or behavioral dismissal, the district court turned to Fifth Circuit precedent, *Shaboon v. Duncan*.¹³⁷ Here, the Fifth Circuit determined the dismissal of a student who “exhibited signs of mental illness, refused to cooperate fully with psychiatrists, and stopped taking her medication” constituted a dismissal for academic reasons.¹³⁸ The Fifth Circuit in *Shaboon* found this to be an academic dismissal because “it implicated her fitness to perform as a doctor.”¹³⁹ After citing *Shaboon*, the district court in *Mathai* added the following:

Evaluation of plaintiff’s progress, or lack thereof, in the area of emotional health and judgment “is no less an academic judgment because it involves observation of her skills ... in actual conditions of practice, rather than assigning a grade to her written answers on an essay question.”¹⁴⁰

The district court then concluded that *Mathai* clearly “could not be deemed fit to engage in her professional duties unless she complied with the treatment recommendations” and that her refusal “furnished a sound academic basis for dismissal.”¹⁴¹ After deciding that the student’s dismissal was academic in nature, the district court cited cases in other circuits that also created a procedural distinction between academic misconduct and behavioral misconduct.¹⁴² The court noted that

Surveying cases from the First, Sixth, and Seventh Circuits, the District Court for the District of New Mexico has distilled the principle that an academic dismissal will be found where a student’s scholarship or conduct reflects on the personal qualities necessary to succeed in the field in which he or she is studying and is based on an at least partially subjective appraisal

134 *Id.*

135 *See id.* at 959.

136 *Id.*

137 *Id.* at 955 and 959.

138 *Id.* at 959 (citing *Shaboon v. Duncan*, 252 F.3d 722, 725-26 (5th Cir. 2001))

139 *Id.*

140 *Id.* at 960 (quoting *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 95 (1978)) (Powell, J., concurring).

141 *Id.* at 960 (quoting *Shaboon*, 252 F.3d at 731) (internal quotation marks omitted).

142 *Id.*

of those qualities.¹⁴³

The district court provided another example from a Seventh Circuit case where a medical resident received an academic dismissal for failing “to disclose on his application an earlier dismissal from another residency program” because this affected his credibility in the care of patients.¹⁴⁴ The district court again stated that Mathai’s inability to abide by the program’s requirements to seek treatment “is a basis for defendants to conclude that plaintiff was academically unfit to continue in her medical training.”¹⁴⁵

Because the district court created a sound argument that the student’s dismissal is academic in nature, the court reiterated the procedural requirements for such a dismissal.¹⁴⁶ “[T]he only procedural safeguards required were ample notice of the conditions upon which her continued enrollment was predicated and warning of the consequences that would follow her failure to abide by those conditions.”¹⁴⁷ Under this standard, the district court ultimately held that no procedural due process violation occurred and the student “certainly received adequate process.”¹⁴⁸ The district court supported this holding with the following:

She received written notice on two occasions that her failure to comply with the school’s treatment requirements could result in expulsion. The Fitness of Duty contracts clearly stated that if plaintiff did not abide by their terms, she was subject to immediate dismissal from the LSU School of Medicine. Under *Shaboon* and *Horowitz*, no more is required.¹⁴⁹

D. Comparing the Three Approaches

Though the assumption approach to the question of a property interest in continued enrollment in higher education is recognized in published legal scholarship, the question remains of how courts would use this approach if the procedural protections afforded to a student did not meet due process requirements. Based on the district court’s application in *Mathai*, it appears that, at least in the Fifth Circuit, courts would likely use the generalized approach. Because the *Mathai* court focused on the distinctions between academic misconduct and behavioral misconduct requirements highlighted in *Goss* and *Horowitz*, the Fifth Circuit could generalize the holding in *Goss* to extend procedural due process requirements to higher education. If the Fifth Circuit cited Supreme Court precedent to illustrate

143 *Id.* (quoting *Allahverdi v. Regents of Univ. of N.M.*, 2006 WL 1313807, at *12–13 (D.N.M. Apr. 25, 2006) (quotation marks omitted)).

144 *Id.* (*Fenje v. Feld*, 398 F.3d 620, 625 (7th Cir. 2005)).

145 *Id.*

146 *Id.* at 961.

147 *Id.* (quoting *Shaboon v. Duncan*, 252 F.3d 722, 730 (5th Cir. 2001)(internal quotation marks omitted); *see also* *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 85 (1978)).

148 *Id.*

149 *Id.*

the required procedures afforded in the instances where due process applies, it logically follows that they may choose to extend *Goss*, and potentially apply other circuit precedent, to definitively hold that there is a property or liberty interest in continued higher education enrollment.

Alternatively, it can be argued that the Fifth and Eighth Circuits could nevertheless assume a property or liberty interest exists and still find a university conduct procedure inadequate. It is certainly established in the Supreme Court precedent of *Horowitz* and *Ewing* that making an assumption about the application of due process is a valid application of constitutional avoidance. The Fifth and Eighth Circuits could hypothetically assume that a student has a property and/or liberty interest in continued higher education enrollment *and* conclude that a conduct procedure utilized to remove a student from a college or university is inadequate under the Due Process Clause.

The circuits that utilize the generalized approach could find themselves in a similar situation. The First, Sixth, and Tenth Circuits could extend *Goss* and circuit precedent and find that the procedural protections offered in student conduct cases do not comport with due process requirements. That does not negate the legitimacy of the generalized approach as a method for determining a property or liberty interest in continued higher education enrollment. The same is true for the assumption approach—it is no less a legitimate application of legal theory because a college or university offered an inadequate student conduct process. Deciding the issue of whether or not procedural due process applies to a factual situation has no bearing on the sufficiency of the process afforded. That decision is independent of the identification of the protected interest itself.

V. Navigating the Current Law and Benefits of Procedural Due Process Protections

If anything is apparent from Supreme Court and circuit court precedent, it is that the concept of property rights in higher education is a largely inconsistent application of constitutional protections. The geographical jurisdiction in which a public college or university exists ultimately decides the constitutional protections afforded to its students. For instance, there are twenty-seven states in the six circuits that use the state-specific approach to identifying a property interest in continued enrollment in higher education. Unless these twenty-seven states provide a property or liberty interest in higher education under state law, the courts in these states may reasonably deny basic procedural protections in student conduct removals.

In addition to the inconsistent application of procedural due process protections in higher education across circuits, federal courts have not reached a consensus on what definitively qualifies as academic misconduct and how to identify such misconduct. The District Court of Nebraska and Eighth Circuit recognize that “[d]ismissals have been considered ‘academic’ when the student’s deficiencies, while arguably warranting disciplinary action, also bear on academic performance”¹⁵⁰

¹⁵⁰ Ashokkumar v. Elbaum, 932 F. Supp. 2d 1002, 1008 (D. Neb. 2013) (citing *Monroe v. Ark. State Univ.*, 495 F.3d 591, 592 and 595 (8th Cir. 2007) (student dismissed from academic program after

In contrast, the District Court of Nevada ruled that the procedural due process provided to a student reached the level of behavioral misconduct protections, so the court declined to conclude if the alleged conduct was behavioral or academic in nature.¹⁵¹ There are very few available cases that provide insight into what conduct qualifies as academic misconduct, so it is difficult to predict how courts would decide the issue.

Though some scholarly reviews of property interests in higher education tend to focus on which of the three approaches is better or which is the more consistent application of Supreme Court precedent, this discussion can be avoided entirely if colleges and universities simply provide constitutionally adequate procedural due process requirements for *all* cases of behavioral and academic misconduct. As illustrated in the cases above, the general consensus among federal circuits requires different procedural processes for removals based on academic misconduct or behavioral misconduct and provide incomplete guidance on how to decide if the conduct is behavioral or academic. The required procedural protections can be summarized from the prior case illustrations as requiring a notice and some opportunity to be heard in behavioral misconduct removals and notice that the alleged conduct may result in removal for academic misconduct cases. This broad summarization of these procedural requirements does not account for the implied flexibility of the Due Process Clause that is highlighted and applied in different ways, depending on circuit precedent.

The inconsistent application of procedural due process protections across circuits and within the two main categories of student conduct cases provides potential compliance problems for colleges and universities across the United States. Not only do compliance issues arise in the application of procedural due process protections, but these protections are only afforded in cases of *removal* from public colleges and universities. There is no case law mandating minimum constitutional protections for students who are found in violation of student conduct charges who do not face sanctions such as suspension or expulsion. Based on this author's observation in the field of student conduct, sanctions resulting in removal from campus are far less common than educational and restorative sanctions.¹⁵² Not only is the field of student conduct less likely to remove students from campus for

receiving an incomplete grade due to a leave of absence for drug treatment. "Although we recognize that Monroe's conduct in this case might have permitted a disciplinary dismissal, it is undisputed that the University dismissed Monroe for failure to complete his course work, not his drug use. Monroe admitted his drug use to the University. Had he denied the allegations of drug use, then the University's decision to dismiss him for his alleged, but not conceded drug use, might constitute a disciplinary dismissal. Moreover, courts have considered dismissals 'academic' in similar scenarios when the student's deficiencies, while arguably warranting disciplinary action, also bear on academic performance.").

151 *Gamage v. Nev. ex rel. Bd. of Regents of Nev.*, 2014 WL250245, at *2 and *9 (D. Nev. Jan. 21, 2014) (Ph.D. student accused of plagiarizing parts of her dissertation. "Without reaching the conclusion whether Plaintiff's removal from the Program was for an academic reason or a disciplinary reason, the Court finds the Defendants provided Gamage more than the procedural due process she was entitled to if she had been removed from the Program solely for disciplinary reasons. Gamage does not dispute the fact that she received notice of the allegations of plagiarism or notice of any of the hearings.").

152 *See also* Northwestern University, Overall Sanctions Assigned, <https://www.northwestern.edu/communitystandards/data-statistics/overall-sanctions-assigned.html> (last visited Feb 18, 2022) (FY 19: 313 cases, 8 removals. FY 20: 282 cases, 9 removals. FY 21: 714 cases, 3 removals).

conduct code violations, but there are also professional organizational standards for student conduct programs that include “a moral and ethical duty to ensure [student conduct] processes are inclusive, socially just, and multipartial.”¹⁵³

Many public colleges and universities likely already afford a process that comports with the notice and opportunity to be heard requirements of procedural due process. However, based on the lack of concrete guidance from the Supreme Court and the circuit split on additional requirements, it is wise for all public institutions to reexamine their processes. Most importantly, this author recommends offering procedural protections that exceed the constitutional minimums for all cases of student misconduct, regardless of the potential for removal from campus. By offering a uniform conduct system that exceeds constitutional minimums, public colleges and universities further insulate themselves from impending changes in the legal landscape and abide by the professional expectations of the field. In a system designed to educate and retain students, a conduct process that exceeds procedural due process requirements illustrates to students that colleges and universities value the constitutional rights of the students, even when they may not be required to do so under the law.

VI. The University of Oregon Model

A. *Summary and Application of the University of Oregon Model*

As a model for how public colleges and universities should extend additional due process protections in their conduct process, the University of Oregon provides such a framework. The University of Oregon Model exceeds the minimum constitutional due process protections required for academic and behavioral misconduct removals. The Oregon Model also provides the same robust procedural protections for all student conduct cases, regardless of the potential sanction outcome. All nonremoval cases receive the same procedural protections that go far beyond the minimum requirements outlined in *Goss*, *Horowitz*, and *Ewing*.

B. *Preliminary Considerations*

The University of Oregon provides for various preliminary considerations before beginning the student conduct process.¹⁵⁴ These considerations include many important elements, but specifically include instructions for disability access

153 Council for the Advancement of Standards in Higher Education, Student Conduct Programs, <http://standards.cas.edu/getpdf.cfm?PDF=E86F0FB4-D022-13D9-03E2DE3AD5532DBF> (last visited Feb 17, 2022) (see document for additional citations).

154 Standard Operating Procedures for General Misconduct/Substance Use Misconduct Allegations, (2020), <https://dos.uoregon.edu/files/substance-use-and-general-misconduct-procedures-2020.pdf> (The Academic Misconduct Procedures include the same procedural protections as the General Misconduct/Substance Use Misconduct procedures) [hereinafter collectively referred to as Procedures].

accommodations and define the role of support persons.¹⁵⁵ The incorporation of accessible accommodations is a critical consideration prior to the start of the conduct process; offering these accommodations is not a constitutionally protected procedural due process element, but it is a commitment to “ensuring an inclusive, accessible, and equitable process for all participants.”¹⁵⁶ This is the first of many examples of the University of Oregon providing procedures that exceed those required by constitutional law.

The university also defines the designation and role of support persons in the conduct process. The Student Conduct Code defines a support person as

...any person who accompanies a Respondent or Complainant for the purpose of providing support, advice, or guidance. Any limitations on the scope of a support person are defined in written procedures or other relevant University policy. Witnesses or other Respondents are not allowed to serve as Support Persons.¹⁵⁷

The Standard Operating Procedures for academic and behavioral misconduct provide the following restrictions on support persons engaged in the conduct process:

Support persons may attend meetings, be copied on formal case communications, and ask the Director reasonable clarifying questions regarding the process. A support person is not permitted to act or speak on behalf of the Respondent, serve as a witness in the same matter, or disrupt any meetings. The Director may require a support person to leave a meeting, including the Administrative Conference, if the support person engages in unreasonable, disruptive, harassing, or retaliatory behavior.¹⁵⁸

Even with this limiting instruction on support person involvement in the student conduct process, the University of Oregon is exceeding the due process right to counsel. As noted previously in *Goss*, the Supreme Court declined to extend the right to counsel to “hearings in connection with short suspensions.”¹⁵⁹ The Sixth Circuit in *Flaim* “assumed without deciding” a right to counsel in academic misconduct cases, while declining to consider “all the circumstances” where student respondents may be afforded the right to counsel.¹⁶⁰ *Flaim* also provided for the right to counsel if the university’s case is presented by an attorney or if the rules of evidence or procedure apply.¹⁶¹ Because the University of Oregon does not use counsel to bring conduct charges against a student and does not utilize

155 *Id.* at 2.

156 *Id.*

157 UNIVERSITY OF OREGON POLICY LIBRARY, STUDENT CONDUCT CODE, § II (10) (2021), <https://policies.uoregon.edu/vol-3-administration-student-affairs/ch-1-conduct/student-conduct-code> [hereinafter Code].

158 Procedures, *supra* note 155, at 2–3.

159 *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

160 *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 640 n. 4 (6th Cir. 2005).

161 *Id.* at 640.

complicated rules of ethics or procedure, the Oregon Model complies with the requirements of *Flaim*. Though not bound by Sixth Circuit precedent and with no Supreme Court guidance on the issue, the University of Oregon drastically exceeds the right to counsel by allowing involvement of counsel in all cases of academic and behavioral misconduct.

While the University of Oregon provides expanded procedural protections for the right to counsel, the support person limitations provided by the Oregon Model provide intentional constraints on attorney involvement in the student conduct process. Support persons can work with the student respondent through their entire case but cannot directly represent the student respondent during the conduct hearing. This allows for students to retain autonomy in the decision-making process of their case, while also creating the greatest opportunity for students to learn and grow from the alleged behavior. Allowing a support person to speak for a student and justify their behavior is not restorative and does not impose responsibility on the student respondent.

Moreover, by allowing a support person, especially legal counsel, to speak for students, the student conduct process begins to mirror a criminal court proceeding. Although it is important to provide procedural due process protections to the extent that they benefit the student and the university, there must be limitations on these protections to prevent a largely restorative and educational process from becoming a full-scale adversarial proceeding. Allowing support persons to counsel the student respondent as they navigate the student conduct process, while also restricting the role of the support person, strikes an appropriate balance between providing broad procedural due process protections that benefit the student from those that do not.

C. *The Notice of Allegation*

As required by *Goss*, *Horowitz*, and *Ewing*, student respondents facing dismissal from a K-12 school or higher education entity for behavioral misconduct must receive notice of the alleged conduct violation that, if proven, would justify removal from the educational setting. Consistent with university policy, the University of Oregon sends a Notice of Allegation (NOA) to a student respondent's university email address, containing the following information:

- A brief description of the alleged misconduct,
- The alleged violations of the Code,
- The name and contact information for the assigned case manager,
- Whether the respondent may be subject to suspension, expulsion, or negative transcript notation,
- A direct link to the Student Conduct Code and procedures, and
- The date, time, and location (or access information) for the informational meeting.¹⁶²

162 Procedures, *supra* note 155, at 2.

The contents of the NOA do not change, regardless of whether the alleged misconduct is academic or behavioral; all student respondents receive the same level of information, even though cases like *Horowitz* and *Ewing* do not require such a notice for academic violations. This notice also remains the same for students who are not facing removal from campus, even though there is no Supreme Court precedent requiring sufficient notice for nonremoval cases. The NOA is explicit in its reference to potential sanctions and informs students whether or not they face suspension, expulsion, or a negative transcript notation. This is considered more than adequate notice required under the Due Process Clause for both academic and behavioral misconduct.

Although not required, the NOA provides direct links to the Student Conduct Code and applicable procedure. This notice allows student respondents the opportunity to fully understand the alleged code violation, details of the adjudication process, and time to consult with a support person prior to their first conversation with a student conduct adjudicator. Though notice of where to find the code and the applicable procedure seems fairly insignificant in the grand scheme of procedural due process protections, it is a simple addition that ensures the university is not withholding any information to keep an advantage over the student respondent. Its inclusion encourages active student involvement in the conduct process, with no negative impact on university resources.

D. The Informational Meeting and Resolution by Agreement

Implemented in August 2020, the Informational Meeting is relatively new to the University of Oregon Student Conduct Procedures. The Informational Meeting allows student respondents the opportunity to meet with their case manager and review the report and evidence against them.¹⁶³ This meeting also allows the case manager to explain the entire student conduct process to the students and discuss possible resolution options.¹⁶⁴ The case manager cannot ask the students any investigative questions during this meeting—it is strictly a time for student respondents to ask any questions regarding the conduct process or resolution options, and to examine the evidence against them.¹⁶⁵ Support persons are invited to attend this meeting with the student respondent as well.¹⁶⁶

In cases that do not involve suspension, expulsion, or negative transcript notations, and if deemed appropriate by the case manager, the student respondents may agree to take responsibility for the alleged conduct violation at the Informational Meeting in the form of a Resolution by Agreement.¹⁶⁷ This agreement is a voluntary agreement in which the student respondents accept responsibility for the alleged conduct violation, accept the imposed Action Plan,

163 *Id.* at 4.

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.*

waive their right to the Administrative Conference (AC), and waive their right to appeal.¹⁶⁸ Once drafted by the case manager, the student respondents have three business days to consult with a support person in deciding to accept or decline the agreement.¹⁶⁹ If the students accept the agreement, the conduct process is over and the students begin the process of completing the Action Plan.¹⁷⁰ If the students decline the agreement, the conduct process continues to the AC with no inference made against the students as to their involvement in the alleged conduct.¹⁷¹

Both the Informational Meeting and Resolution by Agreement are not constitutionally mandated procedural due process protections. These options are additional protections afforded to student respondents that ultimately serve two purposes: (1) to allow the students the opportunity to review all evidence against them and ask questions about the student conduct process before attending a formal hearing; or (2) to allow the students to knowingly waive some of their procedural rights in favor of an expedited resolution process. For many low-level violations in which the students knows they violated the conduct code and wish to accept the consequences as a result, Resolutions by Agreement allow student respondents to avoid proceeding through the formal adjudication process. They can accept responsibility, complete sanctions in the Action Plan, and move on with their academic pursuits. Otherwise, student respondents may receive all the information presented against them, gain a clear understanding of the formal hearing process, and take the time to prepare their responses to the alleged violations in the AC. Regardless of how the Informational Meeting and Resolution by Agreement are categorized, they are additional procedural protections outside of due process requirements that entirely benefit the student respondent with low impact on university resources.

E. The Administrative Conference

Per *Goss*, *Horowitz*, and *Ewing*, students facing removal from campus for behavioral misconduct allegations are entitled to some kind of hearing, while students facing academic misconduct removal do not require any type of hearing. At the University of Oregon, the AC serves as the formal hearing for academic and behavioral misconduct cases, regardless of if removal is a potential sanction. The AC is a private meeting between the student respondents, potential support person, and the case manager.¹⁷² In the AC, the case manager may ask the student respondents questions and gather information regarding the alleged conduct violation.¹⁷³ During the AC, student respondents may name any witnesses they wish the case manager to speak to regarding the incident.¹⁷⁴ Although the

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.* at 5.

173 *Id.*

174 *Id.*

case manager cannot compel a named witness to answer questions or provide information regarding the alleged misconduct, the case manager takes reasonable actions to contact and consult with relevant witnesses.¹⁷⁵ The support person may accompany the students but must allow the students to speak for themselves when presenting their defense to the case manager.¹⁷⁶ Student respondents are not required to answer any questions from the case manager, but student respondents must at least attend the AC in order to preserve their right to appeal.¹⁷⁷ If student respondents do not attend the scheduled AC, the hearing proceeds without the students.¹⁷⁸

Based on the case illustrations previously mentioned, the general consensus for hearing requirements under the Due Process Clause requires an opportunity to be heard and to defend oneself. At the AC hearing phase, the University of Oregon once again exceeds procedural due process protections. As consistent with other areas of the conduct procedural process, the university allows a support person to attend the hearing with the student respondents and may ask questions on the students' behalf. The offered hearing is a private, oral hearing where student respondents may present their own evidence, provide their account of the situation, and propose relevant witnesses, regardless of whether or not they face removal from the university. Further, the case manager serves as an independent tribunal whose entire focus is to determine if the student respondents are or are not in violation of the conduct code. This is opposed to the aggrieved party, whether that be a professor or university administrator, from serving as the decision-maker in a case in which they are closely connected. None of the cases cited above, but especially *Goss*, *Horowitz*, and *Ewing*, provide any guidance on who can and cannot serve as a decision maker in higher education student conduct cases.

Flaim and the Sixth Circuit expand the hearing requirements slightly by indicating a student "might" require cross-examination of a witness in a hearing in order to make a credibility finding.¹⁷⁹ This ability to cross-examine witnesses is currently only concretely required in cases involving Title IX offenses.¹⁸⁰ While the Oregon Model typically provides procedural protections that far exceed the requirements set out by the Supreme Court and nonbinding circuit precedent, implementing a process where respondents and complainants may cross-examine each other begins to remove the educational and nonadversarial nature from conduct hearings. From this author's perspective, cross-examination is detrimental to respondents and complainants in Title IX proceedings and would prove equally as harmful in the non-Title IX student conduct process. Though the Oregon Model

175 *Id.* at 4–5.

176 *Id.* at 5.

177 *Id.*

178 *Id.*

179 *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005)..

180 Final Rule: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 FR 30026 § 106.45(b)(6) (2020) ("Section 106.45(b)(6) requires a live hearing with cross-examination conducted by the parties' advisors at postsecondary institutions.").

advocates for expanded protections, cross-examination for credibility findings do not allow for a restorative and supportive learning environment for respondents. It also requires complainants to unnecessarily reiterate information from the reporting phase and necessitates the right to counsel due to complex procedural requirements for such an adversarial legal process. Further, cross-examination is a drain on university resources by prolonging cases in which a credibility finding may not be necessary to reach an outcome, especially in cases where respondents take responsibility and acknowledge the harm caused.

Though the Oregon Model does not allow for cross-examination, it does allow student respondents to present a robust defense in a private hearing with an impartial decision-maker. This, again, illustrates the University of Oregon's commitment to exceeding procedural due process requirements in the conduct process to the benefit of the students involved and without unnecessarily burdening university resources.

E. The Action Plan and Decision Letter

After the completion of the AC, the case manager makes a finding, based on the preponderance of the evidence standard, as to whether the student respondents are responsible for the alleged Student Conduct Code violation.¹⁸¹ The preponderance of the evidence standard requires the case manager to determine if it is more likely than not that the alleged violation occurred as reported.¹⁸² Then, the case manager sends a decision letter to students either outlining that the students are in violation or not in violation of the conduct charge.¹⁸³ If the students are found in violation, they receive the following information in their emailed Decision Letter: (1) the in violation finding with a rationale for how the case manager reached this decision, (2) the Action Plan containing the assigned sanctions, and (3) information regarding how to file an appeal.¹⁸⁴ The Action Plan "consists of outcomes and administrative sanctions intended to promote personal reflection and growth, repair any harm caused, and help the student realign with institutional values."¹⁸⁵ If notified in their initial NOA, the Action Plan may include suspension, expulsion, or a negative transcript notation.¹⁸⁶

The Supreme Court does not provide any specifics for notifying students of a finding and decision. The Fifth Circuit required in *Dixon* that the university

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.* See also Office of the Dean of Students, Student Conduct and Community Standards, <https://dos.uoregon.edu/conduct> (last visited Mar 14, 2021) ("Students are provided opportunities for personal reflection about decisions and how to make better choices in the future. We encourage students to consider the impact of their actions on themselves, their peers, and the greater community. Sanctions are individually developed with the goal of promoting critical thinking, repairing potential harms, and assisting students to become productive, global citizens.").

186 Procedures, *supra* note 155, at 5.

provide the student respondent with the results and findings of the hearing for their inspection in order to satisfy due process protections.¹⁸⁷ The Sixth Circuit acknowledged in *Flaim* that the Due Process Clause's flexibly may require written findings of fact, but no Sixth Circuit precedent identifies the constitutional right to these written findings.¹⁸⁸ At this final stage of the conduct process, under the Oregon Model, the university again exceeds procedural due process requirements by always providing a written decision rationale to all students, regardless of case type or potential outcome. The Decision Letter allows the university to articulate exactly how the case manager reached their decision in a particular case and provides that rationale to students. By sharing this information with the students, they can fully understand the findings against them and if they chose to do so, prepare to appeal their decision. This process does not unreasonably burden university resources or staff because it is information the Office of Student Conduct would likely retain for each case, even if not publicly shared with students, as a part of the university's Record Retention Schedule.¹⁸⁹ Therefore, providing this written rationale to students allows for students to meaningfully prepare their case for appeal or fully learn from the behavior, with no additional expense placed on the university.

G. The Appeals Process

One final procedural protection afforded to student respondents by the University of Oregon is the opportunity to file a formal appeal. If found in violation, student respondents receive instructions and parameters for filing an appeal.¹⁹⁰ The students may, in writing, appeal the case manager's decision based on at least one of four criteria:

- To determine whether there was any procedural irregularity that affected the outcome of the matter;
- To determine whether the action plan imposed was appropriate for the violation(s);
- To determine whether the finding is not supported by the preponderance of the evidence; and/or
- To consider new information that could alter a decision, only if such information could not have been known to the appealing party at the time of the administrative conference.¹⁹¹

187 *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961); *see also* Berger & Berger, *supra* note 21, at 306.

188 *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 642 (6th Cir. 2005)..

189 Univ. of Or., Office of the Dean of Students, Individual Student Conduct Records and Release Information, <https://dos.uoregon.edu/resources#:~:text=What%20are%20student%20conduct%20records,related%20documentation%2C%20and%20official%20correspondence> (last visited Feb. 17, 2022) ("In accordance with the University of Oregon Records Retention Schedule, student conduct records are retained for a minimum of seven (7) years after graduation, final date of enrollment, date of final resolution, or completion of sanctions, whichever is later. All Academic Misconduct records and records for student conduct matters which result in suspension, expulsion, or degree revocation will be retained indefinitely.").

190 *Id.*

191 *Id.* at 6.

If the student respondents meet one of these appeal standards, the University Appeals Board (UAB), consisting of students, faculty, and staff members, individually review the case manager's decision in accordance with the bases for appeal.¹⁹² The UAB possesses broad authority to uphold decisions, remand for additional fact finding, dismiss the case entirely, or suggest an alternative resolution process.¹⁹³ Unless student appellants are permitted to submit new information to the UAB, the board simply reviews the information within the case file.¹⁹⁴ UAB hearings are closed to the public, including to the appellants.¹⁹⁵ After the UAB reaches a decision, the students receive the written results and the rationale in an Appeals Board Decision email.¹⁹⁶

The opportunity to appeal a conduct decision is not outlined as a procedural due process requirement afforded to public college and university students. Even the court in *Flaim*, which provided additional guidance that exceeded the requirements of *Goss*, *Horowitz*, and *Ewing*, stated that “[c]ourts have consistently held that there is no right to an appeal from an academic disciplinary hearing.”¹⁹⁷ The University of Oregon's decision to create such an opportunity to appeal in almost every circumstance serves a singular purpose: it continues to allow expanded procedural due process protections to students as a measure of best practice in a student-centered conduct process, which does not unreasonably burden itself as a higher education institution.

VII. Background of the University of Oregon Model

This recommended model is currently implemented at the University of Oregon in Eugene, Oregon. The University of Oregon is unique in terms of its categorization under Oregon state law. Under Oregon Revised Statute section 352.033, the University of Oregon is a “public university as [a] governmental entity.”¹⁹⁸ This statute provides the university with a unique status by specifically noting that public universities are “not considered a unit of local or municipal government or a state agency, board, commission or institution for purposes of state statutes or constitutional provisions.”¹⁹⁹ This broad statutory language creates certain exemptions for Oregon's public universities, including exemption from adhering to contested case requirements of the Administrative Procedures Act and preventing the state attorney general from representing the university in any civil litigation.²⁰⁰ Oregon Revised Statute section 352.039, grants broad legislative

192 *Id.*

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.*

197 *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 642 (6th Cir. 2005)..

198 OR. REV. STAT. ANN. § 352.033 (West).

199 *Id.*

200 *See id.*

self-governance powers to public universities, similar to home rule power granted to municipalities and local government entities.²⁰¹ This broad governance power allows the university's Board of Trustees to adopt its own Student Conduct Code, without state approval or guidance. Between both Oregon statutes, the University of Oregon is an entity of self-governance exempt from many state administrative procedural requirements.

Oregon is also unique because there is no state statute that provides a property interest in higher education. As noted previously, the federal district court in *Austin v. University of Oregon* made this determination, while also holding that the Supreme Court and Ninth Circuit did not provide for a property interest in higher education.²⁰² According to circuit precedent, the Ninth Circuit should apply the state-specific approach to determining a property interest, and Oregon law does not provide such a statute.²⁰³ Therefore, neither Oregon state statutes nor the Ninth Circuit find a property interest in higher education for students that attend Oregon's public universities, including the University of Oregon.

The University of Oregon also does not create a property interest through an implied or express contractual relationship. The University's Student Conduct Code specifically states that "[t]his Code is not a contract, express or implied, between any applicant, student, staff or faculty member."²⁰⁴ While this statement alone may not persuade a court that a contractual relationship does not inherently exist between students and the university, the question is largely irrelevant. In theory, a court could decide that the Student Conduct Code does create a contractual relationship between the University of Oregon and its students, thus establishing a property interest in continued enrollment. If such a determination is made and the court in question requires the University of Oregon to provide procedural due process protections in accordance with Supreme Court precedent, the court could easily see the university exceeds the necessary protections afforded by the Due Process Clause. So, the addition of this clause ultimately has no merit on the recommended Oregon Model conduct procedure; the model still exceeds the minimum procedural protections required under the federal Constitution.

Finally, the University of Oregon underwent a total student conduct code and procedural overhaul during the 2019–20 academic year. As a part of this process, the university enlisted the assistance of a professional consulting firm for help in identifying best practices and addressing areas of weakness in the Student Conduct Code and procedures.²⁰⁵ As a result of the report's findings,

201 OR. REV. STAT. ANN. § 352.039(2) (West) ("A public university listed in ORS 352.002 is an independent public body with statewide purposes and missions and without territorial boundaries. A public university shall exercise and carry out all of the powers, rights and privileges, within and outside this state, that are expressly conferred upon the public university, or that are implied by law or are incident to such powers, rights and duties.").

202 *Austin v. Univ. of Or.*, 205 F. Supp. 3d 1214, 1221 (D. Or. 2016), *aff'd*, 925 F.3d 1133 (9th Cir. 2019).

203 *Id.*

204 Code, *supra* note 158, at § IX(4).

205 Catherine Cocks & Dr. Michael DeBowes, *The Student Conduct Code and Process Review of the University of Oregon* (2019).

the University of Oregon drafted an entirely new Student Conduct Code and conduct procedures, discarding the previous code derived from former Oregon Administrative Rule chapter 571, division 21.²⁰⁶ The departure from the former administrative rule allowed for a more streamlined, comprehensible, and practical code, free of legal jargon and citations to various outdated administrative rules and statutes. The use of an outside consulting firm, as well as a significant investment of time and resources by university officials, uniquely situates the University of Oregon's Student Conduct Code—but the policies and procedures implemented by the university can be seamlessly applied to existing student conduct codes and procedures at any public college or university.

VIII. Implementation of the University of Oregon Model at Other Colleges and Universities

As a whole, the University of Oregon's Student Conduct Code procedures for academic and behavioral misconduct far exceed the minimum procedural due process protections for students at public colleges and universities. The university goes above and beyond its current constitutional requirements with procedures that benefit students and the university alike. Thus, public colleges and universities should consider implementing a similar conduct procedure, as it provides robust protections for students, with relatively low expense on institutional resources.

With colleges and universities already federally required to designate at least one employee as a Title IX coordinator, many schools also have some kind of formal student conduct staff that enforces the Student Conduct Code.²⁰⁷ While these offices vary in size and staffing, many public universities already have student conduct procedures for disciplinary actions that provide notice of allegations and hearings before an independent tribunal.²⁰⁸ Because of the baseline staffing and existing conduct procedures, implementing many of the procedural protections offered by the University of Oregon is reasonably seamless. Informational Meetings, Resolutions by Agreement, and support persons can likely be added to existing conduct procedures, without altering the current procedural steps. The addition of these procedural protections typically does not generate additional workloads for current staff—Informational Meetings and Resolutions by Agreement will be used most often in place of formal hearing for students accepting responsibility for low-level misconduct violations. Allowing support persons to advise students outside of the conduct process, while minimizing their involvement during Informational Meetings or ACs, does not add any work for current staff members.

Though the creation of an appeals process does involve collaboration and outreach to students, faculty, and staff members, for public colleges and universities

206 Code, *supra* note 158, at Enactment & Revision History.

207 The U.S. Dept. of Justice, Federal Coordination and Compliance Section, (2020), <https://www.justice.gov/crt/federal-coordination-and-compliance-section-152#:~:text=Under%20the%20Title%20IX%20regulations%2C%20a%20recipient%20must%20designate%20at,as%20its%20Title%20IX%20coordinator.&text=The%20recipient%20must%20notify%20all,as%20the%20Title%20IX%20coordinator.>

208 Berger & Berger, *supra* note 21, at 297.

that already utilize this type of hearing board for the initial student hearings, they may use these same channels to build an appeals board. The appeals board merely requires limited access to a student appellants' case file, minimal guidance from conduct staff during the appeals board hearings, and a designated staff member that sends the appeals decision correspondence to the student appellants after the conclusion of the appeals hearing. For staff that already follow a hearing model similar to the University of Oregon AC, the implementation of an appeals board might prove too strenuous on current staffing and resources. However, these offices can implement many of the other procedural recommendations utilized at the University of Oregon in furtherance of a student-centered, fair-dealing student conduct process. For instance, the addition of an Informational Meeting and Resolution by Agreement may reduce the need for an appeals board as both protections provide for more optimal outcomes for both students and institutions, and require the student to waive any right to appeal.

While this author recommends public colleges and universities reexamine their existing student conduct processes and attempt to implement as much of the Oregon Model as feasible, the model is still vulnerable to critiques. For instance, the University of Oregon requires students be notified if they are facing suspension, expulsion, or negative transcript notation in their initial NOA. This is the only language change that occurs between notices, as students typically all receive the same information, regardless of whether the case is for an academic or behavioral misconduct violation. The university puts itself in an unfortunate position by including this suspension, expulsion, or negative transcript notation in the initial notice to students. It does not allow the case managers to consider suspension, expulsion, or negative transcript notation in a case in which the students *were not* initially notified of these potential sanctions in their NOA. If, during the course of an investigation and fact finding, the case manager determines the students should face any of the previously mentioned sanctions if they are found in violation of the charge, the case manager must renotice the case. The case manager must send a new NOA to students outlining the potential for suspension, expulsion, or negative transcript notation, and then must complete every procedural element required in the Student Conduct Code. Essentially, the case starts over again just so the student respondents are on notice that they may face removal from campus or a negative transcript notation as a potential sanction. This can certainly be viewed as a waste of university resources, and a waste of time for all involved.

Another downside to the Oregon Model is the nature of staff members in the Office of Student Conduct serving as neutral decision-makers. While this typically does not pose an issue with cases of behavioral misconduct, it can cause issues with academic misconduct cases. On occasion, this author observed that when cheating and plagiarism were reported in high-level courses, it was difficult for case managers to make factual findings. However, in most cases, professors often provided clear evidence of the alleged academic misconduct in their initial report to student conduct. If the case involves more ambiguous evidence, case managers follow up with reporters to gather additional information to make a well-informed factual finding that satisfies a preponderance of the evidence. This amount of investigation sometimes causes certain academic misconduct cases to take longer than the typical low-level behavioral violation. While this is often frustrating for

students and faculty alike, the preservation of neutrality in the decision-making process, more often than not, justifies the amount of work required to reach an academic misconduct decision.

In addition to the case manager serving as a neutral decision-maker in cases of academic misconduct, the procedural process afforded in the Oregon Model may also create its own set of disadvantages. As noted extensively, Supreme Court precedent provides for less stringent procedural protections for students facing dismissal for academic misconduct. It can be effectively argued that by granting students facing any cheating or plagiarism allegations the opportunity to formally defend themselves to a decision-maker who is not the academic content expert, puts unnecessary strain on the academic system and interferes with academic freedom. Further, this formalized system of evaluating academic misconduct may create confusion for academic faculty who wish to remove students for purely academic reasons. For instance, in cases in which a student's dissertation is rejected by an academic committee, subsequently resulting in an academic dismissal, is a purely academic decision. This kind of academic failure is distinct from the broad definition of academic misconduct, and faculty members should not be required to give the student full procedural due process protections. As the Court said in *Horowitz*, academic dismissals require "expert evaluation of cumulative information...not readily adapted to the procedural tools of judicial or administrative decision making."²⁰⁹ While this author believes this cumulative evaluation of academic misconduct cases can meaningfully occur through the lens of a student conduct professional, it is a valid point of contention and potential confusion.

A final drawback to the University of Oregon uniform procedural model is simply that it does too much when, sometimes, much less is acceptable. By providing the same robust procedural protections for all academic and behavioral misconduct cases that do not involve removal from campus, the university is putting itself in an unnecessary situation. In this author's experience adjudicating student conduct cases, the large majority of cases involve low-level violations where removal from campus would be too egregious for the alleged conduct violation. Often, if a student is engaged in a behavior that violates the conduct code, that code violation is relatively minor. Further, if it's the student's first case involving student conduct intervention, the resulting sanction is a very minor educational activity. These educational activities range from completing online modules to short reflection papers. Is it necessary to offer that student an overly descriptive notice of allegation, an informational meeting, an AC/formal hearing, a written rationale for the decision reached by the case manager, and an opportunity to appeal? There is no Supreme Court guidance requiring public colleges and universities to offer this for nonremoval cases, so potentially, students could be told they were found in violation of a minor code violation, without receiving prior notice and an opportunity to be heard. This, however, is not the best practice in the field of higher education or, more specifically, within student conduct. The arguments this author makes throughout this section clearly negate the drawback of offering robust procedural protections for low-level violations: if it does not

209 Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978).

unduly burden the university in providing such protections, the university should feel obligated to give those protections and should implement any recommended changes from the Oregon Model as necessary to achieve such a process.

IX. Conclusion

The jurisprudence of procedural due process protections afforded by the Fourteenth Amendment of the U.S. Constitution lacks any legal certainty. From the Supreme Court avoiding the question of property rights in continued higher education enrollment, to circuit splits on whether to define or assume the rights, it is understandable that colleges and universities might not know what protections to provide to their students. Even though the discernable standard only requires sufficient notice and a hearing in behavioral misconduct cases, it is advantageous for public colleges and universities to anticipate changes in case law and to provide additional procedural protections to their students, especially in the area of academic misconduct. This forward-looking planning helps institutions avoid the costly litigation of procedural due process claims from students, while also ensuring fundamental fairness for all students who encounter academic or behavior misconduct violations and their applicable procedures. The University of Oregon Model not only provides procedural protections far beyond constitutional due process protections, but it is also a model easily adaptable to any public college or university, regardless of staffing and funding limitations. In conclusion, students deserve robust procedural due process protections beyond the current standard, and public colleges and universities should look to the standards established at the University of Oregon as the model for how to implement such protections.

Review of Michael Bérubé and Jennifer Ruth's

IT'S NOT FREE SPEECH: RACE, DEMOCRACY AND THE FUTURE OF ACADEMIC FREEDOM

JONATHAN R. ALGER*

Starting with its provocative opening sentence, Michael Bérubé and Jennifer Ruth's new book, *It's Not Free Speech: Race, Democracy, and the Future of Academic Freedom*,¹ makes clear that this volume will be no ordinary recitation of the history or current state of academic freedom. That first sentence asks a simple but loaded question: "Does academic freedom extend to white supremacist professors?"²

The authors' answer to this question is clear: Bérubé and Ruth express a strong belief that academic freedom needs to be rethought so as not to protect professors who espouse perspectives that the authors would characterize as racist and lacking any sort of sound evidentiary basis. The authors take great pains to distinguish academic freedom protections from the constitutional protections of free speech, arguing that judgments about the appropriate exercise of academic freedom should be put squarely in the hands of faculty members, not administrators. Writing in the context of the Black Lives Matter movement and the wave of protests that followed the killing of George Floyd and other Black Americans, Bérubé and Ruth argue that broad free speech principles have too often been used to shield white supremacist professors from consequences for hateful, damaging statements that fail to meet rigorous professional norms. The authors rely on a mixture of history, law, experience, and shared governance principles to reinforce their arguments. If nothing else, their analysis certainly sets the stage for lively discussions and debates regarding the appropriate role, limits, and arbiters of academic freedom.

The book begins by naming names. The authors are direct in labeling instances of what they characterize as white supremacist speech. They argue that academic freedom in such instances has been "weaponized in ways that undermine

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1 MICHAEL BÉRUBÉ AND JENNIFER RUTH, *IT'S NOT FREE SPEECH: RACE, DEMOCRACY AND THE FUTURE OF ACADEMIC FREEDOM* (2022). Bérubé is the Edwin Erle Sparks Professor of Literature at Pennsylvania State University. Jennifer Ruth is a professor of film at Portland State University.

2 *Id.* at 1.

democracy.”³ As colleges and universities become more diverse, their premise is that some faculty members (especially if they have tenure or other forms of status and job security) can hide behind the broad contours of free speech as understood under the Constitution to flout professional standards—while causing real harm to students from historically underrepresented backgrounds. In making this argument, Bérubé and Ruth explicitly understand and justify academic freedom and the educational mission in terms of serving the common good—namely, to support a diverse democracy that is truly inclusive and welcoming to individuals of all backgrounds.

While this understanding might seem unremarkable on its face, it is worth noting at the outset that much of the public discourse about the purpose of higher education today focuses on the notion of higher education as a private benefit (i.e., as a way to prepare individuals for good-paying jobs in the workforce), rather than as a public good. Many of the current attacks on higher education from outside the academy are based on a perception that colleges and universities focus too much on abstract theory, and thus are not adequately equipping students with the skill sets they need for the “real world” of work. Moreover, many politicians and pundits today assert that a major problem with higher education is its overwhelmingly liberal bent. This particular volume seems focused on a higher education audience, rather than on these skeptics outside of higher education, and thus the book is not likely to win many converts to its proposals from the latter group.

The first chapter provides examples of provocative speech that need to be understood within a larger context. In this age of social media—when a single posting can be spread within a matter of moments to a national and even international audience—the nuances of context are often lost. The authors refer to this effect as “a kind of decontextualization apparatus,”⁴ and it is a phenomenon well known to leaders in higher education who are quickly inundated with angry messages when controversial statements “go viral.” The authors criticize administrators for overreacting to some faculty utterances that were not intentionally hurtful, while at the same time imploring faculty members to use prudent judgment with their own language. Their proposed approach to such situations is to provide for greater faculty involvement in the review of such matters—an idea that forms the crux of their position.

In the second chapter, Bérubé and Ruth focus on “extramural speech”—that is, faculty speech that occurs outside the classroom. They provide historical perspective by pointing out how scholarly norms and public notions of what is acceptable can change relatively quickly over time. The key question for institutions, according to Bérubé and Ruth, “is whether a professor is unfit” for duty,⁵ which is by necessity a case-by-case determination.⁶ In analyzing this question and the degree to which faculty members’ extramural speech is protected, they spend a lot of time dissecting relevant policy statements from the American Association of University Professors—the organization that was founded in 1915 in large part to protect the

3 *Id.* at 7.

4 *Id.* at 43.

5 *Id.* at 72.

6 *Id.* at 94.

academic freedom of individual faculty members. Bérubé and Ruth argue for an expansive view of academic freedom that clearly encompasses extramural speech, as it can be difficult to draw clear boundaries between when expression occurs “in” and “outside” of the academy. Thus, they assert that “the experience of freedom is indivisible, and extramural speech must be protected as a prophylactic protection for freedom of research and teaching.”⁷ As they do throughout the book, in this section the authors rightfully point out that contingent faculty face special risks when their expression is challenged, while noting the reality that such faculty make up an increasing portion of the professoriate.⁸

Next, the authors explore the question of what constitutes a firing offense, enumerating examples of controversial speech and how they were handled (or mishandled, as the case may be) by various institutions. To their credit, Bérubé and Ruth are clear and direct about their opinions, as reflected in this passage: “White supremacist scholarship is bad scholarship; it serves morally and politically repugnant ends; and though we can’t wish its legacy away, we can and should say that it has long outlived its expiration date.”⁹ It is hard to dispute this kind of assertion on its face, especially at this moment of national racial reckoning. The harder question, however, is how to define and draw the lines with sufficient clarity and certainty to respect and protect differing, and sometimes controversial, points of view. At the end of their third chapter, the authors themselves go so far as to declare that “[w]hite supremacy is baked into the foundations of some academic fields in this country, and it remains a powerful obstacle to any attempt at honest and free intellectual exchange, let alone any attempt to forge a more perfect union.”¹⁰ If that is the case, it would seem potentially problematic to assume that professors in such disciplines will necessarily be well positioned to draw these lines in the ways the authors believe should be done.

The fourth chapter tackles a subject that has become a pejorative catchphrase for many politicians and commentators in our highly polarized political and social climate, as it discusses the origins and history of critical race theory (CRT). While this phrase has been thrown around a lot in the public sphere recently, its actual meaning and academic underpinnings are much less well understood. Once again, the authors do not pull their punches in arguing that “[t]he backlash against CRT is being used as a strategy to mobilize efforts to suppress knowledge of America’s history of racism.”¹¹ While Bérubé and Ruth are unabashed in their concerns about the Trump era and what they see as the significant harm it caused to progress in race relations, they are critical of individuals on both ends of the political spectrum for not taking meaningful steps to address the impact of racism. Indeed, they castigate traditional liberals for clinging to a naïve faith in the power of the traditional, laissez-faire marketplace of ideas concept that has widely been understood to be a key to long-term progress in civil society under the First Amendment. In their words, “[b]y abandoning the liberal fantasy that all differences are surmountable given enough

7 *Id.* at 89.

8 *Id.* at 89.

9 *Id.* at 125.

10 *Id.* at 126.

11 *Id.* at 146.

speech and counter-speech, we can more honestly defend academic freedom rather than succumbing to the temptation to subordinate it to free speech."¹²

Out of this critique arises the authors' position that academic freedom, if properly understood in a truly democratic and inclusive way, includes a level of responsibility and accountability that will better protect against discrimination in the academy than the kind of speech free-for-all embraced by many free expression purists. Bérubé and Ruth then turn to discuss the limits of academic freedom, arguing forcefully that academic freedom should not be understood as constituting "an indiscriminate endorsement of the value of *all* ideas (including epithets)."¹³ They are clearly disillusioned with "the liberal faith that the best antidote to hate speech is more speech,"¹⁴ citing the fact that this traditional First Amendment view has in fact given white supremacists a continuing platform to espouse hatred and bigotry. Once again, the authors place their faith in faculty members to render judgments that strike the correct balance with regard to which ideas should (and should not) be protected under a properly understood definition of academic freedom in the twenty-first century. In their words, "[f]aculty must make judgment calls on the university's behalf that take into consideration the historical and political circumstances in which their universities find themselves."¹⁵

So how would this actually work in practice? In their final chapter, Bérubé and Ruth double down on their proposal that higher education institutions should rely on newly formed faculty committees, rather than administrators, to make these judgments. These committees would be responsible for developing clearer guidelines than currently exist to identify the contours and limits of faculty expression under academic freedom. While these lines might be difficult to draw, the authors argue that difficult cases are already being investigated by diversity, equity, and inclusion offices and human relations personnel, with assistance from higher education lawyers—most of whom, the authors argue, have little or no experience in the classroom and thus do not fully understand or appreciate appropriate standards of pedagogy. They assert that faculty members are more likely than administrators in such circumstances to stand up to outside pressures, given that administrators will be concerned with threats of bad publicity and potential litigation resulting from controversial faculty speech.

Part of the value of this approach, in the authors' view, is that it restores a sense of shared governance in dealing with what are admittedly thorny and often high-profile challenges at institutions of higher education. They are certainly right in pointing out that shared governance faces significant headwinds in an era of relentless legal and political challenges—and in which controversies over faculty expression can explode quickly with the powder keg of social media always present. They are also on firm and well-trodden ground in sounding the alarm about the power imbalances that put contingent faculty in especially precarious positions when their expression is challenged.

12 *Id.* at 163.

13 *Id.* at 178 n.3.

14 *Id.* at 202.

15 *Id.* at 211.

Less compelling for many readers, however, may be the authors' relatively dim view of the professionalism, integrity, and resolve of administrators who currently play roles in such situations. In many instances, such administrators are trained to bring an analytical lens to investigations of any claims of wrongdoing—which may be coupled with considerable experience in evaluating facts and evidence. On the other hand, faculty members who are experts in specific academic disciplines may not necessarily have expertise in the pedagogy of other disciplines. There are many unresolved questions here about how such faculty committees would be selected and trained. Groupthink and peer pressure can creep into committees of all kinds—even those constituted of highly educated professionals. From a shared governance perspective, therefore, the traditional pitting of faculty against administrators may be less helpful than an honest reckoning with the respective roles each can play in working together to address these difficult questions if and when they arise.

It might be easy to dismiss a book like this as yet another salvo in the ongoing culture wars, but it does raise important questions for institutions of higher education to ponder. The belief that fighting hateful and harmful speech with more speech will inevitably lead to more welcoming and inclusive institutions is hard to reconcile with the increasing level of viciousness, polarization, and tribalism we are witnessing both in and outside of higher education. Furthermore, the costs and burdens of free speech that are imposed disproportionately on faculty, staff, and students from historically marginalized backgrounds are real and increasingly well documented.

Indeed, the authors raise a profound question about the role of higher education in supporting inclusive democracy by positing that “[a]cademic freedom committees would ... understand that academic freedom’s justification is to serve the common good, which is not one and the same as the abstract pursuit of an ever-contested truth.”¹⁶ The authors’ insistence on academic freedom standards that are grounded in facts, evidence, and research reminds us of the value and importance of our educational mission to a healthy democracy at a time when misinformation and disinformation run rampant.

In the face of democratic backsliding across the world, Bérubé and Ruth tell a cautionary tale in asserting that the stakes in this debate are higher than we might have realized only a few years ago. As they warn in their conclusion, “the struggle for academic freedom is the struggle for democracy; but that struggle must be predicated on the belief that academic freedom is a matter of democratic competence, not a license to say and believe anything and everything imaginable.”¹⁷ All of us in higher education could benefit from thoughtful reflection and introspection on this admonition. Have we put too much faith in abstract, near-absolutist principles of free expression and in a search for truth when the entire concept of truth is itself under relentless siege in the public square? Have we paid too high a price for the protection of hateful and bigoted expression that has hindered full participation in higher education? Does such expression really add value in higher education at all? These are questions well worth debating, using all the tools of critical thinking that we seek to develop in our students.

16 *Id.* at 240.

17 *Id.* at 251.

Review of Colin Diver's

BREAKING RANKS: HOW THE RANKINGS INDUSTRY RULES HIGHER EDUCATION AND WHAT TO DO ABOUT IT

ELIZABETH MEERS*

As former Dean of the University of Pennsylvania's law school and former President of Reed College, Colin Diver provides an insightful critique of higher education rankings in his book *Breaking Ranks: How the Rankings Industry Rules Higher Education and What to Do About It* (2022). Diver has first-hand experience with both higher education rankings and the consequences of boycotting them: as a dean, he observed that law schools have been particularly plagued by *U.S. News & World Report* (U.S. News) rankings, while under his predecessor, Reed College famously refused to participate in the U.S. News survey. As his audience is not primarily statisticians, but rather applicants (and their parents, teachers, and counselors) and higher education faculty and administrators, he takes apart higher education rankings in a readily understandable style. He analyzes criteria used by the rankings industry (which he dubs the "rankocracy"), as well as potential criteria (such as student learning and postgraduate life) that the industry ignores. Along the way, he is candid about his personal views (sometimes cynical, sometimes encouraging), while emphasizing his ultimate desire that the rankocracy disappear—or at least be ignored. At the same time, he gives his readers tools to take rankings into account in an informed, not slavish manner.

Although *Breaking Ranks* is not geared specifically to college and university counsel, higher education lawyers may find it instructive and useful. To the extent that higher education rankings motivate institutional decisions and even, as Diver argues, create perverse incentives, the book will help college and university counsel better understand U.S. News and other ranking systems and the context for some of their clients' decisions. By being better informed, college and university counsel can advise more effectively, particularly where rankings criteria overlap with regulatory reporting or compliance obligations. While *Breaking Ranks* does not generally focus on legal issues, it does address U.S. Department of Education (ED) resources and metrics used by the rankings industry, efforts to "game" the system, the implications of higher education rankings for diversity, and the particular problems of ranking law schools.

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I. The Rankocracy

Diver begins by summarizing his complaint about college rankings as “their unfortunate tendency to homogenize a sector historically characterized by immense institutional variety, one that seeks to satisfy the equally huge variations in students’ needs and preferences.”¹ He elaborates, “Trying to squeeze all that variety into the procrustean bed of a single ordinal scale threatens to occlude those differences, to the manifest disadvantage of both prospective applicants and educational administrators... . [I]n setting institutional priorities, educators are tempted to distort their practices and policies, even at the expense of altering their culture and character, in a mad scramble to accommodate some stranger’s monolithic definition of quality.”²

Diver outlines the problems with higher education rankings in a manner readily comprehensible by non-statisticians. He points out issues with selection of variables, assigning weights to variables, overlap among variables, the “salience” of numbers, and the ranking organizations’ periodic tinkering with their formulas.³ But his fundamental critique is that “[o]ne size doesn’t fit all” and it is an “illusion” to identify the “best college.”⁴

Diver dug up some little-known historical tidbits about higher education rankings. The federal government was one of the first ranking organizations, and rankings have been controversial from the start:

- The U.S. Bureau of Education (now ED) “once classified women’s colleges into two categories, marked as ‘A’ (including the highly selective Seven Sisters) and ‘B’ (200 others).”⁵
- In 1910 the Association of American Universities (AAU) asked the Bureau “to rank a broader spectrum of colleges, in order to provide the AAU’s members with an ‘objective’ measure of undergraduates’ preparation for graduate study.” The Bureau developed a list of 344 institutions, sorted into five levels of quality, and inadvertently released it to the public. A “huge outcry from the higher-education industry” led to an executive order by President Taft barring distribution of the list.⁶

Accreditors also got into the act: The North Central Association of Schools and Colleges (today, the Higher Learning Commission) published a review of institutions in 1924.⁷

1 COLIN DIVER, *BREAKING RANKS: HOW THE RANKINGS INDUSTRY RULES HIGHER EDUCATION AND WHAT TO DO ABOUT IT* 17 (2022) .

2 *Id.* at 20.

3 *Id.* at 35–41.

4 *Id.* at 41.

5 *Id.* at 24.

6 *Id.* The executive order predates publication of such orders in the *Federal Register*, but other sources confirm Diver’s account.

7 *Id.* at 24–25. The reviewer was unable to locate this list from publicly available sources, but

Diver marks the beginning of the current rankings industry in 1983, with the publication by U.S. News of its first “best colleges” lists.⁸ Today U.S. News and other ranking organizations rely extensively on data that colleges and universities provide to ED through the Integrated Postsecondary Education Data System (IPEDS).⁹ And ED itself analyzes and publishes that data through its College Navigator, College Scorecard, and College Affordability and Transparency List.¹⁰

Diver argues that the rankocracy thrives because “post-secondary education has become a competition for prestige. And, in our popular culture, rankings have become the primary signifiers of prestige.”¹¹ According to an Art & Science Group student poll in 2016, 72% of respondents considered rankings in their application and enrollment decisions.¹² The top five sources were U.S. News, Forbes, Princeton Review, Niche, and Money, with 58% ranking U.S. News as the most influential.¹³

Diver acknowledges that after improvement in their U.S. News rankings, colleges have experienced measurable increases in their applications, rate of acceptance (or “yield”), and the average SAT and ACT scores of their incoming students.¹⁴ But he bemoans educators’ responses to these trends, particularly because “most academic administrators are well aware of the methodological flaws, if not to say utter vapidness of the popular rankings.”¹⁵ He counters that most changes in rankings are minor and transient, and that it is difficult and expensive to move significantly upward.¹⁶ He complains that in response to rankings, “[a]cademic leaders have reshaped staff incentive and reward structures, altered admissions procedures and criteria, reordered expenditure priorities, and even rewritten strategic plans.”¹⁷

II. Regulatory Metrics

A number of the metrics used by college ranking organizations—cost of attendance, graduation rates, student loan debt, and postgraduate earnings—are related to regulatory reporting and compliance requirements. In general, Diver criticizes the college rankings industry for “giv[ing] much more weight to measures that reward student selectivity, high levels of spending, and the accumulation of wealth than

other secondary sources mention this review.

8 *Id.* at 25.

9 *Id.* at 15, 70–71.

10 *Id.* at 15–16. The College Navigator can be found at <https://nces.ed.gov/collegenavigator/>; the College Scorecard at <https://collegescorecard.ed.gov/>; and the College Affordability and Transparency Center at <https://collegecost.ed.gov/>.

11 Diver, *BREAKING RANKS*, *supra* note 1, at 73.

12 *Id.* at 45.

13 *Id.* at 46.

14 *Id.* at 47.

15 *Id.* at 49–50.

16 *Id.* at 50.

17 *Id.* at 55.

they accord to factors that reward schools for serving low-income students.”¹⁸ Apart from these policy concerns, in light of the misreporting problems that Diver highlights, college and university counsel may want to discuss with their institutional research staff and other relevant offices their processes for collecting and reporting relevant data to these various recipients.

Cost of attendance: Cost of attendance is the starting point for calculating students’ need for purposes of federal student financial aid.¹⁹ Diver observes that the maximum Pell Grant for low-income students today covers only about 28% of the charges for in-state students at public four-year institutions and only 12% at private, nonprofit institutions.²⁰ He favors the so-called “Pell share”—the proportion of an institution’s students who are eligible for or receive Federal Pell Grants—as “a very serviceable way of highlighting an institution’s commitment to socioeconomic progress.”²¹

Diver comments that U.S. News included no metric on social mobility until 2018, when it added a measure based on Pell shares and the graduation rates of Pell recipients. Although that data accounted for only 5% of a school’s overall ranking, he credits U.S. News for “try[ing] to highlight social mobility by publishing a separate listing based on this criterion, using its Pell-related calculations.”²²

Graduation rates: Diver observes that completion measures weight heavily in U.S. News rankings.²³ State and federal governments utilize such metrics for their own purposes. For example, Diver reports that more than half of states “have adopted performance-based funding initiatives in which the size of appropriations made to their public universities depends, at least in part, on improving their graduation rates.”²⁴

The methodology of these various metrics is similar but not necessarily identical. One variable is the pool of students whose progress is tracked—most commonly, first-time, full-time students (not part-time or transfer students) who enroll in the fall semester (not other enrollment periods).²⁵ A second variable is the time period for completion—most commonly for the baccalaureate degree, six years and eight years (the latter used by ED’s College Scorecard).²⁶ College

18 *Id.* at 261. With respect to ED’s financial responsibility ratio known as the “composite score,” Diver observes that “the prevalence of 3.0 scores [the highest score on ED’s scale] makes it impractical to use this index to rank selective schools.” *Id.* at 104; see 34 C.F.R. Subpart L (1997).

19 Diver, *BREAKING RANKS*, *supra* note 1, at 245–48.

20 *Id.* at 250.

21 *Id.* at 251; see *id.* at 248.

22 *Id.* at 253.

23 *Id.* at 218–19.

24 *Id.* at 214.

25 *Id.* at 217. Although National Student Clearinghouse “is now able to track students who transfer from one institution to another..., those who publish comprehensive best-college listings still customarily use graduation rates that omit transfer data.” *Id.* at 221.

26 *Id.* at 218.

and university counsel may want to confirm that their institution attends to such variations in methodology in reporting to the various ranking organizations and government agencies.²⁷

Student loan debt: Diver notes that in 2021, U.S. News also added a metric for student loan debt to its formula.²⁸ He observes that “[t]he indicator of student debt most commonly used...is the average total amount of federally guaranteed loans incurred by a school’s students between their matriculation and the time of their graduation or withdrawal. One can readily obtain such figures from College Scorecard and the IPEDS database.”²⁹ In addition, he notes that in 2020 ED began to publish information about parental debt obtained through the federal “Parent PLUS” loan program, but data about private education loans remains difficult to find.³⁰

Postgraduate earnings data: In the spirit of “pick your poison,” Diver seems to favor postgraduate earnings data as a metric for college rankings. He notes that the two principal sources of postgraduate earnings data are College Scorecard and PayScale.com; for each undergraduate institution, College Scorecard reports median early-career earnings data, based on information from federal tax records concerning salaries received by alumni ten years after they first enrolled at the institution.³¹

Diver comments, “Earnings, of course, are only one indicator of career success. But in our materialistic culture, they are the dominant measure and, for the purposes of constructing ordinal rankings, probably the best one available.”³² Nevertheless, “[t]he statistical correlations that purport to link the college that students attend with their midcareer earnings conceal a vast variation in the human qualities—to say nothing of the random events—that contribute to those outcomes.”³³

III. Misreported Data

Misreporting of data is one way higher education rankings may become legal issues involving college and university counsel. Diver notes that over the years, the U.S. News rankings have been “plagued by reports of institutions submitting incorrect data.”³⁴ For example, in 1995 the *Wall Street Journal* reported “almost 50

27 On a related note, Diver observes, “Although popular best-college rankings have gradually de-emphasized [acceptance and yield rates], they still loom large in the evaluation of institutions by bond-rating agencies, accrediting agencies, and college guides.” *Id.* at 163.

28 *Id.* at 255.

29 *Id.* at 253–54.

30 *Id.* at 254. These aggregate measures of student debt are related to, but differ from ED’s calculation of default rates on federal student loans. See 34 C.F.R. Subparts M (2000) and N (2009).

31 Diver, *BREAKING RANKS*, *supra* note 1, at 229.

32 *Id.* at 240.

33 *Id.* at 240–41. These aggregate statistics concerning students’ postgraduate earnings are related to, but differ from ED’s past and prospective “gainful employment” regulations, which attempt to calculate whether students will earn enough after graduation to service their student loan debt. See U.S. Dep’t of Educ., *Negotiated Rulemaking for Higher Education 2020–21*, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2021/index.html?src=rn>.

34 Diver, *BREAKING RANKS*, *supra* note 1, at 64.

instances in which a school reported a higher number for its graduation rate or median SAT score to U.S. News than the corresponding figure it sent to its bond-rating agency.”³⁵

Diver faults the rankings industry for insufficient diligence. He notes that U.S. News checks for misrepresentation by “flagging year-over-year discrepancies, comparing data against federal government sources when available, and asking a school official to sign off on the school’s data.”³⁶ But he argues that like bond-rating agencies and ED, ranking organizations should require audited data.³⁷

Diver also criticizes the rankings industry for inadequate sanctions. He notes that U.S. News generally identifies schools that it has found to have provided erroneous data, usually does not rank the offender for a year, and occasionally asks the highest officer of the institution to certify future submissions.³⁸ But he argues that ranking agencies could impose harsher penalties such as relegating to the lowest tier institutions that submit false data or refusing to rank such institutions for a period of years.³⁹

Apart from greater discipline by ranking organizations, Diver notes other consequences of misreporting, including loss of jobs by higher education officials found to have falsified data, as well as legal and regulatory problems for the institution.⁴⁰ Diver observes that many rankings now rely on information published by ED or independent third parties.⁴¹ That approach reduces the risk of reporting inconsistent data to different organizations.

But Diver identifies the remaining incentives for gaming the system. For example, college and university counsel are all too familiar with the “Varsity Blues” scandal, in which an admissions consultant and wealthy parents conspired to falsify applicant information and test scores in order to secure admission of children to selective colleges and universities.⁴²

IV. Diversity

Diver also objects to higher education rankings because of their adverse effects on student body diversity. As he summarizes his concerns, rankings

- “cause institutions to focus more on attracting students with impressive SAT scores than on educating them once they arrive on campus”;

35 *Id.*

36 *Id.* at 67.

37 *Id.* at 68.

38 *Id.* at 65, 69.

39 *Id.* at 68.

40 *Id.* at 69–70.

41 *Id.* at 70–72.

42 *Id.* at 101–02.

- “prompt schools...into recruiting scads of surplus applications, so they can lower their acceptance rates and overburden their admissions staff, who are tasked with ‘holistically’ reviewing every applicant”;
- “encourage shifting financial-aid dollars from talented needy students to sometimes less-talented wealthy ones”;
- “put an artificial constraint on the willingness of admissions officers to take chances on applicants with compelling personal stories but low test scores”;
- “reward early-decision admissions policies that disadvantage low-income applicants”; and
- “encourage selectively scrapping standardized tests in favor of equally suspect admissions criteria.”⁴³

Dissenting from widespread opinion in academic circles, Diver expresses a favorable view of admissions policies based on class rank, such as the Texas “Top 10% plan” that figured in the U.S. Supreme Court’s decisions in the *Fisher* case.⁴⁴ He comments that use of high school class rank data to rank colleges “provides an incentive to broaden the range of high schools from which they recruit potential students and thereby provide greater opportunity for applicants who might otherwise be overlooked.”⁴⁵

In another countercultural line of argument, Diver defends standardized tests, such as the SAT, while criticizing their overweight in college rankings. He holds to the traditional view of standardized tests as “a useful measure of academic preparation,”⁴⁶ at the same time acknowledging “the undeniable correlation of SAT performance with the test takers’ family incomes, parental education levels, and racial/ethnic groups.”⁴⁷ Because higher standardized test scores “close[ly] correlat[e]” with higher college rankings, institutions have long attempted to improve their standing by raising their average SAT scores. But Diver argues that “their effort to feed the SAT-score ‘elephant in the room’ have often produced serious distortions and unanticipated consequences”⁴⁸ such as giving excessive weight to standardized test scores in admissions and awarding merit aid at the expense of financially needy students.⁴⁹

Despite these concerns, Diver also bucks the trend toward test-optional and test-blind admissions policies. While “heartily endors[ing] the test-optional defenders’ professed goal of increasing the racial and socio-economic diversity of our

43 *Id.* at 62–63.

44 *See Fisher v. Univ. of Texas at Austin*, 579 U.S. 365 (2016); *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297 (2013).

45 Diver, *BREAKING RANKS*, *supra* note 1, at 129.

46 *Id.* at 155.

47 *Id.* at 134.

48 *Id.* at 141.

49 *Id.* at 142–49.

college-going population,”⁵⁰ he expresses the somewhat cynical conclusion that “the growth in test-optional policies could be attributed in large part to rankings pressures. By implicitly encouraging applicants with low SAT scores not to submit them, institutions would be able to report only the higher figures for those who did.”⁵¹ He notes that test-blind admissions policies damage schools’ rankings because U.S. News gave such schools “the lowest test score by a ranked school in their category.”⁵² He takes heart that discontinuation of the use of standardized tests would “blissfully” end the era of ranking colleges by their students’ SAT scores.⁵³

Diver echoes concerns expressed by many others concerning inequities related to the growth of merit aid, early admissions, and admissions preferences for athletes, “legacies,” and the like. He ties such policies, at least in part, to college rankings because the policies tend to favor upper-income, White applicants who, compared to other demographic groups, on the whole have higher standardized test scores and other metrics that ranking organizations value.⁵⁴

In light of the upcoming consideration by the U.S. Supreme Court of the race-conscious admissions policies of Harvard University and the University of North Carolina,⁵⁵ Diver devotes a chapter to “affirmative action.”⁵⁶ He observes that “the rankocrats have been notably hesitant to incorporate diversity metrics into their formulas.”⁵⁷ He infers that “the real reason for the rankocracy’s hesitancy to feature race and ethnicity in their formulas is that, in our society, prestige is still largely synonymous with Whiteness, and the leading rankings are all about prestige.”⁵⁸

V. Law School Rankings

Diver laments that various problems with higher education rankings are exacerbated in law schools. He contends that the U.S. News “rating system ha[s] dramatically distorted legal education, most especially impacting admissions and career services practices, but also affecting the allocation of resources, programmatic priorities, and even the job satisfaction and longevity of deans and associate deans.”⁵⁹

50 *Id.* at 151.

51 *Id.* at 149.

52 *Id.* at 152, 154.

53 *Id.* at 155.

54 *See id.* at 145–48, 165–69.

55 *See Students for Fair Admission v. Harvard Univ.*, 261 F. Supp. 3d 99 (D. Mass. 2017), *aff’d*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022); *Students for Fair Admission v. University of North Carolina*, Case No. 1:14CV954 (M.D.N.C. 2021), *cert. granted*, 142 S. Ct. 895 (2022).

56 Diver, *BREAKING RANKS*, *supra* note 1, at 172–85.

57 *Id.* at 182. He gives U.S. News some credit for “present[ing] a separate list of schools ranked according to a ‘diversity index,’” but he notes that it “addresses only *interactive...diversity*” (*i.e.*, “the amount and intensity of social interactions among students across racial and ethnic lines”). *Id.* at 178, 182–83 (emphasis in original).

58 *Id.* at 183–84.

59 *Id.* at 55.

Diver points out that unlike collegiate rankings, where various competitors have arisen, U.S. News has a monopoly on law school rankings. And “because legal education is so homogenous, rankings loom especially large in applicants’ choices.”⁶⁰

Diver contends that the incentive to increase an institution’s test score averages is especially strong in law school admissions because the LSAT is such a large factor in the U.S. News formula for such schools.⁶¹ That pressure, he argues, leads to the “troubling...phenomenon of using financial-aid grants to ‘buy’ top-scoring applicants, through the mechanism of merit aid.”⁶²

Diver also blames U.S. News in part for the controversies around placement of law school graduates. He notes that in addition to LSAT scores, employment rates weigh heavily in law school rankings.⁶³ He observes that after the 2008 financial crisis “[g]roups of angry unemployed graduates, burdened by hefty student loans, brought class-action lawsuits against 15 law schools, alleging misrepresentation of their employment numbers.”⁶⁴ In 2011 the American Bar Association (ABA) issued a new accreditation standard that required more detailed reporting of employment data. Diver comments favorably that the employment information “is now publicly available on the ABA’s website, and U.S. News has incorporated it into its formula.”⁶⁵

VI. Conclusion

In his conclusion Diver offers several possible reasons that higher education has experienced increasing competition, fueling the rankings industry:

- “Some economists point to the declining costs of obtaining information about colleges and universities and the diminishing price of transportation to attend more-distant schools. As a result, they argue, colleges that used to compete for students with only a handful of regional institutions must now contend with hundreds of rivals all across the nation, and even the world.”
- “Others assert that the shift in the American economy, from manufacturing-based to knowledge-based industries, has heightened the demand for college degrees—especially from the most selective institutions.”
- “Still others point to a change in public attitudes” from viewing higher education as a “public good” to a “private good”.

60 *Id.* at 55–56.

61 *Id.* at 143.

62 *Id.* at 144.

63 *Id.* at 227.

64 *Id.* at 228.

65 *Id.* The ABA data is available at https://www.americanbar.org/groups/legal_education/resources/statistics/.

- But Diver argues that another root cause is that “even in supposedly post-aristocratic America, many people retain an unquenchable thirst for pedigree.”⁶⁶

Diver acknowledges some “genuine progress” in the rankings industry, as well as continuing concerns.⁶⁷ An increase in the number of rankings publications has largely eliminated U.S. News’s monopoly, but “as the one-time monopolist and first mover, U.S. News continues to exert a disproportionate influence on the world of higher education.”⁶⁸ The movement of information from hard copy onto the world wide web has increased available data and allowed readers to customize rankings. But the College Scorecard on ED’s website has “effectively created an ‘official’ college guide, one whose choice of metrics and format reflects a similar homogenizing mentality.”⁶⁹ And U.S. News and other ranking organizations not only “continue to rely on the preposterous ‘best-colleges’ claim,” but “now purport[] to assign an exact numerical order” not to just twenty-five or fifty, but to hundreds of institutions.⁷⁰

Diver concludes with similar advice to educators and students: either ignore higher education rankings or dig into them to understand them and the limitations of their value. For educators, Diver elaborates, “If you conclude, as we did at Reed, that most of the listings do not deserve your professional and institutional respect, then consider entering into what I call the four stages of rankings withdrawal”:⁷¹

1. “Don’t Fill Out Peer Reputation Surveys”
2. “Don’t Publicize Rankings You Consider Illegitimate”
3. “Celebrate Rankings That Truly Reflect Your Values”
4. “Give Everyone Equal Access to Your Data”⁷²

He explains that the last stage means “not fill[ing] out the annual U.S. News statistical questionnaire.”⁷³ Although U.S. News may rate the school anyway or try to sanction it, Diver advises that “[i]nstead of fearing such treatment, you should see that ‘punishment’ as a badge of honor—and publicly celebrate it.”⁷⁴ He hails that a growing number of institutions—lately, 15 percent of those surveyed—have declined to respond to “U.S. News’s annual beauty contest... .”⁷⁵

66 Diver, *BREAKING RANKS*, *supra* note 1, at 271–72.

67 *Id.* at 274.

68 *Id.* at 274–75.

69 *Id.* at 276–77.

70 *Id.* at 277.

71 *Id.* at 281.

72 *Id.* at 281–85.

73 *Id.* at 284.

74 *Id.* at 285.

75 *Id.*

In the end Diver “celebrat[es] the rich diversity of needs and expectations of those who seek a postsecondary education, and the wide range of institutions that have evolved to satisfy those desires. My dream is that this profusion can and will survive the relentless homogenizing pressures exerted by the rankocracy.”⁷⁶ Students “would approach the choice of where to apply as an exercise in personal discovery and fulfillment” and “find a wealth of information, curated by respected commentators with no obvious ax to grind.”⁷⁷

This idyllic world may help to explain the reason for the rankings industry. Millions of college-bound teenagers who are still learning about themselves see a forest of potentially thousands of colleges and universities in the United States alone. Especially with pressure to apply early, students seek a short-cut to a short list of schools to which to apply. And colleges and universities want to be on that short list. The most encouraging development in the rankings industry that Diver reports may be the emergence of customized rankings, which may help each college-bound student efficiently develop a short list of schools that would be a good fit for that student’s interests and abilities.

76 *Id.* at 285–86.

77 *Id.* at 286–87.